HOLDING THE UNITED NATIONS SECURITY COUNCIL ACCOUNTABLE
FOR HUMAN RIGHTS VIOLATIONS THROUGH DOMESTIC AND
REGIONAL COURTS:
A CASE OF ‘BE CAREFUL WHAT YOU WISH FOR’?

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I. BACKGROUND

A. The Legal Framework

The author has previously argued extensively that the competence of the United Nations Security Council (hereinafter the Security Council) to adopt measures in the interest of international peace and security is not unlimited under international law.¹ In addition, she has argued that due to the absence of a centralised international judiciary that has explicit competence to review the legality of Security Council decisions, domestic and regional courts will increasingly be confronted with requests to this effect in an era where international organs frequently take decisions with direct consequences for the rights of individuals.² In particular, such review may occur in cases where domestic or regional courts are confronted with challenges to domestic or regional measures that implement Security Council resolutions in a manner that results in the infringement of individual human rights. When reviewing these implementation measures, the domestic or regional courts may also be incidentally confronted with the question of whether the Security Council itself acted in accordance with international law when adopting the decision that ultimately resulted in the measure under debate.³

As far as the legal obligations to which the Security Council itself is bound under international law are concerned, she has argued extensively that when the Security

² De Wet and Nollkaemper, above n 1, 184.
³ Ibid 195. This issue is taken up again below in Section II(b)
Council creates subsidiary organs exercising (quasi) judicial functions, such organs have to function in accordance with basic standards of procedural justice; notably, the principles of independence, even-handedness and impartiality. This argument is distilled from public international law itself, namely from articles 24(2) of the Charter of the United Nations (hereinafter the Charter), read together with articles 1(1), 1(3) and 2(2) of the Charter. Article 24(2) of the Charter determines that in discharging its duties, the Security Council shall act in accordance with the purposes and principles of the United Nations, which, in the present context, are contained particularly in articles 1(1), 1(3) and 2(2).

Article 1(1) articulates the primary goal of the United Nations, namely the maintenance of international peace and security and the peaceful settlement of disputes in accordance with international law and procedural justice. Article 2(2) requires that the United Nations (and its organs) respects the principle of good faith, whereas article 1(3) obliges the organisation to protect human rights. According to the author’s line of argument, the principle of good faith as articulated in article 2(2) of the Charter is closely related to the concept of equitable (promissory) estoppel, which was initially developed in interstate relations, but also applies to international organisations as a general principle of law. Where a country or an international organisation creates the legitimate expectation that it will act in a certain manner, it is under a legal obligation to fulfil that expectation. More concretely, in light of the interaction of the principle of good faith with articles 1(1) and 1(3) of the Charter, the principle of good faith would estop the organs of the United Nations from behaviour that violates the rights and obligations flowing from these articles. As a result, the Security Council would be estopped from behaviour that violates the core elements of the human rights norms underpinning article 1(3) of the Charter.

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4 Art 7(2) of the United Nations Charter provides as follows: ‘Such subsidiary organs as may be found necessary may be established in accordance with the present Charter’.
5 The text of these and all other United Nations human rights documents cited in this article are available at http://www.unhchr.ch.
7 De Wet and Nollkaemper, above n 1, 173.
One can draw these core human rights elements from the human rights instruments developed under the auspices of the United Nations itself. These documents represent an elaboration of the Charter’s original human rights vision found in art 1(3) and articles 55-6 of the Charter. The human rights contained in these documents thus constitute the human rights that, under article 1(3), the United Nations must promote and respect. The United Nations is not a party to these instruments but was responsible for their creation, and also for the creation of an elaborate system for monitoring their implementation by member states. This created the expectation that the (organs of the) organisation itself should respect the core content of the norms which that same organisation propagates. The obligation to act in good faith thus obliges the member states, when acting in the context of an organ of the United Nations, to fulfil legally relevant expectations that are raised by their conduct with regard to international human rights standards adopted in the framework of the organisation. It also implies that those (permanent) members of the Security Council that have not yet ratified any of the above-mentioned Covenants are nonetheless bound to the core of the rights contained therein when acting on behalf of the organisation itself.

This line of argument acknowledges that the adoption of coercive measures (such as targeted sanctions) in the interest of international peace and security can result in the limitation of rights and obligations under international law – including human rights obligations – as long as the core content of the rights in question is respected. It thus rejects the notion that the Security Council can deviate completely from international human rights standards when adopting binding measures under Chapter VII of the Charter. It also rejects the notion that the Security Council is only bound by the very small number of peremptory norms of international law (jus cogens), a point which will

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9 See De Wet, above n 1, 2, and in particular Ch 4.
be revisited below. The above line of argument will form the background against which
the author will analyze recent regional and domestic decisions in Europe, in which courts
were called upon to review the legality of Security Council resolutions.

B. The Yusuf and Kadi Decisions

Central to the analysis are two (for relevant purposes identical) decisions of the Court of
First Instance of the European Communities (CFI), Yusuf and Al Barakaat International
Foundation v Council and Commission,\textsuperscript{10} and Kadi v Council and Commission,\textsuperscript{11} as well
as some elements of the subsequent appeal before the European Court of Justice (ECJ) in
Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and
Commission.\textsuperscript{12} The dispute has its roots in Security Council Resolutions 1267 of 15
October 1999\textsuperscript{13} and 1333 of 19 December 2000,\textsuperscript{14} and the measures subsequently adopted
within the European Union (EU) in order to implement them uniformly in all member
states.\textsuperscript{15}

Following the attacks on the United States’ embassies in Kenya and Tanzania, and
the suspected involvement of Osama Bin-Laden with those acts, the Security Council
adopted Resolutions 1267 (1999) and 1333 (2000). These resolutions, geared towards
pressuring the (then) \textit{de facto} Taliban regime in Afghanistan into extraditing Osama Bin-
Laden to the United States, authorised a Security Council Sanctions Committee (the \textit{Al-
Qaeda} Committee) to identify and blacklist individuals and entities associated with the
Taliban, Osama Bin-Laden and \textit{Al-Qaeda} (the \textit{Al-Qaeda} sanctions regime).\textsuperscript{16} The assets
of blacklisted individuals and entities were to be frozen by their state of residence until
such time as the Sanctions Committee might remove them from the list. Since the attacks
on the United States of 11 September 2001, the \textit{Al-Qaeda} Committee has been very

\textsuperscript{10} Yusuf and Al Barakaat International Foundation v Council and Commission (T-306/01) [2005] ECR
II-3353.

