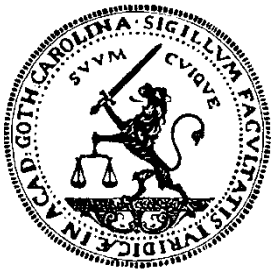

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Inherent hinders in International Law – a case study of obstacles for coherent Human Rights protection in Europe

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Contents

SUMMARY 1

SAMMANFATTNING 2

PREFACE 3

ABBREVIATIONS 4

INTRODUCTION 5

1 DIFFERENT ATTITUDES – DIFFERENT RESULTS 8

1.1 A Constitutional Approach to International law 8

1.1.1 The presumption of equivalent protection towards the EU - the Bosphorus case *9*

1.1.2 How the Court's view on the international legal world order affects its jurisdiction – the Bankovic, Loizidou and Issa cases *11*

1.1.3 A hierarchy crystalised – the Behrami case *14*

1.2 A Pluralist Approach 17

1.2.1 Reasoning of the Court of First Instance *17*

1.2.2 Reasoning of the Court of Justice *20*

1.2.3 Kadi – round three *23*

2 THE KEY ISSUES: THE INHERENT HINDERS IN INTERNATIONAL LAW 27

2.1 The Supremacy Clause 28

2.1.1 Conflict of norms *28*

2.1.2 Article 103 of the UN Charter *29*

2.2 The notion of sovereignty 33

2.2.1 The ECtHR as part of the International Legal Order *34*

3 THE UNDERMINING OF INT'L LAW AND THE POSSIBILITY OF DIFFERENT STANDARDS IN EUROPE 37

3.1 ECJ – undermining International Law 37

3.2 Different standards of human rights protection in Europe 39

4 HOW TO INFLUNENCE A STRUCTURE THAT CANNOT BE CHANGED – HUMAN RIGHTS AS LEX SPECIALIS 41

4.1 Presumption of equivalent protection 42

4.2 Human rights as lex specialis 43

4.3 Final remarks 45

BIBLIOGRAPHY 47

TABLE OF CASES 50

Summary

This thesis deals with the inherent hinders in international law, which are obstacles to a coherent human rights protection in Europe. By looking at cases from the European Court of Justice and the European Court of Human Rights respectively, the inherent hinders are presented through the differences in attitudes demonstrated in case-law from the two courts and discussed in light of the potential effects for human rights protection in Europe.

The ECJ had previously clearly, and firmly, established that EU-law (EC-law until 1 January 2010) is an autonomous legal system: separate from, and superior to, the domestic legal systems of the member states. In 2008, in *Kadi*, the ECJ took another decisive step in establishing its legal independence by distinguishing EU-law from International Law created by the UN Security Council when human rights were at issue.

Quite on the contrary, in a series of cases, the European Court of Human Rights has accepted and confirmed its position as an international organ, part of the system of International Law, or the International Legal Order, with the UNSC as the supreme lawmaker.

This thesis highlights and discusses the key legal aspects underlying the two courts' reasoning; Article 103 of the UN Charter and the human rights limitations of the UNSC as well as the notion of sovereignty in international law. Further, it discusses potential consequences of these attitudes and presents an argument to overcome part of the problem. The author argues that the principle of *lex specialis* could be used as an interpretive means to allow for human rights to trump the mandating character of Article 103 of the UN Charter.

Sammanfattning

Den här uppsatsen handlar om aspekter av generell internationell rätt som begränsar ett enhetligt skydd för de mänskliga rättigheterna i Europa. Genom att diskutera och förklara fall från EU-domstolen och Europadomstolen så visas de begränsande aspekterna i internationell rätt genom de bägge domstolarnas agerande.

EU-domstolen hade sedan tidigare, tydligt och med emfas, slagit fast att EU-rätten (EG-rätten fram till 1 januari 2010) är en egen rättsordning, skild från och högre stående än medlemsstaternas nationella rättsordningar. I fallet *Kadi* från 2008 tog domstolen ytterligare ett steg i sitt ”självständighetsförklarande” genom att särskilja EU-rätten från folkrätt skapad av Säkerhetsrådet, i frågor som rör mänskliga rättigheter.

Å andra sidan har Europadomstolen genom ett antal rättsfall visat på en motsatt attityd i förhållande till Säkerhetsrådet. Domstolen i Strasbourg har, i motsats till sin EU-granne i Luxemburg, genom rättsfall infogat sig i den folkrättsliga strukturen, i den hierarki skapad av FN-stadgan och med Säkerhetsrådet högst upp.

Den här uppsatsen belyser och diskuterar de mest centrala folkrättsliga aspekterna som ligger till grund för de bägge domstolarnas olika synsätt. Med dessa avses artikel 103 i FN-stadgan och den rättsliga osäkerheten kring Säkerhetsrådets skyldigheter att följa mänskliga rättigheter samt begreppet suveränitet inom internationell rätt. Vidare diskuteras potentiella konsekvenser för skyddet av mänskliga rättigheter i ljuset av de domstolarnas olika syn på folkrätten. Slutligen presenteras ett argument som författaren menar skulle lösa delar av problemet. Författaren menar att principen om *lex specialis* skulle kunna användas som tolkningsmedel för att skyddet för mänskliga rättigheter inte ska underordnas den tvingande karaktären i artikel 103 i FN-stadgan.

Preface

I would like to express my sincerest gratitude to my supervisor Dr. Nina-Louisa Arold for her enthusiasm and inspiration in numerous seminars and discussions, for her expressed faith in my ideas and on-the-spot comments. Also, I would like to thank the Raoul Wallenberg Institute and the Law Faculty at Lund University for an intellectually stimulating Masters program. Last, but by no means least, I would like to thank my dear family for endless support and encouragement throughout my university studies.

Human rights are fairness. There is no doubt about that.

Abbreviations

ECJ	The European Court of Justice
UNSC	The United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties
CFI	Court of First Instance
ECHR	European Convention on Human Rights and the Fundamental Freedoms
ECtHR	European Court of Human Rights

Introduction

Respect for individual human rights and the rule of law are the basis of any liberal democracy. As an instrument created through international law, the respect for human rights is not just dependant on the ratification by states of treaties, but also on the enforcement of rights by international courts and tribunals. However the enforcement of human rights is hindered by inherent limitations in international law, which puts human rights protection at the mercy of the UN Security Council (UNSC).

The European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) has in a series of cases during the last ten years demonstrated completely different attitudes towards international law. The theoretical frames for the two different approaches are described as *constitutionalism* and *pluralism* by scholars. The differences can be explained by analyzing two of the key components of international law, which are hindering a coherent human rights protection in Europe. In the light of the incoherent standards of human rights protection generated by these different approaches, the question whether the ECtHR should review state actions based on UNSC resolution has become of utmost relevance.

The ECJ has adopted a pluralistic attitude towards international law, despite the well-established primacy of the UNSC as provided by Article 103 of the UN Charter. It has expressed belief in parallel international legal systems, ignorant of the “supremacy clause” in international law – Article 103 of the UN Charter.

The ECtHR, on the other hand, has demonstrated adherence to a constitutional view of international law where the UN Charter is the centre on an international legal order with sovereignty as the basic norm of the system. As will be shown, this leaves the ECtHR potentially left in the hands of the UNSC, whose legal constraints are undefined.

Whether or not the ECJ and ECtHR will continue to express different attitudes towards the UNSC has a direct bearing for the human rights protection in Europe.

Given the importance of human rights protection, the overall purpose of this thesis is to analyze the key issues behind the divert perceptions of international law in Europe in general – and in relation to the UNSC, whose human rights constraints are unclear, in particular - and to suggest a possible legal solution to make human rights less dependant on the system of general international law. In short, the question of focus for this thesis is: what are the hinders for a coherent human rights protection in Europe, and is it possible to circumvent there hinders?

The key issues identified as obstacles to the realization of human rights in Europe are Article 103, the "Supremacy Clause" of the UN Charter, and the notion of sovereignty and jurisdiction.

The cases where the limitations in international law have been exposed are cases where the two courts have had to construct an attitude towards international law as a *prima facie* issue. The CFI, ECJ and the General Court faced the issue of Article 103 and the supremacy of the UN Charter in the *Kadi* cases. The ECtHR has had to position itself in relation to international law in several cases and in different ways. This thesis deals with cases where the notion of sovereignty, perhaps the most fundamental notion in international law, has been of great relevance.

This thesis is structured as follows. First, the cases of concern from the courts are presented and compared with focus on how the courts dealt with the hinders in international law. The primacy of the UN Charter, pursuant to Article 103 of the UN Charter, is being discussed in the *Kadi* cases from the CFI and the ECJ and in *Behrami* from the ECtHR. The notion of sovereignty and its implication for the interpretation of jurisdiction, are brought to a head in *Bankovic, Behrami* and *Izza* from the ECtHR.

The courts' different approaches are being connected to the academic constructions of pluralism and constitutionalism. The author of this thesis does not claim that the courts have actively tried to sort their cases under these respective theories. Shortly describing these constructions is solely for the purpose of assisting the reader in grasping the wider implications of the problems described. Attaching the different attitudes towards international law to these constructed perceptions is done with inspiration from Professor Gráinne de Búrca in *The European Court of Justice and the International Legal Order After Kadi*, published in Harvard International Law Journal in 2010[1]

Thirdly, the key aspects of the courts' reasoning are analyzed to further demonstrate the inherent limitations of international law and its impact on the realization of human rights in Europe.

Fourthly, arguments against a fragmented international legal order are presented in order to lay the ground for a suggestion of improvement. The author agrees with the concerns of the international legal order potentially undermined by fragmentation, but concludes that the ECJ – which claims autonomy from the UNSC – has in fact proved to be a more bold human rights protector than the ECtHR, in relation to the UNSC.

In light of the ECJ's demonstration that a claim of independence from Article 103 and the ECtHR's discrete adherence to the international legal order, the author argues that using the legal doctrine of *lex specialis* on human rights as a body of law would be an argument for both the ECJ and

[1] Gráinne de Búrca, 'the European Court of Justice and the International Legal Order After Kadi, 51 *Harvard International Law Journal* (2010), 1.

ECtHR to use, irrespective of their different perceptions of international law.

1 Different attitudes – different results

1.1 A Constitutional Approach to International law

The idea of the international community as a constitutional hierarchy can be traced back to the ideas of Kant.[2] The basic idea of a constitutional approach to international law is belief in a systemic unity of international norms and a set of laws and principles that governs the international legal order.[3] One example being the Article 103 of the UN Charter, mandating adherence to the obligations under the charter and therefore called the "Supremacy Clause".[4]

Criticism of the view of international law as a constitutional order concerns the value-centrism and lack of respect for cultural particularities that follows with a system of uniformed rules. Koskenniemi does not agree with the ideas of an international legal-technical authority, mandating harmonized behavior instead of political assessment. He thinks that it is subjecting national sovereignty to criteria of legitimacy (in relation to a certain international normative framework), instead of domestic legality. [5]

The ECHR is an international convention just as any other international convention and is interpreted with use of the VCLT.[6] The Court has adopted different approaches to decisions streaming from the EU and from the UNSC, when acting under Chapter VII of the UN Charter, respectively.

Towards the EU, a presumption of equivalent protection has been applied in situations were a Contracting state has carried out mandatory decisions by the EU. Quite to the contrary, when the same states have carried out decisions from the UNSC, the Court has simply found it self lacking jurisdiction *ratione personae*, because of the imperative nature of the Security Council's role in international law and the inherent hinders in international law.

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[2] De Búrca, p. 35.
[3] De Búrca, p. 36.
[4] Rain Livoja, 'The Scope of the Supremacy Clause of the Untied Nations Charter', 57 *International and Comparative Law Quarterly* (2008), 583, p 584.
[5] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007), 9, p. 13.
[6] See the context in which ECHR is referred to in Malgosia Fitzmaurice, *the Practical Working of the Law of Treaties*, in Malcom D. Evans, *International law*, (Oxford University Press 2006), p.207.

