



# FUNDAMENTAL RIGHTS IN MULTI-LEVEL LEGAL SYSTEMS: RECENT DEVELOPMENTS IN EUROPEAN HUMAN RIGHTS PRACTICE

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## I. INTRODUCTION

As long as the European Union (EU) Constitution Treaty is not in force, the interaction between courts within the European System still remains a challenge. However, it is not only the relationship between the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) which raises questions. The role which national states have to play in a world of globalisation and international constitutionalism<sup>1</sup> seems more and more important. Many State acts are performed in compliance with international regulations and therefore often without discretion. Delegation of sovereign rights from states to supra-national organisations like the EU or international organisations like the World Trade Organisation (WTO) causes new interrelations and fragmentation in international law.<sup>2</sup> As a consequence, the legislation of these institutions affects each other and often individuals are the real addressees of adopted decisions. Particularly when it comes to human rights interferences, individuals are often without a remedy at all or—if available—the proper judicial institution remains uncertain.

The sanction regime by the United Nations (UN) Security Council exposes this assumption particularly well: Going from the general to the particular, the Council acts visibly in some disputes as a ‘world legislature’.<sup>3</sup> The adoption of the resolution 1267 for example imposes, *inter alia*, upon member states to freeze the assets of persons suspected of being involved in terrorist activity. At international level, affected persons cannot invoke the International Court of Justice (ICJ) to assess the lawfulness of this act.<sup>4</sup> At regional level, like the European Community (EC), UN resolutions dealing with economic sanctions are implemented by EC Regulations and therefore individuals could call on the ECtHR or ECJ. While the access to the latter is very re-

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<sup>1</sup> See, e.g., L. Wildhaber, *A Constitutional Future for the European Court of Human Rights*, 23 HRLJ (2002), p. 161; D. Chalmers et al. (ed.), *EUROPEAN UNION LAW* (2006), chapter 2, p. 44 et seq.; J.P. Trachtman, *The Constitutions of the WTO*, 17 EJIL 2006, p. 623; A. Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LJIL (2006), p. 579.

<sup>2</sup> See Report of the Study Group of International Law, “Fragmentation of international law: Difficulties arising from the diversification and expansion of international law”, UN Doc. A/CN.4/L.682, 16 April 2006. See for the WTO & EC Relationship: S. Peers, *Fundamental Right or Political Whim? WTO Law and the European Court of Justice*, in G. de Búrca & J. Scott, *THE EU AND THE WTO* (2003), p. 111; see further Cases: C-149/96, Portugal v. Council; C-392/98 Christian Dior and Lhayher; C-111/99 Léon van Parys. All Judgements of the ECJ and Court of First Instance (CFI) are available at <http://curia.europa.eu/>.

<sup>3</sup> See S. Talmon, *The Security Council as World Legislature*, 99 AJIL (2005), p. 175.

<sup>4</sup> Art. 34 ICJ Statute.

strictive for individuals<sup>5</sup>, the ECtHR can not examine EU/EC acts, as the EU/EC is not a member of the European Convention of Human Rights (ECHR or "Convention"). The only possibility which remains is an indirect control of the implementation through considering the state act itself.

This example shows that as long as an "International Court of Human Rights" is not in place and as long as the EU is not a member of the ECHR, great uncertainty and a lack of judicial remedy could remain. It also points out the judicial interaction between the international, national and regional level with regard to the protection of human rights. All in all, within the European system four levels of interrelation can be assumed: first, the relationship between the UN legal order and the Community legal order and second, the legal order set forth in the ECHR and the Community legal order. Furthermore, the national legal order and the Community legal order as well as the national legal order and the ECtHR.

The only relationship which seems to be somewhat clear in that muddle is that between the national and EC legislation.<sup>6</sup> The EC legal order claimed direct effect and supremacy.<sup>7</sup> The ECJ has also created a doctrine of protection of human rights. Starting with the *Stauder*<sup>8</sup> case in 1969, the Court revisited its protection of fundamental rights in the case of *Internationale Handelsgesellschaft*<sup>9</sup> and later in the cases *Nold*<sup>10</sup> and *Hauer*<sup>11</sup> in 1974 and 1979 made its first references to the ECHR. After the creation of the EU at Maastricht in 1992 and the adoption of the treaties of Amsterdam and Nizza, the protection of human rights is set forth in Article 6 (2) TEU and the (not yet binding) Charter of Fundamental Rights of the European Union<sup>12</sup>, which is incorporated in the EU Constitution Treaty in part II. However, the ECJ's ad hoc treatment of human rights through a doctrine of principles of fundamental rights seems to take into account concerns which member states have regarding their constitutional rights and their loss of competence. Indeed, it is also an unavoidable way to save the principle of supremacy. A recent development in the ECJ jurisprudence is the application of ECtHR case-law to the Third-Pillar of the EU (Police and Judicial Co-Operation in Criminal Matter).<sup>13</sup> Here, a new conflict between national courts and Luxembourg seems to evolve. The German Federal Constitutional Court had declared the national

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<sup>5</sup> Art. 230 TEC.

<sup>6</sup> See on this well discussed topic P. Alston (ed.), *THE EU UND HUMAN RIGHTS* (1999); A. von Bogdandy, *The EU as a Human Rights Organisation? Human rights and the Core of the European Union*, 37 CMLR 2000, p. 1307. R. Ahmed & I. de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EJIL (2006) p. 771; S. Besson, *The European Union and Human Rights: Towards a Post-National Human Rights Institution?*, 6 HRLR (2006), p. 323.

<sup>7</sup> Case 16/64 *Costa v. Enel* [1964] ECR 585. *Further*: P. Craig & G. de Búrca, *EU Law*, Chapter 6, p. 255.

<sup>8</sup> Case 26/29 *Stauder v. City of Ulm* [1969] ECR 419.

<sup>9</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

<sup>10</sup> Case 4/73 *Nold v. Commission* [1974] ECR 491.

<sup>11</sup> Case 44/79 *Hauer v. Rheinland-Pfalz* [1979] ECR 3740.

<sup>12</sup> See EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, [http://ec.europa.eu/justice\\_home/cfr\\_cdf/index\\_en.htm](http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm).

<sup>13</sup> Case 105/03 *Pupino*, [2005] ECR I-5285. See 26 HRLJ (2005), p. 75.

EU Arrest Warrant Act as contrary to the German Basic Law, without mentioning the ECJ findings in the *Pupino* Case.<sup>14</sup>

The relationship between the ECtHR and the national legal order is varied among the member states, as the ECHR itself does not make provision for the methods of its incorporation into national law. The status of the Convention in the member states of the Council of Europe can be divided in several different types: First, states where the Convention has the Status of the Constitution<sup>15</sup>, second, states where the Convention has the same rank as domestic law<sup>16</sup>, and third, states where the Convention has a rank between the constitution and the domestic law<sup>17</sup>. This causes more for some member than for others as far as the relationship to the ECtHR is concerned.<sup>18</sup> E.g. in Austria, belonging to the first group of member states, the rights enshrined in the ECHR are applicable in the Austrian Constitutional Court in the same way as those set forth in the Austrian Bill of Rights. Therefore the human rights standard in Austria is at a very high level as individuals, administrative authorities and legislature are aware of their Convention rights. On the contrary Germany, belonging to the second group, the status of the ECHR and the role of the ECtHR is not yet very clear. In the recent *Görgülü* case the German Federal Constitutional Court made an ambiguous statement with regard to the execution and effects of the decisions of the ECtHR.<sup>19</sup> In the aftermath many statements by those responsible were made in an effort to avert further damage, while the anxiety not to lose legal competence is unmistakable. Indeed, most of the German judges consider the rights enshrined in the ECHR as less

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<sup>14</sup> See Bundesverfassungsgericht Case No. 2 BvR 2236/04 Judgement 18. July 2005. See further: H. Satzger & T. Pohl, *The German Constitutional Court and the European Arrest Warrant*, 4 JICJ (2006), p. 585; C. Tomuschat, *Ungereimtes – Zum Urteil des Bundesverfassungsgerichts vom 18. Juli 2005 über den Europäischen Haftbefehl*, 32 EuGRZ (2005), p. 453.

<sup>15</sup> This is the case for Austria. In the Netherlands, the Convention has even primacy to the domestic constitution. See in particular: H. Tretter, *Austria*, in R. Blackburn & J. Polakiewicz (ed.), *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES* (2001), p. 103; L. F. Zwaak, *Netherlands, ibid.*, p. 595.

<sup>16</sup> This is the case, e.g., in Germany, Italy, Norway, Sweden, Finland, San Marino and Denmark.

<sup>17</sup> E.g., Belgium, Cyprus, Croatia, Eastland, France, Great Britain, Greece, Ireland, Luxemburg, Malta, Portugal, Slovakia, Slovenia, Spain.

<sup>18</sup> See J. Polakiewicz, *The Status of the Convention in National Law*, in R. Blackburn & J. Polakiewicz (Ed.), *supra* note 14, p. 31.

<sup>19</sup> BVerfG 74, 358. Translation in: 25 HRLJ (2004), p. 99. See further: Cremer, *Zur Bindungswirkung von EGMR-Urteilen*, EuGRZ 2004, p. 683. The Court states: "Within the German legal system, the European Convention on Human Rights and its protocols, to the extent that they have come into force for the Federal Republic of Germany, have the status of a federal statute. This classification means that German Courts must observe and apply the Convention *within the limits of the canons of justifiable interpretation* like other statute law of the Federal Government [...] (para. 32, emphasis added)." In taking into account decisions of the ECtHR, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular with regard to a partial system of domestic law whose legal consequences are balanced and that is intended to achieve an equilibrium between differing fundamental rights." (para. 57).

important and the approach of the Federal Constitutional Court does not really clarify the matter for them.

The two remaining relationships mentioned above are between the European Communities and the UN legal order and the ECJ in Luxembourg and the ECtHR in Strasbourg. The latter nearly seemed clarified until the ECtHR came up with the *Bosphorus*<sup>20</sup> case in June 2005, where it had to consider a national act based on an EC regulation implementing a UN resolution. The change the court made in the relationship is worth analysing as the decision can be seen as a new “leading case”<sup>21</sup>. It involves assessing whether the court’s findings are appropriate for a sustainable individual human rights strengthening within the European system.