\textsuperscript{11} Kadi v Council and Commission (T-315/01) [2005] ECR II-3649; Hereinafter reference in relation to
the CFI’s decision will only be made to the relevant paragraphs of the (‘Kadi’).

\textsuperscript{12} Kadi and Al Barakaat International Foundation v Council and Commission (C-402/05 P and C-
415/05 P), judgment of 3 September 2008 (‘Kadi (ECJ)’).

\textsuperscript{13} SC Res 1267, 39 ILM 235 (2000).

\textsuperscript{14} SC Res 1333, 40 ILM 509 (2001).


active in expanding the list of targeted persons and entities. Although following the fall of
the Taliban regime the Security Council lifted the sanctions against Afghanistan in
Security Council Resolution 1390 of 16 January 2002, sanctions have been maintained
against the Taliban, Osama Bin-Laden and Al-Qaeda. Neither Resolution 1267 (1999)
nor subsequent resolutions explicitly provide independent judicial review for the
individuals and entities targeted. Instead, the 1999 resolution merely provides for a
political procedure in the form of de-listing, a point which will be revisited below in
Section II(c)(ii).

The EU implemented Resolution 1267 and subsequent resolutions through
Common Positions and Regulations in order to ensure uniform application in all member
states. The respective Regulations had direct effect, and as they did not explicitly
provide for an independent review mechanism, the issue of the right to a fair trial was
bound to arise before the CFI. In its decision of 21 September 2005, the CFI concluded
that it did not have any (extensive) power to review whether blacklisting resulted in the
violation of fundamental human rights, including the right to a fair hearing. The Court
saw itself restricted to assessing whether the Security Council had acted in accordance
with peremptory norms of international law (jus cogens), ultimately concluding that no
such violations had occurred.

Subsequently on appeal, the ECJ reached the opposite jurisdictional conclusion,
namely that the Community judicature had the right to review the blacklisting, and inter
alia that the right to judicial protection guaranteed by EU law was violated in this case.
Even so, the CFI’s reasoning remains highly relevant. The ECJ’s conclusion that the
blacklisted individuals and entities had the right to a fair hearing at EU level was based
exclusively on EU law, leaving the question of whether or not the Security Council had
acted in accordance with international law unanswered.

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and Yusuf Judgments of the Court of First Instance of the European Communities’ (2006) 19 Leiden
19 See, eg, Common Position 2002/402, above n 15,1 and Regulation 881/ 2002, above n 15, 2; See also
Bulterman, above n 18, 758.
20 Kadi, above n 11, [316], [322], [326]; See also Advocate General Poiares Maduro, ‘Advocate
November 2008.
This means that the ECJ did not follow the same methodology as the CFI, which attempted to resolve the matter on the basis of international law itself. Due to this difference in approach, the validity of the CFI’s arguments pertaining to international law have not been formally refuted. This applies in particular to the CFI’s reasoning on whether the Security Council violated (peremptory) obligations of international law. As a result, it remains unclear whether a decision to grant the affected individuals access to an independent tribunal at the EU level (and on the basis of EU law) would result in a violation of binding Security Council resolutions. If this were the case, it would trigger the international responsibility of the respective member states, which could lead to countermeasures by the Security Council.

The answer to the question of whether state responsibility could be triggered in this fashion would, in turn, depend on whether the Security Council itself acted in accordance with international law when requiring states to implement sanctions in a manner that effectively suspends the right to a fair trial of those affected by the sanctions regime. According to the CFI’s reasoning, the Security Council acted in accordance with international law when suspending this right. This reasoning – which was not addressed at all by the ECJ – has subsequently been adopted by domestic courts in Switzerland\(^{21}\) and the United Kingdom.\(^{22}\) These examples of the potential spill over effect of the reasoning of domestic and regional courts further underline the importance of analysing the reasoning of the CFI.

This chapter challenges the CFI’s reasoning on the basis of the legal framework outlined above in Section I(a). What follows will focus on three questions of public international law which were of central importance to the CFI’s decision. The first concerns the relationship between the primacy rule in article 103 of the Charter and the purposes and principles of the Charter, as well as peremptory norms of international law. The second relates to the competence of the courts of the European Communities under international law to review Security Council decisions, while the third concerns the implications of the right to a fair trial for the Security Council. Although the right to a fair trial

hearing was not the only fundamental right affected by (domestic implementation of) Resolution 1267 (1999) and subsequent resolutions, it was arguably the most deeply affected. In addition, it constitutes a procedural prerequisite for the effective enforcement of all other fundamental rights that were affected by the sanctions regime. As a result, it ought to have a prominent place in the subsequent analysis. Following this discussion, the author will draw some general conclusions from the case law in order to illustrate the (role of domestic courts in the) development of a hierarchy of norms within international law itself.23

22 See R (on the application of Al-Jedda) v the Secretary of Defence, [2005] EWHC 1809. For subsequent developments on appeal before the House of Lords, see n 107 below and accompanying text.

II. CHALLENGING THE REASONING ON THE BASIS OF PUBLIC INTERNATIONAL LAW

A. The Relationship Between Article 103 and Article 24 of the Charter and Jus Cogens

The CFI’s analysis of the Charter framework reflects an insufficient appreciation of the complexities pertaining to the scope of article 103 of the Charter and its relationship with the obligation to respect the Charter’s purposes and principles, as articulated in article 24. In addition, its analysis of the relationship between the Charter purposes and principles and jus cogens norms is confusing, as is its identification of the norms which have acquired jus cogens status.24

The CFI correctly stated that the primacy rule laid down in article 103 of the Charter extends to decisions contained in resolutions of the Security Council, in accordance with article 25 of the Charter which obliges members of the United Nations to accept and carry out the decisions of the Security Council.25 However, the CFI failed to deal extensively with the question of whether the primacy rule also applies in instances where the Security Council itself acts illegally, for example, by violating human rights obligations to which the Security Council itself is bound. Although a disputed point, this author has argued elsewhere that article 25 of the Charter would only apply to decisions which are intra vires. As a result, the primacy rule contained in article 103 would be inapplicable to decisions taken ultra vires. Thus, states would be under no obligation to implement such decisions.26

A question which comes to mind in this context is how to reconcile the Security Council’s own human rights obligations under international law with the presumption of legality attached to Security Council resolutions.27 In light of this presumption, which

24 See also Bulterman, above n 18, 764; Orakhelashvili, above n 23, 149.
26 See De Wet and Nollkaemper, above n 1, 186-7; See also Bulterman, above n 18, 754.
follows from the Security Council’s special role in the maintenance of international peace and security, one cannot lightly assume that a Security Council resolution does not conform with its human rights obligations. The most logical way to harmonise the different obligations would be to interpret Security Council decisions in a human-rights-friendly manner. This would *inter alia* imply that a limitation or derogation from human rights norms cannot be assumed unless explicit. This approach would mean interpreting Resolution 1267 as necessarily (implicitly) granting States discretion to enforce the sanctions regime in accordance with human rights standards, even though this is not self-evident on the face of the resolution.

