

European Court of Justice Secures Fundamental Rights from UN Security Council Resolutions

Sebastian Recker*

Table of Contents

A. Introduction.....	160
B. Case Development	161
I. Security Council Resolution	162
II. Judgment of the Court of First Instance	163
1. Council's Competence and the Observance of Article 249 EC	163
2. Concerning Respect of Certain Fundamental Rights	164
III. Judgment of the European Court of Justice	166
1. Legal Basis of the Contested Regulation.....	166
2. Infringement of Fundamental Rights.....	168
C. Analysis of the Judgment.....	171
I. The Effect of the Judgment in International Law	171
II. The Problem of Priorities.....	172
1. Resemblance to the German (<i>Solange I</i>) "so long as <i>I</i> " Judgment.....	173
2. Independent International Court Unwanted	173
3. Independent International Court as Syllogism	175
III. Jus Cogens as a Basis for an Internal Structure of International Fundamental Rights.....	176
IV. Primary Community Law as Constitutional Law	177
D. Conclusion	178

* Student Research Assistant at the Department of Criminology, Institute for Criminal Law and Justice at the Law Faculty of the University of Göttingen, Germany.

A. Introduction

The European Court of Justice has annulled Council Regulation (EC) No 881/2002¹ freezing funds of Mr. Kadi and Al Barakaat based on Resolution 1267 (1999)² of the United Nations Security Council³. In so doing, the European Court of Justice has set aside the Court of First Instance's judgment⁴. The Court of First Instance held that in principle it had no jurisdiction to review the lawfulness of regulations based on Security Council resolutions. The European Court of Justice stated that acts of the Sanctions Committee under Chapter VII of the UN Charter must be reviewable if restrictions infringe general principles of Community law⁵. This decision creates a new balance of power in international law. Obligations from international agreements cannot prejudice fundamental rights as general principles of the EC Treaty.

Until this judgment, it seemed that the UN Security Council had the unconfined power to determine binding instructions to States under Chapter VII of the UN Charter without the possibility of judicial review by Member States. The conflict between the status quo demanded by the United Nations and the requirement of the European Communities in securing their general

¹ Commission Regulation No. 881/2002, O.J. L 139/9 (2002).

² SC Res. 1267, UN SCOR, 54th sess., 4051st mtg., UN Doc. S/RES/678 (15 October 1999).

³ Notes relating to the decision: *Christoph Ohler*, *Gemeinschaftsrechtlicher Rechtsschutz gegen personengerichtete Sanktionen des UN Sicherheitsrates*, *Europäische Zeitschrift für Wirtschaftsrecht – EuZW* Heft 20 (2008), 630-633; *Kirsten Schmalenbach*, *Bedingt kooperationsbereit: Der Kontrollanspruch des EuGH bei gezielten Sanktionen der Vereinten Nationen*, *Juristenzeitung – JZ* Heft 1 (2009), 35-43; *Nikolaus Graf Vitzthum*, *Les compétences législatives et juridictionnelles de la Communauté européenne dans la lutte contre le terrorisme – l'affaire "Kadi"*, *Zeitschrift für Europarechtliche Studien – ZeuS* (2008) 375-429; *Michael Riegner*, *Bulletin of international legal developments* (2008) Vol. 17, 193-196; *Maja Brkan*, *Presekani (in spet zavezani) gordijski vozeli*, *Pravna praksa* (2008), ŠT. 36, 25-27.

⁴ *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T-306/01 [2005] E.C.R. II-3533, *Common Market Law Review* 43 (2006) 537 ('*Yusuf and Al Barakaat*'); *Yassin Abdullah Kadi v. Council and Commission*, Case T-315/01 [2005] E.C.R. II-3649, *Common Market Law Review* 43 (2006) 537 ('*Kadi*').

⁵ *Al Barakaat International Foundation v. Council and Commission, Yassin Abdullah Kadi v. Council and Commission*, Joined Cases C-402/05 P and C-415/05 P (Eur.Ct.J. 3 September 2008) (not yet reported), summarized in *Weekly Proceedings of the Court of Justice* 31/08, at 1 ('*Kadi and Al Barakaat*').

principles shows the purpose and at the same time abashment of international law. Who determines the rules in international law and who is to decide when the rules have been violated? This question is contentious, because the standing of rules in international law is dependent on the consent of the parties. In this regard, European Union Member States, institutions, citizens and courts were not agreed on how to balance the competence in these cases⁶. For example, the Court of First Instance restricted the supervision of Security Council resolutions to *jus cogens*⁷. Conversely Germany⁸, the French Republic, the Kingdom of the Netherlands, the United Kingdom and the Council demanded exemption from all review arising from measures adopted by the Security Council under Chapter VII of the UN Charter⁹. In contrast, the European Court of Justice and the appellants in the given cases have seen the necessity of effective judicial review if fundamental rights are infringed¹⁰. However, how can international law work if there is no consent regarding the principle of supremacy?

Without question this judgment has decimated the basis of tribute in international law and increased the standard of the European Communities as guardians of their general principles in international law.