In this section, case law from the ECtHR is presented in order to paint the picture of a human rights court to a certain extent backbound in situations where human rights have been violated. First, the Court's attitude towards the EU is presented to lay ground for further analysis and comparison later on. After that, case-law where the Court's attitude towards international legal order has affected its view reasoning on its own jurisdiction is discussed. Lastly, the Court's view of its self as part of an established hierarchy is described.

The cases presented should be read with the idea of the ECHR in mind; the idea that the ECHR would take human rights protection one step further than the two year older Universal Declaration of Human Rights. This is expressed in the preamble to the Convention but does not, as will be shown, always seem to be the actual case.[7]

1.1.1 The presumption of equivalent protection towards the EU - the Bosphorus case

In 1991, the UNSC had adopted sanctions against the Former Yugoslavia (FRY) as a response to the ongoing atrocities in the region. In 1993 the UNSC ordered that all aircrafts in which the majority or controlling interests were held by a person operating from FRY should be impounded. [8] The later being implemented into EC law through Regulation no. 990/93.

In April 1992, the Turkish airline company Bosphorus (the applicant) leased two aircrafts from Yugoslav Airlines, JAT, owned by the FRY. It was a 'dry lease' meaning that Bosphorus Airlines used its own service personal and flight crew and were in full control over the aircrafts, while the ownership was still with JAT.[9] One of the two aircrafts landed in Dublin on 17 may 1993 for a pre-contracted maintenance and was impounded by order of an Irish Government Minister on 21 may.[10] Irish Authorities had been informed that allowing the aircraft to take off would be a breach of EC law as well as against the sanctions resolutions enacted by the UNSC. When the four year lease of the aircrafts was terminated in 1996, the aircraft was still impounded in Ireland.

The applicant sought to repeal the decision of the Irish authorities and its complaint ended up in the ECJ for a preliminary ruling.[11] The question before the ECJ was whether Regulation no. 990/93 was to be applied to an aircraft assuredly owned by a company based in FRY, but leased to a

[7] Ed Bates, *The Evolution of the European Convention on Human Rights*, (Oxford University Press 2010), p. 40 & 109.
[8] Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland. ECtHR. 2005. Application no. 45036/98, para 14-16.
[9] Bosphorus, para. 2.
[10] Bosphorus, para. 15-23.
[11] Bosphorus, para. 43.

company based in another country.[12] The ECJ found the regulation applicable to the aircrafts, despite the *de facto* control of the aircrafts by Bosphorus Airlines. [13] The ECJ also rejected an argument from the applicant on its right to property having been violated. The ECJ found the objective of the sanctions; putting an end to the ongoing violence in FRY superior to the infringement of the applicant's right to use the leased aircrafts.[14]

In front of the ECtHR, the applicant argued that Ireland had violated Article 1 of protocol 1; the right to property, by enforcing Regulation no. 990/93. The Court focused its analysis on the relationship between obligations put on a member state by the EU and the obligations on the same state by the Convention. Having emphasized the growing importance of multilateral cooperation within the EU and the importance of putting an end to the violence in the FRY, the Court did not further scrutinize the nitty gritty of this case.

Having concluded that the Irish courts had acted to follow the ECJ's preliminary ruling, and hence had no discretion to decide otherwise – not to violate EC law, the Court would have faced a situation of two contradicting obligations, had it in the end found a violation of the right to property by Ireland.[15]

Instead, it did acknowledge a *prima facie* conflict between a right of the Contracting state to transfer sovereign power to an international organization and the non-suspendable responsibility of the same state for its action under the Convention, irrespective of the imperative nature of its other international obligations.[16] However, it overcame this conflict by constructing a never seen before *presumption of equal protection* and demonstrated a high level of trust in the fundamental rights protection of the EU legal order. It held that state action in compliance international obligations was justified, as long as the organization in question could be considered to protect fundamental rights in a manner 'at least equivalent' to the level of protection guaranteed by the Convention.[17] This presumption could be rebutted if considered, in the circumstances of a particular case, that the protection of Convention rights by the other international organization in question was "manifestly deficient".[18]

The Court also reiterated a previous emphasis on the need of a positive attitude towards multinational cooperation, or " the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organizations.[19] Here, the Court cited *Costa v.*

[12] Ibid.
[13] Bosphorus, para. 12-18.
[14] Bosphorus, para.19-27.
[15] Bosphorus, para. 147-148.
[16] Bosphorus, para 152-153.
[17] Bosphorus, para 155.
[18] Bosphorus, para 156.
[19] Bosphorus, para 150 and Waite and Kennedy v. Germany. ECtHR. 1999. Application number 26083/94. Waite and Kennedy, para 63.

Enel[20], the landmark decision in which the ECJ outlined the supremacy of EC-law (now, EU-law) over domestic laws, to further emphasize the crucial need for compliance with Community law and further strengthen its opinion that state action in compliance with an obligation under EU law was a "legitimate general interest objective within the meaning of Article 1 of protocol 1".[21]

Not by surprise, the Court found the protection of fundamental rights at least equivalent to the guarantees under the Convention and did not rebut the presumption that the applicant's fundamental rights had been duly considered by the ECJ.

1.1.2 How the Court's view on the international legal world order affects its jurisdiction – the Bankovic, Loizidou and Issa cases

In *Bankovic and Others v. Belgium et.al*, the Court focused on the meaning of the phrase "within its jurisdiction" in Article 1 of the Convention. The determination of the Court's jurisdiction mirrors its self image as being a part of the international legal order.

The applicants in *Bankovic* were parents of people who died as three TV station facilities were bombed during the intervention by NATO in Serbia in April 1999.[22] The applicants invoked violations of Article 2, 10 and 13 by all Contracting states, who at the time were also members of NATO. Proceedings in front of the Court concerned the admissibility of the case.[23] The *prima facie* question for the Court was whether the NATO bombings on the territory of Serbia – not a contracting state - had taken place within the jurisdiction of the Convention pursuant to Article 1. Article 1 reads:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Using Article 31.1 of VCLT, the Court focused on interpreting the ordinary meaning of the phrase "within their jurisdiction" in Article 1 of the Convention, in the light of its object and purpose.[24] This approach was reasoned upon by the Court in *Loizidou v. Turkey*[25] as to mean that the Convention cannot be "interpreted in a vacuum", but must be interpreted in conformity with the "governing principles of international law".[26]

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[20] Costa v. Ente Nazionale Energia Elettrica, Case 6/64, 1964. ECR 585.
[21] Bosphorus, para. 150.
[22] Bankovic and others v. Belgium. ECHR 2001. Application no. 52207/99, para. 1-11.
[23] Bankovic, para. 28.
[24] Bankovic, para. 56.
[25] Loizidou v. Turkey. ECtHR 1996. Application no. 15318/89.
[26] Loisidou, para 43.

The Court concluded that jurisdiction, in its traditional sense, means territorial jurisdiction and that extra-territorial jurisdiction requires special circumstances.[27] Such special circumstances were discussed by the Court in *Loizidou* and in *Issa v. Turkey*[28]. In *Loizidou*, concerning among other things infringements of the right to private life and property of a Cypriot national on Cyprus[29], the Court was faced with the issue of whether northern Cyprus could be considered to be under Turkish jurisdiction. In a preliminary objection, Turkey argued that the Court lacked jurisdiction to try the case because the events of dispute had taken place outside Turkey's jurisdiction within the meaning of Article 1 of the Convention.[30] Turkey had at the time, in the late 1980s, around 30.000 troops in northern Cyprus and was considered an occupational force.[31] The Court considered northern Cyprus to be under Turkish jurisdiction and established a criteria of "effective control" for applicability of Article 1. It held that;

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may [also] arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[32]

The criteria of effective control was further elaborated upon in *Issa*, where family members of Kurdish farmers in northern Iraq had brought a complaint against Turkey for a violation of Article 2, the right to life.[33] The farmers had been taken away by, allegedly, Turkish troops and were later found dead in an area nearby.[34] There was an ongoing Turkish military operation in the area at the time of the alleged violations, but Turkey denied that its troops had been present at the place and time in question.[35]

Reiterating the above mentioned arguments from *Bankovic* and *Loizidou*, the Court held that a temporary military presence in an area could amount to an "effective control" within the meaning of Article 1. It was however because of a lack of factual evidence proving that the soldiers who had been witnessed in the area were in fact Turkish, the applicant's claim was dismissed.[36]

Going back to *Bankovic*, the Court did not agree with the applicants who had argued that just as Turkey in *Loizidou* did have responsibility to ensure

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[27] Bankovic para 59.
[28] Case of Issa and Others v. Turkey. ECtHR 2004. Application no. 31821/96.

[29] Loizidou, para 11-15.
[30] Loizidou (preliminary objections), para. 36.
[31] Loizidou, para 16.
[32] Loizidou (preliminary objections), para 62.
[33] Issa, para 10-19.
[34] Ibid.
[35] Issa, para 25.
[36] Issa, para 77-80.

the rights and freedoms under the Convention in the area where it exercised effective control, the NATO countries were to be "held accountable for those Convention rights within their control in the situation in question exercised effective control over ", aiming at the bombings of the TV-stations.[37] They argued that concluding otherwise would create a black hole in the human rights protection in Europe as the applicants would not have had anywhere else to complain.[38] The Court however found this argument to equal a situation where anyone affected by a Contracting state anywhere in the world would be considered to be within the jurisdiction of that state, which it did not consider supported by the wording of Article 1.[39] Nor did it consider the NATO countries to have exercised effective control through its control of the air space over Belgrade at the time of the airstrikes.[40]

In *Cyprus v. Turkey*[41], the Court held that there was a need "to avoid a regrettable vacuum in the system of human rights protection", considering the population of Cyprus presently living under the Turkish occupation.[42] Previously, it had been covered by the Convention as Cyprus was a Contracting party to the Convention by the time of the disputed actions in that case. Applied to the situation in Bankovic, the Court firmly stressed the Convention's regional function; it simply was not constructed to be applied worldwide and Belgrade clearly was not within the territory of a Contracting state to the Convention.

To sum up, in the recent decision of *Medvedyev and Others v. France*[43], the Court reiterated the principles of jurisdiction carved out in the judgments described in this section. The Court stated that:

> In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them for the purposes of Article of the Convention.[44]

This quote accurately sums up how the court is an integral part of an international legal order. It uses the VCLT to interpret the Convention and reiterates that the Convention needs to be in conformity with international law. The outcome of this reasoning is that the Court takes its starting point in the key component of international law; state sovereignty. This will be analyzed further in subsequent sections.

[37] Bankovic, para 47.
[38] Bankovic, para 51.
[39] Bankovic, para. 75.
[40] Bankovic, para 76.
[41] Cyprus v. Turkey. ECtHR 2001. Application no. 2578/94.
[42] Cyprus v. Turkey, para. 78.
[43] Medvedyev and Others v. France. ECtHR 2010. Application no. 3394/03.
[44] Medvedyev at para. 64.

1.1.3 A hierarchy crystalised – the Behrami case

In the joint admissibility cases of *Behrami v. France and Saramati v. France, Germany and Norway* [45], the ECtHR demonstrated a constitutional approach to the international legal order by finding the cases non-admissible through the determination that military troops responsible for the alleged violations had committed actions which directly attributable to the UNSC, and not to their respective sending states.