The interaction between the UN and the European legal order was unsettled up to now, as both European courts were silent in regard to that.<sup>22</sup> The example of freezing assets of suspected terrorists was decided by the Court of First Instance (CFI) in the cases of *Yusuf, Kadi*<sup>23</sup> in 2005 and *Hassan, Ayadi*<sup>24</sup> in 2006. Here, the CFI had to answer the question of which legal rule—EC or UN—prevails, and whether Community courts are authorized to rule on the lawfulness of UN resolutions.

The following article will illuminate these two relationships on the basis of the recent cases and give a prospect for a coherent human rights framework within the regional European system.

## II. THE BOSPHORUS CASE AND THE RELATIONSHIP BETWEEN THE EUROPEAN COMMUNITY AND THE ECTHR

### 1. Previous cases

The Bosphorus case has to be considered in light of the previous case-law concerning the relationship between the ECtHR and the European Community. As the EC/EU is not a member of the ECHR, the issue is whether member states can be held responsible for violations of Convention rights when implementing EC/EU regulations. The first decision considering that problem was made by the European Commission of Human Rights in its *Melchers*<sup>25</sup> case. The Court had to examine an executive act by the German Minister of Justice who was implementing a decision by the EC Commission

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<sup>20</sup> *Bosphorus Hava yollari Turizm Ve Ticaret AS v. Ireland*, App. No. 45036/98, Judgement 30 June 2005 (hereinafter “Bosphorus”). All ECtHR Judgements are available at HUDOC, <http://cmiskp.echr.coe.int/tkp107/search.asp?skin=hudoc-en>.

<sup>21</sup> S. Douglas-Scott, *A tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 CMLR (2006) p. 629, 637.

<sup>22</sup> See Case T-184/95, *Dorsch Consult v. Council and Commission*, [1998] ECR II-667; *Bosphorus Case*, *supra* note 20.

<sup>23</sup> Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Judgement 21 September 2005. (hereinafter “Yusuf”); Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, Judgement 21 September 2005. (hereinafter “Kadi”)

<sup>24</sup> Case T-49/04, *Faraj Hassan v. Council and Commission*, Judgement 12 July 2006. (hereinafter “Hassan”); Case T.253/02, *Chafiq Ayadi v. Council and Commission*, Judgement 12 July 2006. (hereinafter “Ayadi”)

<sup>25</sup> M & Co. 64 Decisions Reports, p. 138.

concerning fines. The Commission of Human Rights stated that member states cannot evade their responsibility under the Convention by transferring powers to international organisations and that acts of national authorities remain under the obligations of the ECHR and the control of the ECtHR if implementing EU obligations.<sup>26</sup> However, the complaint was declared inadmissible, as the human rights standard provided within the European Community is equivalent to that provided under the ECHR and further scrutiny is not compatible with the sovereignty of supranational organisations. This “equal protection” doctrine was later compared by scholars to the *Solange* cases the German Federal Constitutional Court delivered with regard to its relationship to the ECJ and the EC legal order.<sup>27</sup> In similar cases the European Commission for Human Rights reiterated its findings,<sup>28</sup> while the ECtHR was more restrained<sup>29</sup>. The Strasbourg Court made a change in its *Matthews* case were it has to review the *EC Act on Direct Elections of 1976* which was akin to EC primary law but without jurisdiction to the ECJ.<sup>30</sup> *Matthews*, a citizen of Gibraltar, alleged a violation of her right to participate in elections set forth in Article 3 First Additional Protocol, as Gibraltar, not belonging to the British Territory, was excluded by the Act on Direct Elections. The Court found the complaint admissible based on the assumption that the member states had took part in the negotiation and adoption of the Election Act and the Maastricht treaty. By doing so, the member states had used their jurisdiction enshrined in Article 1 of the Convention. The Court reiterated the Melchers finding that the member states remain responsible under the ECHR if transferring powers to supra-national organisations, but did not make a constraint based on “equal protection”. Rather the “practical and effective” guarantee of the Convention rights is determined. Therefore, for the first time Strasbourg found a violation of the Convention by a member state acting within the framework of the EC.

In the aftermath of the *Matthews* decision the Court missed several opportunities to clarify the inherent ambiguity left in the term “equivalent protection”. Many applicants approached the Court on the issue of Article 6, al-

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<sup>26</sup> See at 145: “The Convention does not prohibit a Member State from transferring powers to international organisations. Nonetheless a transfer of powers does not necessarily exclude a State’s responsibility under the Convention with regard to the exercise of transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or exclude and thus be deprived of their preemptory character. The object and purpose of the Convention as an instrument for the protection of individual human beings requires that provisions be interpreted so as to make its safeguards practical and effective. Therefore the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection.”

<sup>27</sup> See BVerfGE 73, 339 (*Solange II*) translated in 3 CMLR (1987), p. 225; BVerfGE 89, 155 (*Maastricht*); BVerfGE 102, 147 (*Bannanenmarktordnung*).

<sup>28</sup> *Heinz v. Contracting States also Parties to the European Convention* (1994) 76A Decisions Reports 125.

<sup>29</sup> *Pafitis v. Greece* 1998-I 436 (1999) 27 EHRR 566.

<sup>30</sup> See *Matthews v. United Kingdom*, Application No. 24833/94, Judgement 18 February 1999; J. Kokott & R. Schölch, *Denise Matthews v. The United Kingdom*, 93 AJIL (1999), p. 682; H. G. Schermers, *Matthews v. United Kingdom*, 36 CMLR (1999) p. 673.

leging a breach in the context of competition law proceedings before the ECJ.<sup>31</sup> In the *Emesa Sugar* case the applicants complained of a breach of Article 6 in proceedings before the ECJ as the right to respond to the Advocate General's Opinion was refused. The Court considered the application inadmissible, as the claimed right is not applicable to all, but rather to criminal proceedings and some civil rights.<sup>32</sup> Considering the application illogically inadmissible on the matter *ratione materiae* and not *ratione personae*, the Court avoided strengthening its *Matthews* reasoning based on accession to supra-national organisations and not on national implementation acts as such.<sup>33</sup>

## 2. The Bosphorus case

### 2.1 *The facts*

Bosphorus was a long pending case, starting in 1993 before the Irish national courts and ending in 2005 before Strasbourg. The applicant is a Turkish airline charter company ("Bosphorus Airways") which leased two airplanes from Yugoslav Airlines in 1992 and registered them in Turkey. One of the applicants' aircraft was seized in May 1993 by Irish authorities in Dublin airport were it had been for maintenance work with the state-controlled company TEAM Aer Lingus. The impoundment was disposed by a decision of the Irish Minister for Transport based on Article 8 EC Regulation 990/93<sup>34</sup>. This EC Regulation came into force in April 1993 and implemented UN Security Council Resolution 820 (1993)<sup>35</sup> imposing sanctions against former Yugoslavia. The Minister's decision was considered before the Irish High Court and Irish Supreme Court after Bosphorus Airway challenged its lawfulness. The Irish High Court held in 1994 that the EC Regulation was not applicable to the aircraft, whereas the Irish Supreme Court, invoked on appeal by the Minister for Transport, referred a question under Article 249 EC Treaty to the ECJ, asking whether Article 8 EC Regulation applied. The ECJ ruled that the aircraft was covered by the Regulation and therefore the Supreme Court held the Minister's appeal successful.<sup>36</sup>

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<sup>31</sup> See e.g. *Kress v. France*, App. No. 39954/98, Judgement 7 June 2001.

<sup>32</sup> *Emesa Sugar BV v. Netherlands*, Application No. 62032/00, Admissibility Decision of 13 January 2005.

<sup>33</sup> See J. Bröhmer, *Die Bosphorus Entscheidung des Europäischen Gerichtshofs für Menschenrechte—Der Schutz der Grund—und Menschenrechte in der EU und das Verhältnis zur EMRK*, EuZW 2006, p.71, 75.

<sup>34</sup> Council regulation 990/93 of 26 April 1993 Concerning Trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro). Article 8 is worded as follows: "All vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States."

<sup>35</sup> UN Doc. S/RES/820, 17 April 1993.

<sup>36</sup> Case 84/95 *Bosphorus Airways* [1996] ECR I-3953. The ECJ ruled that neither the right to peaceful enjoyment of property nor the fundamental right to pursue a commercial activity was absolute. It reiterates the fundamental rights standard within the EC legal order and found the interference proportionate. See hereunto: I. Connor,

Bosphorus Airways filed a complaint before the European Commission on Human rights alleging a breach of Article 1 Protocol No. 1 through a loss of three years of its four-year lease.<sup>37</sup> The case was referred to the ECtHR and relinquished to the Grand Chamber.

### 2.2 *The decision*

The Chamber first considered the admissibility of the case and obtained several third party submissions by the European Commission, the Italian Government, the Government of the United Kingdom and the Institut de Formation en Droits de l'Homme du Barreau de Paris ("Institut"). The admissibility was challenged by the Irish Government and the third party interveners, except the Institut. They argued that the impugned act by the Minister was not an exercise of discretion and also to appeal the judgment of the High Court and to make a reference pursuant to Article 234 TEC to the ECJ was obliged under Article 10 TEC and the duty of loyal-cooperation. In emphasising the *Melchers* and *Matthews* cases they maintained that the protection under the EC and the UN was equivalent to that under the ECHR, hence the application was inadmissible, as the ECtHR could not consider acts of the EU. The European Commission further stressed that "to require a state to review for Convention compliance an act of the EC before implementing would pose an incalculable threat to the very foundations of the EC" and also "subjecting individual EC acts to Convention scrutiny would amount to making the EC a respondent in Convention proceedings whiteout any of the procedural rights and safeguards of a contracting state to the Convention".<sup>38</sup> On the contrary, the applicant and the Institut argued that the equivalent protection doctrine is not applicable as the matter in dispute is not the EC Regulation or the sanction regime per se and that the Irish government had "a real and reviewable" discretion. The applicant further noted that to follow the *Melchers* case law would mean "that any member state of the EC could escape its Convention responsibility once its courts referred a question and implemented an ECJ ruling" and "to accept that any state act implementing an EC obligation does not fall within the state's Convention responsibility would create an unacceptable lacuna of human rights protection in Europe".<sup>39</sup>

In considering Article 1 of the Convention the court held briefly that the notion of "jurisdiction" is defined territorially under International Law and "presumed to be exercised throughout the states territory".<sup>40</sup> As the impoundment took place on the Irish territory the applicant fell within the juris-

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*Can Two walk Together, Except They Be Agreed?*, 35 CMLR (1998), p. 137; P. Koutrakos, EU INTERNATIONAL RELATIONS LAW (2006), pp. 433.

