International Law, Human Rights and the European Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in *Kadi*

Stefan Griller*

UN human rights binding on states; binding on UN organs? – Sanctions mechanism as implemented in EU – Kadi and others – Relation between UN law and EC law – Prevalence of EC human rights obligations – Exceptions, political question – *Solange* – Monism and dualism

International law and human rights

The respect for human rights undisputedly is an important obligation flowing from the Charter of the United Nations (hereinafter, the Charter or UN Charter), consequently binding on all members. Under Article 55 of the Charter, the United Nations shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' All members 'pledged themselves to take joint and separate action' for the achievement of this purpose (Article 56). These provisions are to be read against the background of and in connection with the preamble of the Charter, reaffirming the faith of the peoples of the United Nations 'in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women', and Article 1 paragraph 3 of the Charter, making international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms one of the purposes of the United Nations.

These provisions, and specifically Article 56 of the Charter, are being interpreted to constitute legal obligations.[1] However, it is widely acknowledged that

* Professor at Wirtschaftsuniversität Wien, Research Institute for European Affairs; Elements of this paper were presented in the framework of the workshop 'Global Constitutionalism: Process and Substance', 17–20 Jan. 2008, in Kandersteg, Switzerland, organised by *Anne Peters* and *Klaus Armingeon*. I am grateful for comments I received on the first draft.

[1] *See* International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory

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they are very general in provenance, and vague in their content. While there is little doubt that substantial infringements of human rights are outlawed, the concrete impact in 'hard cases' appears to be rather unclear.[2] At least partly, this is also due to the deliberately designed context of these obligations in the final version of the UN Charter: the obligation to respect human rights has to be weighed especially against the domestic-jurisdiction-clause in Article 2 paragraph 7 UN Charter.[3]

At least partly this uncertainty is mitigated by the fact that, in the meantime, a whole body of specific treaty obligations in the field of human rights emerged at UN level. These include 'core' UN human rights treaties: the Covenants on Economic, Social and Cultural Rights, as well as on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child.[4] The resulting universal recognition of human rights as part of general international law prompted the claim to integrate human rights into the law of worldwide organisations, including economic organisations like the World Trade Organization.[5] A core argument is that human rights today have to be qualified as 'relevant rules of international law applicable in the relations between the parties' and are thus relevant 'context' for interpretation under the Vienna Convention on the Law of Treaties.[6]

Opinion of 21 June 1971 < http://www.icj-cij.org/docket/files/53/5595.pdf> at para. 131. The argument had been convincingly developed by H. Lauterpacht, *International Law and Human Rights* (New York, Frederic Praeger 1950) p. 145 et seq.

[2] *See* I. Brownlie, *Principles of Public International Law*, 6th edn. (Oxford, Oxford University Press 2003) p. 532.

[3] *See* A. Cassese, *International Law*, 2nd edn. (Oxford, Oxford University Press 2005) p. 377 et seq.

[4] *See* for a survey <http://www2.ohchr.org/english/law/index.htm>. However, not all UN members are parties to all of these agreements, which is an impediment to universal application.

[5] *See* especially the body of work of *Petersmann*, e.g., E.-U. Petersmann, 'From "Negative" to "Positive" Integration in the WTO: Time for "Mainstreaming Human Rights" into WTO Law?', 37 *CML Rev.* (2000), p. 1363; E.-U. Petersmann, 'Time for Integrating Human Rights into the Law of Worldwide Organisations. Lessons from European Integration Law for Global Integration Law', *Jean Monnet Working Paper* No. 7/01 (2007a) <www.jeanmonnetprogram.org/papers/01/012301.html>; E.-U. Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', 13 *European Journal of International Law* (2002) p. 621; E.-U. Petersmann, 'Constitutionalism and the Regulation of International Markets: How to Define the "Development Objectives" of the World Trading System?', *EUI Working Paper Law* No 2007/23 (2007b) <http://cadmus.iue.it/dspace/bitstream/1814/7045/1/LAW-2007-23.pdf> especially at p. 7 et seq.

[6] Art. 31 para. 3 lit. c Vienna Convention on the Law of Treaties. *See* Petersmann 2007a, *supra* n. 5, at p. 13 et seq; Petersmann 2002, *supra* n. 5, at p. 633 et seq. However, this is not undisputed. Compare only the following: R. Howse, 'Human Rights and the WTO: Whose Rights, What Humanity? Comment on Petersmann', 13 *European Journal of International. Law* (2002), p. 651; P. Alston,

By contrast, the Universal Declaration of Human Rights, as adopted by the General Assembly in 1948 is not *per se* a legally binding instrument.[7] However, it remains to be discussed, whether and to what extent it may be binding on other grounds, especially as customary international law.[8]

This leads us to the disputed issue of human rights guarantees enshrined in customary international law[9] and *jus cogens* respectively. In its famous dictum in the *Barcelona Traction* case, the ICJ addressed human rights guarantees as international obligations of a state towards the international community as a whole, characterizing them as obligations *erga omnes*. As examples, the court mentioned the outlawing of genocide, and also 'principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.'[10]

There is widespread consensus also in the academic debate that the core standards of human rights protection form part of *jus cogens*. However, the implications are far from being clarified – some commentators favouring a rather small common body of obligations, mainly comprising a non-discrimination principle in matters of race,[11] while others go much farther. E.g., several authors[12] perceive also the 1998 ILO Declaration on Fundamental Principles and Rights at Work[13] as an expression of the existing obligation to respect core human rights. The International Labour Conference had declared that all Members, 'even if they have not ratified' the respective ILO Conventions,

> have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
> (a) freedom of association and the effective recognition of the right to collective bargaining;

'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', 13 *European Journal of International Law* (2002), p. 815; E.-U. Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston', 13 *European Journal of International Law* (2002), p. 845.

[7] Compare, e.g., Brownlie, *supra* n. 2, p. 534 et seq.

[8] H.J. Steiner and P. Alston, *International Human Rights in Context*, 2nd edn. (Oxford, Oxford University Press 2000), p. 367, submit that parts of the Universal Declaration of Human Rights have 'clearly' become customary international law.

[9] Cassese (*supra* n. 3, at p. 395) talks about a right to democratic governance which might be in the process of coming into being. Obviously this would not mean that it forms part of jus cogens.

[10] International Court of Justice, *Barcelona Traction, Light and Power Company, Limited, Judgment* <www.icj-cij.org/docket/files/50/5387.pdf> at paras. 33 and 34.

[11] A rather cautious approach is taken by Brownlie (*supra* n. 2, at p. 546 et seq.).

[12] E.g., Petersmann 2007a, *supra* n. 5, at p. 14.

[13] CIT/1998/PR20A < http://training.itcilo.it/ils/foa/library/declaration/decl_en.html>.

(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.

The focus of this debate is primarily on possible human rights obligations of UN *member states*. However, we have already seen that there are also good reasons to hold that international organisations are equally bound by human rights standards,[14] and that they cannot evade *jus cogens*. This is true for both the UN[15] and specialised organisations.