Both cases originated from Kosovo in 2000 and 2001 respectively.[46] A security force under "unified command and control" by the UNSC had been established through UNSC Resolution 1244 and contained "substantial NATO participation".[47] Parallel to the international military presence, an interim civil administration for Kosovo (UNMIK) had been set up under the same UNSC resolution.[48]

In March 2000, Mr. Behrami had suffered the death of one of his sons and the disfiguring of his other son after an accident where the two boys had been playing with an undetonated cluster bomb, which had exploded in the boys presence.[49] It was uncontested that French KFOR troops had been aware of the dangerous area for month prior to the accident but had not considered a clearing of the area a high priority.[50] In his complaint to the Court, Mr. Saramati alleged a violation of Article 2 by the French KFOR troops for their omission to clear the area under their command of cluster mines. [51]

Mr. Saramati was arrested by UNMIK police in April 2001 and kept in detention during a pre-trial investigation of alleged attempted murder and illegal possession of a weapon.[52] The detention, which was extended a number of times on grounds in the UNSC Resolution of the authority of the KFOR to "maintain a safe and secure environment", was ordered by French and Norwegian KFOR officers.[53] He was kept in detention from July 2001 to January 2002 when he was convicted of the charges brought against him. However, the Supreme Court of Kosovo overturned his conviction in October 2002 and he was released upon a re-trial.[54] Mr. Saramati complained to the Court under Article 5 in conjunction with Article 13 for the extra-judicial detention that he suffered for six month while waiting to have his case tried. His complaint was directed at France, Germany and

[45] Behrami v. France. Application no. 71412/01 and Saramati v. France, Germany and Norway. Application no. 78166/01. ECtHR 2007.
[46] Behrami, para. 2.
[47] Ibid.
[48] Behrami, para. 4.
[49] Behrami, para. 5.
[50] Behrami, para. 6.
[51] Behrami, para. 61.
[52] Behrami, para. 8.
[53] Behrami, para. 11.
[54] Behrami, para. 10-17.

Norway; the states represented in the local UNMIK administration where he had been detained.

Mr. Behrami and Mr. Saramati both argued that there was sufficient linkage within the meaning of Article 1 of the Convention between them and the respondent states. The Court was of a different opinion. It did in fact find the supervision of the de-mining in *Behrami* to be under the UNMIK mandate and the responsibility for the order to detain Mr. Saramati to be within the security mandate of KFOR.[55]

Via a chain of different military constellations, it in fact was NATO, and not the UN commanding KFOR.[56] The applicants had argued that the actual control on the ground was detached from the UN mandate and thus the actions and omissions of the different troops could not be attributable back to the UNSC.[57] The Court on the other hand analyzed Resolution 1244 and found that the UNSC's power to guarantee the security of Kosovo was a delegable power with clearly defined limits, since the mandate was fixed with "adequate precision", and that the resolution contained provisions on how reporting back to the UNSC should be structured.[58]

Because of this detailed resolution, the court held that the UNSC had retained "ultimate authority and control" over the mission in Kosovo and that it was only the operational control which was delegated to NATO.[59] Because of this, the Court found that the impugned actions were actually "attributable" to the UN and hence the respondent states could not be held responsible for the civilian casualties during the bombing in question.

The Court brought up the principle of equivalent protection from *Bosphorus* but held that it was not competent *ratione personae* to try actions and omissions by states that were considered to be in principle attributable to the UN.[60]

Its reasoning was, as the reader soon will notice, in many ways similar to the CFI's in *Kadi*. First, it retreated that the Convention "cannot be read in a vacuum but must be interpreted in light of any relevant rules and principles of international law applicable in relations between its Contracting Parties".[61] This statement means, which the Court also noted, that pursuant to Article 25 and 103 of the UN Charter, the Contracting states' obligation towards the UN and the decisions by the UNSC prevails over the obligations under the Convention.[62] In reaching this conclusion on the interpretation of the UN Charter, the Court cited *Military and Paramilitary Activities in and against Nicaragua*[63] from the ICJ and *Kadi* from the CFI.

[55] Behrami, para. 127.
[56] Behrami, para. 135.
[57] Behrami, para 74.
[58] Behrami, para. 134.
[59] Ibid.
[60] Behrami, para. 142.
[61] Behrami, para. 147.
[62] Ibid.
[63] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) 1986 ICJ reports. Judgment of 27 June 1986.

The Court held, just as the CFI in *Kadi* the "imperative nature of the principle aim of the UN" to fulfill the primary objective of maintaining international peace and security. In an interesting passage, the Court noted that "[w]hile it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace", it still held that the UNSC had "extensive means" to fulfill the objective of international peace and security.[64] An interpretation of the Convention, affecting Contracting states in their fulfillments of duties imposed on them under a Chapter VII resolution, would be to interfere with the decision of the UNSC. And in fact "be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself."[65]

The applicant brought up *Bosphorus* and argued that the substantial and procedural protection of human rights provided by KFOR did not amount to an equivalent protection to that under the Convention.[66] The Court never validated that claim. Instead, it distinguished this case from *Bosphorus* where it had considered the action taken by the Irish authorities to have been actually carried out by the Irish authorities and by virtue of an Irish decision originating in a EU decision requiring implementation. None of these three factors being at hand in this case, according to the Court[67]. Hence, the Court found the actions and omissions by KFOR and UNMIK to be directly attributable to the UN and did not find the cases admissible, since the UN was not a party to the ECHR.

As expressed in the cases just presented, there is an quiet acceptance of the International Legal Order and the Court's position as an institution constrained by its frames. The ECJ, as will be presented in the next section, has adopted a fundamentally different approach to the "game rules" of the international legal order.

[64] Behrami, para. 148.
[65] Behrami, para. 149.
[66] Behrami, para. 150.
[67] Behrami, para. 151.

1.2 A Pluralist Approach

A pluralist approach to international law is based on the premise of separate and distinct legal orders.[68] The relationship between different legal systems in a pluralist approach is governed by political processes rather than law and is open to different normative approaches that coexist in a system of mutual accommodation.[69] Pluralism as a concept accepts the likelihood of clashes of different authorities and normative systems and considers such an international atmosphere more sensitive to different attitudes and cultures, than a constitutional system.[70]

Kennedy denies that there is an international legal order in the first place.[71] According to him, lawyers from different parts of the world have different starting points and different perceptions of international law and hence, there is not only one solution to international legal problems. The international legal order, which is premised on unity and coherence, does not really exist because the interpretation of international norms is contingent of different perceptions which are not global, but varies from culture to culture.[72]

In *Kadi and Al Baarkaat International Foundation v. The European Council and the European Commission*[73], the ECJ carved out the final pieces of its autonomy from the international legal order by distinguishing EU law from supremacy of the UN Charter.[74] It did so by emphasizing that the European Legal Order, existing independently from International Law, could not overlook its own central values to fulfill its member states' obligation under the UN Charter.

In *Van Gend en Loos*, the ECJ had held that the EC legal order was a new legal order of international law for which the member states of the European Community had limited their sovereign rights in certain fields.[75]

1.2.1 Reasoning of the Court of First Instance

[68] de Búrca, p.32.
[69] de Búrca, p.33.
[70] Ibid.
[71] David Kennedy, 'Teaching from the Left: A Conference at Harvard Law School'. 31 *New York University Review of Law and Social Change* (2007), 641, p. 644.
[72] Ibid.
[73] Kadi & Al Barakaat International Foundation v. The European Council and the European Commission, ECJ (2008), joint cases C-402/05 C-415/05.
[74] Katja S. Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: the Kadi Decision of the ECJ from the Perspective of Human Rights', 9 *Human Rights Law Review* (2009), 288, p. 303.
[75] Case 26/62 Van Gend en Loos (1963) ECR 1, at p.12.

In October 1999, the UNSC enacted Resolution 1267 condemning the fact that terrorists, such as Usama bin Laden and his associates, were able to safely seek shelter on Afghani territory. Further, it reaffirmed its conviction to the suppression of international terrorism as part of the maintenance of international peace and security.[76] It requested that states would undertake to ensure that no financial means were made available to the Talibans from within the territories of any member state of the UN. A Sanctions Committee was established to run the day to day operations of the sanctions regime and to further ensure that States fulfilled its obligations.[77]

Through Resolution 1333 (2000), the Sanctions Committee was given the authority to select individuals and institutions whose financial resources were to be immediately frozen by states.[78] In March 2001 the Sanctions Committee first put together a list of names whose assets were to be frozen and on 17 October and 9 November 2001, Mr. Yassin Abdullah Kadi, a Saudi Arabian National, Mr Ahmed Ali Yusuf and the Al Barakaat International Foundation, established in Sweden (together: the claimants), were added to that list. For the purposes of this thesis, references will be to *Kadi* only. The reasoning in the two cases were the same.

In January 2002, the Security Council reaffirmed its policy of freezing the financial means of anyone associated with Usama bin Laden, the al-Qaeda network or the Talibans, through Resolution 1390.[79] The European Council, having implemented previous resolutions into the Community Legal Order, implemented Resolution 1390 through Regulation 881/2002 on the basis of Articles 60 EC (now 75 EC), 301 EC (now 215 EC) and 308 EC (now 352).

The claimants complained respectively to the European Union Court of First Instance (CFI), now the General Court. They sought the annulment of the regulations regulating the freezing of their financial assets[80], in so far it related to them, and claimed that their respective rights to a fair trial, an effective remedy and property had been violated.[81]

The CFI dismissed all claims, holding that there had not been any violation of any fundamental rights. The structure of the international legal order and

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[76]United Nations Security Council Resolution 1267. 15 October 1999. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1267(1999). Visited on 1 February 2011.

[77] Resolution 1267 at para 4 and 6.

[78] United Nations Security Council Resolution 1333, 19 December 2000. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/806/62/PDF/N0080662.pdf?OpenElemet. Visited on 1 feb. 11.

[79] United Nations Security Council Resolution 1390, 16 January 2002. Available at http://daccess-ods.un.org/TMP/2898379.26626205.html. Visited on 1 feb. 11.

[80] Kadi v. Council of the European Union and Commission of European Communities , The Court of First Instance of the European Communities, 21 September 2005. Case T-315/01, para 37 & 59 and Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of European Communities ,

[81] Yassin Abdullah Kadi v. Council of the European Union and Commission of European 2005. Case T-315/01, para 37 & 59.

the supremacy of the UN Charter over both Community law and domestic law did not grant the CFI to perform a full review of the cases but only in relation to a possible violation of a *jus cogens* norm. The Court reasoned that the international legal order, as it is crystallized through Article 25 and Article 103 of the UN Charter and Article 30 of the VCLT, established the primacy of the UN Charter over both domestic law and community law, in the event of a conflict of norms with another international treaty.[82] This reasoning being based on the premise of International Law's primacy over national law, as established in Article 27 of the VCLT.[83]

The CFI found this hierarchy of norms "built" into the Treaty of the European Union. Article 307 EC (now: 357 EU) limits the supremacy of Community law to subsequently entered into obligations by the member states. This, according to the CFI, meant that the member states of the EU had not been able to transfer more power to the Community than had allowed the UN Charter, ratified by five of the six founding states of the Community prior to the establishment of the European Economic Community in 1958.[84] Despite the fact that the EU was not bound directly by the UN Charter, the CFI argued that since the Council had approved the adoption of economic sanctions through the inclusion of Article 228a of the Treaty (now 251 EU) thus absorbing that competence from the member states, it had in effect become directly bound by the UN Charter in the area of economic sanctions.[85]

Because of this duty of adherence to the UN Charter, the CFI argued that any review of the internal lawfulness of the contested regulations, would in effect be a review of the Security Council Resolutions upon which the regulations were based, and thus not possible due to the supremacy of the UN Charter.[86]

However, and this is where the reasoning becomes hard to totally grasp, in contrary to the statement just made, the CFI held that such a review of the internal lawfulness of the regulations (and thus by the Security Council resolution) would be within the sphere of competence of the court in regards to violations of *jus cogens*.[87] The CFI cited Article 53 the VCLT, which holds that "a treaty is void if it conflicts with a peremptory norm of general international law".[88]

Moving on, the Court interpreted the UN Charter and concluded that it presupposes the existence of certain mandatory principles, there among the "fundamental rights of the human person", as expressed in the preamble of the UN Charter.[89] According to Article 24(2) of the UN Charter, the

[82] Kadi 2005, para 183.
[83] Kadi 2005, para 182.
[84] Kadi 2005, para. 188.
[85] Kadi 2005, para. 192-203.
[86] Kadi 2005, para 215.
[87] Kadi 2005, para. 226.
[88] Kadi 2005, para. 227.
[89] Kadi 2005, para. 228.