In this context the recent *Möllendorf* decision of the ECJ provides an interesting example. This request for referral to the ECJ arose from unforeseen third party property rights consequences of the *Al-Qaeda* sanctions regime. A contract of sale concerning real property was concluded between the *Möllendorfs* (the sellers) and buyers who were subsequently blacklisted under the *Al-Qaeda* sanctions regime. At the time of the blacklisting the buyers were already in possession of the immovable property and the sellers had already received (and spent) the sales price. However, ownership had not yet transferred since the transaction was not yet registered in the Land Register as required by German law.

Since registration was no longer possible after the blacklisting of the buyers, the question arose whether the sales transaction had to be reversed. This would have been the normal procedure under German civil law in cases where a legal impediment arises against the transfer of property. The sellers objected, arguing that rescission of the contract would disproportionately limit their right to property. The ECJ supported this position to the extent that it required the national authorities to apply German contract

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30 Gerda *Möllendorf & Christiane Möllendorf-Niehuus* (C-117/06) [2008] 1 CMLR 11(*Möllendorf* decision).
31 Ibid [24.]
32 Ibid [34], [52].
33 This money would then have to remain in a frozen account for as long as the buyers remained blacklisted; See Ibid [70].
law in a manner that gave maximum effect to the EU protection regime for fundamental rights. It is important to note that the legality of the sanctions regime itself was not at stake in this case. Instead, it concerned the scope of the EU implementation measures and in particular their impact (‘collateral damage’) on the rights of third parties under EU law. Even so, the case provides an interesting example of the technique of human-rights-friendly interpretation, in the sense that elements of proportionality and human rights protection were interpreted into a sanctions regime. Neither Resolution 1267 and subsequent resolutions, nor the EU implementation measures explicitly provide for such protection in instances where the sanctions regime affects the rights of unlisted third parties. Even so, the ECJ was prepared to read it into the sanctions regime.

If one considers the approach of the CFI in the Yusuf and Kadi decisions in light of the aforementioned analysis, it appears that the CFI did not succeed in striking a balance between the presumption of legality attached to Security Council resolutions and respect for human rights obligations. The CFI essentially concluded that the Security Council acted intra vires, but this conclusion was reached in a manner that was confusing both in relation to its interpretation of the purposes and principles of the Charter, as well as its treatment of jus cogens. The CFI acknowledged that article 24(2) of the Charter obliges the (organs of the) United Nations to respect the purposes and principles of the Charter, which include respect for human rights and fundamental freedoms. However, at the same time the CFI equated the human rights standards contained in the purposes and principles to jus cogens obligations, and in this fashion severely limited their scope. This is rather perplexing, since the purposes and principles are drafted in broad language. In addition, the concept of jus cogens did not yet exist at the time the Charter was

34 Ibid [76], [81].
35 Some might question whether the situation of third parties who are indirectly affected by the sanctions regime would at all be comparable with that of persons forming the direct object of the sanctions regime. However, this author submits that the Möllendorf-case remains an interesting example of how a court can read human rights protections into a sanctions regime.
36 Kadi, above n 11, [228]-[9]; See also Nada, above n 21, [5.4], [7].
37 For the very restricted list of jus cogens norms generally recognised as such, see International Law Commission, Report of the International Law Commission, UN GAOR, 61st sess., Supp No 10, UN Doc A/61/10, 421. Cf Orakhelashvili, above n 23, 184 who defines jus cogens in a much broader fashion.
adopted, as it was only introduced into positive law through article 53 of the Vienna Convention on the Law of Treaties of 1969. Therefore, it seems unconvincing to reduce the scope of the purposes and principles of the Charter to a narrow category of norms, the existence of which was only formally acknowledged at a much later point in time. One should also consider the fact that the concept of *jus cogens* was first and foremost introduced to regulate interstate treaties, begging the question of whether it even applies to decisions of international organisations and their organs. Current legal doctrine tends to answers this question in the affirmative, as anything else would allow states to circumvent their most fundamental obligations by creating an international organisation. Nevertheless, one would have expected the CFI to address this issue directly.

One can further criticise the CFI for its over inclusive categorisation of *jus cogens* norms, considering both the prohibition of arbitrary deprivation of property and the immunity of the United Nations (including decisions of its organs) within the corpus of *jus cogens* obligations. At no point does the CFI indicate any authority for these conclusions. One should keep in mind that neither the International Covenant for Civil and Political Rights (ICCPR) nor the International Covenant for Economic, Social and Cultural Rights (ICESCR) guarantees the right to property. Although the right was (subsequently) included in the three regional human rights instruments, it remains

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38 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969 1155 UNTS 331 (entered into force 27 January 1980). Article 53 determines that: ‘A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’

39 The CFI assumed that this was the case in the *Kadi*, above n 11, [226].

40 See E de Wet, ‘The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary Law’ (2004) 14 European Journal of International Law 1; See also Tomuschat, above n 25, 546.

41 *Kadi*, above n 11, [242], [288]. The term arbitrary is rather perplexing in itself, as it remains unclear what the CFI means by this.


44 Tomuschat, above n 25, 547.

contested whether it has acquired the status of customary international law, let alone *jus cogens* status.\textsuperscript{46} If the right to property itself has not acquired *jus cogens* status, it seems unconvincing to argue that the arbitrary deprivation of the right to property has done so.

Similarly, the immunity enjoyed by the United Nations, as specified in article 105(1) of the Charter,\textsuperscript{47} does not belong to the corpus of *jus cogens* norms. The article was intended to protect the organisation against direct action in domestic (or regional) courts, which must be distinguished from the case at hand, which concerns the incidental review of a binding decision taken by an organ of the United Nations.\textsuperscript{48} In essence therefore, the CFI’s analysis of the human rights obligations binding on the Security Council is both under and over inclusive. It is under inclusive insofar as the CFI reduces the purposes and principles of the Charter to *jus cogens* obligations. However, by simultaneously attaching *jus cogens* status to obligations which are not recognised as such in state practice, the CFI’s analysis is over inclusive.