The focus of this paper is on this aspect: what are, if any, the human rights standards which have to be observed by UN organs, specifically by the UN Security Council, and how can these standards be enforced? May regional human rights obligations like the European Convention for the Protection of Human Rights and Fundamental Freedom (or the Inter-American system for the protection of human rights) be used as a yardstick for scrutiny? Starting point is the recent jurisprudence within the EU on the means of legal protection available against Security Council resolutions.

Combating terrorism by the Security Council

Relevant facts

In 1999, the Security Council took action against the continued use of Afghan territory for the sheltering and training of terrorists. It demanded that the Taliban turn Usama bin Laden over to the appropriate authorities. In order to ensure compliance with that demand, Resolution 1267 (1999) provides that all the States must 'freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban... .' The listing of individuals and entities was to be decided upon by the Sanctions Committee. It could, from the beginning, also authorise exceptions on a case-by-case basis on the grounds of humanitarian need. During the following years, several amendments to that resolution were enacted. Resolution 1333 (2000) strengthened the sanctions by requesting the States to 'freeze without delay funds and

[14] Compare already Lauterpacht, *supra* n. 1, at p. 159 et seq. *See also* Petersmann 2007a and 2002, *supra* n. 5.

[15] For an in depth debate *see* E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford and Portland Oregon, Hart Publishing 2004), esp. p. 178 et seq., and p. 217 et seq. Her conclusion that the Security Council is mainly bound by *jus cogens* and the principles of the Charter (like self-defence and the right to self-determination) is rather cautious regarding human rights standards. It appears to correspond to a certain extent to the findings of the CFI to be discussed below.

other financial assets of Usama bin Laden and individuals and entities associated with him' as designated by the Sanctions Committee. As from 2002 onwards, exceptions from the freezing of funds are available upon request of interested persons, for covering basic expenses, reasonable professional fees, extraordinary expenses and the like, provided that the Sanctions Committee does not oppose or agrees respectively to such exemption. Today some 370 individuals and 110 entities are listed.[16]

The EU implemented and continues to implement these sanctions according to the mechanism foreseen in the Treaties by first enacting a Common Position within the Common Foreign and Security Policy (CFSP), and second an EC regulation transposing this measure into Community law.[17] An annex to that regulation contains the list of persons and entities affected by the freezing of funds. This list is subject to amendments by the Commission on the basis of determinations by the Security Council or the Sanctions Committee. Both the CFSP measure and the regulation were amended (replaced) according to the developments at UN level within the Security Council.[18]

Yassin Abdullah Kadi, *Ahmed Yusuf*, and the *Al Barakaat International Foundation* filed an action with the Court of First Instance of the European Communities (hereinafter, Court of First Instance or CFI), claiming that the Court should annul the implementing EC regulations which brought them within the scope of the sanctions.[19] The CFI dismissed these actions. The judgments were appealed. The

[16] *See* <www.un.org/sc/committees/1267/consolist.shtml>.

[17] Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP, *OJ* [2001] L 57/1, 27.2.2001; Regulation (EC) No. 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No. 337/2000, *OJ* [2001] L 67/1, 9.3.2001 (adopted on the basis of Arts. 60 and 301 TEC); as amended, *inter alia*, by Regulation (EC) No. 2199/2001, *OJ* [2001] L 295/16, 13.11.2001.

[18] *See* especially Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746, 1999/727, 2001/154 and 2001/771/CFSP, *OJ* [2002] L 139/4, 29.5.2002; as amended by Common Position 2003/140/CFSP, *OJ* 2003 L 53, p. 62. Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001, *OJ* [2002] L 139/9, 29.5.2002; as amended, e.g., by Regulation (EC) No. 561/2003, *OJ* [2003] L 82/1, 29.3.2003; and Regulation (EC) No. 866/2003, *OJ* [2003] L 124/19, 20.5.2003.

[19] CFI 21 Sept. 2005, Case T-306/01, *Yusuf and Al Barakaat International Foundation* v. *Council and Commission* (hereinafter, *Yusuf* case). Almost identical is CFI 21 Sept. 2005, Case T-315/01, *Kadi* v. *Council and Commission*. The quotations in the above text are taken from the *Yusuf* case. However, the wording in Case T-315/01 (*Kadi*) is almost identical. Compare also the subsequent judgments of the CFI: especially CFI 12 July 2006, Case T-49/04, *Hassan* v. *Council and Commission*; CFI 12 July 2006, Case T-253/02, *Ayadi* v. *Council*; CFI 31 Jan. 2007, Case T-362/04, *Minin* v. *Commission*.

European Court of Justice (hereinafter, ECJ) set them aside, annulled the actual version of the implementing Regulation No. 881/2002, and reversed the findings of the CFI in many substantive points.[20]

Judgments of the European Courts

Court of First Instance

From the alleged grounds for annulment – the lack of competence to enact the regulations, the abuse of the legal form[21] of the regulation and the violation of fundamental rights – only the third shall be addressed further here. It involves the crucial issue of the relationship between EC law and UN law, including the standards and the reach of human rights protection under general international law.

The applicants maintained that the contested regulation infringed their fundamental rights, in particular their right to property, the right to a fair hearing, and the right to an effective judicial remedy, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The CFI ruled on the relationship between UN law and member states' law, including EC law. It held that from

> the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty.[22]

In this respect, the Court mainly referred to Article 103 of the UN Charter which provides that, in 'the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail', and it extended this consequence to resolutions of the Security Council.[23] The Court saw an obligation to set aside conflicting 'internal' law:

> ... Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law,

[20] ECJ 3 Sept. 2008, Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* (hereinafter, *Kadi and Al Barakaat International* case).

[21] Suffice it to state that both claims were dismissed, even if partly on very much differing grounds – compare in this respect *Kadi and Al Barakaat International, supra* n. 20, paras. 121–247.

[22] *Yusuf and Al Barakaat International Foundation* v. *Council and Commission*, *supra* n. 19, at para. 231.

[23] Ibid., at para. 233 et seq.

> that raises any impediment to the proper performance of their obligations under the Charter of the United Nations.[24]

Furthermore, and on the grounds that not only the EC member states, but also the EC as such must be considered to be bound by the obligations under the Charter,[25] the Court principally denied its own power of judicial review *vis-à-vis* resolutions of the Security Council.[26]

The Court made only one exception: it felt empowered to check, indirectly, the lawfulness of the resolutions of the Security Council with regard to *jus cogens*, 'understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.'[27] Consequently, resolutions of the Security Council must observe the fundamental peremptory provisions of *jus cogens*. 'If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.'[28]

It is interesting and important to note that the CFI made a sharp distinction between those cases where the Community institutions merely transpose into Community law resolutions of the Security Council – like in the *Yusuf* and the *Kadi* cases –, and instances where the Security Council resolution leaves the identification of individuals who are to be subjected to sanctions, and also the procedural requirements for such action, to the member states.[29] In the latter cases, the CFI insisted on the application of human rights protection standards as enshrined in EC law. In the *Modjahedines* case**,** the Court did not hesitate to annul a decision for the lack of a sufficient statement of reasons and the violation of the applicant's right to a fair hearing, but also because the Court was – due to the lack of sufficient information – not, even at the end of the procedure, in a position to review the lawfulness of that decision.