Security Council cannot discharge its primary responsibility to maintain international peace and security without doing so in accordance with the "purpose and principles" of the United Nations.[90] This requirement of adherence to *jus cogens* and preexisting norms of human rights led the Court to arrive at the conclusion that it had the competence to review possible violation of fundamental rights as alleged by the claimants, in as far as violations of the *jus cogens* norms of fundamental rights were concerned.[91]

The CFI then dismissed all claims of violations, using quite evasive arguments. The right to property was not violated because it was not arbitrarily deprived the claimants; it was part of a legitimate protection against international terrorism by the Security Council, it was only a temporary measure and did not affect the "very substance of the right"[92] but only the use thereof and there was an possibility of review by the Sanctions Committee.[93]

The CFI found no violation of the right to be heard as part of the right to a fair trial since the Community had no authority under International Law to perform such a review and was hence not obliged to do so. It also concluded that the Sanctions Committee had intended to take account, "as far as possible", of the fundamental right to be heard.[94]

On the claim of breach of the right to property, the Court said that it did not have jurisdiction to review the lawfulness of the regulation under Community law and because of the hierarchy of International Law, neither the facts nor evidence relied on by the Sanctions Committee.[95] Performing such a review would be a trespass on the prerogative of the Security Council to assess the appropriate measures for threats to international peace and security. The Court added that such an assessment required political and value based judgments which in principle falls outside of a judicial review.[96]

Taking a step away from the hinders to human rights realization in international law – by adding the jus cogens reasoning – the CFI overall remained on faithful to the rules of the international legal order. Its reasoning was overturned by the ECJ.

1.2.2 Reasoning of the Court of Justice

The ECJ did not at all bother to adhere to the very strict constitutionalist order set by the CFI. The Court held that the right to be heard and to an

[90] Kadi 2005, para 229.
[91] Kadi 2005, para. 231.
[92] Kadi 2005, para. 248,
[93] Kadi 2005, para. 240 -250.
[94] Kadi 2005, para 258-265.
[95] Kadi 2005, para. 284.
[96] Ibid.

effective legal remedy had been violated, because of the applicant's inability to be heard and the lack of information communicated to him.[97] The European Council had adopted a position to of not providing the ECJ with any evidence for investigation.[98] Because of this lack of information, the Court also held that the right to an effective legal remedy was violated by the ECJ in the present case as well.[99] The Court finally held that the infringement of the right to property, which in principal could be justified, was unjustified because of the lack of guarantees enabling the applicant to bring his case in front of a competent authority.[100]

In a balancing of interests, the Court did not annul the contested regulation with immediate effect, arguing that it would seriously prejudice the effectiveness of the regulation, which the Community was still forced to implement.[101] Instead, the Court ordered the Council to maintain the claimants' names on the sanctions lists with due consideration of the applicants' fundamental rights, while remedying the infringements found by the Court during three month time.

Advocate General Maduro did in his opinion set a direction for the ECJ to follow. He took a starting point in *Van Gend en Loos* and the independence of EU law from International law.[102] He added that the Community traditionally had played an active role on the International stage and that Community law was guided by a presumption that it would honor its international commitments.[103]

In the light of Advocate General Maduro's starting point, the *Kadi* case could be seen as yet another emphasis in the ECJ's separation of European Union law from International law.

The starting point for the Court's assessment was a set of key principles on which to base a final determination of the standard of review to be applied. In *Les Verts*, the Court had held that the EC Treaty, now the EU Treaty[104], has established a complete set of legal remedies for the Court to review the legality of the acts of all Community institutions and member states.[105] The Court also reiterated that an international treaty could not affect the autonomy of Community legal system, which observance was ensured by the exclusive jurisdiction of the Court by virtue of Article 220 of the EC

[97] Kadi & Al Barakaat International Foundation v. The European Council and the European Commission, ECJ (2008), joined cases C-402/05 C-415/05, para. 348.
[98] Ibid.
[99] Kadi 2008, para. 350 ff.
[100] Kadi 2008, para.
[101] Kadi 2008, para 373.
[102] Opinion of Advocate General Poiares Maduro in Case C-402/05 P, Kadi v. The European Council and the European Commission, para.21.
[103] Ibid.
[104] After the entry into force of the Lisbon Treaty on 1 Jan 2010.
[105] Les Verts v. Parliament, ECR 1339, para.23. (1986).

Treaty.[106] Moreover, it also held that fundamental rights formed an "integral part of the general principals of law whose observance the Court ensures"[107] and reiterated that the respect for human rights was a condition of lawfulness for Community legal acts in general.[108]

The Court rejected the CFI's view that a review of the Community regulation would in fact be an indirect review of the lawfulness of the Security Council resolution, due of the autonomy of the European legal order.[109] That being said, the Court held that the European Community had to respect international law "in the exercise of its powers"[110]. In one way, the Court then recognized the principal authority of the UNSC and held that due attention had to be given to the decisions by the UNSC when it exercised "its primary responsibility with which that international body is invested for the maintenance of peace and security at the global level".[111]

Despite this acknowledgement of the pivotal role of the UNSC, the Court held that there was nothing in the UN Charter prescribing a certain method of implementation of the decisions taken under Chapter VII, and hence that there was nothing in the UN Charter that excluded any judicial review in the light of fundamental freedoms by virtue of the fact the regulation was implementing a Chapter VII resolution.[112]

Looking at the EC Treaty, the Court found that Articles 307 EC (now 351 EU) and 347 EC (now 347 EU) allowed for international obligations of the member states to supersede Community law in certain cases concerning infringements of the common market, but that such a supersession was not possible in relation to the fundamental principles of human rights enshrined in Article 6.1 of the EC Treaty. The Court stressed that even if the obligations under the UN Charter would be part of the hierarchy of norms within the Community legal system, it could not prohibit a review of a regulation's compability with fundamental rights.[113] Also, it exposed its pluralist approach and held that the measure to deny a UN resolution primacy over the fundamental principals of the EU, would not "challenge the primacy of that resolution in international law".[114] The following quote provides a good summary of the Court's argument;

> the validity of any Community measure in the light of fundamental rights must be considered to be the expression […] of a constitutional guarantee streaming from the EC treaty, as an autonomous legal system which was not to be prejudiced by an international agreement.[115]

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[106] Kadi & Al Barakaat International Foundation v. The European Council and the European Commission, ECJ (2008), joined cases C-402/05, para. 282.
[107] Kadi 2008, para 281 f.
[108] Kadi 2008, para.284.
[109] Kadi 2008, para. 290.
[110] Kadi 2008, para. 291.
[111] Kadi 2008, para. 294.
[112] Kadi 2008, para. 299.
[113] Kadi 2008, para. 305-308.
[114] Kadi 2008, para. 288.
[115] Kadi 2008, para. 316.

The Commission had argued that Court should not find jurisdiction to try the case because of the nature of the contested regulation, just as the ECtHR did in the *Behrami*.[116] The Court however cited the ECtHR's reasoning in *Behrami* and distinguished the present case from that one and also, it seems, upheld the Security Council's position as the primary insurer of international security.[117] According to the ECJ, the cases in front of the ECtHR, had concerned actions "directly attributable" to a subsidiary organ to the UN Security Council or

> actions falling within the exercise of powers lawfully delegated by the Security Council pursuant to that Chapter, and not actions *ascribable* to the respondent States before that court, those actions *not, moreover, having taken place in the territory* of those States and *not resulting* from any decision of the authorities of those States.[118]

The Court instead compared this case to *Bosphorus*, where the Security Council resolution had instead been incorporated into Community law through a regulation and was not directly attributable to the UN or a subsidiary body of the UN, provided by the criteria of direct attributability in *Behrami* (even though *Behrami* was decided after *Bosphorus*).[119] By doing this, not only did the ECJ use ECtHR case-law to distinguish the case at hand from *Behrami*, it also indirectly upheld the distinctively different roles of the ECtHR, as an international court operating within the boundaries of international law, and the ECJ as supranational court operating by its own premises.

The Court briefly assessed the re-examination procedure in front of the Security Council and considered it insufficient in guaranteeing fundamental rights protection.[120] It then took an approach similar to the German Constitutional Court in *Solange I*[121] and the ECtHR in *Bosphorus,* and held that - despite the fact that it had concluded that a full review was demanded by Community law - it had to ensure a full review of the case *because* of the insufficient re-examination procedure in front of the Sanctions Committee.[122]

1.2.3 Kadi – round three

In September 2010, Mr. Kadi once again complained to the CFI (now; the General Court). This time requesting that the Commission should disclose all the documents relating to his inclusion on the sanctions list and annul the regulation in so far as it concerned him. This had not been done subsequent to the ECJ's ruling in *Kadi*.

[116] Kadi 2008, para 310.
[117] Kadi 2008, para 311.
[118] Kadi 2008, para. 313.
[119] Kadi 2008, para. 313.
[120] Kadi 2008, para. 322.
[121] BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß, 271.
[122] Kadi 2008, para. 326.

After the decision by the ECJ in 2008, the Commission had communicated to him the grounds for his listing by the Sanctions Committee and he had been given an opportunity to put forward his comments.[123] The Commission argued in return that the ECJ's ruling in *Kadi* did not require the Commission to disclose any evidence and held further that the listing of Mr. Kadi was justified, despite the fact that criminal proceedings against him regarding the same subject matter in Switzerland, Turkey and Albania had been closed.[124] The Commission held that such criminal proceedings involved "different standards of evidence from those applicable to the Sanctions Committee, which were preventive in nature."[125]

The main issue in this case was the standard of review to be applied by the General Court, not whether a review was possible in the first place. The Commission argued that the applicable standard of review should be restricted and limited to establishing that there had not been any "manifest error in the assessment of the facts or misuse of power".[126] Hence, a procedural review rather than a review of the legality of the decision. The Commission argued, just as it had done in previous cases, in favor of a stabile UN system and stated that an approval of Mr. Kadi's claim of full disclosure would undermine the need of a centralized UN sanctions system to fight international terrorism.[127] The opposite would, according to the Commission, impose obligations on the member states of the EU in contradiction with Article 103 of the UN Charter and the obligation to abide to decisions taken under the UN Charter.[128]

The General Court took a firm stand and held that limiting the intensity and extent of the judicial review in the way argued by the Commission would in fact be not an effective judicial review but a "simulacrum" of a review .[129] It cited the ECJ on that any Community measure must be reviewed in the light of fundamental rights, being an expression of a constitutional guarantee stemming from the EU Treaty and not suspendable by an international agreement, not even by a Chapter VII resolution from the UNSC.[130]

The General Court then took the stand, just like the German Constitutional Court in *Solange I*,[131] that this must be the case *at the very least*, so long the re-examination procedure operated by the Sanctions Committee clearly failed to offer guarantees of effective judicial protection".[132] This perception of its subsidiary role in securing fundamental rights within the EU was prior to this case elaborated upon by the General Court in *Organisation des*

[123] Kadi 2010, para 53.
[124] Kadi 2010, para. 60.
[125] Ibid.
[126] Kadi 2010, para. 83.
[127] Kadi 2010, para.97.
[128] Kadi 2010, para. 100.
[129] Kadi 2010, para. 123.
[130] Kadi 2010, para. 125.
[131] Supra note 121.
[132] Kadi 2010, para. 127.

Modjahedines du People d'Iran, where the exil-Iranian organization "Organisation des Modjahedines du People d'Iran had gotten its financial assets frozen in 2002 through a community measure implementing UNSC Resolution 1373 and complained to the CFI.[133] This was in 2006, after the CFI decision in *Kadi*, but before the ECJ's decision in the same case. The CFI held that the rights to a fair hearing at the Community level did not usually contain a right for the claimant to express his views on the appropriateness and well-foundedness of the decision in question, had this right been adequately secured at the national level.