Insufficient reasoning also plagues the CFI’s conclusion that it would not have the right to review incidentally binding Security Council resolutions.\textsuperscript{49} First, the CFI failed to explain if and to what extent the existing practice of the CFI and ECJ in this regard, as well as those of other (international) courts and tribunals, would be relevant to its decision. Second, it failed to explain why an exception to its ‘non-competence’ would exist in relation to peremptory norms of international law. At this point it is necessary to mention that similar deficits plague the reasoning of the ECJ. Although its decision turned on EU law, the ECJ did note in rather categorical terms that the Community judicature did not have the jurisdiction to review incidentally the lawfulness of a decision adopted by an international body. Moreover, the ECJ was unwilling to accept that any

\textsuperscript{46} Tomuschat, above n 25, 547.

\textsuperscript{47} The basis is not arts 25, 103 of the Charter as suggested in *Kadi*, above n 11, [288]; See also Tomuschat, above n 25 550.

\textsuperscript{48} See also Bulterman, above n 18, 772.

\textsuperscript{49} *Kadi*, above n 11, [221], [225]-[6]; See also *Nada*, above n 21, [6.2].
exception existed in relation to the compatibility of the international decisions with peremptory norms of international law.\textsuperscript{50}

Before engaging in analysis of these points, it is worth recalling that when conducting incidental review, domestic and regional courts may be confronted with several different dimensions of a hierarchy of norms. The first concerns the more traditional question of the standing of international law in the domestic legal order, whereas the second (and for the purposes of this article more relevant) dimension concerns the existence of a normative hierarchy within international law itself. Incidental review implies that the regional or domestic court is first of all concerned with reviewing or interpreting domestic or regional implementation measures – a competence which is regulated by its own domestic or regional legal order. This legal order may also give an indication of the extent to which international law overrides domestic law. From the perspective of public international law, the dominant view is that international law takes precedence over all domestic law, including states’ constitutions.\textsuperscript{51} Even so, it remains debatable whether this position corresponds with state practice. The relationship between international and constitutional law is not always (explicitly) clarified in domestic Constitutions and where it is clarified, the picture is varied in terms of whether international law takes precedence. These conflicting positions are illustrated by the \textit{Kadi} case itself, since the CFI determined that international law overrides EU law, whilst the ECJ gave preference to fundamental principles of EU law, which it treated as a municipal legal order.\textsuperscript{52}

In those instances where the domestic or regional court gives preference to international law, it will also engage in an interpretation of international law. This, in turn, may lead to a domestic or regional court reviewing whether a hierarchy exists amongst different international obligations. In these instances the question arises if and to what extent such a review is permitted under international law. In the European contexts, such review has become common where the relationship between states’ human rights

\textsuperscript{50} \textit{Kadi} (ECJ), above n 12, [287].
\textsuperscript{51} See, eg, \textit{Treatment of Polish Nationals and Other Persons of Polish Origin in the Danzig Territory (Advisory Opinion)} [1932] 1932 PCIJ (Ser A/B) No 44.
\textsuperscript{52} \textit{Kadi} (ECJ), above n 12, [285], [308], [316].
obligations under the European Convention of Human Rights (ECHR)\textsuperscript{53} and other treaty obligations is concerned.\textsuperscript{54} The fact that neither the European Court of Human Rights (ECtHR) nor the respective domestic courts were explicitly set up with the purpose to review different sets of international obligations against one another, has not prevented them from developing this competence in practice. Less common and more controversial is the incidental review of Security Council obligations by domestic and regional courts. This review is complicated by the fact that the courts are not necessarily confronted solely with the balancing of different treaty obligations pertaining to the same state. They can also be called upon to determine the legality of the acts of an international organisation, which is itself a product of one of the treaties in question.

Recent practice of the Community judicature indicates that one can identify three situations of incidental review of Security Council resolutions. In the first scenario, the ECJ had to interpret the scope of the EU’s implementation measures, and incidentally that of the relevant Security Council resolutions. However, in this situation neither the legality of the measures nor that of the Security Council resolutions were questioned. In the second scenario, the ECJ was confronted with challenges to the legality of the implementing measures, but could avoid an incidental review of the legality of the respective Security Council measures. In this instance the Security Council measures were formulated in broad terms, as a result of which those responsible for their implementation had discretion as to how to achieve the desired result. The third scenario concerned disputes about the legality of measures of implementation which incidentally also touched on the legality of the respective Security Council resolutions. This was the case where the relevant Security Council resolutions were formulated in narrow terms which did not prima facie allow the member states (or the EU) any discretion in relation to their implementation. As far as the first two scenarios are concerned, the ECJ has not hesitated to exercise its competence in the past, even though such review was not

\textsuperscript{53} European Convention on Human Rights, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

\textsuperscript{54} For example, both the European Court of Human Rights (ECtHR) and domestic courts have been confronted with the question of whether the obligation not to subject someone to cruel, inhuman and degrading punishment in accordance with art 3 of the ECHR, see above n 53, would override the obligation to extradite a suspect in accordance with an extradition treaty to which a state is party. See, eg, Soering v The United Kingdom, 11 EHHR 439 (1989); Netherlands v Short, Hoge Raad 30 March 1990, [7.4], excerpted and translated in (1990) 29 International Legal Materials 1375.
provided for under the Charter. This suggests that international law has developed in a manner that permits domestic and regional courts some discretion in interpreting or even reviewing Security Council resolutions.

An example of the first scenario is found in the Bosphorus decision.\(^{55}\) In that instance, the ECJ had to determine the scope of EC Regulation 990/993\(^{56}\) and, in particular, whether it authorised the impoundment by the Irish authorities of two aircraft leased to the applicant by the former Yugoslav airline JAT. As the respective EC Regulation implemented a Security Council sanctions regime against the former Federal Republic of Yugoslavia, the ECJ also had to determine the scope of Security Council Resolution 820 of 17 April 1993.\(^{57}\) The ECJ also took the purpose of the sanctions regime into account when concluding that the limitation of the applicant’s right to property under international law (he effectively lost three years of a four year lease) was proportionate under the circumstances.\(^{58}\) However, neither the legality of EC Regulation 990/93 nor the sanctions regime from which it resulted was in question.

The second scenario is exemplified in the Segi case.\(^{59}\) In this instance the ECJ reviewed the EU measures implementing Security Council Resolution 1373 of 28 September 2001,\(^{60}\) which *inter alia* requested United Nations member states to freeze all funds and other financial assets or economic resources of those involved in terrorist activities.\(^{61}\) In order to ensure consistent implementation of this resolution across member states, the EU implemented this resolution through a series of measures which *inter alia* resulted in the blacklisting of the Basque organisation Segi.\(^{62}\) This organisation filed an

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\(^{55}\) Bosphorus Hava Yollari Turzm ve Ticaret AS v Minister of Transport, Energy and Communications, Ireland and the Attorney General (C-84/85) [1996] ECR I-3953; See also the Möllendorf decision, above n 30.