European Court of Justice

The ECJ also ruled on the principles governing the relationship between the international legal order – including UN law – and the Community legal order. However, it arrived at markedly differing conclusions, and found that the CFI had

[24] Ibid., at para. 240.
[25] Ibid., at paras. 242 et seq.
[26] Ibid., at paras. 263 et seq.
[27] Ibid., at para. 277.
[28] Ibid., at para. 281.
[29] CFI 12 Dec. 2006, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran* v. *Council* (hereinafter, *Modjahedines* case), at paras. 100 et seq.

erred in law when it held that a regulation designed to give effect to UN Security Council resolutions must enjoy immunity from jurisdiction as to its internal lawfulness save with regard to its compatibility with the norms of *jus cogens*.[30] By contrast, it found

> that the Community judicature must, ..., ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.[31]

Several fundamental considerations led to this result. The ECJ held that 'the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights',[32] and made a sharp distinction between eventual effects within the Community and within the international legal order, by stressing that reviewing a Community regulation would not at the same time include reviewing the lawfulness of the UN resolution. Even denying the lawfulness of the Community measure, the Court concluded, 'would not entail any challenge to the primacy of that resolution in international law.'[33]

Three grounds of diverse quality determined the Court's judgment: that the Community is based on the *rule of law* which includes the review of any act adopted, that the *autonomy of the community legal order* is ensured by virtue of the exclusive jurisdiction of the Court, and that *fundamental rights form an integral part of the general principles of law* whose observance the Court ensures.[34]

The ECJ at the same time considered the consequences of the respect of international law in general and obligations resulting from the UN Charter in particular. Apparently, the Court accepted such obligations of the Community, at least in principle.[35] Nevertheless, it resolved the resulting tension clearly in favour of the Community legal order, mainly by pointing to the fact that the Charter of the UN leaves the members 'the free choice among the various possible models for transposition of those resolutions into their domestic legal order.'[36] At the

[30] *Kadi and Al Barakaat International, supra* n. 20, para. 327.
[31] Ibid., para. 326.
[32] Ibid., para. 285.
[33] Ibid., para. 288.
[34] Ibid., paras. 281–284; compare also paras. 316 et seq.
[35] Ibid., paras. 291–297, esp. at para. 296.
[36] Ibid., para. 298.

same time, the Court concludes that this would allow for judicial review of the 'internal lawfulness' of the contested regulation.

Moreover, the ECJ also dealt with the contention that it should refrain from reviewing the lawfulness of the contested regulation, having regard to the re-examination procedure within the UN legal system.[37] In this respect the Court not only observed that the most recent improvements at UN level could not be taken into account, given that they had been adopted after the contested regulation; even the refurbished system, the Court noted, could not give rise to immunity from jurisdiction within the Community. For this re-examination procedure 'does not offer the guarantees of judicial protection', given that it is 'still in essence diplomatic and intergovernmental', that the decisions by the Committee at UN level are taken by consensus, thereby giving each member a veto right, that an applicant would only be represented indirectly through the respective government, and that the Sanctions Committee is not, in a sufficient manner, required to communicate reasons and evidence.

On the basis of this reconstruction of the relationship between international, in particular UN law and Community law ('in principle the full review'), it was comparatively simple for the ECJ to arrive at the verdict that the contested regulation violated several fundamental rights.

First, the Court found a violation of the right to be heard and the right to effective judicial review.[38] It reconfirmed previous jurisprudence that the principle of effective judicial protection requires communicating the grounds for being included in the list of targeted persons, in order to enable those persons to bring an action. The Court confirmed the CFI's finding that both communicating the grounds and hearing the appellants prior to the *first* listing was not required, given that it would jeopardise the effectiveness of the freezing of funds, and it even conceded that, in the fight against terrorism, overriding considerations such as safety might militate against the communication of certain matters and against being heard. However, the ECJ stressed the need to reconcile such legitimate security concerns with the need to accord the individual a sufficient measure of procedural justice. The lack of any communication on the evidence against the appellants violated the right to be heard, and, given that they consequently were unable to defend their rights with regard to that evidence, and that also the Court was unable to review the lawfulness, also the right to an effective legal remedy.

Second, the ECJ found a violation of the right to respect for property.[39] It reiterated previous jurisprudence that this right is not absolute and may be restricted, and added that the fight against terrorism can be regarded as a legitimate

[37] Ibid., paras. 318–326.
[38] Ibid., paras. 334–353.
[39] Ibid., paras. 354–370.

goal. However, the Court equally stressed that the applicable procedures must afford a reasonable opportunity of putting the case to the competent authorities. It observed that the contested regulation was adopted without furnishing any such guarantee. As a result, the restriction at issue was unjustified.

Consequently, the ECJ nullified the contested regulation. To prevent seriously and irreversibly prejudicing the effectiveness of the measure and to allow for re-examination, the Court ordered the regulation to be maintained for a period not exceeding three months.

Remarks on the recent jurisprudence

Introduction

Both the judgments of the CFI and that of the ECJ are landmark decisions on the relationship between Community law and international law,[40] on fundamental rights protection under international law, and on the proportionality of measures taken in the course of the fight against terrorism. The CFI made a very cautious effort in balancing EU internal standards of fundamental rights protection against the respect of obligations flowing from UN law. By contrast, the ECJ reversed the most important findings of the CFI and established a fully-fledged, yet indirect fundamental rights review *vis-à-vis* Security Council resolutions, at least 'in principle'.

The rulings include several far-reaching contentions which are anything but uncontroversial.[41] Only the most important of these shall be addressed in turn in the following.

The Relation between UN law and EC law

According to the CFI, the legal effect of UN law follows the ideal of radical monism.[42] This is true for both the member states' legal orders and for the Community legal order. UN law would prevail over member states' and over Community law, which must not be applied in cases of conflict. This amounts or at least

[40] In this respect in general, compare only P. Eeckhout, *External Relations of the European Union* (Oxford, Oxford University Press 2004), esp. p. 274 et seq., with further references.

[41] For a – positive – appraisal of the CFI judgments in the cases *Yusuf* and *Kadi see* the comments by C. Tomuschat, 'Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission; Case T-315/01, Yassin Abdullah Kadi v. Council and Commission', 43 *CML Rev.* (2006), p. 537. Critique can be found in P. Eeckhout, 'Community Terrorism Listings Fundamental rights, and UN Security Council Resolutions', 3 *European Constitutional Law Review* (2007), p. 183.