B. Case Development

The European Court of Justice has set aside the judgment of the Court of First Instance of the European Communities in Case T-306/01 and Case T-315/01. In these judgments the plaintiffs applied to have Council Regulation (EC) No 881/2002 declared null and void because of infringements on their Fundamental Rights. The implementation has become necessary for the EC to execute the obligations of United Nations Security Council Resolution 1267 (1999). This resolution requires Member States to freeze funds and other financial resources of individuals with ties to the Taliban in order to combat international terrorism. The Court of First Instance stated that binding Security Council resolutions are not revisable to community law¹¹. According to the judgment of the Court of First Instance

⁶ *Kadi and Al Barakaat*, paras 107-115 (ECJ).

⁷ *Yusuf and Al Barakaat*, para. 277; *Kadi*, para. 226 (CFI).

⁸ *Frank Schorkopf*, *Grundgesetz und Überstaatlichkeit* (2007), 152-156.

⁹ *Kadi and Al Barakaat*, paras 111-112, 114-115 (ECJ).

¹⁰ *Kadi and Al Barakaat*, paras 107-108, 327 (ECJ).

¹¹ *Yusuf and Al Barakaat*, paras 263-282; *Kadi*, paras 212-231 (CFI).

the supervision of Security Council resolutions is restricted to *jus cogens*, which in this case was not infringed.

I. Security Council Resolution

The Security Council is the principal organ of the United Nations with a primary responsibility for the maintenance of international peace and security as set down in Article 24 of the UN Charter. According to Article 1 (1) and (3) of the UN Charter, preservation of “*international peace and security*” throughout the world is one of the aims the United Nations and its members strive towards. However, the aims listed in Article 1 of the UN Charter are not just a political programme. Article 24 of the UN Charter grants the ability to make binding recommendations which are applied against state or non-state actors by the UN Security Council, based on Chapter VII and Article 41 of the UN Charter. Resolution 1267 (1999) established sanctions condemning acts carried out by the Taliban in Afghanistan. Since the US invasion of Afghanistan in 2001, the sanctions have also been applied to individuals and organizations located in all parts of the world. In order to suppress international terrorism, the Security Council stated in Paragraph 4(b) of Resolution 1267 (1999) that all states must freeze funds and other financial resources of individuals with ties to the Taliban. All twenty-seven European Union Member States are members of the United Nations¹². They are bound to the primacy of the obligations under the Charter of the United Nations, Article 103 UN Charter. As a consequence of this obligation, laid down in Article 25 UN Charter, according to the wording of the Charter, Member States must carry out the decisions of the Security Council. The Court of First Instance states that this obligation has antecedence to any other obligation Member States may have entered into under an international agreement¹³. However, as this obligation does not bind the Community, as it is not a Member of the United Nations, the European Community is bound by Art 307 EC by Community Law. If the European Community has assumed powers from Member States in an area referred to under the United Nations Charter, the Community must ensure that Member States fulfil their obligations. Therefore action by the European Community was necessary in order to imply this resolution into

¹² *Ministry of Foreign Affairs and Trade*, United Nations Handbook 2008/09, (2008) 11-13.

¹³ *Yusuf and Al Barakaat*, paras. 239-240; *Kadi*, paras 189-190 (CFI).

Community Law. First the Council adopted Common Position¹⁴ 2002/402/CFSP¹⁵ whereby the Council adopted the contested regulation on the basis of Articles 60 EC, 301 EC and 308 EC.

II. Judgment of the Court of First Instance

Mr. Kadi based his claim on three grounds of annulment alleging breaches of his fundamental rights¹⁶. In addition to violations of his judicial rights, his right to be heard and his right to effective judicial review, Mr. Kadi argued that there had been an infringement of his right to respect for property and of the principle of proportionality. *Al Barakaat* mentioned that the Council was not concerned with the adoption of the regulation and a breach of Article 249 EC and fundamental rights¹⁷.

1. Council's Competence and Observance of Article 249 EC

The European Union incorporates Security Council resolutions in two steps. First the Council generates a Common Position based on Article 15 EU. Then it dispenses a Regulation on Article 249 II EC based on Articles 60 EC, 301 EC and 308 EC.

It is, however, questionable if the Council was competent to adopt a measure based on Article 249 II EC. The plaintiffs mentioned that the measures were disproportionate to the pursued objective of interruption or due economic relations with third countries¹⁸. The Court of First Instance replied that Articles 60 EC and 301 EC expressly contemplate the implementation of a common foreign and security policy assigned to the European Union by Article 2 EU¹⁹. This contemplation was forced by the Maastricht Treaty, which related Community actions imposing economic sanctions and the objectives of the European Union Treaty regarding to external relations.

Article 249 II EC facilitates the order of regulations edged over general public. In the case of *Yusuf* and *Al Barakaat* the plaintiffs argued that the regulation prejudices the rights of individuals directly and

¹⁴ Council Common Position 2002/402/CFSP, O.J. L 139/4 (2002).

¹⁵ Common Foreign and Security Policy.

¹⁶ *Kadi and Al Barakaat*, para. 49 (ECJ).

¹⁷ *Kadi and Al Barakaat*, para. 50 (ECJ).

¹⁸ *Kadi and Al Barakaat*, para. 69 (ECJ).