In *Kadi*, the ECJ had concluded that a full review of the contested regulation should not only concern the merits of the decision but also the evidence and information used by the Sanctions Committee as the basis for their decision.[134] The General Court took full notice of this conclusion, despite their opposite conclusion in its ruling from 2005, and underscored that national security or the threat of terrorism was not a valid reason to withhold information from review by the Community judicature.[135]

The General Court called the measure of freezing of Mr. Kadi's financial assets for almost 10 years "draconian" and considered him as effectively being a prisoner of the state.[136]

In *A. and Others v. the United Kingdom*[137], concerning lengthy detentions of suspected terrorists in the post-9/11 terrorist hunt, the ECtHR held that proceedings must always ensure "equality of arms" – which translates into an opportunity to effectively challenge "the basis of the allegations against him".[138] Referring to *A. and Others*, the Court found a violation of the claimant's right to defend himself, having not had an opportunity to review any grounds for his inclusion on the sanctions lists.[139]

Further, it found the lack of an established communication procedure and the Commission's sending of the summary of reasons, without further references to evidence or facts, insufficient to comply with the right a fair hearing and effective judicial protection.[140]

The development of human rights protection in the courts of the European Union - from the CFI's limited conditioning of Article 103 of the UN Charter to the ECJ's firm advocacy for human rights protection, confirmed by the General Court – adds to an astonishment over the ECtHR's commitment to the hierarchy of the international legal order.

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134 Kadi (2008) para. 135.
135 Kadi (2008), para 146.
136 Kadi (2010), para. 149.
137 A. And Others v. The United Kingdom. ECtHR 2009. Application no. 3455/05.
138 A. And Others., para. 204.
139 Kadi (2010), para. 176.
140 Kadi (2010), para. 157.

Interesting to note is that the ECJ, being part of a constitutional order of the EU does not submit itself to a second constitutional hierarchy; the international legal order. The ECtHR – being part of an interstate organization without any claim of autonomy has on the other hand kept on confirming its position in the global legal order.

Having outlined the cases of interest for a discussion on the inherent hinders in international law, it is time to move over to a closer look at the key legal issues creating the hindrance of further coherence of enforcement of human rights in Europe.

2 The key issues: The inherent hinders in international law

Expressed through the cases presented in the previous section, there seems to be a shared understanding between the ECJ and the ECtHR of the UNSC as the primary watchdog over international peace and security. In two of the most important passages of its 380 paragraph long judgment, the ECJ in *Kadi* stated that there needs to be special attention given to the UNSC when it is exercising it primary responsibility of maintaining international peace and security under Chapter VII, but that the UN Charter has given the member states a choice on how to transpose resolutions by the UNSC into domestic legislation.[141]

On the other hand, in Strasbourg, the ECtHR has given its indirect support for the primacy of the UN Charter. By using the tools of international law to emphasize the principle of territorial jurisdiction, and thereby indirectly the principles of state sovereignty and non-intervention in Article 2 of the UN Charter, the ECtHR has also upheld the role of the UNSC as the only international body authorized to stand above the principle in Article 2 of the UN Charter, through the Chapter VII means.[142]

A starting point for an explanation of these two different attitudes towards International Law is to be found in the way the two courts perceive their own respective roles. In his opinion on *Kadi* before the ECJ, Advocate General Maduro positioned the ECJ and ECtHR as operating on different premises; the ECJ as a constitutional court over an autonomous legal order, and the ECtHR as the result of an interstate agreement, constructed on principles of international law[143], however without really explaining fully *why* the difference exists.[144] His description in full reads:

> The task of the European Court of Human Rights is to ensure the observance of the commitments entered into by the Contracting States under the Convention. Although the purpose of the Convention is the maintenance and further realization of human rights and fundamental freedoms of the individual, it is designed to operate primarily as an interstate agreement which creates obligations between the Contracting Parties at the international level. This is illustrated by the Convention's intergovernmental enforcement mechanism. The EC Treaty, by contrast, has founded an autonomous legal order, within which States as well as individuals have immediate rights and obligations. The duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community.[145]

[141] Kadi, para 294 f.
[142] Bankovic, para. 59.
[143] Opinion of Advocate General Poiares Maduro in Case C-402/05 P, Kadi v. The European Council and the European Commission, para. 37.
[144] Markovic, p. 109.
[145] SOURCE

In *Bankovic* the ECtHR held that the Court must "determine State responsibility on conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty".[146] It continued; "While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction […] are, as a general rule, defined and limited by the sovereign territorial rights of other relevant states.[147]

Two issues have now arisen as fundamental for the upholding understanding and structure of International law, which in turns hinders further coherence in the human rights protection in Europe; (1*)* the nature of Article 103 of the UN Charter, and the unique position of the UNSC in international law and: (2) the notion of statehood and the importance of sovereignty in international, as exposed by the ECtHR in the cases presented.

2.1 The Supremacy Clause

2.1.1 Conflict of norms

Before moving on with an analysis of Article 103, a short comment regarding conflict of laws more generally is of use. For the purpose of this thesis, a norm conflict is a situation where a state is faced with a situation of two contradictory *obligations* or one obligation and one *right*.[148]

An important distinction is between *apparent* and *genuine* norm conflicts. An *apparent* conflict is a situation which can be avoided through interpretative means.[149] Hence, a situation where it is possible to interpret one of the two conflicting norms as not being conflicting. In a *genuine* conflict, the situation is only resolved if one norm is allowed to prevail over the other without consequences nor responsibility for the state in question.[150] In international law, there is no system for resolving genuine norm conflicts.[151]

Applying the reasoning of norm conflicts to the case-law of the ECtHR and its relation to Article 103 of the UN Charter, the following is interesting to note. A difference between *Bosphorus* and *Behrami* is that in the former case, the ECtHR did not touch upon the issue of Article 103, because the actions in question were attributed to Ireland, while in the latter, supremacy of Article 25 and 103 of the UN Charter over the ECHR was avoided by attributing the actions of the respondent states to the UN.

Hence, in both cases, the Court successfully avoided having to frame and solve a genuine norm conflict between the Convention and Article 103 of

[146] Bankovic, para. 57.
[147] Ibid at para 59.
[148] Marko Markovic, 'Norm Conflict in International Law: Whither Human Rights', 20 *Duke Journal of Comparative & International Law* (2008), 69, p.72.
[149] Ibid.
[150] Ibid.
[151] Markovic, p.74.

the UN Charter. Most notably, in *Behrami,* the court's reasoning on attribution of the alleged state actions to the UNSC could be interpreted as a way of *not having to say* that the UNSC resolution granting authority to the operation on the Balkans trumped the Convention, referred to by the ECtHR as the "constitutional instrument of the European public order".[152] On the other hand, back-bound by the constraining obligations of a Chapter VII resolution, it could on the other hand not openly divert from the International Legal Order.[153]

The general rule for solving apparent conflict of norms in international law is provided for in Article 30 VCLT. The codification corresponds in large to customary law.[154] When all parties to one treaty are also parties to another, conflicting treaty, the rule is simple; either the treaty later in time (*lex posterior* principle) or the one more specific (*lex specialis* principle) prevails.[155] If all the parties to the later treaty are not parties to the former, the provisions of the later treaty do not trump the provisions of the former in relation to those states only bound by the first treaty.

Pursuant to the principle of *lex specialis*, if neither the wording nor the object and purpose of a multilateral treaty precludes the entering into of bilateral treaties between some of the signatory states, such an agreement can be entered into.[156] This would be of benefit for the ECJ. The general rule of *lex specialis* could be applied to the relation between the EU-treaty and the UN Charter, if it was not for Article 103 of the UN Charter. As will be argued below, this principle could be used as an interpretive means in order to adjust the status of human rights within the framework of international law in situations of genuine norm conflicts.

2.1.2 Article 103 of the UN Charter

Article 30(1) VCLT is subjects the general rules of interpretation in Article 30 to Article 103 of the UN Charter, which reads:

> In the event of a conflict between the obligations of the Members of the Untied Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 103 is a conflict of laws clause.[157] Charter obligations are given prevalence over any conflicting obligation, without invalidating the conflicting obligation.[158] Despite lacking textual support, the meaning of

[152] Behrami, p. 145 & Markovic, p. 86.
[153] Ibid.
[154] Bruno Simma et.al, The Charter of the United Nations, a Commentary Vol.2, 2 ed., Oxford University Press (2002), p. 1294.
[155] Ibid.
[156] Ibid.
[157] Markovic, p. 76.
[158] Ibid.

"obligations under the present Charter" in Article 103 has been interpreted to encompass both authorizations and commands of the Council.[159]

Article 103 of the UN Charter implies a primacy of the purposes of the United Nations – the maintenance of international peace – over conflicting obligations in other treaties, thereby creating a hierarchal "international public order". [160] It is not for nothing that Article 103 is often referred to as the "supremacy clause" of the UN Charter. [161] In a sense, the functions of the UN, possibility even world peace itself, can only be upheld if Article 103 is respected, as it ensures, mandatory adherence to the decisions of the UN.[162] The discussion whether Article 103 also implies primacy of the Charter over conflicting obligations of International law, such as customary law, is lengthy and of no relevance for this thesis.[163]

The Security Council is the central organ of the UN, being both the most important lawmaking body and its executive branch.[164] Compared to the other bodies of the United Nations, it is the only one entrusted with compulsory power of the member states, through Chapter VII.[165]

Article 25 of the Charter stipulates that the members of the UN have agreed to "accept and carry out the decisions" of the UNSC in accordance with the Charter. Read together with Article 103, there is a duty accept and carry out the decisions by the UNSC in a situation where an obligation under another international agreement would stipulate otherwise. This reading of the UN Charter was reiterated by the ICJ in the *Lockerbie case*, where compulsory measures taken by the UNSC under Chapter VII of the UN Charter overrode any choice that Libya had under the Montreal Convention for the Surpression of Unlawful Acts Against the Safety of Civil Aviation of prosecuting the persons suspected of the terrorist attack against an American civil airliner over Scotland.[166]

Article 25 talks about the compulsory adherence to "decisions" of the UNSC. Decisions of the Council, which are mere recommendations and hence not binding, are not considered included in the ambit of Article 25.[167] Decisions taken under Chapter VII of the Charter of threats to international peace and security are binding in the meaning of Article 25.[168]

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[159] Ibid.
[160] Dinah Shelton, *International Law and Relative Normativity* in Malcom D. Evans *International law* (Oxford University Press 2006), p.178.
[161] Livoja, p 584.
[162] Simma, vol.2, p. 1302.
[163] For a good summary of different interpretations see; Livoja. (2008), pp 583-612,
[164] Bruno Fassbender, 'the United Nations Charter As Constitution of The International Community', 36 *Columbia Journal of Transnational Law* 531, p.574.
[165] Ibid.
[166] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK), (Provisional Measures) (1992), para.39.
[167] Bruno Simma et.al, The Charter of the United Nations, a Commentary Vol.1, 2 ed., Oxford University Press (2002), p. 457.
[168] Simma, vol.1, p. 456.

The reasoning of the ECJ, that it has been left to the member states to transpose their UN-obligations into their domestic legal systems,[169] does not rhyme very well with the idea of an international public order" and an obligation of all member states to always give primacy to their obligations under the Charter. A right for member states to scrutinize the decisions of the UNSC in substance involves value-based assessments.[170] If this was possible, it would undermine the proper function of the Council as the sole decision maker on international peace and security issues.[171]

In light of the analysis of Article 103 this far, it seems as if Article 103 should not have been disregarded by the ECJ in the way it was in *Kadi*. However, adding another piece to the puzzle troubles this description of Article 103 and puts more rationale behind the ECJ's reasoning.