[42] Compare for the theoretical dimension of the issue in the text *infra* after n. 90.

comes near to direct effect and supremacy of UN law, very similar to what is known in the relation between EC law and national law. And indeed this is what the Court did: it set aside, at least partly, Article 230 TEC, which would, under normal circumstances, provide for full review of EC regulations.

Primacy in this sense is presented as directly flowing from the UN Charter. However, the Charter does not require such effects. It is true that according to Article 103 UN Charter obligations under the Charter shall prevail in the event of a conflict with obligations under any other international agreement. However, this is an obligation for UN-members to bring their international commitments and their legal orders into conformity with obligations under the Charter. Direct effect and supremacy as developed within the EU legal order is different insofar as it includes immediate effects within the domestic legal order.

The ECJ seems to have in principle accepted the starting point of the CFI,[43] namely that the Community in principle is bound by UN law even without being a member to that organisation. Even if this is not expressly spelt out, it follows from the ECJ's language generally accepting the binding nature of UN law and its deliberations to reconcile that with constitutional requirements flowing from EC law.[44]

But from this point onwards, the ECJ took a different avenue. Most striking is the strict separation between Community and UN law.[45] This is done by making a sharp distinction on the one hand between the 'autonomous' Community legal order,[46] and on the other hand obligations flowing from resolutions of the Security Council. It is even contended that striking down an implementing Community measure 'would not entail any challenge to the primacy of that resolution in international law.'[47]

However, this would only be true if the member states would remain fully bound by these resolutions, and at the same time free to implement them under Community law. This is certainly not the case, given that the restrictive measures required would affect the freedoms of the internal market, and therefore would

[43] Compare *supra* n. 25. The CFI convincingly referred, by analogy, to ECJ, 12 Dec. 1972, Case 21-24/72, *International Fruit*, paras. 10–18, where the ECJ held that the Community was bound by obligations flowing from the GATT which all members had been parties to before founding the Community.

[44] *Kadi and Al Barakaat International, supra* n. 20, esp. para. 296, but also paras. 285, 288, 300–309.

[45] This was prepared esp. by AG Poiares Maduro, 16 Jan. 2008, Case C-402/05 P, *Yassin Abdullah Kadi* (hereinafter, *Kadi* case), para. 21 et seq., and esp. para. 39 of the Opinion; in the same vein AG Poiares Maduro, 23 Jan. 2008, Case C-415/05 P, *Al Barakaat International Foundation* (hereinafter, *Al Barakaat* case).

[46] *Kadi and Al Barakaat International, supra* n. 20, paras. 282, 316 et seq.

[47] Compare *supra* n. 33.

equally come under the fundamental rights scrutiny of the ECJ.[48] Also the alternative: amending primary law in favour of implementing and enforcing Security Council resolutions irrespective of any fundamental rights violations is certainly not advocated by the ECJ. As a result, this *is a clear challenge* to the binding force of such resolutions. Neither the Community nor the member states are entitled to perform the measures required by such resolutions if this would entail a violation of fundamental rights as guaranteed within the 'autonomous' Community legal system. It is true that the UN Charter leaves free choice on how to transpose resolutions into the domestic legal order.[49] However, contrary to the suggestion of the ECJ, this does not help if Community law categorically impedes transposing measures in violation of fundamental rights. The ECJ does not explain how the general rule that 'the European Community must respect international law in the exercise of its powers'[50] should be reconciled with its categorical dictum that measures violating EC human rights guarantees must not be adopted within the EC.

In essence, while internally stressing the autonomy of the Community legal system serves to preserve – through supremacy and direct effect – a higher derogatory rank *vis-à-vis* national law, externally it serves to reduce the binding force of international obligations: within the Community they may only be implemented and enforced if properly authorised by the Community legal system. A violation of 'constitutional principles',[51] in particular the respect of fundamental rights, is not allowed. This is reinforced by the novel finding that even transitional derogations, especially under Article 307 EC, are not acceptable regarding the principles of liberty, democracy and respect for human rights and fundamental freedoms.[52]

Human Rights obligations at UN and EC level

The CFI in effect reduced the human rights obligations of the UN in general and the Security Council specifically to the body of *jus cogens*.[53] Human rights viola-

[48] This is rightly stressed by AG Poiares Maduro, *Kadi* case, *supra* n. 45, para. 30 of the Opinion. A different view can be found in Eeckhout, 2007, *supra* n. 41 at p. 191 et seq.

[49] *Kadi and Al Barakaat International, supra* n. 20, para. 298.

[50] ECJ 16 June 1998, C-162/96, *Racke*, para. 45. Reconfirmed in *Kadi and Al Barakaat International, supra* n. 20, para. 291.

[51] *Kadi and Al Barakaat International, supra* n. 20, para. 285.

[52] Ibid., paras. 301–304. Less surprising is that 'primacy' of international agreements including UN law according to Art. 300(7) ECT could never extend to primary law, of which fundamental rights form part; compare paras. 305–309.

[53] Furthermore, the content of *jus cogens* remains unclear. In *Yusuf* case (*supra* n. 19) the CFI considered aspects of the right to property, the right to a fair hearing, and the right to judicial remedy. In *Hassan* v. *Council and Commission* (*supra* n. 19, at para. 127) it referred to the Universal Declaration of Human Rights, in order to contemplate on a possible right to respect for private and

tions outside the body of *jus cogens* would not be reviewable. It might remain possible claiming that the obligations of the Security Council would go beyond that and comprise human rights guarantees other than those included in *jus cogens*. However, in this regard they would not be enforceable. *Jus cogens*, by contrast, could be enforced by the member states by disregarding the binding force of such resolutions for their jurisdiction. They could be declared null and void within the respective legal order.

The CFI did not provide any reason for this limitation to the body of *jus cogens*. The impression arises that this has to do with the Court's effort to preserve the 'political prerogative' for the Security Council:

> ..., determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts, ...[54]

Even stronger is the pronouncement that checking the appropriateness and proportionality of Security Council measures would result in

> trespassing on the Security Council's prerogatives under Chapter VII of the Charter of the United Nations in relation to determining, first, whether there exists a threat to international peace and security and, second, the appropriate measures for confronting or settling such a threat. Moreover, the question whether an individual or organisation poses a threat to international peace and security, like the question of what measures must be adopted vis-à-vis the persons concerned in order to frustrate that threat, entails a political assessment and value judgments which in principle fall within the exclusive competence of the authority to which the international community has entrusted primary responsibility for the maintenance of international peace and security.[55]

It is submitted that the CFI confounded two issues: first, there is the decision on whether or not there is a threat to international peace and security and how to

family life and a right to a reputation: 'Even if the right to respect for private and family life and the right to a reputation may be regarded as falling within the ambit of the rules of jus cogens relating to the protection of the fundamental rights of the human person, only arbitrary interference with the exercise of those rights could be considered to be contrary to those rules (on this point, see Article 12 of the Universal Declaration of Human Rights, which states that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation").'

[54] *Yusuf and Al Barakaat International Foundation* v. *Council and Commission*, *supra* n. 19, at para. 270; *see also* at para. 280.