\(^{58}\) Bosphorus decision, above n 55, [26]; See also Bulterman, above n 18, 767.


\(^{60}\) SC Res 1373, 40 ILM 1278 (2001).

\(^{61}\) See also Bulterman, above n 18, 757.

action for damages arising from the implementation measures, on the basis that those measures violated their international right to judicial protection in accordance with article 6(2) of the Treaty On European Union (EU Treaty). In their view, the violation consisted in the fact that they had no means of challenging Segi’s inclusion on the blacklist, due to the nature of the Common Positions that were adopted under the so-called third pillar of the EU Treaty. Effectively, this claim also constituted an indirect challenge to the validity of the relevant Common Position.

In reviewing the matter and concluding that EU law indeed provided for an avenue of legal protection in this case, the ECJ emphasised the applicants’ right to a remedy and access to a court of law. However, it is important to note that Security Council Resolution 1373 clearly left states the discretion to implement the obligations contained therein in accordance with international human rights obligations. For example, it did not identify the persons to be blacklisted in a manner that appeared to suspend any avenue of (domestic) legal protection for such individuals. As a result, the question of whether the respective implementing measures were in accordance with the EU standards of legal protection could be addressed without raising the issue of the possible illegality of Security Council Resolution itself.

The Yusuf and Kadi cases represent the third scenario mentioned above. In these instances the CFI and ECJ were confronted with a request for an annulment of EC regulations. However, due to the manner in which these regulations implemented a Security Council sanctions regime, the request for annulment unavoidably raised issues concerning the legality of the Security Council measures. As these regulations were near literal transpositions of the relevant Security Council resolutions, any review of the

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64 Segi decision, above n 59, [52].
65 Ibid [51]-[2], [54].
66 See in particular Segi, above n 59, [57] (Advocate General Mengozzi); See also See also Bulterman, above n 18, 757.
 substance of the challenged regulations necessarily amounts to indirect review of the relevant Security Council measures.\textsuperscript{67}

It is surprising that the both the CFI and the ECJ reached the conclusion about their own lack of competence to review the legality of Security Council resolutions adopted under Chapter VII of the Charter in a rather categorical fashion.\textsuperscript{68} One would have expected these courts to justify their power to both review the scope of Security Council decisions and balance these obligations against other international (human rights) obligations of states, while distinguishing this from the power to review the legality of such decisions, a power which they did not have. In addition, both the CFI and ECJ could have considered the potential relevance of previous, well-known international decisions that confirmed the power of the respective international courts or tribunals to review the legality of Security Council resolutions. The first such case concerned the Namibia opinion of the International Court of Justice (ICJ),\textsuperscript{69} in which the ICJ confirmed the power of the General Assembly and the Security Council to terminate a League of Nations mandate. In doing so, the ICJ effectively reviewed the legality of binding Security Council resolutions terminating South Africa’s mandate over (then) South-West Africa. Whilst acknowledging that it was not a court of appeal, the ICJ nonetheless – in the exercise of its judicial function – considered the validity of the respective Security Council resolutions and concluded that they were adopted in accordance with the Charter.\textsuperscript{70}

Similarly, in the Tadić decision,\textsuperscript{71} the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), itself a sub-organ of the Security Council, reviewed the legality of the Chapter VII resolution by means of which the Security Council created the ICTY. Relying inter alia on the Namibia opinion of the ICJ, the Appeals Chamber concluded that it had the inherent jurisdiction to determine its own jurisdiction, which effectively amounted to the competence to review the legality of the relevant Security Council resolution ‘in the exercise of its judicial function’. Of course

\textsuperscript{67} Tomuschat, above n 25, 543.
\textsuperscript{68} A similar approach is found in Nada, above n 21, [6.2].
\textsuperscript{70} See also Tomuschat, above n 25, 545.
one has to acknowledge that the Community judicature is not in any way bound to these decisions. What is more, the nature of the ICJ and the ICTY is very different from that of CFI and ECJ. Whereas the two former courts are international institutions, the CFI and ECJ, given their centralised nature, arguably bear more resemblance to municipal courts. Even so, one should keep in mind that all of these institutions are independent judicial bodies, none of whose statutes explicitly provide for the competence to review the legality of Security Council resolutions. A coherent and systematic approach to international law would have required the CFI and ECJ to explain whether this fact has any bearing on their own competence and if so (or if not), why (not). Moreover, if one accepted that no power of review existed, one would also have expected an explanation as to why an exception would exist in relation to *jus cogens* norms. In this instance the ECJ was more consistent than the CFI, since it rejected the CFI’s submission that an exception existed in relation to peremptory norms of international law.

C. The Right to a Fair Hearing

1. The Content of a Right to a Fair Hearing

As indicated in Section I, the human right that was arguably restricted most severely by the implementing measures pertaining to Resolution 1267 and subsequent resolutions, is that of the right to a fair trial. The substance of this right (of which the core content is binding for the United Nations), is defined in article 14(1) of the ICCPR. That article provides that, in the determination of any criminal charges against individuals, or of their rights and obligations in a [civil] suit of law, everyone is entitled to a fair and impartial hearing by a competent, independent and impartial tribunal established by law.

Although there has not been much dispute about the fact that Resolution 1267 and subsequent resolutions affect the civil limb of article 14(1), the question of whether the freezing of assets undertaken in accordance with these resolutions constituted a sanction

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71 *Prosecutor v Dusko Tadić a/k/a “Dule” (Decision on the Defence Motion for Interlocutory Appeal and Jurisdiction) (IT-94-1-AR72) (2 October 1995) [27]

72 See Section I(a)
belonging to the criminal sphere, has been more controversial.\textsuperscript{73} However, recent jurisprudence of the UK House of Lords pertaining to a right to a fair trial as guaranteed by article 6(1) ECHR indicates that the level of protection provided respectively under the criminal and civil limbs of this article would not necessarily differ significantly.\textsuperscript{74} There is sufficient similarity in the wording of article 6(1) ECHR and article 14(1) ICCPR to apply the decision by analogy in the present context.\textsuperscript{75} The relevance is increased by the fact that the case relates to precautionary measures adopted in order to prevent terrorism, as is the case with the \textit{Al-Qaeda} sanctions regime.