¹⁹ *Kadi and Al Barakaat*, para. 67 (ECJ).

prescribes the imposition of individual sanctions²⁰. The Court of First Instance accomplished the regulation's general application because the regulation prohibits anyone to raise funds or economic resources for the persons named in Annex I to the regulation²¹. Although the named persons are directly and individually concerned for the purpose of Article 230 IV EC, this does not change the general nature of the prohibition.

2. Concerning Respect of Certain Fundamental Rights

As the Sanctions Committee decided under Chapter VII of the UN Charter, its resolution is binding on Member States under Article 48 of the UN Charter. Therefore, the question arises as to whether the Court of First Instance is generally competent to undertake a review of the lawfulness of the resolution. But the Court of First Instance is only able to go into the merits of the case if it is competent to undertake a review.

Scope of Review of Lawfulness

The Court of First Instance holds forth that the resolution falls within the scope of its judicial review. In this scope, determining what constitutes a threat to international peace and security is exclusively the scope of the Security Council. For this reason it exists outside the jurisdiction of Community Law²². The only exception is the inherent right to individual or collective self-defence, Article 51 UN Charter. On the one hand, such jurisdiction would be incompatible with international law, Articles 25, 48 and 103 UN Charter and also Article 27 of the Vienna Convention on the Law of Treaties. On the other hand, it would be incompatible with the norms of the EC and EU Treaty, especially Article 307 EC and the principle that it must be exercised in compliance with international law. References to infringements of fundamental rights as protected by the Community cannot affect the validity of a Security Council resolution. In principle, Security Council resolutions fall outside the ambit of the judicial review of the Court of First Instance.

Jus Cogens

According to the European Court of First Instance, the Court is empowered indirectly to prove whether the resolution is lawful according to

²⁰ *Kadi and Al Barakaat*, para. 69 (ECJ).

²¹ *Yusuf and Al Barakaat*, para. 186 (CFI); *Kadi and Al Barakaat*, para. 72 (ECJ).

²² *Yusuf and Al Barakaat*, para. 276; *Kadi*, para. 225 (CFI).

jus cogens. *Jus cogens* refers to norms of international law which have peremptory force and which are binding on all subjects of international law with no derogation except by another peremptory rule²³. *Jus cogens* is defined in Articles 53 and 64 of the Vienna Convention on the Law of Treaties. Article 53 states that a treaty provision contrary to a *jus cogens* norm is void. *Jus cogens* norms are norms which are accepted by the international community of states as a whole in a treaty or custom²⁴. The United Nations is also bound by *jus cogens* because the UN Charter itself requires the existence of mandatory principles of international law and, consequently, fundamental rights as well. Security Council resolutions are bound by fundamental peremptory provisions of *jus cogens*. However, neither Member States nor the United Nations may derogate from “intransgressible principles” of international customary law²⁵.

The alleged breach of the right to be heard must be rejected by the Court. Due to its bond to decisions of the Sanctions Committee, the Community has indeed no power to investigate the resolution. However, a person can submit his allegation to the Sanctions Committee via his national authority²⁶. The person is bound to the diplomatic protection of his state, but in conflict, he is allowed to bring an action for judicial review against any wrongful refusal by the national authority.

In the Court of First Instance’s view, the fundamental right to respect for property is not infringed upon by freezing funds. This measure has neither the purpose nor the effect of treating the listed persons in an inhuman way²⁷. Therefore, the Court has established that freezing funds is a temporary precautionary measure which does not affect the substance of the right, unlike a confiscation²⁸.

Furthermore, the Court of First Instance stated that the right to effective judicial review was not infringed upon. The plaintiff was able to bring an action for annulment before the Court under Article 230 EC. The Court reviews the lawfulness of the regulation and, indirectly, the lawfulness of the resolution in light of *jus cogens*. However, the Court is not competent to review indirectly whether the resolution is compatible with fundamental rights guaranteed by the Community legal order. Admittedly

²³ *Rebecca Wallace & Anne Holliday*, *International Law*, 1st ed. (2006), 25.

²⁴ *Rebecca Wallace & Anne Holliday*, *International Law*, 1st ed. (2006), 25-26.

²⁵ *Yusuf and Al Barakaat*, para. 282; *Kadi*, para. 231 (CFI).

²⁶ *Yusuf and Al Barakaat*, para. 317; *Kadi*, para. 270 (CFI).

²⁷ *Yusuf and Al Barakaat*, paras. 290-291; *Kadi*, paras 239-240 (CFI).

²⁸ *Yusuf and Al Barakaat*, paras. 294-302; *Kadi*, paras 243-251 (CFI).

there is no independent international court responsible for ruling individual decisions taken by the Sanctions Committee. According to the Court of First Instance this lacuna in judicial protection is not contrary to jus cogens, since it is justified by the nature of the decisions made under Chapter VII of the UN Charter “*In the circumstances of this case, the applicant’s interest in having a court hear his case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council in accordance with the Charter of the United Nations*”²⁹. Therefore, it is required to mention that there is a mechanism for re-examining the measures after 12 or 18 months.

All in all, the mechanism of applying at any time to this committee is adequate for guaranteeing the right to effective judicial review by jus cogens.