[55] Ibid., at para. 339.

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respond to it. This is certainly a 'political' decision not to be taken by judicial organs. Second, however, the respect for the 'constitutional' limits set to that political decision is a matter which, by contrast, typically is charged to courts; and it includes the enforcement of the respect of human rights obligations. By reducing its scrutiny *vis-à-vis* the Security Council to *jus cogens* the CFI reduced the scope of possible conflict. This might be seen as a specific European version of a 'political question doctrine' without the CFI revealing that.[56] However, exempting Security Council resolutions in such a far-reaching manner from human rights control hardly is reconcilable with the respective obligations not only incumbent on UN member states but also on the UN itself.

There are several other issues which shall not be elaborated here. Of crucial importance is the role of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Should the European Court of Human Rights (ECtHR) apply its 'low key' approach towards the scrutiny of legal obligations resulting from EC law[57] also in the absence of proper scrutiny by the European courts, no protection would be available. Should the ECtHR, as one would expect, insist on its full competence in cases where the Community courts waive their responsibility,[58] another conflict would arise: that between obligations flowing from the ECHR and those allegedly flowing from resolutions of the Security Council.

The ECJ, by contrast, remains entirely silent on the human rights standards which might be binding on the Security Council. This is made possible by the strict yet problematic distinction between the two legal orders referred to: international law, particularly obligations flowing from the UN Charter, and Community

[56] The issue is rightly raised by AG Poiares Maduro, *Kadi* case, *supra* n. 45, paras. 33 et seq. of the Opinion.

[57] ECtHR 30 June 2005, Application No. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi* v. *Ireland*: State action taken in compliance with 'obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty' (para. 154) is justified 'as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.' (para. 155) 'If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.' (para. 156)

[58] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi* v. *Ireland* (*supra* n. 57, at para. 156): 'However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.' Such consequence could only be avoided if the ECtHR would follow the CFI's reading of Art. 103 UN Charter which would then imply to disregard from the guarantees of the ECHR. This can hardly be expected. And it would not appear to be well founded legally either.

law. On these grounds, and unlike for the CFI, there was no urgent need to reconcile eventual tensions or solve contradictions between the two. Instead, the Court 'fully' reviewed the implementing regulation against the fundamental rights protection standards of EC law, and held that it violated the appellant's right to be heard, the principle of effective judicial protection, and the right to respect for property.

In this context the ECJ clearly rebutted the idea that the fight against terrorism could justify every derogation from fundamental rights standards. Instead the Court was eager to balance on the one hand the need to restrict fundamental rights in order to enable efficient measures, and on the other hand the requirement to keep such restrictions proportionate.[59] It conceded that under the circumstances, the Community authorities were not required to communicate the grounds for the contested measures before they were taken *for the first time*.[60] It even conceded that in the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations might justify the lack of communication in *certain matters* and, correspondingly, even a lack of being heard.[61] However, the total absence of efficient remedies could not be justified. Based on the premises mentioned this is convincing.

Alternative solutions and theoretical context

Introduction

The *Yusuf* and the *Kadi* case and the related jurisprudence brought – once again – to the surface the need to reconcile the tensions between the prevalence of UN law, the unclear standards of human rights protection *vis-à-vis* 'secondary UN legislation', and the standards of human rights protection within the EU. These questions are neither new nor singular with regard to UN law. To a certain extent they are similar to the well-known tension in Europe, on the one hand between constitutional human rights guarantees of the EU member states and the jurisprudence of the ECJ, and on the other hand between the guarantees of the ECHR and EC law.

Not all important aspects were explicitly addressed in the judgments at issue. Some shall be mentioned in the following.

[59] *Yusuf and Al Barakaat International Foundation* v. *Council and Commission*, *supra* n. 19, at para. 344.
[60] Ibid., at para. 338.
[61] Ibid., at para. 342; *see also* para. 374.

Minimum standards?

A radical departure from the premises both of the CFI and the ECJ would be to look at human rights standards incumbent on the Security Council – be they limited to *jus cogens* or not – as minimum standards. As a consequence it would be entirely justified if UN members would apply stricter standards. This would amount to a sort of analogy to Article 60 ECHR. It includes a guarantee for member states that their 'domestic' level of protection would not be restricted or adversely affected.

While such reading is indisputable regarding the ECHR, things are different here. If the minimum standard approach would be applied to Security Council resolutions, member states would be entitled to disregard them arguing that they would violate their internal standards of protection. At least for EU member states, this would be the inevitable consequence on the grounds of the well founded contention 'that the mechanism established to protect the human rights of persons targeted individually by the Security Council does not live up to legitimate expectations.'[62]

However, there is no safeguard provision comparable to Article 60 ECHR included in the UN Charter. Furthermore, such a guarantee might be quite natural within a framework like that of the ECHR, which guarantees human rights standards without at the same time providing for the law-making of a 'common legislator'. It is highly problematic in an environment where any such guarantee might compromise the uniform application of the common body of law, and even the authorisation to enact secondary law as such. This is well-known within the EU: The ECJ never accepted reservations on the side of the member states.[63] Arguably, the problem is not so very different from eventually jeopardising the authority of the Security Council. For these reasons, the first alternative does not appear to be available.

[62] Tomuschat, *supra* n. 41, at p. 551.

[63] ECJ 17 Dec. 1970, Case C-11/70 *Internationale HandelsgesellschaftmbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, at para. 3 (*see also* ECJ 13 Dec. 1979, Case C-44/79 *Liselotte Hauer* v. *Land Rheinland-Pfalz*, at para. 14): 'Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. [...] [T]he law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.' Therefore, it cannot be expected either that the ECJ would accept reading Art. 53 of the Charter of Fundamental Rights of the European Union differently.

'Solange'-test?

Another alternative would be to transpose the well-known '*Solange*'-test to the relationship between EC law and Security Council resolutions.[64] This test has been applied in the past to both the relationship between national human rights guarantees and EC law – mainly by the German Constitutional Court (*Bundesverfassungsgerichtshof*, hereinafter *BVerfG*) –, and the relationship between the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms and EC law – by the ECtHR.

On the grounds of this approach and in its more recent jurisprudence the German Constitutional Court[65] refrains from a detailed fundamental rights scrutiny of secondary Community law. Reconfirming its Maastricht judgment[66] the *BVerfG* stresses that it

> guarantees by its jurisdiction in a relationship of co-operation with the European Court that an effective protection of basic rights for the inhabitants of Germany will also generally be maintained as against the sovereign powers of the Communities and will be accorded in the same respect as the protection of basic rights required unconditionally by the Constitution and

[..] [that it]

> provides a general safeguard of the essential content of the basic rights. The Court thus guarantees this essential content as against the sovereign powers of the Community as well.[67] … The constitutional requirements as identified in BVerfGE 73, 339 (340, 387) [*Solange* II] are met, as long as [*solange*] the jurisprudence of the ECJ *in general* ensures an effective protection of fundamental rights against the sovereign powers of the Community, which is in its substance comparable to the indispensable standards of the GG and provides a general safeguard of the core guarantees of the basic rights[68] [emphasis added].