The so-called \textit{Control Order} decision of the House of Lords illustrated that a fair trial, whether in a civil or criminal context, implies a core minimum protection of access to an independent, impartial and even-handed judicial hearing.\textsuperscript{76} In question were so-called non-derogating control orders imposed under the \textit{Prevention of Terrorism Act 2005} (UK)\textsuperscript{77} which confined targeted individuals to their homes for 18 hours per day. The orders were adopted on the basis of a reasonable suspicion of their involvement in terrorism. Although the individuals had the right to challenge the legality of the order, neither the individuals nor the Special Advocates whom the state appointed on their behalf had access to the evidence which led to the imposition of the order in the first place.\textsuperscript{78}

The majority of the House of Lords did not accept that the (cumulative effect of) the control order constituted a criminal charge, as there was no assertion of criminal conduct but merely a foundation of suspicion. In addition, the purpose of the order was

\textsuperscript{73} Elsewhere this author has answered this question in the affirmative in light of the punitive nature, severity, as well as the stigmatisation resulting from the sanctions, see De Wet and Nollkaemper, above n 1, 177.

\textsuperscript{74} \textit{Secretary of State for the Home Department v MB} and \textit{Secretary of State for the Home Department v AF} [2007] UKHL 46 (\textit{Control Orders} decision).

\textsuperscript{75} The relevant sentence of art 14(1) ICCPR, see above n 42, reads as follows: ‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’ The relevant sentence of art 6(1) ECHR, see above n 53, reads as follows: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

\textsuperscript{76} D Marty (Rapporteur) Committee on Legal Affairs and Human Rights, ‘UN Security Council and European Union Blacklists’ to the Parliamentary Assembly of the Council of Europe, 16 November 2007, Doc 11454 [52], <http://assembly.coe.int> at 19 November 2008; See also De Wet and Nollkaemper, above n 1, 177-8.

\textsuperscript{77} \textit{Prevention of Terrorism Act 2005} (UK).
preventative, and not punitive or retributive. The House of Lords confirmed that the proceedings fell within the civil limb of article 6(1) ECHR; moreover, it explicitly relativised the difference between the criminal and civil limb of that article by emphasizing the need for procedural protection commensurate with the gravity of the potential consequences – regardless of whether one is dealing with the criminal or civil dimension of article 6(1).

Acknowledging the severe nature of the control orders at stake, the House of Lords further described the right to be heard in judicial proceedings as being of essential importance. It underlined that whilst the right was not absolute, it contained a core, irreducible and non-derogable minimum. In the present circumstances this core content was undermined, as the affected individuals were effectively confronted by a bare, unsubstantiated assertion which they could only deny. The justifiability of the control orders depended exclusively on closed (inaccessible) materials, which could not be effectively challenged by the controlled persons. The situation was therefore distinguishable from cases where the thrust of the case was conveyed to the controlled person by a summary of statements which have been made anonymous.

In essence therefore, the House of Lords confirmed that the ability to effectively challenge allegations of involvement in terrorism constitutes an irreducible minimum of the right to a fair trial, regardless of whether one is dealing with a civil suit or criminal charge. If one applies this reasoning analogously to article 14(1) ICCPR, a similar core content of the right to a fair hearing would constitute an outer limit for Security Council action. Consequently, Security Council resolutions authorizing the freezing of individual assets as a preventative measure against terrorism have to provide for some form of independent and impartial *ex post facto* judicial review that enables the affected individuals to be informed about the gist of the case against them. An unsubstantiated assertion supported by inaccessible evidence would not meet this criterion. This would be...

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78 *Control Orders* decision, above n 74, [65] (Baroness Hale of Richmond).
79 *Control Orders* decision, above n 74, [24] (Lord Bingham of Cornwall).
81 Ibid [24] (Lord Bingham of Cornwall), [657] (Baroness Hale of Richmond).
82 Ibid [28]-[30] (Lord Bingham of Cornwall); See also [32], [43].
83 Ibid [41], [43] (Lord Bingham of Cornwall), [85] (Lord Carswell), [46] (Lord Brown of Eaton-Under-Heywood).
84 See also *Kadi* (ECJ), above n 12, [433], which comes to a similar conclusion although without
the case regardless of whether one regards the freezing of assets as a criminal charge or
civil suit, in light of the severe consequences for the listed individuals.\footnote{where a
security council resolution does not explicitly provide for such review, one would have
to assume that it is implicit in the resolution so as to prevent the conclusion that the
security council adopted an illegal resolution.}

2. **The CFI’s Analysis of the Al-Qaeda Sanctions Committee’s (De-)Listing
Procedure**

An examination of the Al-Qaeda Sanctions Committee’s procedures reveals that they do
not adhere to the core of the elements of a fair trial, notably those of access to a judicial
tribunal, impartiality, independence and even-handedness. The CFI’s analysis reflects a
poor understanding of the procedure itself as well as its impact on international human
rights standards to which the United Nations itself is bound.

According to the Guidelines of the Sanctions Committee for the Conduct of its
Work (hereinafter the Guidelines),\footnote{Guidelines of the Sanctions Committee for the
2008.} affected individuals do not have a right to be heard
before the Sanctions Committee and can submit requests for de-listing to the Sanctions
Committee only via their states of citizenship or residence,\footnote{Ibid [8(e)]. The Focal Point
was created in SC Res 1730 of 19 December 2006, <http://www.un.org/Docs/sc/unsc_resolutions06.htm> at 19 November 2008, para 1, and was not yet
in existence at the time of the Yusuf and Kadi decisions. see C Feinäugle, ‘Die Terroristenlisten
der Sicherheitsrats’, (2007) 40 Zeitschrift für Rechtspolitik 75.} or the so-called Focal Point
in the secretariat of the United Nations. The Focal Point, which was created in December
2006, does not engage in any substantive review of the request. It merely serves as an
administrative unit that passes on de-listing requests to the Sanctions Committee.\footnote{Ibid
[8(d)]. The Focal Point was created in SC Res 1730 of 19 December 2006, <http://www.un.org/Docs/sc/unsc_resolutions06.htm> at 19 November 2008, para 1, and was not yet
in existence at the time of the Yusuf and Kadi decisions. see C Feinäugle, ‘Die Terroristenlisten
der Sicherheitsrats’, (2007) 40 Zeitschrift für Rechtspolitik 75.} Whether the request for de-listing will actually be considered by the Sanctions
Committee depends on the willingness of the state of residence or citizenship to exercise
diplomatic protection with the Sanctions Committee.\footnote{See D Marty (Rapporteur), above n
76.}