<sup>37</sup> After the lease of the aircraft had expired and the UN sanctions against Yugoslavia were suspended, the aircraft was directly returned to Yugoslav Airlines.

<sup>38</sup> *Bosphorus case*, *supra* note 20, para. 124.

<sup>39</sup> *Ibid.*, para. 117. The Applicant argued further, in citing Article 234 TEC, that the EC did not offer "equivalent protection" as individuals have no right to an reference under Article 234 TEC (para. 118).

<sup>40</sup> *Ibid.*, para. 135. Cf. *Case Bankovic et al. v. Belgium and 16 other states*, App. No. 52207/99, Decision of 12. December 2001; *Ilascu et al. v. Moldavia and Russia*, App. No. 48787/99, Judgement of 8 July 2004.

diction, hence the complaint is *ratione loci, personae* and *materiae* admissible.<sup>41</sup> Therefore the Court went on to examine the submissions under the merits of the complaint.

While there was an issue between the parties on the applicable rule and the legal basis for the impugned measure, the Court held that the interference amounted to a “control on the use of property” according to Article 1 § 2 Protocol No. 1. The legal basis for the impugned interference, the court found, was Article 8 EC Regulation, as directly applicable and with full effect in Ireland. The court also states, in following the EC Commissions submission, that the Irish authorities did not have discretion when implementing the Regulation and appealing the High Court judgment. Regarding to the UN resolution, the Court held that it was pertinent to the interpretation of the Regulation but did not form part of the Irish domestic law.<sup>42</sup>

The Court proceeded to assess if the impugned impoundment was justified under the requirements of Article 1 § 3 Optional Protocol No. 1. Here it found that the required “general interest” was the compliance with legal obligations flowing from Ireland’s membership of the EC<sup>43</sup> and examined whether this compliance can justify the interference with the applicant’s rights. Here, in this most important part of the judgment, the court reiterates its findings in *Melchers* and *Matthews* that the Convention does not prohibit the transference of sovereignty to an international/supra-national organisation and that such organisations are not responsible under the Convention as long as they are not a party to it.<sup>44</sup> Otherwise, the contracting state could be held responsible under Article 1 for all acts or omissions of its organs, including those arising from compliance with international obligations. In reconciling these conflicting findings, the Court mentioned the equivalent protection doctrine and stated:

However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention’s role as a “constitutional instrument of public order“ in the field of human rights protection. It remains the case that a state would be fully responsible under the

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<sup>41</sup> *Bosphorus case*, *supra* note 20, para. 138.

<sup>42</sup> *Ibid.* para. 145.

<sup>43</sup> *Ibid.* para. 150.

<sup>44</sup> *Ibid.* para. 152.

Convention for all acts falling outside its strict international obligations.<sup>45</sup>

In applying this standard, the Court mentioned Article 6 (2) TEU as well as the jurisprudence of the ECJ and the Charter of Fundamental Rights, and found that the EC legal order contains equivalent protection for individuals, hence Convention compliance at the relevant time was assumed.<sup>46</sup> The last question the Court had to answer was if the presumption of compliance by the Irish Government could be rebutted in the present case. Here, it found that “there was no dysfunction in the mechanisms of control of the observance of Convention rights”, therefore the protection of the applicants rights was not manifestly deficient and the presumption has not been rebutted. In conclusion the Court could not find a breach of Article 1 Protocol No. 1.

### 2.3 Appraisal

The recent case clarifies the indirect review of EC law by the ECtHR. The EC act itself may not be, but implementing acts of member states are judicable. The Bosphorus ruling is an obvious departure from the approach taken in the *Melchers* case. Hereby, Strasbourg filled a remaining gap in considering the legal nature of EC Regulations in the national legal order and the national implementation act within the ECHR.<sup>47</sup> The admissibility is based on Article 1 ECHR, except the defendant is the Community itself or their organs. The Court’s reasoning with regard to Article 1 is straightforward and appropriate. In considering the admissibility *ratione personae* the Court should have clarified that the impugned measure was an implementation act, hence a claim against the Community was inadmissible. Therefore, it is not clear whether the EC or the member state is responsible for the implementing act.<sup>48</sup> Arguing that the Irish authorities never had discretion, the Court also missed an opportunity to expand on the nature of Article 10 TEC and the related ECJ jurisprudence.<sup>49</sup> The ECJ defined the additional obligations under Art. 10 TEC broadly.<sup>50</sup>

<sup>45</sup> Bosphorus case, *supra* note 20, para. 155-157.

<sup>46</sup> *Ibid.*, para. 159-165

<sup>47</sup> In the case *Cantoni v. France*, App. No. 17862/91, Judgement 15. November 1999, the Court reviewed a French law, implementing an EC directive.

<sup>48</sup> F. Hoffmeister, *Bosphorus v. Ireland*, 100 AJIL (2006), p. 442, 446. Hoffmeister emphasized Article 299 ECT, and mentioned that EC law does also apply on the territory of the member states. The Court had already considered this issue in the case *CFDT v. European Commission* (1978), 13 Decisions Reports, p. 231.

<sup>49</sup> See *Bosphorus case*, *supra* note 20, Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garliki. In regard to article 234 TEC the Judges emphasizing (para. 3): “Although the interpretation of Community law given by the Court of Justice of the European Communities is binding on the court which made the referral, the latter retains full discretion in deciding how to apply that ruling *in concreto* when resolving the dispute before it.”

<sup>50</sup> See C. Costello, *The Bosphorus ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 6 HRLR (2006), p. 87, 109. Costello referred to the *Schmidberger* case where the ECJ held that member states have a broad discretion when acting under Article 10 TEC obligations.

It is also noteworthy that the ruling will have an impact on the ongoing codification of the rules for responsibility of international organisations undertaken by the International Law Commission.<sup>51</sup> A clarification of the responsibility of International Organisations for implementing acts of their member states seems necessary, as the Articles on Responsibility of States for Wrongful Acts do not cover this particular case.<sup>52</sup> A more “functional” reading of the term “jurisdiction” to such an extent that the implementing acts of member states are acts of the EC, having “distinct legal personality”, appears inappropriate.<sup>53</sup> Such an approach was made by Panels within the Dispute Settlement Understanding of the WTO, as the EC is, pursuant to Article IX WTO-Agreement, a member of the WTO. This is untenable in the framework of the ECHR considering the fact that the EC is not a member of the ECHR.

Another possibility in the recent case would have been to declare the application inadmissible according to Article 35 (2) lit. b ECHR. Therefore, the Court should have interpreted the term “another procedure of international investigation or settlement” as encompassing ECJ proceedings, like it is the case for complaints considered by the UN Human Rights Committee.<sup>54</sup> Instead, without even mentioning Article 35, Strasbourg ruled for the possibility to consider cases as the last Court in the European system. It placed itself in a superior position to the ECJ where it comes to human rights issues within the EC legal order. Although the Court reserved its right to rule in a last instance, it accepted the human rights standard within the EC and placed a high barrier for an assessment. In modifying the equivalent protection doctrine with a “manifest deficiency” test, Strasbourg devolved the *Solange* jurisprudence of the German Federal Constitutional Court into the relationship between the ECtHR and the ECJ. But as President Wildhaber stated, there are some decisive differences between the two approaches. The *Solange* jurisprudence requires the rebuttal of the presumption of equivalence protection a general decrease of the human rights standard within the EC. On the contrary, the Bosphorus jurisprudence is working on a case-by-case basis as the presumption can be rebutted in each individual case, hence applications are not in principle inadmissible *ratione materiae*.<sup>55</sup> However, the ambiguity of the notion of equivalent protection still remains, and the fact that a new manifestly deficient test was established does not make the challenges for individual complaints much clearer. Therefore, closer attention should be paid to both terms.

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<sup>51</sup> See Third Report of Special Rapporteur G. Gaja on Responsibility of International Organisations, UN Doc. A/CN.4/553, 13 May 2005, para. 25-44 (evaluating Bosphorus in para. 33). See further draft article 15, UN Doc. A/CN.4/L.666/Rev.1, 1 June 2005.

<sup>52</sup> A. Cassese, *International Law* (2005), pp. 241.

<sup>53</sup> F. Hoffmeister, *supra* note 48, p. 446,447.

<sup>54</sup> See *Pauger v. Austria*, App. No. 16717/90, Judgement of 28 May 1997; F. Jacobs/R. White, *The European Convention on Human Rights* (2006), p. 488.

<sup>55</sup> See Address by L. Wildhaber, *The Coordination of the Protection of Fundamental Rights in Europe*, 8. September 2005.

### 2.3.1 The “equivalent protection” doctrine and the “manifest deficiency” test

As the “equivalent protection” doctrine was criticized after its establishment in the *Melchers* case and in *Matthews*, now the Court seems to have taken such criticism into account. The general approach, which would declare International or supra-national organisations immune from any supervision by the ECtHR was abandoned in favour of a more particular form of scrutiny through a mechanism of “rebuttable presumption”. However, in ruling that “equivalent protection” does not mean “identical” but rather “comparable” Strasbourg consequently permitted a lower standard within the compared legal system. The argument that an identical protection could run counter to the interest of international cooperation fails to respect the ECHR as a minimum standard of fundamental rights.