The duty of the member states to "agree and carry out the decisions of the Security Council in accordance with the present Charter" in Article 25 of the Charter, raises the question of possible human rights constraints on the Security Council. This topic has been subject to extensive research and academic debate.

Article 25 and Article 103 read together grants the UNSC to let the end justify the means.[172] However, the duty to agree and carry out a decision of the UNSC is attached to the premise that the decision it self is "in accordance" with the Charter. This raises the following two question; 1) are decisions of the UNSC only binding if they are in accordance with the UN Charter and if so; 2) who has the authority to determine what is to be considered to be "in accordance" with the Charter?[173]

Presupposing that the first question should be answered in the affirmative, Megret and Hoffmann have identified three ways to construct arguments on how to answer the second question; an internal, external and a hybrid of both.[174] The external argument is based on the premise that the UN is only bound by the human rights which are also customary international law, in some cases even *jus cogens*.[175]

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[169] Kadi, para. 299.
[170] Simma, Vol.1, p. 459.
[171] Ibid.
[172] Gerhard Thallinger, *Sense and Sensibilty of the Human Rights Obligations of the United Nations Security Council*, ZaöRV 67(2007), 1015-1040, p. 1027.
[173] Bruno Simma et.al, The Charter of the United Nations, a Commentary Vol.1, 2 ed., Oxford University Press (2002), p. 459.
[174] Frédéric Mégret & Florian Hoffmann, *the UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 Human Rights Quarterly 314 (2003).
[175] Mégret & Hoffmann, p.317 & Thallinger, p.1022.

This approach on the human rights obligations of the UNSC was taken by the CFI in *Kadi*, when it held that it only had jurisdiction to review UNSC resolutions in light of *jus cogens norms*.[176]

The argument most frequently used is the internal argument. It gives that if a decision by the Council is not in accordance with human rights, it is not in accordance with the Charter and therefore not binding.[177] Hence, the Security Council is under an obligation to comply with the internal human rights obligations of the Charter.

Pursuant to Article 24, the Security Council "shall act in accordance with the purposes and principles of the organization when discharging its duties".[178] These principles are set out in articles 1 and 2 of the Charter. Article 1 prescribe that international disputes shall be settled in accordance with the principles of justice and international law. Article 2 obliges all members of the UN to promote human rights and respect the principle of good faith. According to Article 55, the Security Council shall promote "universal respect for, and observance of human rights and fundamental freedoms". Legal sources further detailing the good faith obligation would be International Bill of Rights, composed by the Universal Declaration, the ICCPR and the ICESCR.

The Devil's advocate has just noted that Article 2 speaks about all *members* of the UN, not the *UN itself*. This has been interpreted to mean that the UNSC would not necessarily be bound to perform its duties in good faith.[179]

The UN not being bound by its own principles opens for the problem that the CFI raised in *Kadi.* On the one hand, the phrase in Article 103: "in accordance with the Charter" could be interpreted in the light of Article 2(5) of the Charter and the general obligation to support the aim of the organization.[180] However, leaving it up to the member states to determine the exact aim of the organization or to what extent a specific order in a UNSC resolution is in accordance with the Charter, thereby letting the member states themselves decide whether they would adhere to the requirements of a resolution or not, could possibly undermine the power of the UNSC.

The third way to construct an argument to bind the UNSC to the norms of human rights, as described by Megret and Hoffmann, is the hybrid alternative. [181] It is based on the idea that states should not be able to circumvent human rights by letting an international organization do something which would have been unlawful for a state to do. Since states

[176] Kadi (2005) para 183 & 231.
[177] Mégret & Hoffmann, p.318.
[178] Gerhard Thallinger, 'Sense and Sensibilty of the Human Rights Obligations of the United Nations Security Council', 67 *ZaöRV* (2007), 1015, p. 1024.
[179] Gabriel H. Oosthuizen, Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law, 12 *Leiden Journal of International Law* (1999), 549, p.560.
[180] Supra note 178.
[181] Mégret & Hoffmann, p.318.

are bound by human rights norms, an international organization is as bound by human rights as its creators.[182] In *Waite and Kennedy v. Germany*[183], the ECtHR reasoned in this way and stated that it would be incompatible with the object and purpose of the Convention to allow for the contracting states to escape its obligations under the Convention by creating an international organization performing certain tasks in it place.[184]

The CFI, in *Kadi*, observed full adherence to Article 103, however subject to any possible violation by the UNSC of a *jus cogens* norm.[185] If the UNSC is in principle bound by human rights, as just discussed, any decision contrary to human rights should be seen as a derogation thereof[186] Article 4 of ICCPR allows for derogation of certain rights, never the right to life and prohibition of torture, in times of a public emergency threatening the life of the nation to the extent strictly required by the exigencies of the situation.

The Human Rights Committee has held that for Article 4 to be applicable, an official declaration must be made by a state of the existence of a state of emergency.[187] Applying Article 4 of ICCPR to Article 39 of the UN Charter, which triggers the applicability Chapter VII of the Charter, gives that the conditions of Article 4 would probably be met every time there is a threat to international peace and security, since such a situation usually is equivalent to a state of public emergency.[188] The limitations of Article 4 could be seen as analogously applicable to the UNSC.[189]

The extent to which the Security Council can derogate from human rights in accordance with Article 4 ICCPR is not an easy task to determine. At the very least, the Security Council bound by the proportionality test built into Article 4 of ICCPR ("to the extent strictly required by the exigencies of the situation") and by Article 42 of the Charter, limiting the Council's actions to measures to the "extent these are necessary to restore international peace and security". This means that every time Chapter VII is applied, human rights are put of business, which does not let one rest with comfort. It leaves space for political considerations and ad hoc decisions violating human rights, such as in the *Kadi* cases.

2.2 The notion of sovereignty

The starting point for any discussion on jurisdiction in public international law is, just as the ECtHR has pointed out, from the perspective of territorial

[182] Ibid.
[183] Waite and Kennedy v. Germany. ECtHR. 1999. Application number 26083/94.
[184] Waite and Kennedy, para. 67.
[185] Kadi (2005), para 183 & 231.
[186] Gerhard Thallinger, *Sense and Sensibilty of the Human Rights Obligations of the United Nations Security Council*, ZaöRV 67(2007), 1015-1040, p. 1029.
[187] Thallinger, p. 1030.
[188] Ibid.
[189] Ibid.

integrity and national sovereignty.[190] Accordingly, one country cannot assess jurisdiction over anything that happens within another state's territory without the later state's consent.[191] Anything else would be a violation of the principle of the sovereign equality of states, a principle robustly established in international law in Article 2(1) (sovereign equality) and 2(7) (non-intervention) of the UN Charter. The only exemption to this firmly established root of the international legal order, is the power of the Security Council to ignore the principle of sovereign equality when applying Chapter VII of the Charter.

The developning different functional regimes in international law, such as human rights, international trade law and environmental norms all have different starting point and centre of focus than sovereignty and statehood.[192] However, these regimes still operate within the "game rules", created by public international law and no functional regime seems to have replaced statehood and sovereignty as the centre, the starting point, of international law.

A short, but telling example of the central relevance of statehood in international law is the *Nuclear Weapons Case*[193]. In that case, ICJ concluded that despite the fact that nuclear weapons were not compatible with human rights law and environmental law, and were considered 'scarcely reconcilable' with the fundamental proportionality principle of International Humanitarian Law[194], it could not be excluded that the threat or use of nuclear weapons could be outlawed "in an extreme circumstance of self-defense, where the very survival of the state would be at stake".[195] The ICJ put the upholding of the sovereign state on a higher pedestal than human rights and environmental concerns.

2.2.1 The ECtHR as part of the International Legal Order

A development of the extra-territorial reach of the Convention would most likely not have been foreseen by the drafters of the Convention.[196] Actually, it has been argued that the drafting states never would have ratified the Convention, had they been aware of the Court's substantive reach into what had previously been perceived as purely domestic matters.[197]

The ECtHR has since the 1970's adopted a strong teleological approach to the interpretation of the Convention with the starting point that the "object

[190] Martin Dixon, *Textbook on International Law*, (Oxford University Press 1990) (6ed. 2007), p.143 f & Ian Scobbie, *Wicked Heresies or Legitimate Perspectives* in Malcom D. Evans (ed), *International Law*, (Oxford University Press 2006), p.98.
[191] Ibid.
[192] Martti Koskenniemi, *What is International Law for?* in Malcom D. Evans (ed), International Law, (Oxford University Press 2006), p. 61.
[193] Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (Advisory Opinion of July 8.
[194] Legality of the Threat or Use of Nuclear Weapons, p. 242.
[195] Supra note 156 at p. 262.
[196] Bates, p.111.
[197] Bates, p.114.

and purpose" of the Convention is to effectively protect the rights covered in it. Derived from this, the Court also declared in the 1970's that the Convention was a "living instrument" which had to be interpreted in light of present-day conditions.[198]

The doctrine of margin of appreciation used by the ECtHR and the possibility to derogate from rights obligations due to for example national security concerns deemed "necessary in a democratic society", which is also used with frequency by the Court are other examples where the upholdning of statehood shines through in international law.[199] Before clearly expressed in *Sunday Times* in 1979, the Court had shown reluctance of finding violations of the Convention in domestic legislation.[200]

In *Bosphorus*, the ECtHR escaped dealing with an apparent norm conflict between Article 103 of the UN Charter and the Convention, by finding the grounding of the aircrafts to be actions attributable to Ireland, by virtue of EU-legislation.[201] It constructed the presumption of equivalent protection and overcame the genuine norm conflict between EU-law and the Convention.

By finding the actions of the respondent states attributable to the UN and dismissing the case on a lack of jurisdiction *ratione materiae*, the ECtHR in *Berhami* did not actively have to take a stand on the issue of the hierarchy of international law created through Article 103 of the Charter in that case either. Article 103 was actually not mentioned in the Court's reasoning at all. Nor did the ECtHR have to put it self in the position of putting the Convention before the UN Charter by disregarding the UNSC resolution in question. [202]

By using these technical maneuvers, the Court avoided the difficulty of allowing a UN resolution to trump the "constitutional instrument of European Public Order[203] hence allowing member states to commit human rights violations using Article 103 of the UN Charter as an "excuse". Needless to say, this was not compatible with the Court's view in *Waite and Kennedy* on the transfer of responsibilities to international organizations.[204] In *Bosphorus*, the Court commented on such transfer of authority to international organizations:

> Absolving contracting states completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its preemptory character and undermining the practical and effective nature of its safeguards.[205]

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[198] Bates, p.328.
[199] Martti Koskenniemi, *What is International Law for?* in Malcom D. Evans (ed), *International Law*, (Oxford University Press 2006), p. 62.
[200] Bates, p. 348.
[201] Supra note 12.
[202] Supra note 152.
[203] Bosphorus, para.156.
[204] Supra note 176.
[205] Bosphorus, para 154.

If the ECtHR would have gotten to a different result in its attribution analysis in Behrami, its second step would have been an analysis of jurisdiction similar to the one in *Bankovic*. Just as in *Bankovic, Behrami* the alleged violations in *Behrami* took place in formerYugoslavia – outside the territory of the contracting states to the ECtHR.

In *Bankovic*, the Court made an explicit statement in favor of the international legal order and the hierarchy of norms established through Article 103, when it held that assessing jurisdiction over contracting states acting under a Chapter VII mandate would "be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself."[206]

The ECtHR has pointed to the importance of not limiting the applicability of the Convention to the territories of the Contracting states but has limited its claim of extraterritorial application carefully. For example, in *Cyprus v. Turkey*, the Court reasoned that it was important "to avoid a regrettable vacuum in the system of human rights protection".[207] On the other hand, as the Court reiterated in *Medvedyev and Others*, it is only in exceptional cases that the Court has accepted extraterritorial jurisdiction.[208]

By constructing the "exceptional cases" of extraterritorial jurisdiction using 31.1 of VCLT - the document of interpretation of public international law- the Court focused on interpreting the ordinary meaning of the phrase "within their jurisdiction" in Article 1 of the Convention, in the light of its object and purpose.[209] This approached was justified by the Court in *Loizidou* as to mean that the Convention cannot be "interpreted in a vacuum", but must be interpreted in conformity with "governing principles of international law".[210]

Having described the key issues within international law hindering the full applicability of human rights, it is now time to move over an overview of the potential consequences that the different assessment by the ECJ and the ECtHR of these hindering functions international law has had, or potentially will have.