III. Judgment of the European Court of Justice

Mr. Kadi based his concern to set aside the Court of First Instance’s judgment on the lack of any legal basis for the regulation and infringement of fundamental rights by disregarding several rules of international law³⁰. Ahmed Ali Yusuf’s name was struck from the Court’s register in response to his abandonment of the appeal³¹. However, Al Barakaat also based its concern on the lack of any legal basis for the regulation and infringement of fundamental rights by disregarding Article 249 EC³².

1. Legal Basis of the Contested Regulation

Mr. Kadi denounced the fact that the Court of First Instance had taken Articles 60 EC and 301 EC as a legal basis even though these provisions were only able to provide a basis for measures against third countries, not for measures against individuals and non-State entities³³. In addition, Article 301 EC exhibits no function as a “bridge” between the EC and EU Treaties in order to achieve EU treaty ambitions. On account of the

²⁹ *Yusuf and Al Barakaat*, para. 344; *Kadi*, para. 289 (CFI).

³⁰ *Kadi and Al Barakaat*, para. 116 (ECJ).

³¹ *Kadi and Al Barakaat*, para. 119 (ECJ).

³² *Kadi and Al Barakaat*, para. 117 (ECJ).

³³ *Kadi and Al Barakaat*, para. 123 (ECJ).

fact that Article 308 EC was misinterpreted, here the Court of First Instance assimilated the objectives of the separated legal orders.

The European Court of Justice stated that the Court of First Instance was right to determine that Articles 60 EC, 301 EC and 308 EC were the correct legal basis, however, it was not right in its argumentation³⁴. Indeed, Article 301 EC functions as a “bridge” between EC and EU treaty ambitions, but neither the wording nor the structure provide any foundation for an extension to Article 308 EC³⁵. The Court of First Instance’s conclusion runs counter to the wording of Article 308 EC, which requires an acquisition to the “operation of the common market”, not including the objectives of the Common Foreign and Security Policy (CFSP). Article 308 EC is part of a system based on the principle of conferred powers. It does not include a basis for widening the scope of power beyond the general framework created by provisions of the EC Treaty. However, Article 308 EC should fill gaps where the EC Treaty shows deficiency of provisions even though the Community needs such powers to attain one of the objectives laid down by the EC Treaty³⁶. The regulation falls within the ambit of Articles 60 EC and 301 EC, while the restrictive measures are of a financial nature, in so far as the inclusion of both articles was justified by law³⁷. However, these provisions do not impose measures against individuals and non-State entities which are not linked to the governing regime of a third country, as Article 308 EC is seen by the European Court of Justice as the missing piece to be authorised in order to impose such measures³⁸. The European Court of Justice has also used the objectives of the EC treaty as a legal basis. Articles 60 EC and 301 EC are the expression of an objective, making it possible to adopt measures of a financial nature through the efficient use of a Community instrument. This objective is seen by the European Court of Justice as an objective of the Community for the purpose of Article 308 EC, while the measures exhibit a link to the operation of the common market. This interpretation is supported by Article 60(2) EC, which contends that the power of taking measures on Article 60(1) EC can only be exercised if Community measures have not been taken pursuant to Article 60(1) EC³⁹.

³⁴ *Kadi and Al Barakaat*, para. 166 (ECJ).

³⁵ *Kadi and Al Barakaat*, para. 195 (ECJ).

³⁶ *Kadi and Al Barakaat*, para. 198 (ECJ).

³⁷ *Kadi and Al Barakaat*, paras 213-214 (ECJ).

³⁸ *Kadi and Al Barakaat*, para. 216 (ECJ).

³⁹ *Kadi and Al Barakaat*, para. 228 (ECJ).

The European Court of Justice dismissed the grounds of appeal relating to the lack of legal basis as unfounded⁴⁰. Al Barakaat's ground of appeal relating to infringement of Article 249 EC was dismissed by the argumentation of the Court of First Instance⁴¹.

2. Infringement of Fundamental Rights

Mr. Kadi alleged that the Court of First Instance erred in law by supposing that it had no power to review the lawfulness of Security Council resolutions adopted by virtue of Chapter VII of the UN Charter. Similarly, the fact that the Security Council has not established an independent international court competent to rule on actions brought against individual decisions taken by the Sanctions Committee does not mean that Member States also have no power to do so⁴². In his view the re-examination procedure before the Sanctions Committee does not offer protection of fundamental rights in the way guaranteed by the ECHR. In addition, Mr. Kadi cited the *Bosphorus*⁴³ case, in which it was decided that all Community legislative measures must be subject to judicial review, even if a measure's origin is an act of international law⁴⁴. Security Council resolutions can only have legal effect if their implementation was consistent with law in force.

Competence to Review Community Measures

The European Court of Justice ensures fundamental rights according to settled case-law. In this way the European Court of Justice based this jurisdiction to constitutional traditions common to Member States and international instruments for human rights protection, like the ECHR⁴⁵. Even if Member States are bound by obligations imposed by an international agreement, these obligations are not able to prejudice constitutional principles of the EC Treaty⁴⁶. All Community acts must respect fundamental rights. Thus, respect of fundamental rights is a

⁴⁰ *Kadi and Al Barakaat*, para. 236 (ECJ).

⁴¹ *Kadi and Al Barakaat*, paras 241-247 (ECJ).