Trying to assess the meaning of the term equivalent protection, it is worth noting that the scope of application of the doctrine is only relevant in the context of actions of international or supra-national organizations like the EC, and where member states of those organisations are implementing acts without discretion.<sup>56</sup> The amount of equivalent protection requires “protection of fundamental rights both in the substantive guarantees provided and in the mechanisms controlling their observance”.<sup>57</sup> The question which therefore arises and the Court affirmed is whether the EC legal order comprises a human rights standard equivalent to that set forth in the ECHR. As the ECJ cannot rely on statutory norms containing human rights protection within the EC, one has to look to the Luxembourg jurisprudence citing the ECHR or findings of the ECtHR. Spielmann concluded in an analysis published in 1999, that “divergent interpretation is possible in certain areas such as European competition law, although the ECJ, in recent cases, seems to have taken a similar line to the European Court of Human Rights, referring not only to the Convention as the minimum standard, but taking into account the Strasbourg jurisprudence”<sup>58</sup>. A similar conclusion was made by Douglas-Scott in 2006, stating that the ECJ is more and more willing to refer to the ECHR and the ECtHR jurisprudence.<sup>59</sup> Also, Wildhaber has stated that the interrelation between both European courts’ jurisprudence is “demonstrating a clear commitment to ensure harmony”.<sup>60</sup> The danger of human rights double standards between Strasbourg and Luxembourg seems thus to be unlikely.

Considering the equivalent protection of fundamental rights between the ECHR and the EC, attention should be paid to the right of individual application. As the Court itself emphasises in its reasoning “it is true that access of

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<sup>56</sup> C. Costello, *supra* note 50, p. 107.

<sup>57</sup> *Ibid.*, p. 111.

<sup>58</sup> See D. Spielmann, *Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities* in P. Alston (ed.), *THE EU AND HUMAN RIGHTS*, p. 757, 777.

<sup>59</sup> See S. Douglas-Scott, *supra* note 21, p. 650. See, e.g., the cases: 36/78 *Rutili v. Minister for the Interior* [1975] ECR 1219; C-185/95 *Baustahlgewerbe v. Commission* [1988] ECR I-8417; C-13/94 *P v. S & Cornwall County Council* [1996] ECR I-2143; C-112/00 *Schmidberger v. Austria* [2003] ECR-I 5659.

<sup>60</sup> See L. Wildhaber, *supra* note 55, p. 5 highlighting the recent decision of the ECJ in the case *Pupino*.

individuals to the ECJ is limited”.<sup>61</sup> However, after mentioning the indirect benefits for individuals by acts of member states pursuant to their complementary role, the ECtHR concluded that, despite the lack of individual remedy, the protection of fundamental rights of the EC law is equivalent to that of the Convention. This reasoning was criticized by concurring opinions. The joint concurring Judges were not “entirely convinced” and stated that the “right of individual application is one of the basic obligations assumed by the States on ratifying the Convention. It is therefore difficult to accept that they should have been able to reduce the effectiveness of this right for persons within their jurisdiction on the ground that they have transferred certain powers to the European Communities”.<sup>62</sup> Concurring Judge Ress also expressed his concerns regarding individual remedies and said that Art. 230 TEC should be interpreted in the lights of Article 6 § 1 ECHR more extensively.<sup>63</sup> Both objections are well founded considering the fact that the absence of a direct individual control within the EC is indeed a challenge for the protection of human rights. It is therefore crucial how the “manifest deficiency” test will be practised by the Court in the future. Insufficient access to the ECJ remains a challenge where the Court may consider cases admissible.<sup>64</sup>

An assessment of the mechanism of “manifest deficiency” leads to the assumption that the standard for the protection of fundamental rights within the compared legal order can be lower than that set forth in the ECHR because the presumption of equivalent protection is only rebutted by a manifest deficiency and not a deficiency as such. Also, the threshold for rebutting the presumption of equivalence is vague, and the Court gives neither a definition nor any hint. At first glance three possible cases can be assumed: first, when there is no adequate review in the particular case because the ECJ has no competence, second when the ECJ has been too restrictive in its interpretation of individual access to it, or third, where there has been an obvious misinterpretation or misapplication by the ECJ of the guarantees of the Convention right.<sup>65</sup> Another case could be the ECJ aberrance from the settled case-law of the ECtHR. All this examples seems in fact likely to occur.<sup>66</sup> As the manifest deficiency test is held to work on a cases-by-case basis a general definition of its application is inappropriate with its purpose. It relies on Strasbourg to show that it is more than a catch phrase.

### 2.3.2 *Conclusion and perspective*

In conclusion, the Bosphorus case can be assessed as strengthening the human rights protection within the European system. Although the Court could not find a violation in the present case it is not to deny that the obvious

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<sup>61</sup> Bosphorus case, *supra* note 20, para. 162.

<sup>62</sup> Bosphorus case, Joint Concurring Opinion, *supra* note 20, para. 3.

<sup>63</sup> Bosphorus case, Concurring Opinion Judge Ress, *supra* note 20, para. 3.

<sup>64</sup> See C. Costello, *supra* note 50, p. 150.

<sup>65</sup> See Bosphorus case, Concurring Opinion Judge Ress, *supra* note 20, para. 3. See similar C. Costello, *supra* note 50, p. 115-118. Costello sees the inadequate access to the ECJ in the case of primary law, the IV Title of the TEC, the third pillar and the common foreign and security policy under of the EU.

<sup>66</sup> See for discussion on the accession, H.C. Krüger & J. Polakiewicz, *Proposals for a Coherent Human Rights Protection System in Europe*, 22 HRLJ (2001), p. 1, 3.

departure from the *Melchers* case is welcomed from a human rights aspect. One should also consider the time frame in which the Court delivered its judgement. It was at the time when the ratification of the EU Constitutional Treaty was still doubtful as France (in May) and the Netherlands (in June 2005) rejected the Constitution by referendum. As the Constitutional Treaty provides accession for the EU to the ECHR, the Court's reasoning in *Bosphorus* can be interpreted as strengthening its role regardless of the ratification and a possible accession.

It is not yet clear whether or not the Constitutional treaty will come into force and it is rather unlikely that it will happen without a significant change in its provisions. The accession of the EU to the ECHR is set forth in Article I-9 (2) and Article 17 of the (not yet into forth) Additional Protocol No. 14, which will amend Article 59 ECHR. These provisions overcome the lack of competence declared by the ECJ in its Advisory Opinion.<sup>67</sup> Nevertheless, an EU accession to the ECHR does not tackle all the problems regarding the relationship between the two, but nearly all of them. New questions, like the relationship between the ECHR and the Charter of Fundamental Freedoms as well as technical and legal issues of an accession will arise.<sup>68</sup> Under a new constitutional framework two solutions for the relationship between the ECJ and the ECtHR are proposed: first, a procedure whereby the ECJ invokes a preliminary ruling of the ECtHR and second, an ex-post control procedure where the ECtHR controls the ECJ pursuant to Article 34 ECHR.

### III. THE *JUSUF* CASE AND THE RELATIONSHIP BETWEEN THE EUROPEAN COMMUNITY AND THE UN LEGAL ORDER

The relationship between the EC and the UN legal order was, until the recent judgments of the European Court of first Instance (CFI), unclear. Both the ECJ and the ECtHR had, in earlier decisions avoided making statements on this complex interrelationship.<sup>69</sup> The first time the ECJ was confronted with implementation of UN Security Council resolutions was the *Bosphorus* case. Here, the ECJ did not consider the UN Security Council resolution when reviewing the actions of the Irish authorities by the yardstick of the EC's fundamental rights because the authorities had a margin of interpretation. The ECtHR mentioned the UN sanction regime in the same case only insofar as the resolution was pertinent to the interpretation of the EC Regulation as ruled by the ECJ.<sup>70</sup> In the *Dorsch* case, where the Iraqi sanction regime adopted by the UN Security Council caused financial damage to the applicant, Luxembourg did not have to rule on the lawfulness of the sanctions re-

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<sup>67</sup> With this provisions the Treaty overcomes the lack of competence which were declared by the ECJ in its Advisory Opinio. See: Opinion 2/49 on accession by the Community to the European Convention on Human Rights and Fundamental Freedoms [1996] ECR-I-1759; J. Kokott & F. Hoffmeister, Case report: Opinion 2/94, 90 AJIL (1996), p. 664.

<sup>68</sup> See for the relationship between both Article II-112 and Article II-113 of the Constitutional Treaty.

<sup>69</sup> See M.-G. Ketvel, *The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy*, 55 ICLQ (2006), p. 77.

<sup>70</sup> See *Bosphorus* case, *supra* note 20, para. 145.

gime, as this was not at issue. The ECJ also referred to its Bosphorus reasoning.<sup>71</sup>

In the *Jusuf* and *Kadi* cases the CFI had to answer the questions of which legal order, UN or EC, prevails and if the Court has competence to review the lawfulness of Security Council resolutions.<sup>72</sup>

### 1. The facts

Although the attacks of 11 September 2001 boosted anti-terror activities, global terrorism is not a new phenomenon and counter terrorism measures at UN level were installed before this date. Among these counter terrorism measures are financial sanctions regimes which form part of so called “smart sanctions”, intended to be directed at individuals, companies and organizations, or restrict trade with key commodities.<sup>73</sup> Established by the UN Security Council under Chapter VII of the UN Charter they aim to avoid negative humanitarian consequences for the civilian population or third countries by calling on member states, *inter alia*, to freeze funds or financial assets of suspected terrorists.

Recently two different types of financial sanctions regimes can be distinguished. The first one, the UN financial sanctions regime against persons and entities associated with Al-Qaida and the Taliban, is established by Security Council resolution 1267 of 15 October 1999. Secondly, a general UN financial sanctions regime against terrorism, created by resolution 1373 of September 2001. The regimes differ insofar as the latter resolution does not list persons or entities and instead allows member states to decide who is falling under the resolution. Resolution 1373 is accompanied by a Counter Terrorism Committee, a subsidiary-body pursuant to Article 29 UN Charter, which monitors the implementation by considering state reports.<sup>74</sup>

The regime the CFI had to examine was that established under resolution 1267 of October 1999. It is a very complex regime expanded after the attacks of the 11 September 2001 by Security Council resolutions 1333, 1390, 1452, 1526 and 1617.<sup>75</sup> A so called “Committee 1267”<sup>76</sup>—flanked by a monitoring group—determines which persons are to be listed. Therefore, UN member states have to give relevant information to the Committee on persons suspected to be associated with Usama bin Laden, Taliban or Al-Qaida, and the Committee updates its list on a periodic basis. Additional guidelines for the conduct of the Committee’s work were adopted in November 2002 contain-

<sup>71</sup> See Dorsch case, *supra* note 22, para. 88.

<sup>72</sup> The following review is only considering the *Jusuf* case as both judgements, *Jusuf* and *Kadi*, were delivered by the Court at the same day and contain the same reasoning.