[206] Behrami, para. 149.
[207] Cyprus, para. 78.
[208] Medvedyev at para. 64.
[209] Bankovic, para. 56.
[210] Loizidou, para 43.

3 The undermining of int'l law and the possibility of different standards in Europe

3.1 ECJ – undermining International Law

By marking the separateness of EU law from public international law created by the UNSC, the ECJ has put the member states in a delicate dilemma if a situation similar to the one in *Kadi* would occur again. The ECJ has created a situation of conflict of laws between the mandatory character of EU-law and the obligations imposed on member states through Article 103 of the UN Charter, by making its argument based on EU-law, and by both emphasizing and stressing the autonomy of EU-law from international law.

The ECJ might also have gone down a dangerous route of potentially undermining the structure of international law and hence further the international human rights protection steaming from it. If such other systems are tempted to further proclaim their autonomy and local understanding of human rights, the upholding the Chapter VII privileges of the UNSC, and of an international structure of human rights norms, could be at stake.[211]

Scholars have criticized the ECJ for contributing to the fragmentation of International Law. It has been suggested that the ECJ should have taken a starting point in the possible human rights obligations in Article 24(2) of the UN Charter and used the legal tools of the UN system to review the UNSC resolution.[212]

De Búrca argues that the ECJ opened for this possibility when it held that the UN Charter leaves it open to its member states to choose the method of implementation of UNSC decisions.[213] Instead of using this opening in international law to further strengthen the global dialogue of human rights protection through treaties, due process as customary international law and possibly even *jus cogens*, the ECJ did instead "fail to avail itself of the opportunity to develop a channel for the mutual influence of the EU and the UN legal orders."[214]

Ziegler, arguing from the perspective of state responsibility for breaches of international obligations, believes that putting the member states in a potential situation where adhering to one obligation would render the state

[211] de Búrca, p.42.
[212] Ziegler, p. 297 f.
[213] de Búrca, p.42.
[214] Ibid.

responsible for a breach of another would be "potentially detrimental" for both the EU and the UN.[215]

Koskenniemi has a strong stand on the importance of statehood and sovereignty. He does not criticize the aims of the different legal regimes that have human rights, efficient economies or sustainable environment as its central values instead of statehood and sovereignty.[216] His basic premise is instead that it is by an exercise of sovereignty that states are able to reach human rights, free-trade and environmental agreements and that it is only states which have provided a stable structure that can encompass the interests of different social groups aspiring for values that might, or actually do, conflict.[217]

The exercise of sovereignty to limit sovereignty through the building of international legal regimes and institutions has, according to Koskenniemi, created a trend in International Law of 'governance' instead of 'government' where values and normative concepts are the criteria of good international governance, instead of legitimacy derived from sovereignty.[218]

A growing trend of conditional respect for sovereignty, demonstrated through for example the development of the doctrine on the "Responsibility to Protect" and the humanitarian interventions in Kosovo in 1999 and now recently in Libya[219] demonstrates thus a "functional notion" of sovereignty where statehood is accepted on the basis of its acceptance of certain values and that a state aspires to achieve a certain purpose or normative theory.[220]

Koskenniemi is critical towards this value-centrism of International Law. He finds the values and purposes aspired to be indeterminable.[221] What "peace" and "security" (in the UN Charter) means for someone is not the same as for someone else. Even if such values were in fact determinable, Koskenniemi claims that the method to be applied requires political choices and assessments, not just legal-technical expertise on a global level.[222] To Koskenniemi, sovereignty is the guarantee for an active political life where people remain political subjects, not just objects that receives pre-wrapped values constructed through expert-ruling. This, he claims, is the case in a global setting where sovereignty is reduced to a purpose.[223]

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[215] Zeigler, p. 304.
[216] See for ex. Koskenniemi, *What is International Law for?*, p. 62.
[217] Koskenniemi, *What is International Law for?*, p.63.
[218] Koskenniemi, *What is International Law for?*, p.63 & Martti Koskenniemi, *What use for Sovereignty today?*, 1 Asian Journal of International Law (2011), p.62.
[219] UN Security Council Resolution 1973. 17 March 2011. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement. Visited on 15 June.
[220] Koskenniemi, *What use for Sovereignty today?*, p.62.
[221] Koskenniemi, *What use for Sovereignty today?*, p.68.
[222] Ibid.
[223] Ibid.

Koskenniemi's argument is in line with the reasoning adopted by the ECtHR regarding the Convention's relation to the UN Charter and, implicitly, the International Legal Order. By not diverting from the International Legal Order, basing its reasoning on the premise of sovereignty, the ECtHR remains faithful to the idea of International Law as constructed by sovereigns, for sovereigns.

3.2 Different standards of human rights protection in Europe

Despite the fact that the two courts are only 164 km apart, the courts' attitudes towards International Law and the Security Council are, as we have seen, wide apart.[224] With the EU not adhering to the hierarchy of international law, and the ECtHR doing the opposite, there is currently a possibility of different standards of human rights protection in Europe.

A concrete, and slightly disturbing example of such diverting standards, would be the case of a Swedish and a Norwegian citizen respectively being identified by the UN Sanctions Committee as suspected of financing terrorism. If they would have their assets frozen through the use of targeted sanctions pursuant to the resolution 1267 regime, the possibilities for them to have their cases tried in substance by an international tribunal would not be equal, based on what we know from the cases presented in section 1.

Since the EU has found it necessary to incorporate the sanctions resolutions into EU law through regulations, the Swedish citizen would have the possibility to complain to the General Court that Sweden had not fulfilled its human rights obligations under Article 6 of the EU-Treaty, on the basis of Article 258 of the EU-Treaty. Applying the reasoning of the General Court in *Kadi 2*, with its references to *Kadi*, the General Court would assess a full review of the regulation in the light of the fundamental rights of the EU Treaty, being a separate and autonomous legal order.[225] It would, presumably, reiterate that full review of were a fundamental rights are a constitutional guarantee not dispensable by a Chapter VII resolution.[226]

The Norwegian citizen, on the other hand, would not have the same clear cut road to a review in substance of his or her case. Since Norway is not a member of the EU, the sanctions regulations from the UN Sanctions Committee would be the direct basis for Norwegian regulations on the matter. Having exhausted all domestic remedies, the suspect would end up in the ECtHR, which would be in the delicate position of having to choose to apply its reasoning from either *Bosphorus* or *Behrami*. In *Bosphorus*, the court had held that the actions, which had been decided and carried out, by

[224] http://www.distance-calculator.co.uk/distance-from-luxembourg-to-strasbourg.html. Visited on 22 May 2011.
[225] Supra note 130.
[226] Ibid.

the Irish authorities against the impounded aircrafts had been attributable to the Irish Government by virtue of an Irish decision – the implementation of the EU regulation which in turn was an incorporation of a UNSC resolution.[227]

In *Behrami*, the court did not find that the actions taken by the respondent NATO-states were neither decided or carried out by the respective states, nor were the actions attributable to the states but to the UNSC, over which the court could – for obvious reasons – not claim jurisdiction.[228] As discussed above, finding the actions of the NATO-states attributable to the UN could be seen as a way of avoiding an explicit deference to the primacy of the UNSC and an undermining of the human rights regime in Europe.[229]

If the ECtHR would find the alleged violations attributable to the Norwegian state, the ECtHR would still have to face the question of supremacy of the UN Charter pursuant to Article 103. The following question would arise; would the court try the infringements at hand, using the equivalent protection mechanism from *Bosphorus,* or would it defer to its reasoning from *Behrami* and hold that affecting the member states in their fulfillments of duties imposed on them under a Chapter VII resolution would "be tantamount to imposing conditions on the implementation of a UNSC resolution which were not provided for in the text of the resolution itself"?[230]

This discrepancy in human rights assessment of cases with connection to decisions by the UNSC adds to a confusion over the usefulness of human rights protection in Europe. The accession of the EU to the ECtHR is motivated by a stronger human rights protection in Europe, with the EU being subject to external human rights control by the ECtHR.[231] This is only partially true. On the one hand, it will strengthen the protection of EU citizens' human rights. On the other hand, in our cases of concern, it will create a "first" and "second class" type of protection. Even with the EU having acceded to the ECHR, EU citizens will be able to turn to the ECJ when its self-proclaimed independence from the international legal order will offer a stronger human rights protection, while citizens of contracting states to the ECHR not being member states of the EU, will have to do with the limited protection offered by the ECtHR.

[227] Supra note 57.
[228] Ibid.
[229] Supra not 152 & 215.
[230] Supra not 65.
[231] http://www.coe.int/lportal/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention. Visited on 18 June.

4 How to influnence a structure that cannot be changed – human rights as lex specialis

It cannot be contested that it is on the basis of state sovereignty that establishment of international human rights norms and institutions have been possible.[232] However, it cannot not on the other hand be ignored that it is states, and the respect for sovereignty of statehood, which is currently hindering a more coherent human rights protection in Europe, as described in this thesis. Koskenniemi, arguing for the importance of respecting the notion of sovereignty from a perspective of statehood, and not from the starting point of functionality, makes as an argument for democracy.

Human Rights are an infringement on sovereignty. An international agreement requiring a state to treat everyone within its jurisdiction in a certain way. However, international human rights norms can also have a positive effect and strengthen domestic democracy, freedom of speech, minority protection and protection of property – the examples are many.[233]

This thesis does not have an argument to change the structure of international law away from the notion of sovereignty. Not getting in further to a discussion on whether a constitutional or a pluralistic approach to international law would be preferable from a human rights perspective, an argument will instead be presented that allows for coherent human rights enforcement both within the constitutional order of the ECtHR and the pluralist court of the ECJ.

The ECJ has, in a situation where the UNSC has enacted a regulatory framework in total ignorance of fundamental human rights, been able to still stand up for human rights because of its perception of EU-law as autonomous. The ECtHR is bound by the constraints of the UN Charter and the notion of sovereignty and has to rely on the good faith of the UNSC. However, if other constitutional systems were to be inspired by the ECJ and pursue autonomy claims from International law, the international human rights regime could very well loose in strength and credibility.[234]

From a strict human rights point of view, the EU is, as we have seen, better equipped than the ECtHR to deal with the inherent hinders in international law. There should not be a need for a regional multinational institution to disobey the UNSC because of lacking respect for human rights. If the UN shall remain an important actor in international matters, its decisions must to

[232] Supra note 217.
[233] Paul Berman, 'Global Legal Pluralism', 80 *Southern California Law Review* (2006-2007) 1155, 1183.
[234] De Búrca, p.42.

be respected. The argument made by both the CFI in *Kadi* [235]and by the ECtHR in *Behrami*[236] regarding the importance of upholding the authority of the UN is a valid point. Hence, from the perspective of the upholding of the UN and its central values, neither the ECJ nor the ECtHR have acted fully satisfactory.

A coherent approach to solve situations of conflicting obligations in situations where adherence to Article 103 would be an important step in minimizing the distance between the two European courts, their different approaches to international law and in improving the coherence between the two courts.