⁴² *Kadi and Al Barakaat*, para. 254 (ECJ).

⁴³ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, application No. 45036/98, judgment of the European Court of Human Rights (Grand Chamber) of 30 June 2005, (2006) 42 E.H.R.R. 1.

⁴⁴ *Kadi and Al Barakaat*, para. 255 (ECJ).

⁴⁵ *Kadi and Al Barakaat*, para. 283 (ECJ).

⁴⁶ *Kadi and Al Barakaat*, para. 285 (ECJ).

condition for the lawfulness of Community acts. The European Court of Justice must review them in the framework of the legal system established by the EC Treaty. In this case the review of lawfulness applies to Community acts, which incorporate the obligations, not the latter as such. According to the resolution, the European Court of Justice is not competent to review Security Council resolutions under Chapter VII of the UN Charter⁴⁷. The European Court of Justice has therefore set aside the Court of First Instance's argumentation. Even if the review were limited to *jus cogens*, the Court would not be competent to review the Security Council resolution⁴⁸. Article 307 EC states that national courts, and in this case Community courts, must ensure that rights under earlier agreements are honoured and correlative obligations fulfilled. But Article 307 EC is not able to permit any challenge to principles of the Community which include fundamental rights. Accordingly, the Community must have a chance to evaluate the lawfulness of Community measures according to their consistency with major principles and fundamental rights. Article 300(7) EC states that Member States and Community institutions are bound by agreements concluded under this article. The agreement of the Security Council would have primacy over acts of secondary Community law if Article 300(7) EC were applicable to the UN Charter. But even if this primacy existed, it would not extend to primary law⁴⁹. Because of this, there is no binding of the Community to the primacy if fundamental rights are infringed. Furthermore Article 300(6) EC supports the view that an international agreement cannot enter into force if an adverse opinion of the EC Treaty has been found. The European Court of Justice is competent to review community measures, even if they are based on a Security Council resolution⁵⁰.

Rights of the Defence

The right to effective judicial review is a general principle of Community law. It is taken from the constitutional traditions common to Member States and is guaranteed by Articles 6 and 13 of the ECHR. Furthermore, it is stipulated in Article 47 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice,

⁴⁷ *Kadi and Al Barakaat*, para. 287 (ECJ).

⁴⁸ *Kadi and Al Barakaat*, para. 287 (ECJ).

⁴⁹ *Kadi and Al Barakaat*, para. 308 (ECJ).

⁵⁰ *Kadi and Al Barakaat*, para. 326 (ECJ).

France⁵¹. In order to ensure the effectiveness of judicial review the individuals and organisations included in the list provided in Annex I to the resolution must be granted the possibility to have the Community institutions reassess the lawfulness of the measure in question. But the effectiveness of freezing funds and resources is not given if the concerned persons are inducted to these measures. In order to attain the objective pursued these measures must include an element of surprise. But how can this be achieved without infringement of effectiveness and the right to be heard on the one hand and fundamental rights on the other hand? Of course, the struggle against terrorism is of overriding importance for the safety and conduct of international relations. But this does not mean that measures may be exempt from all review at a subsequent point in time. Neither the Common Position 2002/402, nor the regulation planned procedures of communicating the evidence or giving a chance of hearing those persons⁵². Because they had no possibility to recheck the measures and no opportunity to state their position the appellants' rights to defence were not respected. Because the appellants were not informed of the evidence an effective legal remedy was not possible. The right to be heard is infringed if the person cannot raise a claim. No plaintiff can defend himself if he does not know what he did wrong. Since there was no possibility of effective judicial review and no opportunity for self-defence, the right to be heard and the right to effective judicial review were infringed by the Community measures⁵³.

Right to Respect for Property

Aside from the right to effective judicial review, the right to respect for property is one of the general principles of Community law, Article 1 of the First Additional Protocol to the ECHR. However, the right to respect for property is not absolute. It must be viewed in the context of its role in society⁵⁴. The European Court of Justice has to review whether the act of freezing funds is disproportional to the right to respect for property. The freezing of funds is a temporary measure which does not purport to deprive persons of their property. The European Court of Justice had to check if the measure can be justified. Accordingly, the interest of the public must be weighed against the interest of individuals. The restrictive measures

⁵¹ *Kadi and Al Barakaat*, para. 335 (ECJ).

⁵² *Kadi and Al Barakaat*, para. 345 (ECJ).

⁵³ *Kadi and Al Barakaat*, paras 352-353 (ECJ).

⁵⁴ *Kadi and Al Barakaat*, para. 360 (ECJ).

contribute to actions against the Taliban and link individuals with non-State entities. The aim of the Security Council resolution is to maintain international peace. Theoretically, infringements of property rights can be justified by this aim. But the question arises as to whether such a restriction can be justified in the given cases. The regulation included request possibilities for basic expenses and “extraordinary expense” if the Sanctions Committee expressly objects⁵⁵. But as shown, the applicants’ procedures must afford a chance of effective judicial review. The regulation was adopted by the Community without offering any guarantee of the right to be heard in a situation where property rights are significantly restricted. In combination with the restriction of the right to defence, these measures constitute an unjustified restriction of the right to respect for property. As far as the regulation concerns the appellants, it must be annulled⁵⁶.