<sup>73</sup> Other forms of targeted sanctions are, *e.g.*, trade restrictions on particular goods or services, travel restrictions, diplomatic constraints, cultural and sport or air traffic restrictions.

<sup>74</sup> See <http://www.un.org/sc/ctc/>.

<sup>75</sup> UN Doc. S/RES/1333, 1 December 2000; UN Doc. S/RES/1390, 16 January 2002; UN Doc. S/RES/1452, 20 December 2002; UN Doc. S/RES/1526, 30 January 2004; UN Doc. S/RES/1617, 29 July 2005. All UN documents are available at <http://documents.un.org/default.asp>.

<sup>76</sup> See <http://www.un.org/Docs/sc/committees/1267Template.htm>.

ing instructions for listing and de-listing of suspected persons.<sup>77</sup> General criticism of the Committee's work is directed at its decision making and de-listing procedure.<sup>78</sup> The criteria for getting listed are vague and decisive information is not always disclosed. Furthermore, the de-listing process is not a judicial but rather a political one as individuals or entities have to petition the government of residence to review the case. The government can make a request for de-listing to the Committee, which reach decision by consensus of its fifteen members. Since the adoption of Resolution 1452 in December 2002, exemptions to the freezing of funds and assets are possible for covering basic expenses like food, rent or medicine.<sup>79</sup>

The resolutions described above were put into effect in the EU by Common Positions<sup>80</sup> under the second pillar and by Council regulations<sup>81</sup> ordering the freezing of the funds of the persons and entities concerned under the first pillar. The EC regulations have direct effect in the member states pursuant to article 249 TEC and according to article 46 TEU the ECJ or CFI cannot review acts under the second pillar. Hence, the only possibility for individuals or entities to challenge the lawfulness of infringements caused by the implementation of the UN resolutions sanction list is an application of annulment of the regulation pursuant to article 230 (4) TEU.

*Ahmed Ali Jusuf*, residing in Sweden and *Al Barakaat International Foundation*, established in Sweden, are listed in the UN sanctions list and the annex list of the implementing EC regulation. Both lodged an application to the CFI, claiming that the CFI should annul the regulations on the grounds of the Council's incompetence to adopt the regulation. They also alleged a breach of their fundamental rights.

## 2. The decision

The Courts' reasoning can be divided into three main parts: First, the issue of whether the Council had competence to impose economic sanctions on individuals, second the status of UN law in EC law and third, the scope of the review of lawfulness and infringements of fundamental rights.

The applicants challenged the competence of the Council to adopt the regulation on the basis of article 60 and 301 TEC as the wording of both pro-

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<sup>77</sup> See Guidelines of the Committee for the conduct of its work, adopted on 7 November 2002 amended on 10 April 2003 and revised on 21 December 2005, available at: [http://www.un.org/Docs/sc/committees/1267/126\\_guidelines.pdf](http://www.un.org/Docs/sc/committees/1267/126_guidelines.pdf).

<sup>78</sup> See Report of the Special Rapporteur M. Scheinin on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/61/267, 16 August 2006, para. 30-41; M. Bultermann, *Fundamental Rights and the United Nations Financial sanction Regime: The Kadi and Jusuf Judgements of the Court of First Instance of the European Communities*, 19 LJIL (2006), p. 753, 756.

<sup>79</sup> See Un Doc. SR/RES/1454 at § 1(a), 20 December 2002; Section 9 (a) of the Guidelines, *supra* note 76.

<sup>80</sup> See Common Positions: 1999/727/CFSP, 15 November 1999; 2001/154/CFSP, 26 February 2001; 2002/402/CFSP, 27 May 2002; 2003/140/CFSP, 27 February 2003.

<sup>81</sup> See EC Regulation No. 337/2000, 14 February 2000; EC Regulation No. 467/2001, 6. March 2001; EC Regulation 881/2002, 27 May 2002; EC Regulation No. 1580/2002, 4 September 2002; EC Regulation 561/2003, 27 March 2003; EC Regulation 881/2002, 19 May 2003.

visions only authorised the imposition of measures against third states and not individuals. In its rejoinder the Council argued that the regulation was adopted on the grounds of article 60, 301 and also 308 TEC—hence in accordance with the principle of attribution of powers pursuant to article 5 TEC. The Court primarily clarified that measures based on article 60 and 310 TEC can be directed against individuals within the community as long as the core of the measures seek to reduce economic relations with a third state. As the impugned regulation implemented a UN Security Resolution not directed on a regime or a third party but against terrorism as such, the Court held that the EC regulation can not be based on articles 60, 301 TEC. Also article 308 TEC as such is not sufficient as this provision requires action by the community in the course of the operation of the common market objectives mentioned in article 2 and 3 TEC, whereas the impugned regulation adjusts aims of the Common Foreign and Security Policy under the second pillar of the EU (article 11 TEU). It then considered articles 60, 301 and 308 in combination—the legal basis relied upon by the Council. The Court reasoned that the requirement of consistency as laid down in article 3 TEU and the nature of articles 60, 301 as a bridge between the third and the second pillar as well as the fact that “states are not longer the only source of threats to international peace and security”, justifies a recourse to article 308 TEC.<sup>82</sup> Therefore, articles 60, 301, 308 TEC empower the EC to impose economic and financial sanctions against individuals and gave the Council competence to adopt the impugned regulation.

Before considering an alleged breach of fundamental rights, the Court had to consider the relationship between the UN and the EC legal order as the determination of the latter directly affects the scope of review of lawfulness. The CFI first clarified the relationship between the Charter of the UN and the domestic law of the UN member states. It deduced the primacy of the UN legal order on the one hand from article 27 Vienna Convention on the Law of Treaties (VCLT) as having the status of customary international law and, on the other hand, from article 103 UN Charter and article 30 VCLT as the decisive international treaty law. This primacy extends, pursuant to article 25 and the jurisprudence of the ICJ with regard to article 103 UN Charter, also to UN Security Council resolutions. Within the EC legal framework the primacy of UN law is ensured by articles 307 (1) and 297 TEC. Pursuant to article 307 TEC the rights and obligations arising for EC member states from agreements before the establishment of the EC are not affected by the ECT.

The Court then considered whether the EC itself is bound by UN decisions. This is not the case, as the EC itself is not a member of the UN. However, the Court draw an analogy to international trade law and its jurisprudence with regard to the former General Agreement on Tariffs and Trades of 1947 (GATT 1947). The EC is a member of the WTO but wasn't member of the GATT 1947. As the EC member states were members of the GATT 1947 but, according to article 133 TEC, did not have important competence in international trade law, the ECJ held in the *International Fruit Company* case that

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<sup>82</sup> Jusuf case, *supra* note 23, para. 164-170.

the EC is the successor to the rights and obligations of the member states.<sup>83</sup> Conferred this reasoning on the UN legal order, the Court stated that “in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community”.<sup>84</sup>

As a consequence of the primacy of the UN legal order with regard to the EC legal order the Court concluded that the review of UN Security Council resolutions fell, in principle, outside its competence. A competence for an indirect review of UN Security Council resolutions can, according to articles 25, 48 and 103 UN Charter and article 27 VCLT, neither be justified from a perspective of international law nor, pursuant articles 5, 10, 297 and 307 (1) TEC and article 5 TEU, from a perspective of EC law.<sup>85</sup>

Here, the court could have stopped its scrutiny of the case, but instead, and in by far the most dramatic part of the reasoning, it went on to an indirect review of the UN Security Council Resolution on the yardstick of *jus cogens*. The CFI considered *jus cogens* “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”. It refers to Article 53 and 64 of the VCLT, the Preamble of the UN Charter and the Advisory Opinion of the ICJ from 1996 on the Legality of the Threat or Use of Nuclear Weapons. The fact, that *jus cogens* norms have a binding effect on the bodies of the UN and especially the UN Security Council, concluded the Court from article 24 (2) UN Charter. But what is missing is a reasoning why the Court considered itself competent to review Security Council resolutions on the yardstick of *jus cogens*. However, in the last part of its reasoning, the Court examines whether fundamental rights within the ambit of *jus cogens* were infringed.

The applicants alleged a breach of three fundamental rights: the right to property, the right to a fair hearing and the right to an effective judicial remedy.

The Court first assessed whether the freezing of funds infringed the right to property.<sup>86</sup> Its reasoning is somewhat confusing as it omits a detailed examination of whether the right to property has the status of *jus cogens*. Instead, the Court mentioned article 17 of the Universal Declaration of Human Rights and hypothetically determined that even if the right to property can be considered *jus cogens* it is only “an arbitrary deprivation of that right that might, in any case, be regarded as contrary to *jus cogens*”.<sup>87</sup> However, the Court did not find an arbitrary deprivation as the freezing of funds was enacted by a Security Council Resolution to condemn international terrorism and the fight against terrorism is of significant importance. Also the freezing of funds does not affect the substance of the right to property but rather the use. Further, the Court paid attention to the several derogations and exemptions which the EC

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<sup>83</sup> Cases 21/72 to 24/72 International Fruit Company and Others, [1972] ECR 1219, para. 18.

<sup>84</sup> Jusuf case, *supra* note 23, para. 253.

<sup>85</sup> *Ibid.*, para. 260-276.

<sup>86</sup> Jusuf case, *supra* note 23, para. 285-303.

<sup>87</sup> *Ibid.* para. 293.

regulation provides under the Sanctions Committee in some circumstances. Therefore, the Court could not find that the right of property was infringed.

With regard to the right to be heard, the applicants alleged a breach in so far as they were not heard before the imposition of the sanctions and did not have the opportunity to defend themselves. The Court first distinguished between the right to be heard before the Sanctions Committee and the right to be heard by EC institutions before the adoption of the regulations. The Court dismissed the former by stating that this right is not provided by the UN Security Council Resolutions and the Court could also not find a norm of *jus cogens* which contains a right under these circumstances. Apart from that, the Court based its argument on the surprise effect which is inherent in such measures and the general procedure before the Sanctions Committee for delisting. Although the procedure before the Sanctions Committee is, as individuals have to call for a state's petition, a diplomatic one, the Court could not find that this restriction violates any fundamental right having status of *jus cogens*. The Court also dismissed the right to be heard before the adoption of the EC regulation by applying the jurisprudence of the ECJ. It reiterates its findings that the EC institutions had no discretion and therefore no power to install any mechanism when implementing the legally binding UN Security Council resolution.