On its words, Article 103 leaves no room for conditional adherence of a UNSC decision adopted under Chapter VII. As presented in Section 1, the ECtHR, CFI and the ECJ adopted three different approaches in relation to UNSC Chapter VII decision. Neither the ECtHR nor the ECJ has left open any room for conditioned adherence to decisions by the UNSC. The CFI on the other hand argued in *Kadi* that compliance would be conditioned on compliance with the norms of *jus cogens.* Considering the undeterminable nature of *jus cogens*[237] and the limited content of which the CFI prescribed it, it was not a conditioned compliance satisfying a human rights advocate.[238]

Instead of focusing on who should review the UNSC and its decisions, intellectual focus should be invested in how to construct a mechanism to escape the dilemma of supremacy of the UN Charter, in situations where human rights are at stake. This could be done either within the legal systems of EU-law and ECHR or by re-framing the position of human rights within the body of international law, by adding to the means of interpretation of international law.

4.1 Presumption of equivalent protection

Let us turn back to the ECtHR's creation of a *presumption of equivalent protection*, in order to save Ireland from its conflicting obligations under the ECHR and the EU-regulation, in *Bosphorus*. In its complicated reasoning of attribution, the ECtHR did not extend application of the principle to situations of conflict between the ECHR and the UN Charter.

As noted, when distinguishing the facts in *Behrami* from *Bosphorus*, the ECtHR effectively avoided having to take a stand in the norm conflict between the Article 103 and the Convention. Because of the court's view of it self as part of the international legal system it also avoided subverting

[235] Supra note 80.
[236] Supra not 53.
[237] Bruno Simma, Dirk Plkowski, Of Planets and the Universe: Self-Contained Regimes in International Law, 17 *European Journal of International Law* 483 (2006), 496.
[238] Supra not 71.

explicitly “the constitutional instrument of the European public order” to the constitutional hierarchy of international law topped by the UNSC.[239]

A way for the ECtHR to claim at least partial independence from the international legal order, in order to better protect human rights in situations where international law created by the UNSC is involved, would be to apply the presumption of equivalent protection to situations when a member state has carried out its duties under a UNSC resolution and hence potentially violated individual rights under the Convention.

However, applying the presumption to such a situation would in fact create a pluralistic situation of norm conflict for the state in question, as the hierarchy between the two provided by Article 103 would be ignored. The ECtHR would stand up for human rights, but the state in question would find it self in a more difficult legal-technical situation of facing two contradicting obligation. This is the same scenario as have created the ECJ through its reliance on EU-law to ignore Article 103 of the UN Charter. Hence, using the presumption of equivalent protection to situations involving Article 103 would potentially undermine the ECHR regime further, as the member states would face the political dilemma of adhering to either the ECtHR, or the UNSC.

4.2 Human rights as lex specialis

One way of overcoming the hinder of Article 103 and the supremacy of the UN Charter and hence achieve a more coherent realization of human rights in both EU-law and ECHR, would be to apply the principle of *lex specialis* as a means of interpretation when faced with a conflict involving Article 103 in cases of norm conflict. Such an argument would be derived from the body of general international law and would allow the both the ECJ and the ECtHR to not divert from its respective perceptions of its own roles.

The rule of *lex specialis* gives that when more than one rule is applicable in a specific situation, *lex specialis* can be applied *prima facie* to give prevalence for the most specified norm over the more general norm.[240] This is applied between conflicting treaties of international law, or between a treaty and a norm of customary international law.[241] The principle of *lex specialis* is built on the assumption that the parties to the norms in question were aware of an existing norm when deciding to further specify it in another treaty.

There is, however, no procedural norm in international law specifying *when* to apply the *lex specialis* rule and when not to.[242] It has been argued that there seems to be a fundamental supremacy of procedural norms over

[239] Supra note 152.
[240] Thirlway, p.132.
[241] Ibid.
[242] Shelton, p. 160.

substantial norms, which translates well into ECtHR's unwillingness to openly divert from Article 103 of the UN Charter.[243] Article 103, procedural in character, trumps substantive human rights norms.

Some scholars argue that due to the sovereign equality of states, no hierarchy of norms exists in international law, hence there is no need for conflict-solving principles such as *lex specialis.*[244] This theoretical and pluralistic approach is far from compatible with how Article 103 has been approached by both the ECJ and the ECtHR in practice.

Applying the *lex specialis* principle as means of interpretation does not necessarily mean that a conflict between Article 103 of the UN Charter and EU-law/ECHR would undermine Article 103 in general. Instead, by arguing *lex specialis*, human rights – whether as part of the EU-law, the ECHR or international treaties such as the ICCPR, could be given preference over general international law (for example a UNSC resolution) in a situation where adhering to the resolution would violate human rights, even though general international law, through Article 103, requires mandatory adherence to UNSC resolutions. A genuine norm conflict would be identified between Article 103 and the human rights norm in question – *prima facie,* hence acknowledging that the obligation under the UN Charter should prevail. Though, as a second step, human rights would be interpreted as *lex specialis* to general international law (and Article 103) which would allow a court to slightly

Granting human rights norms preference over Article 103, using an argument derived from general international law instead of from the respective European legal systems, would neither undermine international law, nor create a negative spiral of other constitutional systems applying the same logic as did the ECJ in *Kadi* to serve their own interests.

This reasoning is also coherent with both a pluralist and a constitutional approach to international law. Neither the ECJ nor the ECtHR would have to adjust its structural positions towards Article 103 and the primacy of Chapter VII based legislation from UNSC. The autonomy of the EU legal order, in human rights matters, would not have to be rebutted, but an argument derived from international law could be added to the ECJ's reasoning in order not to further fragmentize an already fragile system.

The ECtHR could remain faithful to international law and the method of confirmative interpretation adopted, but also further pursue its purpose of taking some of the rights from the UDHR one step further. When confronted with a genuine norm conflict, the Court would not have to duck as in *Bosphorus* or Behrami but could acknowledge the conflict and apply *lex specialis* in order to render the Convention applicable.

[243] Ibid.
[244] Ibid.

In order for the *lex specialis* argument not to be an incentive for creative legal argumentation to escape UNSC resolutions, the human rights norms referred to as *lex specialis* should be the international legal covenants on hum an rights, such as the ICCPR or ICSECR. A regional court like the ECtHR could then transpose the argument derived from the international norm to its corresponding regional norm. In this way, regional claims of a certain human rights norm being *lex specialis,* without any corresponding norm in international law, could be avoided.

Accepting human rights as *lex specialis* to the general international law is also a way of further strengthening general international law – and the international legal order – as *lex generalis.*

4.3 Final remarks

Coherent enforcement is key in order to strengthen global human rights protection. As shown, the different attitudes of the ECJ and the ECtHR towards the UNSC have effect on substantive human rights protection. The ECJ, with its pluralistic approach and self-proclaimed autonomy, has proven bolder and more determined to stand up for human rights, despite its member states' obligations under article 103 of the UN Charter. The ECtHR, very much aware of its position within the international legal order, is almost back bound in certain cases where a strong voice advocating human rights would be needed.

Article 103 and the notion of sovereignty are key elements of international law and instrumental for the upholding of the UN-system. The critics correctly state that the price of pluralism in human rights matters could have a negative impact on human rights outside Europe, if other constitutional systems would find inspiration in the Court's reasoning. On the other hand, a UNSC without any clear human rights constraint should not be entrusted with the kind of power that it actually has. The *Kadi* cases being an on the spot, but yet terrible, example.

Applying the *lex spcialis* principle to a norm conflict between article 103 and a human rights norm as a means of interpretation would have a mediating effect. No normative or systemic changes would be necessary but human rights could be given a higher status as *lex specialis* in relation to general international law.

This thesis has just touched upon a problem of fragmentation of international law which is of growing relevance to anyone studying, researching or practicing international human rights law. There are many reasons to come back to the problems laid out in this thesis, as well as a need to further strengthen the position of human rights within the hierarchy

of international law. In Europe, the accession of the EU to the ECHR will be monitored closely as well as the development of human rights law within the body of EU-law.

Bibliography

Books

Bates Ed, *The Evolution of the European Convention on Human Rights*, (Oxford University Press 2010).

Dixon Martin, *Textbook on International Law*, (Oxford University Press 1990) (6ed. 2007).

Malgosia Fitzmaurice, *the Practical Working of the Law of Treaties*, in Malcom D. Evans, *International law*, (Oxford University Press 2006).

Koskenniemi Martti, *What is International Law for?* in Malcom D. Evans (ed), International Law, (Oxford University Press 2006).

Scobbie Ian, *Wicked Heresies or Legitimate Perspectives* in Malcom D. Evans, *International Law*, (Oxford University Press 2006).

Simma Bruno et.al, *The Charter of the United Nations, a Commentary*,Vol.1, 2 ed., Oxford University Press (2002).

Simma Bruno et.al, *The Charter of the United Nations, a Commentary*,Vol.2, 2 ed., Oxford University Press (2002).

Shelton Dinah, *International Law and Relative Normativity* in Malcom D. Evans *International law* (Oxford University Press 2006).

Thirlway Hugh, *The Sources of International Law*, in Malcom D. Evans (ed.), *International Law* (Oxford University Press 2006).

Articles

Berman Paul, Global Legal Pluralism, 80 *Southern California Law Review* (2006-2007) 1155.

de Búrca Gráinne, The European Court of Justice and the International Legal Order After Kadi, 51 *Harvard International Law Journal* (2010)

Fassbender Bruno, The United Nations Charter As Constitution of The International Community', 36 *Columbia Journal of Transnational Law* 531 (1998).

Koskenniemi Martti, Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization', 8 *Theoretical Inquiries in Law* 9 (2007).

Koskenniemi Martti, What use for Sovereignty today?, 1 *Asian Journal of International Law* (2011).

Kennedy David, Teaching from the Left: A Conference at Harvard Law School, 31 *New York University Review of Law and Social Change* 641 (2007).

Livoja Rain, The Scope of the Supremacy Clause of the Untied Nations Charter, 57 *International and Comparative Law Quarterly* 583 (2008).

Markovic Marko, Norm Conflict in International Law: Whither Human Rights, 20 *Duke Journal of Comparative & International Law* 69 (2008).

Simma Bruno, Plkowski Dirk, Of Planets and the Universe: Self-Contained Regimes in International Law, 17 *European Journal of International Law* 483 (2006).

Thallinger Gerhard, Sense and Sensibilty of the Human Rights Obligations of the United Nations Security Council, 67 *ZaöRV* 1015 (2007).

Ziegler Katja S., Strengthening the Rule of Law, but Fragmenting International Law: the Kadi Decision of the ECJ from the Perspective of Human Rights', 9 *Human Rights Law Review* 288 (2009).

Table of Cases

European Court of Human Rights

Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland. ECtHR. 2005. Application no. 45036/98, para 14-16.

Loizidou v. Turkey. ECtHR 1996. Application no. 15318/89.

Issa and Others v. Turkey. ECtHR 2004. Application no. 31821/96.

Medvedyev and Others v. France. ECtHR 2010. Application no. 3394/03.

Behrami v. France. Application no. 71412/01 and Saramati v. France, Germany and Norway. Application no. 78166/01. ECtHR 2007.

Bankovic and others v. Belgium. ECHR. Application no. 52207/99.

Cyprus v. Turkey. ECtHR 2001. Application no. 2578/94.

European Court of Justice

Case 26/62 Van Gend en Loos (1963) ECR 1.

Costa v. Ente Nazionale Energia Elettrica, Case 6/64, 1964. ECR 585.

Les Verts v. Parliament, ECR 1339, para.23. (1986).

Yassin Abdullah Kadi v. Council of the European Union and Commission of European Communities , The Court of First Instance of the European Communities, 21 September 2005. Case T-315/01.

Opinion of Advocate General Poiares Maduro in Case C-402/05 P, Kadi v. The European Council and the European Commission.

Kadi & Al Barakaat International Foundation v. The European Council and the European Commission, ECJ (2008), joined cases C-402/05 C-415/05.

Yassin Abdullah Kadi v. European Commission, ECJ (2010), T-85/09.

International Court of Justice

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) 1986 ICJ reports. Judgment of 27 June 1986.

Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (Advisory Opinion of July 8).

Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK), (Provisional Measures) (1992).

German Constitutional Court

BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß (1974).