C. Analysis of the Judgment

I. The Effect of the Judgment in International Law

On 3 September 2008, the European Court of Justice annulled the regulation. However, the Court did not want to damage the effectiveness of the restrictive measure⁵⁷. In order to maintain effectiveness on the one hand and annul the regulation on the other hand the Court decided to annul the regulation without immediate effect. This decision is uncharacteristic of the Court but comprehensible in the given case in light of the aim of the Security Council resolution. For this reason, the European Court of Justice has ordered that the effects of the regulation be maintained for a period of three months as of the date of delivery. Because of the fact that the judgment does not state if the measures against the plaintiffs were justified, immediate effect would obviate the effect of the regulation. According to Article 231 EC, the effect of the regulation has to be maintained for this period to give the Council the chance to remedy the infringements⁵⁸. This decision seems justified. Indeed, the issue of the infringements of the plaintiffs’ rights is not solved in this manner, but in contrast to the lack of effectiveness and the retrograde step of terrorism combat the decision of perpetuation appears to be fungible.

⁵⁵ *Kadi and Al Barakaat*, para. 364 (ECJ).

⁵⁶ *Kadi and Al Barakaat*, para. 372 (ECJ).

⁵⁷ *Kadi and Al Barakaat*, para. 373 (ECJ).

⁵⁸ *Kadi and Al Barakaat*, para. 375 (ECJ).

In order to comply with the judgment the Commission communicated the UN Sanctions Committee's reasons for listing Mr. Kadi and Al Barakaat. The plaintiffs were given the chance to comment on having no links to the Al-Qaida network. After consideration of the plaintiffs' comments the Commission adopted Regulation (EC) 1190/2008⁵⁹ on 28 November 2008, amending Council Regulation (EC) No 881/2002 for the 101st time. Here it considered listing them again. The Commission saw the listing as justified because of the given association with Al-Qaida. Annex I to this regulation added Al Barakaat International Foundation and Yassin Abdullah Kadi to the list of persons, groups and entities covered by the freezing of funds and economic resources again under this regulation. The regulation entered into force in due time on 3 December 2008. Although the European Court of Justice stated that fundamental rights were infringed, in the end nothing changed for the plaintiffs. First, between 3 September and 3 October the plaintiffs could not extend their fundamental rights because of the court's decision to annul the regulation without immediate effect. Second, the plaintiffs could not convincingly argue that they had no contact to Al-Qaida so that they again find themselves on the aforementioned list. From the plaintiffs' standpoint the decision could be seen as "much ado about nothing".

II. The Problem of Priorities

The primacy of United Nations Security Council resolutions under Chapter VII of the UN Charter is acknowledged by its members. Article 24 of the UN Charter grants the ability to make binding recommendations, which, according to the wording, the members must carry out, Article 25 UN Charter. According to the principles laid down in the UN Charter and the acceptance of its members and Community law, the question arises as to how an area of conflict can at all develop? As shown, the Security Council is bound by fundamental peremptory provisions of jus cogens. However, if jus cogens norms have not been infringed, the Security Council has done nothing wrong. Thus, fundamental rights have to give way to the obligation laid down in Article 25 UN Charter.

Yet, how is the conflict to be resolved if the subordinated legal order guarantees a higher standard of fundamental rights protection? According to both judgments community institutions are not competent to review the

⁵⁹ Commission Regulation No. 1190/2008, O.J.L. 322/25 (2008).

lawfulness of the Security Council resolutions. In this regard, primacy of the superior legal order is ensured.

1. Resemblance to the German (*Solange I*) “*so long as I*” Judgment

Nonetheless, the question arises as to whether the European Court of Justice was right in its position that it has the power to review the community measure. On the one hand, the European Court of Justice has to ensure the possibility to review any community act in the framework of its legal system. On the other hand, the community act simply reflects the ruling from the superior legal order, excluded from discretionary power. The possibility of review calls the primacy into question. This situation resembles the German Federal Constitutional Court’s (*Solange I*) “*so long as I*” judgment of 1974⁶⁰. The German Court stated in this decision that it has full authority to review community measures from the superior legal order, “*so long as*” there is no sufficient protection of human rights guaranteed by the superior legal order, the Community. Even though the European Court of Justice lambasted this judgment, one could presume that the Court has taken advantage of the “*Solange I*” judgment by applying double standards.

It remains questionable if these cases are comparable to each other and if the intentions of the Courts are comparable in the given cases. The European Court of Justice did not avow to take full control “as long as” there is no sufficient standard in human rights protection by the United Nations. But might not that be intended by this judgment?

2. Independent International Court Unwanted

A sufficient standard in human rights protection could be guaranteed by an international court. An administrative court could be seen as the ideal solution to this problem. Creation of a new administrative court seems desirable at first glance, but when considering the difficulties that arose while creating the United Nations Administrative Tribunal it begins to seem unrealistic⁶¹. With regard to an already existing court, the International

⁶⁰ Internationale Handelsgesellschaft GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (*Solange I*) [1974] 2 CMLR 540.