Considering the right to judicial review<sup>88</sup> the Court stressed the fact that the applicants had invoked the CFI on the legal basis of article 230 TEC. However, as it is not the role of the Court to control the political assessment of the Security Council's measures taken in responsibility for the maintenance of international peace and security, the Court stated that there existed a lack of judicial remedy as the Security Council had not established an international court reviewing individual complaints against decisions by the Sanction Committee. This lacuna is, in the opinion of the CFI, not a breach of *jus cogens* as those higher rules of international law are not absolute in regard to the right of judicial review. Here, the Court mentioned article 8 of the Universal declaration of Human Rights and article 14 of the International Covenant of Civil and Political Rights (ICCPR) and the possibility of derogation at a time of public emergency set forth in article 4 ICCPR. The Court also refers to the doctrine of state immunity and the immunity of international organisations as an inherent restriction of the right to judicial review. In the context of the decision made by the Security Council, such a immunity follows in the view of the court from article 25 and 103 UN Charter. In conclusion, as none of the pleas were successful, the Court dismissed the application.

### 3. Appraisal

In the Jusuf case a European court, for the first time, ruled on the relationship between the UN legal order and the EC. It is a courageous decision and the fact that the CFI even considered the applicants fundamental rights on the yardstick of *jus cogens* is remarkable from a human rights perspective. Nevertheless, the reasoning remains in some parts unclear or sometimes silent about important aspects of human rights as well as EC law. Therefore, a critical examination follows, whereby the focus will be on four aspects: first, the

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<sup>88</sup> *Ibid.*, para. 332-347.

recourse the Court made in respect to article 308 TEC for justifying the imposition of individual sanctions, second the UN/EC relationship, third the way the Court ruled on the meaning of *jus cogens* and fourth, the survey of the applicant's fundamental rights.

### 3.1 *The legal basis*

The legal basis for the implementation of economic sanctions is, from a fundamental rights perspective, of great concern. Article 52 (1) of the Charter of Fundamental Rights of the European Union codifies, that "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms." As the Court itself stated, the imposition of economic sanctions on individuals under the present circumstances interferes at least with the right of property, the right to be heard and the right of judicial review. Not, perhaps, at the level of *jus cogens* but on a level the European system provides within the legal framework of the ECHR and the ECJ jurisprudence. The doctrine of reservation of statutory powers is a fundamental legal maxim.

The combination of articles 60, 301, 308 TEC for the legal justification of the economic sanctions on individuals overstretched the wording of these norms. Although the Court held the same in respect to articles 60, 301 and 308 alone, it justified the combination as a legal basis on the grounds of the threat of international terrorism and the role of non-state actors thereby. An act of EC institutions must be in compliance with the principle of attribution of powers pursuant to article 5 TEC. The EC is to large extent an economic community and has no power in the area of the fight against terrorism. The fight against terrorism is an objective of the Common Foreign and Security Policy and not part of the objectives of the EC as laid down in articles 2, 3 and 4. The reference the Court made to article 3 TEU is not fully convincing as it blurs the pillar construction of the EU.<sup>89</sup> The Court therefore should have paid more attention to the relationship between the EC and the EU. As the TEC does not contain a binding provision with regard to the requirement of consistency pursuant to article 3 TEU, one can argue that article 3 (2) TEU has abandoned the TEC implicitly, like article 6 (2) TEU did with regard to fundamental rights and therefore binds the EC.<sup>90</sup> As a result of the Jusuf decision, the strict distinction between EC law and EU law has, relatively speak-

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<sup>89</sup> Particularly in disagreement with the Courts reasoning is A. Garde, *Is it really for the European Community to implement anti-terrorism UN Security Council resolutions?*, 56 CLJ 2006, p. 281, 282.

<sup>90</sup> See S. Steinbarth, *INDIVIDUALRECHTSSCHUTZ GEGEN MASSNAHMEN*. The legal basis for the implementation of economic sanctions is, from a fundamental rights perspective, of great concern. Article 52 (1) of the Charter of Fundamental Rights of the European Union codifies, that "any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms." As the Court itself stated, the imposition of economic sanctions on individuals under the present circumstances interferes at least with the right of property, the right to be heard and the right of judicial review. Not, perhaps der EG zur Bekämpfung des internationalen Terrorismus, *Zeitschrift für Europäische Studien* 2/2006, p. 269, 276.

ing, become more similar to the Judgement the ECJ delivered in the *Pupino case*.<sup>91</sup>

Consent is the basis of its conclusion as it takes into account recent developments which the drafters of the treaties could not have foreseen. The fact that individuals can threaten international peace and security was also recognized by the Security Council when interpreting article 39 UN Charter.<sup>92</sup> The EC has to be in accordance with those findings. Furthermore, the ECJ had already expanded the economic sanctions regime on non-state actors as long as they are in control of a part of a country.<sup>93</sup> The last factor – the link to a third country—was now renounced.

It should also be mentioned that the CFI anticipates the European Constitution Treaty.<sup>94</sup> Article III-322 (1) of the Constitution Treaty adopts articles 60, 301 and 308 as it requires a link to a third country, whereas article III-322 (2) provides for economic and financial sanctions against individuals.<sup>95</sup>

### 3.2 *The relationship between EC/UN*

The distinction the Court made in its judgement between the legally binding effect of the Security Council resolution on member states and the EC itself is important because it clarifies the relationship within this multi-level framework.

Assessing the legally binding effect of Security Council resolutions on member states of the EC was not too difficult for the CFI and its appraisal of paramountcy pursuant to article 25 and 103 UN Charter is correct. Although the wording of article 103 UN Charter is ambiguous regarding to “obligations”, it is a stable opinion that this obligation encompasses Security Council resolutions.<sup>96</sup> It is also worth noting that Security Council resolutions are not,

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<sup>91</sup> There the ECJ ruled that third pillar legislation is definitely binding and that Member States are held to implement it correctly. The Case T-105/03, *Maria Pupino*, Judgement 16 June 2005.

<sup>92</sup> See, e.g., Un Doc. S/RES/748, 31. March 1992.

<sup>93</sup> See, e.g., the sanctions against União Nacional para a Independência Total de Angola (UNITA) in 1988, EC regulation No. 1294/1988, 28 July 1988.

<sup>94</sup> See M.-G. Ketvel, *The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy*, 55 ICLQ (2006), p. 77, 107.

<sup>95</sup> Article III-322 (1) and (2) is worded as follows:

(1) Where a European decision is adopted in accordance with Chapter II, provides for interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the Union Minister of Foreign Affairs and the Commission, shall adopt the necessary European regulations or decisions. It shall inform the European Parliament thereof.

(2) Where a European decision adopted in accordance with Chapter II so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph I against natural or legal persons and groups or non-state entities.

<sup>96</sup> See R. Bernhardt, in B. Simma (ed.), *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, Vol. II, Article 103, para. 9. For a different opinion see D. Bowett, *The Impact of Security Council Decisions to Dispute Settlement Procedures*, 5 EJIL (1994), p. 92.

unlike EC acts, “directly applicable” within the domestic legal order, but have to be implemented by an incorporating national act.<sup>97</sup>

This situation differs for the EC as it is not a member of the UN and can not be one pursuant to article 4 (1) UN Charter.<sup>98</sup> However, the analogy the CFI made in respect to its findings on international trade law leads to a subjugation of the EC legal order under the UN legal order in cases of binding acts of the UN Security Council.<sup>99</sup> The assumption that the EC is indirectly bound through its member states has to be distinguished from the question of whether the EC was held to implement the Security Council resolution by an EC regulation. This is to negate the fact that the EC has the competence to adopt an implementing regulation does not mean that the EC has to act.<sup>100</sup> But once the EC decided to act, it is bound by the Security Council resolution, because an abandonment of the resolution in the framework of a directly applicable EC regulation would violate the principle pursuant to article 10 TEC and obligations which the member states have in respect to the UN Charter. As a consequence of the judgment the CFI delivered, EC member states lose sovereignty once more, here in the field of the UN and economic sanctions. With regard to fundamental rights, such transfer of powers is of concern if the human rights standard within the two legal systems is not alike. It can lead to an erosion if the legal order which prevails rules on a lower standard. This aspect has to be borne in mind by considering the EC legal order and the national legal order as well as the UN legal order and the EC legal order.

### 3.3 *Jus cogens and the scope of review*

The Court concluded from the paramountcy of the UN Security Council resolution that it has no authority to review those acts directly. It drew the same conclusion with regard to a review of the EC implementation act as this would mean an indirect review of the Security Council resolution on the standard of the fundamental rights acknowledged in the EC. Here, the Court obviously differs from the *Bosphorus* findings of the ECJ on the ground that the EC institutions had no discretion when transferring the resolution into the EC legal order, as this was not the case in *Bosphorus*.

The most doubtful part of the decision is the fact that the Court found itself authorised to review the Security Council resolution on the yardstick of *jus cogens*. This right of review was derived by the CFI from the doctrine of *jus cogens* itself but without giving a reasonable argumentation. The assumption that the Security Council is bound by *jus cogens* does not answer the question of who has the power to control the compliance. Although this assumption

<sup>97</sup> See A. Cassese, *INTERNATIONAL LAW*, p. 232-234.

<sup>98</sup> In some resolutions the Security Council also addressed non-member states and international organisations to act in accordance with the provisions of the resolution. See S. Bohr, *Sanctions by the United Nations Security Council and the European Community*, 4 EJIL (1993), p. 256, 262.

<sup>99</sup> See for an detailed comparison between the reasoning in the *International Fruit Company* case on GATT 1947 and the UN system already P. Eeckhout, *EXTERNAL RELATIONS OF THE EUROPEAN UNION* (2004), pp. 437-439.

<sup>100</sup> See K. Schmalenbach, *Terrorismus vs. Normenbeorie: der Vorrang des UN-Rechts vor EU-Recht*, JURISTISCHE ZEITUNG 7/2006, p. 349, 352.

convinces as a conclusion, the reasoning the Court used in getting there is not. Therefore, it is worth focusing on the concept of *jus cogens* in general and on the question of whether Security Council acts are subject to judicial review.