[64] In this vein Eeckhout, *supra* n. 41.

[65] *See* especially Solange I (BVerfG 29 May 1974, Case BvL 52/71, BVerfGE 37, 271, esp. at 285); Solange II (BVerfG 22 Oct. 1984, Case 2 BvR 197/83, BVerfGE 73, 339, esp. at 383 et seq.); Banana judgment (BVerfG 7 June 2000, Case 2 BvL 1/97, BVerfGE 102, 147). This jurisprudence is not overturned by BVerfG 18 July 2005, Case 2 BvR 2236/04, BVerfGE 113, 273, esp. paras. 74 et seq. and 81 et seq. <http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604en.html>. The Constitutional Court annulled the German law for violating constitutional guarantees, the preservation of which could have been brought in line with the European framework decision at issue.

[66] BVerfG 12 Oct. 1993, Case 2 BvR 2134, 2159/92, BVerfGE 89, 155.

[67] The English version of the first part of the citation is taken from '*Brunner* v *The European Union Treaty*', 1 *Common Market Law Reports* (1994), p. 57 at p. 79.

[68] Banana Judgment, *supra* n. 65; the author's own translation of the second part.

The situation is similar in other EU member states, e.g., in Italy.[69]

The stance taken by the ECtHR regarding the relationship between the guarantees of the European Convention and EC law is similar.[70] The ECtHR refrains from detailed scrutiny as long as 'the relevant organisation', and the EC specifically, protects fundamental rights in a manner which can be considered 'at least equivalent' to the Convention. The Court continues:

> By 'equivalent' the Court means 'comparable': any requirement that the organisation's protection be 'identical' could run counter to the interest of international co-operation pursued.[71]

In substance, this test reflects the argument that insisting on standards of protection identical to the internal protection level would fundamentally undermine international co-operation in general. If every state or international organisation, would make respect for its internal standards a condition for the conclusion of an agreement, no such agreement would ever be possible. This is more than an abstract consideration. It is an argument of contextual interpretation of the respective legal instruments, be it national constitutions or international agreements like the European Convention. Given that they allow for international co-operation, calls for discarding the 'strong version' that identical protection would be required. Otherwise integration clauses would be deprived of their substance. Arguably this is included in the ECtHR's dictum that insisting on identical protection would 'run counter to the interest of international co-operation.'[72]

The '*Solange*'-test is performed on the grounds of the 'integrated legal order'. It amounts to teleologically reducing the human rights guarantees as enshrined in the 'domestic legal order' for the sake of international co-operation. Prima vista, however, such solution might still be in conflict with the Vienna Convention on the Law of Treaties, which explicitly rules out that a party might 'invoke the provisions of its internal law as justification for its failure to perform a treaty'.[73] Therefore, it is at least advisable to go a step further and ask to what extent such a test could be in conformity with UN law.

[69] For an evaluation compare M. Cartabia, 'The Italian Constitutional Court and the Relationship Between the Italian legal system and the European Union', in A.-M. Slaughter et al. (eds.), *The European Court and National Courts* (Oxford, Hart Publishing 1998) p. 133.

[70] *See supra* n. 57 and n. 58.

[71] *See Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi* v. *Ireland, supra* n. 57, at para. 155.

[72] Ibid.

[73] Art. 27 Vienna Convention on the Law of Treaties.

UN standards and the lacuna of judicial review

Jus cogens or more?

Any effort to reconcile human rights obligations of the Security Council and diverging member states' obligations flowing from international treaties or their constitutions respectively has to distinguish several issues.

First, human rights, as demonstrated,[74] have to be qualified as limits to secondary law-making *within* the United Nations, binding also on the Security Council. This result is not compromised by the fact that the standards and the scope of protection are still highly unclear. On the grounds of the UN Charter it is, however, not necessary – and most probably also not possible – to infer the standards of protection from a common tradition of the member states, as within the European Union,[75] and also within the Council of Europe on the basis of the European Convention on the Protection of Human Rights and Fundamental Freedoms.[76] Within the UN, the challenge is to interpret and concretise especially Articles 55 and 56 UN Charter. This is a standard which is common to all UN members, and it is more than a minimum standard. Given the ambiguity of the UN Charter's text, concretisation is foremost a task of the UN organs. While this is anything but easy, one might be on the safe side concluding that no indication points into the direction that there could be a reduction to the body of *jus cogens*, whatever its precise meaning would be. Such a reading would not only be irreconcilable with the undisputed weight the Charter assigns to human rights protection.[77] It would also produce an inconsistent disparity between the obligations of UN members – clearly going beyond the minimum standard of *jus cogens* – and the UN itself.

Enforcing the limits

Second, and whatever the standards of protection might be, what has to be discerned is the issue of possible consequences in cases of violations of those standards. This goes beyond the – equally important – fact that the availability of judicial remedies is in itself guaranteed by human rights. However, there is the separate issue of how to deal with violations of international law in the course of

[74] *See supra* in the text near n. 14.

[75] Art. 6 para. 2 TEU.

[76] E.g., ECtHR 7 Dec. 1976, *Handyside* v. *The United Kingdom,* Application No. 5493/72, at para. 49, with regard to Art. 10 para. 2 of the Convention: it held there is no unlimited power of appreciation for the Contracting States, but it is instead the Court which gives the final ruling. 'The domestic margin of appreciation thus goes hand in hand with a European supervision.'

[77] Lauterpacht (*supra* n. 1, at p. 145 et seq.) forcefully elaborates on the significance of the Charter with regard to human rights protection.

decision-making by international organs.[78] The prevailing view in the academic debate differentiates between two situations: Whenever a mandatory judicial dispute settlement mechanism including the competence to decide on the legality of enacted measures is established, the parties to the dispute are bound by such decision. Within such a system, a decision taken by a body under international law produces legal effects, but can be challenged before the respective judicial instances. Even flawed measures eventually will have to be accepted, according to the settlement of the dispute. If, by contrast, no such mandatory judicial review is established, flawed measures may be judged upon by the addressees, including eventual rejection or disregard. Ultimately, this includes the option to qualify such flawed measure as null and void with regard to the consequences within the legal order of the respective member. In this case, enforcement of the limits of decision taking is decentralised. As a consequence, diverging views on the details of these limits cannot be excluded. There is no good reason available why it this should be limited to a violation of *jus cogens*.

This contrasts sharply with the apparent view of the CFI,[79] but goes well together with the ECJ's judgment.

Consequences

On the grounds of these premises, the evaluation of the 'terrorist cases' diverges from the findings of the CFI, and converges with those of the ECJ.

First, if we admit that the standards of scrutiny also under UN law go beyond *jus cogens*, the mechanism of listing and de-listing individuals cannot be brought into conformity with elementary requirements of fair hearing and judicial review, even today.