\footnote{reference to the Control Orders decision.}

2008.}

\footnote{Ibid 92 [8(e)].}

\footnote{Ibid [8(d)].}

\footnote{See D Marty (Rapporteur), above n 76.}

2008.}

\footnote{Ibid [8(e)]. The Focal Point was created in SC Res 1730 of 19 December 2006, <http://www.un.org/Docs/sc/unsc_resolutions06.htm> at 19 November 2008, para 1, and was not yet
in existence at the time of the Yusuf and Kadi decisions. See C Feinäugle, ‘Die Terroristenlisten
der Sicherheitsrats’, (2007) 40 Zeitschrift für Rechtspolitik 75.}

\footnote{Guidelines, above n 86, paras 8(d)(vi), 8(e).}
acknowledges the right of states to exercise diplomatic protection, it does not oblige them to do so.\textsuperscript{90} In this context one has to note that subsequent to the Yusuf and Kadi decisions, the CFI decided that EU law obliges the EU member states to exercise such diplomatic protection in relation to blacklisted individuals in their territory.\textsuperscript{91} However, this does not alter the fact that this avenue of diplomatic protection does not amount to even-handed, independent and impartial judicial protection.

First, the affected individuals have no access to the information upon which their inclusion in the sanctions list was based, as it is in the discretion of the state requesting the listing whether such information has to be made public.\textsuperscript{92} The listed individuals therefore do not have access to the thrust of the case against them. The Sanctions Committee also reaches its decisions by means of political consensus, as a result of which the objection of one member can prevent the removal from the list.\textsuperscript{93} In addition, the Committee effectively reviews its own decision; the same members who initially suspected individuals of involvement in international terrorism consider the accuracy of that judgment.\textsuperscript{94} Where the Sanctions Committee refuses to de-list individuals, the result is that they remain blacklisted for an indefinite period of time as there is no sunset clause attached to the blacklisting procedure.\textsuperscript{95} In order to introduce a sunset clause, a new Chapter VII resolution would be necessary which could, in turn, be prevented by a veto from one of the permanent members.

In light of these considerations, it is unconvincing for the CFI to claim that the Guidelines guarantee an effective de-listing procedure and that rights of individuals are only affected for a limited period of time.\textsuperscript{96} Similarly, the submission that the Guidelines

\textsuperscript{90} International Law Commission, above n 37; See also Bulterman, above n 18, 756.
\textsuperscript{92} Guidelines, above n 86, para 5(g); See also Kadi (ECJ), above n 12, [323]-[5].
\textsuperscript{93} Guidelines, above n 86, para 4(e). See also Bulterman, above n 18, 756.
\textsuperscript{94} Guidelines, above n 86, para 3(b).
\textsuperscript{95} SC Res 1333 (2000) above n 14 paras 23-4, initially imposed these measures for 12 months. However, thereafter SC Res 1390 (2002) above n 17, para 3, extended them for an indefinite period of time.
\textsuperscript{96} Kadi, above n 11, [274]; See also Ayadi, above n 91, [142]-[3]. In Nada, above n 21, [8.3], the Swiss Federal Supreme Court acknowledges that the procedures provided for the Sanctions Committee do not satisfy the requirements of art 6(1) ECHR and art 14(1) ICCPR. It nonetheless accepts that these procedures are the only avenue of redress available to the listed individuals.
take the fundamental rights of the listed persons into account as much as possible seems apologetic at best since the Security Council could have done much more to ensure the right to a fair hearing. It could, for instance, have instituted a quasi-judicial body conforming to the standards of a fair trial to deal with complaints of listed individuals, or alternatively it could have explicitly authorised decentralised judicial review of such individuals along the lines of Resolution 1373. However, the fact that the Security Council did not follow these options does not necessarily mean that no avenue for judicial review existed in the current case. As explained in Section II(c)(i), the CFI could have adopted the interpretation endorsed in this article that the Al-Qaeda sanctions regime implicitly authorised judicial review in a decentralised fashion. Instead, by assuming the opposite – namely that the de-listing procedure was the only remedy available to the listed individuals – it legitimised a sanctions regime in violation of the Charter purposes and principles.

### III. ASSESSMENT IN LIGHT OF SUBSEQUENT DEVELOPMENTS

In light of the above analysis one can conclude that the reasoning of the CFI in the Yusuf and Kadi decisions is convoluted and unconvincing. However, this has not prevented these decisions from significantly influencing the approach of other courts in the region towards the emerging hierarchy of norms in international law and the role of domestic courts in enforcing such a hierarchy. At first glance, the Yusuf and Kadi decisions have strengthened the notion of a hierarchy in international law by imposing outer limit on Security Council action (compliance with Jus Cogens norms). They have also confirmed (a limited) role for domestic and regional courts in enforcing this hierarchy.

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97 Kadi, above n 11, [265]; Ayadi decision, above n 91, [140].

98 See also United Nations Commission of Human Rights, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc A/61/267 (2006) [39]. The Special Rapporteur is of the view that if there is no adequate international review available for United Nations sanctions lists then national review procedures are necessary.

99 The ECJ for its part acknowledged that the procedures of the Sanctions Committee do not amount to judicial protection: Kadi (ECJ), above n 12, [323]. However, in doing so the ECJ referred to the standards of judicial protection as recognized within the EU legal order and applicable to Community Acts (including those implementing Security Council resolutions. It did not address the issue of whether international human rights standards pertaining to judicial protection were applicable to a (sub-organ) of the Security Council.
Closer scrutiny reveals that this development does not result in any meaningful human rights protection when human rights infringements are likely to result from binding Security Council resolutions. Equating the outer limits for Security Council action with the very small number of *jus cogens* obligations currently acknowledged under international law, makes these limits ring hollow in the ears of those concerned about the Security Council’s increasing encroachment on individual human rights. It is also likely to spark attempts to elevate all human rights to *jus cogens* status in order to curb the Security Council’s powers, a move which may ultimately devaluate the concept.

While the subsequent reaction of the ECJ to the CFI’s decision provides for comprehensive human rights protection for individuals affected by Security Council sanctions on the EU level, it is not an entirely satisfactory solution. As its reasoning was based entirely on the nature of the EU as an autonomous legal order in which certain fundamental (human rights) values had to be protected, it leaves the question of whether the Security Council is bound by more than *jus cogens* obligations unanswered. Stated differently, it is possible to argue that the CFI’s reasoning pertaining to article 103 of the Charter and its relationship with *jus cogens* norms on the one hand, and the purposes and principles of the Charter, on the other remains valid as it has not (yet) been overturned.