### 3.3.1 *The concept of jus cogens*

The Report on fragmentation of international law of the Study Group of the International Law Commission (ILC) states that although the international legal system has a “horizontal” nature, “there is an important practice that gives effect to the informal sense that some norms are more important than other norms and that in cases of conflict, those important norms should be given effect to”.<sup>101</sup> To this “informal hierarchy of international law” belongs the concept of *jus cogens*, obligations *erga omnes* and article 103 UN Charter. In recent international law disputes the notion of *jus cogens* has been one of the most controversial issues along scholars and although it is not really a new concept, the scope of application and content is still unclear.<sup>102</sup> The CFI refers in its decision to article 53 and 64 of the Vienna Convention of the Law of Treaties. The UN Charter is a simple multilateral treaty and was adopted before the VCLT, thus the effect which the VCLT set forth in its provisions in regard to *jus cogens* are irrelevant in terms of the relationship to the UN Charter.<sup>103</sup> Therefore, the Court rightly confers in its judgement to the UN Charter itself and the status of the VCLT as customary international law.<sup>104</sup> The definition set forth in the VCLT on *jus cogens* is also contested and partially described as “very defective”.<sup>105</sup> Trying to determine the content of *jus cogens* one can neither find a general and abstract definition nor a list of appropriate examples.<sup>106</sup> The difficulties the CFI had while assessing whether the applicants right have such a status were obvious, and even the Court often fails to undertake such an attempt. However, the concept of *jus cogens* attracts wide interest along national and international Courts, particularly on the topic of state and head of state immunity in regard to universal jurisdiction.<sup>107</sup> Nev-

<sup>101</sup> See Report of the Study Group of the ILC, *supra* note 2, para. 327.

<sup>102</sup> See on the concept of *jus cogens* in general: L. Hannikainen, PEREMPTORY NORMS (*Jus Cogens*) IN INTERNATIONAL LAW (1988); A. Orakelashvili, PEREMPTORY NORMS IN INTERNATIONAL LAW (2006); S. Kadelbach, *Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms*, in C. Tomuschat and J.-M. Thouvenin (eds.), THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER; *Jus Cogens and Obligations Erga Omnes* (2006).

<sup>103</sup> See Report of the Study Group of the ILC, *supra* note 2, para. 367.

<sup>104</sup> Jusuf case, *supra* note 23, para 278, 279.

<sup>105</sup> See A. Cassese, INTERNATIONAL LAW, p. 201, citing J. de Aréchaga.

<sup>106</sup> See Kadelbach, *supra* note 102; D. Shelton, *Normative Hierarchy in International Law*, 10 AJIL (2006), p. 291, 302. See further: Draft Articles on State Responsibility and Commentary, article 40, para. 3; Draft on the Law of Treaties of the ILC, ILCY 1966, vol. II, p. 248. The Report of the Study Group of the ILC, *supra* note 2, para 375, confers the status of *jus cogens* to the following rights: prohibition of aggression; right to self-defence; prohibition of genocide; crimes against humanity; prohibition of slavery; prohibition of piracy; prohibition of racial discrimination and apartheid; basic rules of international humanitarian law.

<sup>107</sup> See for examples D. Shelton, *supra* note 106, p. 291, 305.

ertheless the ICJ, to which the Court referred to in its decision, was very reluctant in mentioning *jus cogens*. As ad hoc Judge Dugard states in his separate opinion in the case *Congo v. Rwanda* of February 2006: “this is the first occasion on which the ICJ has given support to the notion of *jus cogens*”.<sup>108</sup> So far, the ICJ ruled on obligation *erga omnes* but implied the existence of *jus cogens*.<sup>109</sup> The most famous decision regarding obligations *erga omnes* is the *Barcelona traction* case, where the ICJ held: “Such obligations [*erga omnes*] derive, for example, in contemporary international law from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”<sup>110</sup> Therefore it would have been possible for the CFI to confer it to other regional and international courts using the concept of *jus cogens*—quite frequently as far as human rights were concerned.<sup>111</sup> It could have conferred, for instance, on the ECtHR and its judgement in the case *Al-Adsani*. One may also wonder why the Court cited the phrase “intransgressible principles of international customary law” which the ICJ used in its Advisory Opinion of the Legality of the Threat or Use of Nuclear Weapons of 1996 considering international humanitarian law and not “elementary considerations of humanity”, the ICJ used in its Corfu Channel case in 1949.<sup>112</sup> The latter term fits better in terms of fundamental rights, which were at issue.

In sum it can be said that the way the CFI used the term *jus cogens* was too broad or, as Bultermann states “the Court seems to mix up international human rights, international humanitarian law, *jus cogens* and customary international law”.<sup>113</sup> It would have been desirable, if the CFI had explained its perception of the concept of *jus cogens* in a more detailed manner, especially with regard to international human rights. Such an attempt might have prevented the decision’s shortcomings regarding to the scrutiny of the applicants fundamental rights.

### 3.3.2 Security Council resolutions and the right to indirect review on its lawfulness

The CFI concluded that it is authorised to an indirect review of UN Security Council resolutions on the yardstick of *jus cogens* as the Security Council itself is bound. This reasoning is not fully convincing.

First, the court’s finding that the Security Council itself is bound by norms of *jus cogens* is in accordance with the accepted opinion along scholars

<sup>108</sup> Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), separate opinion of Judge ad hoc Dugard, para. 4

<sup>109</sup> The difference between *jus cogens* and obligations *erga omnes* is that latter determines only the scope of application to the “international community as a whole” whereas *jus cogens* norms have hierarchical superiority in a case of norm conflict. See Report of the Study Group of the ILC, *supra* note 2, para. 380.

<sup>110</sup> Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), ICJ Reports 1970, p. 33, para. 33.

<sup>111</sup> For an overview see case Congo v. Rwanda, separate opinion of Judge Dugard, *supra* note 108, para 5.

<sup>112</sup> Corfu Channel case (UK v. Albania), ICJ Reports 1949, p. 22.

<sup>113</sup> See M. Bultermann, *supra* note 78, p. 753, 769.

and international courts.<sup>114</sup> Here, the wording of Article 24 (2) UN Charter is a good starting point but the Court could have enforced its argument by referring to existing case law. For instance, Judge Lauterpacht had drawn the same conclusion in a separate opinion in the ICJ case concerning the *Application of the Genocide Convention between Bosnia Herzegovina and Yugoslavia*.<sup>115</sup>

However, this conclusion does not solve the problem of who has the power to review the compliance with *jus cogens*. As Shelton stressed: “One may suppose that each state, each Court and each international institution may determine whether or not this violation has occurred.” It is not inherent in the concept of *jus cogens*, that a breach is subject to judicial review.<sup>116</sup> This is especially true of the right to review the lawfulness of Security Council resolutions, as this organ has, pursuant to article 24 (1) UN Charter the primary responsibility for the maintenance of peace and security. It is often stated that a judicial review would jeopardize this important role and would run counter to the Council’s margin of appreciation. A detailed analysis of this issue would go beyond the scope of this essay, but two arguments are worth mentioning. First, the likelihood that the Security Council imposes obligations on its member states contrary to *jus cogens* norms is almost impossible. But even if it does, a judicial assessment of incompatibility would not jeopardize the authority of the Security Council as the norms of *jus cogens* “give legal form to the most fundamental policies or goals of the international community”<sup>117</sup>. Secondly, the fact that the Security Council appears increasingly as a “world legislator” calls for a comprehensive balance on the international community level. Therefore, the CFI approach is welcomed from a human rights perspective and one may wish it could rule similarly to the *Solange* jurisprudence of the German Constitution Court.<sup>118</sup> As such an attempt is incompatible with the paramouncy of the UN legal order, the decision of the CFI, however, clearly showed the lack of a fully-fledged human-rights review within the UN structure. This gap can obviously not be filled within the European legal order and therefore the yardstick of *jus cogens*, applied by the CFI, was a blunt sword. The role for a comprehensive judicial review is at the UN level itself, for instance, by the ICJ or—in future—an International Court of Human Rights.<sup>119</sup> As long as such a mechanism is not in force, the CFI decision serves to strengthen the recognition of international human rights and pays tribute to a concept of constitutionalism in international law. But the Court should

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<sup>114</sup> See, e.g., A. Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EJIL (2006), p. 59, 63.

<sup>115</sup> See case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, *Bosnia and Herzegovina v. Yugoslavia*, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, p. 440, para. 100. See also case *Congo v. Rwanda*, separate opinion of Judge Dugard, *supra* note 108, para. 8.

<sup>116</sup> See M. Payandeh, *Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte*, 66 ZaöRV (2006), p. 41, 57.

<sup>117</sup> See also case *Congo v. Rwanda*, separate opinion of Judge Dugard, *supra* note 108, para. 10.

<sup>118</sup> For a comparison see: A. Arnold, *UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz*, Die „Soweit-Rechtsprechung“ des Europäischen Gerichts erster Instanz, 44 AVR (2006), p. 201.

<sup>119</sup> For proposing the ICJ, see: A. Wessel, *The UN, the EU and Jus Cogens*, 3 IOLR 2006, p. 1, p. 5.

not have argued on the concept of *jus cogens* as this is too vulnerable and subverts the Courts authority. Rather, a reasoning along international law as such and a derivation of its competence to an indirect review of the resolution from the deficiency of the UN system and the importance of international human rights within the UN would have been consistent. As the UN Special Rapporteur on globalisation and its impact on the full enjoyment of human rights stated: “the primacy of human rights law over all other regimes of international law is a basic and fundamental principle that should not be departed from.”<sup>120</sup>

### 3.3.3 *Fundamental rights protected by jus cogens*

As a consequence of the application of the yardstick of *jus cogens* the Court could not find any infringement of the fundamental rights of the applicants. Neither the right to property, nor the right to a defence nor the right to effective judicial review were violated. As pointed out above, the Courts’ reasoning in regard to the fundamental rights is not persuasive as no detailed subsumption whether the right is part of *jus cogens* or not took place.