It was already mentioned that, not least as a reaction to the critique of the deficiencies of the protection of individuals, the Security Council inserted review mechanisms into targeted sanctions making sure that petitioners can bring their case before the Sanctions Committee which would then decide upon eventual delisting. As mentioned, this happened with regard to the sanctions against the Taliban and Usama bin Laden and his allies, but also in other cases.[80] In 2006, the Security

[78] Compare for the following: S. Griller, *Die Übertragung von Hoheitsrechten auf zwischenstaatliche Einrichtungen* (Wien, Springer 1989), at p. 449 et seq.

[79] Outside the scope of *jus cogens*, the CFI appears to advocate the impossibility of challenging illegal measures adopted by international organs and the Security Council specifically. Such measures would consequently remain exempt from any judicial review. This is different regarding *jus cogens*. Here, the Court obviously shares the view presented above; otherwise it could not feel entitled to scrutinise Security Council resolutions with the possible consequence of declaring them illegal and prohibiting their enforcement. Unfortunately, the CFI does not explain this difference.

[80] E.g., in the case of sanctions against Liberia: Security Council Resolutions S/RES/1521 (2003) of 22 Dec. 2003 and 1532 (2004) of 12 March 2004. This played a certain role in dealing with a

Council generalised this approach and adopted a resolution on a 'de-listing procedure' which is principally to be applied in all cases including sanctions against individuals.[81] A focal point to receive de-listing requests was established within the secretariat. Petitioners seeking de-listing can file their request either directly with the focal point or with their state of residence or citizenship. The Sanctions Committee is to decide upon such requests. It decides, however, by consensus, following a certain mechanism both for listing and also for de-listing individuals being the target of sanctions like travel bans or freezing of assets.[82] The Committee reviews the list every three months on a case-by-case basis. If after one month after a respective initiative, no committee member recommends de-listing, the request shall be deemed rejected. To give one example: Over the years, the 'Al-Qaida and Taliban Sanctions Committee'[83] de-listed 11 individuals and 24 entities, among them Mr Yusuf (in August 2006), but not Mr Kadi.

While this mechanism certainly brings about progress compared to the previous absence of any review, it has to be said that what was established is clearly a political procedure, including a veto right against delisting for every Security Council member. This is very different if compared to judicial review, guarantees of fair trial being absent. This is what finally determined the verdict of the ECJ,[84] in contrast to that of the CFI.

Second, in the absence of a mandatory judicial review system at UN level,[85] member states' courts appear to be entitled to judge upon the legality of Security Council resolutions. While this would, as a matter of principle, not allow encroachments on the political dimension of the decision to adopt sanctions, it would, by contrast, not entirely exclude enforcing human rights obligations *vis-à-vis* the Security Council. Given the vagueness of the respective guarantees, such scrutiny might overlap with human rights standards which would be applicable within the

complaint against being listed by the Sanctions Committee: *See Minin* v. *Commission*, *supra* n. 19, esp. paras. 100 et seq.

[81] Security Council Resolution S/RES/1730 (2006) of 19 Dec. 2006.

[82] Compare, e.g., the Guidelines of the Security Council Committee established pursuant to Resolution 1521 (2003) concerning Liberia.

[83] Security Council Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities.

[84] *See supra* in the text after n. 38. Compare also *Hassan* v. *Council and Commission*, *supra* n. 19, at para. 119, where the CFI arrived at the same result as soon as it applied 'normal' and not only *jus cogens* standards.

[85] While the ICJ is the principal judicial organ of the UN (Art. 92 UN Charter), it is not entrusted with reviewing the lawfulness of measures of UN organs. Such review is only available indirectly through an advisory opinion of the ICJ (Art. 96 UN Charter). However, such procedure can only be opened upon request of the General Assembly or the Security Council, a majority in one of those bodies being needed. It has never happened that a UN member which felt unjustly treated succeeded in opening such review procedure.

'domestic' legal order of the member state. It is here where the '*Solange*'-test as sketched out above and the consequences of the decentralised legality control might meet.

The Security Council could probably avoid such scrutiny or at least render it illegal, if it would establish – by Security Council resolution – a mandatory judicial review mechanism for allegedly illegal resolutions and decisions of the Sanctions Committee.[86] This '*Solange*-dimension' appears in the ECJ's reaction to the argument that it should forgo the exercise of any review given that there is a review system in place within the UN.[87] The Court answered that this system is insufficient. However, when it concluded that review by the Community judicature was mandatory, the wording was: *in principle* full review.[88] This leaves the door open to reduce scrutiny as soon as an effective mechanism of judicial control at UN level would be established.[89]

Some theory

The conflict at stake involves at least two legal orders: That of the EC and of the UN. A fully fledged analysis would also have to take the ECHR and EC member states into account given that the latter are bound by the Convention, and that the Convention at the same time is a source of inspiration for the ECJ to determine the common constitutional tradition of the member states in the field.

It is submitted that – from the point of scientific analysis – at least three perspectives are conceivable, and that it might be fruitful to use the lens of the theoretical debate on the relation between different legal orders. This is first and foremost the controversy on monism and dualism.[90] Arguably, much of the more

[86] Such review mechanism would itself have to meet the human rights standards valid within the United Nations. However, an initiative to that end is not in sight.

[87] *Kadi and Al Barakaat International, supra* n. 20, para. 318 et seq.

[88] Ibid., para. 326.

[89] Compare also the passage in AG Poiares Maduro, *Kadi* case, *supra* n. 45, para. 54 of the Opinion.

[90] On monism, dualism, and the relationship between EC law on the one hand and both national and international law on the other hand compare S. Griller, 'Völkerrecht und Landesrecht – unter Berücksichtigung des Europarechts', in R. Walter/C. Jabloner/K. Zeleny (Hrsg), Hans Kelsen und das Völkerrecht. Ergebnisse eines internationalen Symposiums in Wien (1.–2. April 2004), Schriftenreihe des Hans Kelsen-Instituts, Band 26 (Wien, Verlag Manz, 2004) p. 83–120, with further references. The piece includes a critique of the crucial thesis of the autonomy of the Community legal order (at p. 105 et seq). The above text builds on these grounds without deepening the issue. From the recent academic debate compare only H. Keller, *Rezeption des Völkerrechts* (Berlin et al., Springer 2003), favouring 'pragmatic' solutions, and M. Jestaedt, 'Der Europäische Verfassungsverbund. Verfassungstheoretischer Charme und rechtstheoretische Insuffizienz einer Unschärferelation', in Ch. Callies (Hrsg.), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund* (Tübingen, Mohr Siebeck publishers 2007) p. 93, favouring a 'classical' monist solution.

recent debate on 'constitutional pluralism'[91] deals with the same issues and arrives at similar results.