⁶¹ *Christian Tomuschat, Die Europäische Union und ihre völkerrechtliche Bindung, Vorträge und Berichte Nr. 158, Zentrum für Europäisches Wirtschaftsrecht (2007), 34.*

Court of Justice could be seen as the proper court to review Security Council resolutions. However, the UN Charter includes no specific ability for the competence to assess measures. Indeed, not only does the UN Charter include no specific ability, such ability was discussed at the “United Nations Conference on International Organization” in San Francisco in 1945, but explicitly rejected⁶². Nevertheless, today it is questionable if it cannot be interpreted by the UN Charter. The International Court of Justice itself states that it has no power to review Security Council resolutions⁶³. Others cite implicit authority under Article 96 UN Charter⁶⁴. Besides the politically motivated position of the International Court of Justice the majority of literature arrives at the conclusion that the power to review is applied in the UN Charter. If the Charter is to be recognized as “the constitution” of the international community, respect in practice is just the next step in the development of the International Court of Justice into a court with the power to review Security Council resolutions. It simply has to give up its politically motivated position towards having the power to review. One could come to the conclusion that the judgment of the European Court of Justice renews the discussion about whether the International Court of Justice could be seen as a constitutional court.

The development of the relationship between Community law and national law again comes to mind. Even though there is no international court that understands itself as an independent court with the power to review or even as constitutional court, the building blocks of such a court are invested in the UN Charter. Until now, this development is unwanted politically, however, an international (constitutional) jurisdiction was also unwanted in the European Communities. At that time the aim of the Community was to create a uniform common market. The EEC Treaty even lacked a provision dealing with priority. The starting position of establishing supremacy was worse than today on an international level. While having no formal basis in the EC Treaty, the European Court of Justice developed the

⁶² *United Nations Committee of Jurists*, Documents of the United Nations Conference on International Organization San Francisco, 1945 Volume XIV, 821-822.

⁶³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports (1971), 16, para. 89; *Bruno Simma*, The Charter of the United Nations a commentary, 2^{ed}. Vol. 2 (2002), 1187-1188.

⁶⁴ *Martin Dixon*, Textbook on International Law 6th^{ed}. (2007), 304; *Mehrdad Payandeh*, Rechtskontrolle des UN-Sicherheitsrates durch Staatliche und überstaatliche Gerichte, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 66 (2006), 41-71, 49.

priority in its jurisdiction⁶⁵. Therefore the validity of Community law cannot be reviewed by the Member States. So why does it differ between the proportion to the Member States and the international legal order? Admittedly at that time the Community included six Member States which were relatively homogenous in their cultural and economic starting position. However, after the Second World War, the states were mindful of maintaining sovereignty. Creating a common market was the aim of the Community, a political union was unwanted. In my view the starting positions are comparable, even if international law covers more members, which exhibit greater differences. The actors in international law are more open and more used to working together in international partnerships, agreements and organisations, than they were after the Second World War. Even if on the one hand actors do not want to suffer the loss of sovereignty, on the other hand they create international organisations in order to be heard and to express their concepts globally⁶⁶.

3. Independent International Court as Syllogism

The starting positions seem comparable to each other. The European Court of Justice acknowledges supremacy as a basic principle while mentioning that it has no power to review Security Council resolutions. Accordingly the court assesses the transforming act with regard to constitutional principles of Community law. However, if this standard is reached in international law the European Court of Justice has to relinquish from its viewpoint as the German Federal Constitutional Court did. Upon delivering a comparable standard, the German Federal Constitutional Court stated in its “*as long as IF*” (*Solange II*) judgment of 1987, that as long as

⁶⁵ Josephine Steiner and Lorna Woods and Christian Twigg-Flesner, *EU Law*, 9th ed. (2006), 71.

⁶⁶ International organisations like *United Nations* as well as regional organisations like *North American Free Trade Agreement (NAFTA)*, *Central American Integration System (SICA)*, *Caribbean Community (CARICOM)*, *Andean Community*, *Southern Common Market (MERCOSUR)*, *European Free Trade Association (EFTA)*, *European Union (EU)*, *Commonwealth of Independent States (CIS)*, *Arab Maghreb Union (AMU)*, *Economic Community of West African States (ECOWAS)*, *Economic Community of Central African States (ECCAS)*, *Southern African Development Community (SADC)*, *Intergovernmental Authority on Development (IGAD)*, *Cooperation Council for the Arab States of the Gulf (GCC)*, *South Asian Association for Regional Cooperation (SAARC)*, *Association of Southeast Asian Nations (ASEAN)*, *Pacific Islands Forum (PIF)*.

Community law ensures the effective protection of fundamental rights, a ruling from the European Court of Justice would not be subject to a review by the German Court⁶⁷. The German Court developed its jurisdiction in a logical and consistent manner. Thirteen years later, the demanded protection of human rights was reached in the German Court's view so that it granted superiority. Since the European Court has assessed the regulation with regard to its standard, the Court has to acquiesce if this standard is given by the superior legal order. Without mentioning the words "as long as", the judgment of the court has to be understood as an "as long as" judgment. In my view an independent international (constitutional) jurisdiction could be a syllogism if the International Court of Justice changes its politically motivated position towards reviewability. Such an acknowledgment seems to reflect and combine the different aims of the actors in international law. The Member States acknowledge the superior legal order without losing influence if the standard is not guaranteed by the superior legal order in the future. This solution for solving the problem of priorities between Germany as a Member State and the Community is not unique in international law. In the *Bosphorus* case, the ECHR stated that the protection of fundamental rights by EC law could have been regarded as equivalent to the standard of the European Convention on Human Rights. The court just advanced the *Solange II* decision. "*Such a presumption could be rebutted if, in a particular case, it was considered that the protection of Convention rights was manifestly deficient*"⁶⁸.