Considering first the right to property, the Court only mentioned article 17 (2) of the Universal Declaration of Human Rights. The Universal declaration of Human Rights is a resolution of the UN General Assembly, hence a non legally binding document. Here, the Court should have scrutinized whether the right to property has the status of customary international law.<sup>121</sup> It should have looked at the two Covenants and—as neither of the two acknowledge the right of property, to the Additional Protocol No. 1 of the ECHR and the jurisprudence of the ECtHR, the American Convention of Human Rights and the African Charter of Human and Peoples’ Rights. The freezing of funds and assets does also have a serious impact on human dignity, the right to food and the right to life. Instead, the Court relied on the assumption that the impugned measures were not inhuman and degrading treatment or an arbitrary deprivation of the right to property. The former term, inhuman and degrading treatment, is part of the definition enshrined in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The prohibition of torture is part of *jus cogens*.<sup>122</sup> The ECtHR also found that the destruction of possessions can constituted inhuman and degrading treatment.<sup>123</sup> While the CFI were right in concluding that the possible exemptions and derogations set forth in the guidelines of the UN Sanc-

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<sup>120</sup> See Sub-commission on the promotion and protection of human rights, UN Doc. E/CN.4/Sub.2/2000/13, 15 June 2000, para. 63, cited in D. Shelton, *supra* note 106, p. 291, 294.

<sup>121</sup> Cf. C. Tomuschat, *Primacy of United Nations Law: Innovative features in the Community Legal Order*, 43 CMLR (2006), p. 537, 547.

<sup>122</sup> See, e.g., S. Marks & A. Clapham, *INTERNATIONAL HUMAN RIGHTS LEXICON* (2005), p. 363; Judgement of the International Tribunal for the former Yugoslavia, Prosecutor v. Furundzija (Case IT-95-17/I-T), 10 December 1998, para. 153.

<sup>123</sup> The ECtHR had to rule on the destruction of houses during operations by security forces in Turkey and Romania. See *Belgin v. Turkey*, App. No. 23819/04, Judgement of 16 November 2000. See further F. Jacobs & R. White, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2006), p. 488.

tions Committee don't allow such an assumption, one might briefly consider the right to property.

The Courts' examination of the right to be heard lacks again to clarify the status of *jus cogens*. Instead, it widely applied the ECJ jurisprudence and left the yardstick of *jus cogens* it had imposed for the review of the applicants fundamental rights. In conclusion, the Court reconciled with the idea of diplomatic protection of the Sanctions Committee procedure.

In regard to the right to an effective judicial review it is conspicuous that the Court had difficulties to justify the infringement. First, it clearly stressed the existence of a lack of judicial remedy, as the Security Council had not established an international court reviewing individual complaints against decisions by the Sanction Committee. Afterwards, it undertook an attempt to justify this shortcoming in emphasising that this right is neither in the Universal Declaration of Human Rights nor in the ICCPR absolute guaranteed. Also some restrictions to that right are inherent in respect to the doctrine of state immunity and immunity of international organisations as recognized by the ECtHR in the case *Waite and Kennedy*.<sup>124</sup> In regard to UN Security Council resolutions, the Court rules, such jurisdictional immunity is based on article 25 and 103 UN Charter.

This reasoning is not maintainable. Again, the reference to the non legal binding Universal Declaration of Human Rights is in respect to *jus cogens* fruitless. The jurisdictional immunity of the UN is not based on article 25 and 103 UN Charter but article 105.<sup>125</sup> But more than that, the situation in the case *Waite and Kennedy*, the Court referred to, is not comparable with the present case.<sup>126</sup> In *Waite and Kennedy* the ECtHR ruled that there was no breach of the right to access to the court pursuant to article 6 ECHR as it granted an international organisation (European Space Agency) immunity from domestic jurisdictions because under their Convention the applicants had "reasonable alternatives" to protect effectively their rights under the ECHR. In the present case, such reasonable alternatives are not available for the applicants. The diplomatic procedure before the Sanctions Committee is far away from the right to effective judicial review as it depends on the willingness of the states to bring a complaint before the Sanctions Committee. It is not a "reasonable alternative" to individual complaints before an international court. Considering the political listing of terrorist groups, the Special Rapporteur on Human Rights while countering terrorism, M. Scheinin, stressed in his latest report of 2006: "If there is no proper or adequate international review available, national review procedures—even for international lists—are necessary".<sup>127</sup> Also the September 2005 World Summit Outcome adopted a resolution calling on the Security Council "to ensure that fair and clear procedures exist for placing

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<sup>124</sup> Case *Waite and Kennedy v. Germany*, App. No. 26083/94, Judgement of 18 February 1999.

<sup>125</sup> See also C. Tomuschat, *supra* note 121, p. 537, 550.

<sup>126</sup> Similar M. Bultermann, *supra* note 78, p. 753, 771.

<sup>127</sup> See Report of the Special Rapporteur M. Scheinin on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/61/267, 16 August 2006, para. 39.

individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions".<sup>128</sup>

### 3.4 Conclusion

The *Jusuf* case disclosed many shortcomings in both the UN and the EC legal order. If the Security Council wants to be accepted as a guardian for the maintenance of peace and security in the world, an adequate human rights protection within its own system seems necessary. The shift by the Security Council from abstract to concrete resolutions—through imposing economic sanctions on individuals reveals the necessity for a judicial control. As the UN legal order prevails, such a control should take hold on the UN level itself, e.g. in the Sanctions Committee. The case also raises the old debate about the judicial control of the Security Council.<sup>129</sup> During the UN reform process, such an approach was even not on the agenda.<sup>130</sup> Here, the only fitting institution seems to be the ICJ.

The CFI judgement is to be welcomed from a human rights perspective. This becomes obvious by comparing it to a similar judgment the High Court in England delivered in 2005.<sup>131</sup> In the same way, the High Court had to rule on the superiority of Security Council resolutions adopted under chapter VII. The High Court found the primacy of the resolution over Britain's human rights obligations but without considering a possible breach of *jus cogens*. Sure, as the *Jusuf* judgement disclosed, the concept of *jus cogens* is a idling cycle for a effective human rights control as the standard set fourth in this concept is very high. However, it is a useful concept to expand the scrutiny. In the *Jusuf* case, the CFI applied international human rights in general or fundamental rights acknowledged in the EC, both far away from being subject to the concept of *jus cogens*. In this way it strengthens the protection of human rights.

The most important question is whether the concept of *jus cogens* encompasses a right to judicial review. The CFI assumed such an inherent right, but without giving a detailed reasoning. Therefore, this approach seems untenable and the Court should have given a reasoned argument.

With regard to the protection of fundamental rights within the EC, the judgment sparked a discussion about whether the principle of succession can be extended to human rights treaty obligations of the EC member states. It is proposed that insofar as EC member states have transferred powers to the EC, the latter is bound by the member states obligations.<sup>132</sup> For the EC/UN relationship, however, such an extension is irrelevant as article 103 UN Charter also applies to human rights treaties like the ICCPR or the ECHR.

<sup>128</sup> UN Doc. A/RES/60/1, 16 May 2005, para. 109.

<sup>129</sup> See, e.g., B. Fassbender, *Quis judicabit? The Security Council, its powers and its legal control*, 11 EJIL (2005), p. 219.

<sup>130</sup> See N. Blokker et al., *UN-Reform Symposium*, 2 IOLR (2005), p. 361-436.

<sup>131</sup> The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State of Defence, Judgement of 12 August 2005, [2005] EWHC 1809.

<sup>132</sup> See R. Ahmed & I. de Jesús Butler, *supra* note 6, p. 788. The authors pointed out that under an international law perspective the principle of succession is broader than this one accepted under the ECJ jurisprudence as it does not require a exclusive competence by the EC/EU.

#### IV. PROSPECTIVE AND CONCLUDING REMARKS

A comparison of both cases analysed above implies two similarities. Firstly, both decisions anticipate regulations set forth in the European Constitution Treaty. The CFI, when relying upon the legal basis for the imposition of economic sanctions on individuals and the ECtHR by an indirect examination of EC acts regardless of accession. While the latter is welcomed from a fundamental rights perspective, legitimacy questions arise as the ratification process is still stagnating. Secondly, the ECtHR and the CFI both examined the judicial interactions critically and were not reluctant to strengthen the respective role they have to play. The ECtHR, by developing a manifest deficiency test and the CFI by confidently applying *jus cogens*. Both concepts are installed to ensure a non-erosion of fundamental rights within the legal order in question and have a similarity of structure to the *Solange* jurisprudence of the German Constitutional Court. In *Solange II*, the German Constitutional Court conditionally accepted the primacy of community law as long as the ECJ protects fundamental rights within the EC. This case was preceded by *Solange I* where it held the contrary. It is well accepted among speakers that this jurisprudence has strengthened the development of fundamental rights within the EC legal order. Regarding the cases mentioned in this article, the same conclusion can be made. The manifest deficiency test demands the EC Courts be more aware of the ECHR. Regarding the UN legal order, a direct comparison to the *Solange* jurisprudence fails because of the clearly regulated primacy. The CFI ruling, however, pointed out the obligations of the Security Council and drew a line to limits the Court will accept.

In regard to the UN legal order, the CFI called for an independent international court.<sup>133</sup> Such an “International Human Rights Court” seems necessary if the Security Council is adopting resolution directly against individuals. An effective judicial review within the UN Sanctions Committee can only be a provisional measure. Early this year a Unified Standing Treaty Body was proposed by the Inter-Committee Meeting.<sup>134</sup> Considering the individual complaints mechanism, the establishment of an International Human Rights Court could also encompass the possibility to resolve the ongoing problems within the UN Human Rights Monitoring System.

The *Jusuf* case is now on appeal before the ECJ and one might well be curious if the same conclusion will be drawn. In the event that the ECJ concluded no breach of the applicants fundamental rights, it might be presumed that the ECtHR will be invoked by the applicants on the same issue. Here, Strasbourg can hardly refer to its *Bosphorus* ruling but rather hold the EU member states collectively responsible.<sup>135</sup> It has to answer the remaining question on the relationship between the ECHR and the UN legal order. The moment of truth will also come for the “manifest deficiency test”, if the ECJ likewise avoids a full-fledged scrutiny of the applicants fundamental rights.

<sup>133</sup> Jusuf case, *supra* note 23, para. 340.

<sup>134</sup> See Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body, UN Doc. HRI/MC/2006/2, 22 March 2006.

<sup>135</sup> See F. Hoffmeister, *supra* note 48, p. 442, 448.