First, there is the angle of the international legal order the UN is forming an essential part of. Such perspective includes the determination to what extent, if any, the Security Council in its resolutions has to observe human rights. As argued above, this is indeed the case, even if the standards are vague. Moreover, the absence of judicial control at UN level can at the same time provide for the justification of legal scrutiny on the side of UN member states. This would inevitably imply the risk of diverging results of such control by different member states.

Second, there is the angle of EC law. Arguably this is the stance the ECJ took when it stressed the 'autonomy' of the EC legal order,[92] as proposed by AG Poiares Maduro.[93] This 'new legal order' is seen as distinct from international law. On these grounds, the relationship between international law and EC law 'is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.'[94] However, even if one would prefer to qualify the legal order of the EC not as an entirely 'new' but instead a particular legal order within the body of international law, it would be possible to frame the question similarly: The rules of this legal order determine the incorporation of general international law and also of UN law.

As indicated, good reasons speak for the position that on these grounds, and largely by analogy to the well-known '*Solange*'-test applied by national courts *vis-à-vis* EC law and also by the ECHR *vis-à-vis* EC law, human rights scrutiny of the European courts *vis-à-vis* Security Council resolutions could be suspended under the condition that in general equal protection would be guaranteed at UN level. This not being the case leads to the application of EC human rights standards. It is an open question whether in this case 'full review' would be adequate, or an 'equivalence' test as mentioned.

The third position would be a sort of meta-analysis looking for a more general account of these solutions, an explanation of how these legal orders do interact.

[91] E.g., J. Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement', 14 *European Law* Journal (2008), p. 389; M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European Law Journal* (2005), p. 262; M. Poiares Maduro, 'Contrapunctal Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Oxford – Portland Oregon, Hart Publishing 2003), p. 501; N. Walker, 'The Idea of Constitutional Pluralism', 65 *Modern Law Review* (2002), p. 317.

[92] Compare *supra* n. 46. *See* already ECJ 5 Feb. 1963,Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v. *Netherlands Inland Revenue Administration*, at p. 12.

[93] AG *Poiares Maduro*, in his opinion in *Kadi* case (*supra* n. 19, at para. 21) puts it that way: 'in other words, the treaty has created at municipal legal order of trans-national dimension is, of which it forms the "basic constitutional charter".'

[94] AG Poiares Maduro, *Kadi* case, *supra* n. 45, at para. 21 of the Opinion.

Here the old debate on a dualist or monist relationship between international law and municipal law – applied *mutatis mutandis* to the relation of international law and EC law – comes in. The more recent debate conceptualises the issue under the term 'pluralism' or 'uniformity'. Arguably, this is not much different from the debates in the first half of the 20th century. This is specifically so if the view is shared that monism in the version of state centred monism (as opposed to a monist view favouring the international legal order as the prevailing one) is nothing else than 'pluralism', given that in this case legal validity has to be derived from all the different national constitutional authorisations.[95] The same is true for a dualist explanation.

It is submitted that it is not necessary to take side with one of the 'models' dealing with the relationship between various legal orders. A preliminary result of the old debate on monism and dualism is that neither of the two can be entirely excluded as a valid explanation for the interaction of international and municipal law. If we take a closer look at the 'terrorist-cases', such conclusion appears defensible. A monist approach introducing the international legal order, and the UN legal order as a part of it, as the delegating system, might conclude that Security Council resolutions have to be respected as long as they abide by UN human rights standards. Violations of the standards can, in the absence of a centralised review system, bring the member states into the position of reviewing 'secondary measures'. By doing so, member states would be abiding by UN law if they arguably would enforce UN human rights standards. It would not be wholly excluded that they would arrive at such result by implementing *their own* human rights standards as long as these standards are overlapping with those at UN level. It might be argued that the stance of the CFI came close to that. However, it is even radical in the sense that the CFI was prepared to set aside conflicting EC law, and that it did not provide reasons why it would only seek to protect *jus cogens*.

By contrast, a monist approach qualifying the national legal orders and that of the Community respectively as the delegating system, and the international legal order as the delegated order, would argue that human rights review mechanisms using 'municipal' standards would be obligatory. However, also under this premise, there is no need to deny the openness of these legal systems *vis-à-vis* the international legal order. The same is true on the grounds of a dualist position claiming that international law and 'municipal law' – State law as well as EC law – rest on distinct legal fundaments (final authorisations). Arguably the ECJ in the *Kadi and Al Barakaat judgment* comes near this solution. But this is not at all certain. The Court does not give us any explicit guidance if at all, on which grounds, under

[95] There is, however, an important difference regarding 'pragmatic' solutions. It is submitted that such 'pragmatic' solutions tend to favour the subjective preferences of those who propose them, or legitimise solutions which were developed without much theoretical underpinning.

which circumstances and to what extent it would be prepared to modify the scrutiny of measures implementing and enforcing international law obligations.

In principle even the well-known '*Solange*'-tests could be justified, also on the grounds of a dualist or monist (EC law being the delegating order) approach. The argument would be that systematically interpreting the provisions allowing for entering into international obligations and implementing them into the 'municipal' legal order – in the case of the EC, e.g., the mechanisms enshrined in Article 300 EC – necessitates modifications: for the sake of international co-operation, it would not be possible to impose the details of the *internal* human rights standards to all partners of an international agreement. For in most cases this would make the conclusion of such agreements impossible and would consequently deprive the respective provisions on the conclusion and implementation of any meaning.

As an overall result one might conclude that first, the 'isolated' application of UN law and EC law respectively seem to be compatible, at least in principle, with the application of judicial scrutiny of Security Council resolutions by European courts. Second, such control could be explained both on the grounds of a monist and a dualist concept of the relationship between international law and 'municipal' law.

International law including the UN Charter does not outlaw the need of transposing obligations into municipal law, or negate the need to respect human rights. Nor does EC law disregard international obligations. As a consequence one might indeed arrive at the result that both legal orders are respecting each other. To a certain extent, the discussion at stake is on reconciling two different systems in their attempt to establish an effective legal order of their own and at the same time taking account of the repercussions of such interaction. However, stressing the 'autonomy' of the EC legal order alone is no powerful concept meeting minimum standards of legal certainty (rule of law) in governing the tensions between 'constitutional' guarantees and international law obligations.

Conclusion

The jurisprudence of the ECJ and the CFI of the EC on the protection of human rights *vis-à-vis* Security Council resolutions targeted at individuals should be taken as an opportunity to reflect both on the standards of human rights protection in general international law, specifically within the UN and on the relationship between UN law and member states law and EC law respectively. The stance taken by the CFI is indeed too restrictive. There is no good reason to refrain – as things stand today – from a detailed human rights scrutiny of Security Council resolutions. Such scrutiny reveals that the respective Security Council resolutions and especially the mechanism of upholding the listing of individuals violate basic guar-

antees of a fair trial and of a judicial review mechanism, as well as the right to respect for property. Consequently, the ECJ was right in reversing the judgment of the CFI and in annulling the transposing EC regulation. But some fundamental issues concerning the relationship between EC law and international obligations have not been properly addressed and remain unanswered by the Court.

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