This, in turn, implies that from the perspective of public international law, EU member states that provide extensive judicial protection to individuals when implementing Resolution 1267 and its follow-up resolutions would violate Security Council obligation and could face state responsibility claims on the international level. This perception is strengthened by the fact that the Swiss Federal Supreme Court already adopted the reasoning of the CFI in December 2007, in a case in which the facts were similar to that of the *Yusuf* and *Kadi* decisions.\footnote{Nada, above n 21. One might have expected a slightly more critical analysis of the reasoning in this case, especially as Switzerland is not a member of the European Union and therefore not bound by a decision of the CFI. Instead, the Swiss Federal Supreme Court endorsed the *Yusuf* and *Kadi* reasoning in its entirety.} For this reason, it would have been preferable if the ECJ had also overturned the deficient reasoning of the CFI in relation to international law, on the basis that the Security Council itself is bound to the core content of the international human rights standards developed under the auspices of the United Nations.
Moreover, such clarification also has practical relevance on the domestic level. As long as the CFI’s analysis regarding international law is not refuted, it can result in different levels of human rights protection within EU member states when implementing Security Council resolutions – depending on whether the respective Security Council measures affect community law. In accordance with the ECJ decision in Kadi, member states would have to live up to the extensive fundamental human rights protection required by community law whenever they give effect to Security Council measures that affect the common market.\footnote{See Advocate General Poiares Maduro, above n 20.} However, when giving effect to Security Council decisions that fall outside the scope of community law, they would be able to effectively suspend fundamental human rights protection, as long as this does not result in a violation of a \textit{jus cogens} obligations. In this context the \textit{Al-Jedda} case which was decided before English courts, provides an interesting example.

This case concerned an entirely different issue, namely whether the detention without trial on the basis of Security Council Resolution 1546 of 8 June 2004\footnote{SC Res 1546, 43 ILM 1459 (2004).} of a British/ Iraqi national by British forces in Iraq in 2004, violated the extraterritorial application of article 5(1) of the ECHR.\footnote{\textit{Al-Jedda}, above n 22.} Following the reasoning of the \textit{Yusuf} and \textit{Kadi} decisions,\footnote{Ibid [64].} the Court of Appeal concluded that there was no such violation. This resulted from the authorisation to use ‘all necessary means’ in Iraq in Resolution 1546,\footnote{SC Res 1546 (2004) above n 102 para 10.} which served as a basis for deviating from the protection provided by rights in the ECHR.\footnote{\textit{Al-Jedda} decision, above n 22, [71].} Subsequently on appeal, the House of Lords\footnote{\textit{Al-Jedda} decision, above n 22, [71].} did not review this part of the Court of Appeal’s reasoning, aside from confirming that the Security Council is bound by \textit{jus cogens}. As a result, one could interpret its decision as an approval, in principle, of the Court of Appeal’s reasoning that the Security Council is only bound by peremptory norms of international law and no more.

At this point it is worth noting that although the House of Lords did accept that Resolution 1546 provided a legal basis for interment – a ground for detention which is not covered by article 5(1) ECHR – it was not inclined to accept a complete displacement
of the protection provided by article 5, and determined that it should be applied as far as possible. 108 Of particular interest is the extent to which the guarantees provided by article 5(4) ECHR would still be applicable in instances where individuals were interned in Iraq for security purposes on the basis of Resolution 1546. Unfortunately this particular question was not under debate before the House of Lords at the time, and is unlikely to be resolved in the near future. On the one hand, a convincing argument can be made that Resolution 1546 did not intend to have the effect of suspending the protection provided by article 5(4) ECHR. The text of this resolution explicitly calls for the promotion and the protection of human rights and the maintenance of international peace and security in accordance with international law. 109 However, even though this line of argument might result in better judicial protection for those prisoners detained on the basis of Resolution 1546 as such, it would not clarify – as a matter of principle – whether the Security Council could suspend human rights protection entirely. It would still make it possible for EU member states to provide different levels of human rights protection when implementing Security Council measures, depending on whether or not those measures affect areas governed by Community law.

These developments illustrate that judicial review of Security Council measures by regional and domestic courts has thus far raised as many (if not more) questions than it attempted to answer. This may strengthen the hand of those opposing such review, claiming that it results in legal uncertainty and an undermining of the efficacy of Charter obligations. 110 In addition, domestic or regional courts can only provide limited relief. The regional or domestic determination of illegality of a Security Council resolution on the basis of international law, or a determination of its non-applicability due to incompatibility with fundamental values of domestic law or EU law, could not result in an annulment of that resolution. It remains in force on the international level – even if not applied on the domestic or regional level – until such a time as it is revoked by the Security Council itself.

107 Al-Jedda, above n 22, [35] (Lord Bingham of Cornhill).
108 Al-Jedda, above n 22, [126] (Baroness Hale of Richmond). It is also interesting to note that the majority of the House of Lords was not inclined to accept that there was no extraterritorial application of the ECHR. See, eg. [5] (Lord Bingham of Cornhill).
109 See SC Res 1546 (2004) above n 102, Preamble, para 7(a); Orakhelashvili, above n 23, 172.
110 See also Nada, above n 21, [6.2].
However, one should also keep in mind that the fact that decisions of domestic or regional courts are not universally binding and have no formal effect outside their own jurisdiction, does not necessarily mean that they have no practical effect on other jurisdictions or on the international level. If nothing else the *Kadi* decision of the CFI has illustrated the potential spill over effect of a regional decision pertaining to international law on various domestic jurisdictions and in very different contexts. Courts are keen to take note of developments in other jurisdictions, regardless of whether this stems from a legal obligation.

Moreover, the uncertainties resulting from the *Kadi* jurisprudence may be a necessary element in the dialogue that is developing between domestic and regional courts, as well as these courts and (international) political organs in an era where the infringement of human rights increasingly originates from within international organisations. In time, this dialogue may result in more underlying consensus between the different actors, less differences in interpretation and better protection of individual human rights by international organisations. After all, much of the current confusion could be removed if the Security Council itself had sufficient political will to provide for an effective judicial review mechanism at the level of the United Nations, and in accordance with the human rights standards developed by the organisation itself. In such a situation, domestic and regional courts would be much less inclined to engage in stringent judicial review of Security Council decisions, and the risk of contradictory interpretations would be significantly reduced.

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111 This position was supported by Advocate General Poiares Maduro, above n 20, [54] and also alluded to in the *Kadi* decision (ECJ), above n 14, [322].