III. Jus Cogens as a Basis for an Internal Structure of International Fundamental Rights

As shown jus cogens norms are norms of international law with peremptory force. They are binding on all subjects of international law with no derogation except by other peremptory rules. Theoretically, jus cogens norms could develop into an all-embracing system of protection for fundamental rights. The Vienna Convention refers disputes of jus cogens norms to binding judicial decisions by the International Court of Justice. The International Court of Justice is seen by the treaty as the organ for giving binding decisions. However, the Vienna Convention on the Law of

⁶⁷ Application of *Wünsche Handesgesellschaft (Solange II)* [1987] 3 CMLR 225.

⁶⁸ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, application No. 45036/98, judgment of the European Court of Human Rights (Grand Chamber) of 30 June 2005, (2006) 42 E.H.R.R. 1.

Treaties includes no absolute right for the International Court of Justice. The validity is limited because of Articles 65 and 66 of the Vienna Convention on the Law of Treaties. By these norms, parties to the Treaty have the right to claim the invalidity of the Treaty in case of an alleged conflict with a peremptory norm. This limitation does not fit with *jus cogens* as an all-embracing system of protection for fundamental rights.

However, this abstraction does not correspond to reality. In practice, the leading political organs in international law are the General Assembly of the United Nations and the Security Council of the United Nations. They act against violations of *jus cogens* norms. Nonetheless, these organs are political, not judicial organs, with no possibility of condemnation. Accordingly, determination and expansion of *jus cogens* norms is needed most to create sufficient protection of human rights in international law.

IV. Primary Community Law as Constitutional Law

If one compares the judgment of the Court of First Instance with the judgment of the European Court of Justice, it is evident that the European Court of Justice remained silent with regard to Article 103 UN Charter. This norm conveys conflict obligations under the UN Charter prior to other international obligations. The argument that the UN Charter is to be recognized as the constitution in international law is ultimately based on Article 103 UN Charter. So the question arises as to how the European Court of Justice could pay no attention to the norm, even though it played a major role in the Court of First Instance's judgment. Even if the Community is not a member of the UN Charter it has assumed powers from Member States in an area referred to under the UN Charter. Thus, it must ensure that Member States fulfil their obligations. But does the obligation in the given case correspond to the obligation under the UN Charter? Fundamental rights are infringed. However, fundamental rights belong to primary community law. The European Court of Justice defines the EC Treaty and therefore primary community law as the constitutional charter⁶⁹.

Regarding the constitutional charter: If primary community law is the constitutional charter, non-observance of Art. 103 EC has to be seen as the consequence. Constitutions arising from the autonomy of the Community legal system cannot be changed by international agreements, treaties or practice⁷⁰. However, can primary community law be seen as a constitutional

⁶⁹ *Kadi and Al Barakaat*, para. 281 (ECJ).

⁷⁰ *Kadi and Al Barakaat*, para. 282 (ECJ).

charter? The European Court of Justice mentioned this phrase once in its rulings⁷¹. The political answer of the Lisbon Treaty is the renunciation of anything that might suggest that the EC Treaty is a constitution. If the Court's viewpoint influences community law, the status of the United Nations is debilitated until a sufficient standard in human rights protection is guaranteed by international law.

D. Conclusion

In my view the development in international law pertaining to the standard of fundamental rights bears a resemblance to the argument between the European Union and its Member States. Similar to the German Federal Constitutional Court in 1974, the European Court of Justice manifested the priority of international law by its judgment of 2008. Even if the European Court of Justice has stated that the protection of fundamental rights is at present not comparable to the standard in the Community, the Court has taken the next step of establishing an independent international court, possibly even an international constitutional court. Since the European Court has assessed the regulation with regard to its standard, the Court has to acquiesce if this standard is given by the superior legal order. I have to admit that the viewpoint of the European Court of Justice shows only the beginning of this development, but it unavoidably leads to an independent international (constitutional) court if the United Nations wishes to be capable of acting. The only hurdle is the politically motivated position which the International Court of Justice has assumed. If the United Nations notices that it has to guarantee this standard in human rights protection to be capable of acting, its point on an independent international (constitutional) court has to change. If its position changes and this standard is guaranteed in the superior legal order the European Court of Justice has to accept the priority of international law as a superior legal order. In 1974 the German Federal Constitutional Court considered cementing its position of priority vis-à-vis the Community. History shows that the German Court initiated the process of establishing a system of protection of fundamental rights by the European Court of Justice. If the International Court of Justice starts establishing fundamental rights in international law, an independent international (constitutional) court will be the syllogism.

⁷¹ *Parti écologiste "Les Verts" v European Parliament*, Case 294/83 [1986] E.C.R. 1339, para. 23.