



Amsterdam Center for International Law

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Amsterdam Center for International Law

Human Rights Considerations in the Enforcement of Security Council Sanctions in (the) European Legal Order(s): A Public International Law Perspective

Prof. Dr. Erika de Wet, LL.M. (Harvard)

A. Background

The seminar focuses in particular on the role that courts in Europe play in the enforcement of Security Council resolutions that also affect the international human rights obligations of the State in question. The courts include the ECJ and the ECtHR, as well as certain domestic courts, notably the House of Lords, the French Court of Cassation and the Swiss Federal Tribunal. The seminar examines if and to what extent these courts have the competence to interpret and review binding Security Council decisions. In doing so, it compares binding decisions pertaining to economic sanctions to other binding decisions such as those authorizing the detention of individuals. It further analyses the different techniques applied by the courts in question when engaging in an act of balancing Security Council decisions with international human rights obligations.

Finally, the seminar also investigates whether the behavior of domestic and or regional courts confirm the emergence of an international human rights hierarchy, that can be considered to be an emerging international value system. Given the special nature of binding Security Council resolutions and the resulting obligations for member states under Article 103 of the United Nations Charter (the Charter), the question of whether an emerging international human rights hierarchy would prevail or perish when conflicting with binding Security Council resolutions can serve as an indication of the current stage of development of the international value system, and its potential viability.

B. Lecture 1: UN Security Council sanctions and the international constitutional order

Reading materials

E. de Wet, 'The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation?' 5 *European Constitutional Law Review* 2009/ 2.

Yassin Abdullah Kadi & Al Barakaat International Foundation v Council of the European Union and others (Joined Cases C-402/05 P and C-415/05 P, ECJ), **par. 310 - par. 315 (complete version in supplement)**.

Questions:

1. Is there an (emerging) international constitutional order? If so, what are its benchmarks?
2. Is pluralism preferable to an "international constitutional order"?

3. To what degree are human rights norms hierarchically superior to other norms of general international law?
4. Is the emerging international value system (hierarchy of human rights norms) a manifestation of western (European) hegemony?
5. What are the implications of the “dualist” approach of the ECJ in the *Kadi* case for the international responsibility of States under public international law?

C. Lecture 2: Judicial Review of Security Council Resolutions by Regional Courts in Europe

Reading Materials:

Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Minister for Transport, Energy and Communications and others (Case C-84/95, ECJ), **par. 3 – par. 5 (complete version in supplement)**

Case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland (Application no. 45036/98, ECtHR), **par. 135 – par. 167 (complete version in supplement).**

Organisation des Modjahedines du peuple d’Iran v Council of the European Union (Case T-228/02, ECJ), **par. 1 – par. 17; par. 89 - par. 174 (complete version in supplement)**

Agim Behrami and Bekir Behrami v France and Ruzhdi Saramati v France, Germany and Norway (Application no. 78166/01, ECtHR), **par. 121 – par. 135 (complete version in supplement).**

Questions:

1. Under what circumstances would the ECJ and the ECtHR be confronted with the issue of reviewing international obligations?
2. Do regional courts have the competence to review international obligations? Does the answer to this question depend on whether the review concerns a UN Security Council Resolution as opposed to other obligations under international law?
3. Can the roles of the ECJ/ ECtHR be compared to those of other international tribunals (e.g. ICJ/ ICTY) when they engage in the interpretation or reviewing of Security Council resolutions?
4. What are the main differences/ similarities between the *Bosphorus*, *OMPI* and *Kadi* cases?
5. What are the similarities/ differences in the approaches of the ECJ and the ECtHR when interpreting/ reviewing UN Security Council sanctions?
6. What distinguishes the *Behrami* case from *Bosphorus*, *OMPI* and *Kadi*?

D. Lecture 3: The Ghost of the CFI's *Kadi* decision and its impact on Domestic Courts in Europe

Reading Materials:

Agim Behrami and Bekir Behrami v France and *Ruzhdi Saramati v France, Germany and Norway* (Application no. 78166/01, ECtHR), **par. 121 – par. 135 (complete version in supplement)**.

A, K, M, Q & G v H.M. Treasury [2008] EWHC 869 (Admin), **par. 1 – par. 3; par. 34 – par. 49 (complete version in supplement)**.

R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) [2007] UKHL 58, **par. 22 – par. 39 (complete version in supplement)**.

Supplementary reading for lecture 3

Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Administrative appeal judgment (Case No 1A 45/2007; BGE 133 II 450) **(only ILDC 461 (CH 2007)) in supplement**.

Sassi and others, Cassation appeal, Pourvoi No 03-84652; (Bulletin Criminel 2005 No 1, 4 January 2005) **(only ILDC 776 (FR 2005) in supplement)**

Questions:

1. Examine the spill-over effect of the CFI's reasoning in the *Kadi* case on the *Nada* case before the Swiss Federal Tribunal. If the *Nada* case is pursued before the ECtHR, should this court declare it admissible in light of the *Behrami* case?
2. How did the HoL (Lord Bingham) distinguish between the *Al-Jedda* case from *Behrami* for the purposes of admissibility? Do you find Lord Bingham's reasoning convincing?
3. Was there a spill-over effect of the public international law reasoning of the CFI in the *Kadi* case for *Al-Jedda*? What are the risks inherent to this "spill-over effect"?
4. What were the implications of *Al-Jedda* case for individuals in the UK blacklisted as a result of UN Security Council sanctions, following the *A, K, M, Q & G* case?
5. Compare the techniques of the UK House of Lords and Court of Appeal, the French Court of Cassation and the Swiss Federal Tribunal when confronted with potential human rights violations resulting from UN Security Council resolutions. What are the differences/ similarities?
6. What are the advantages/ disadvantages of domestic courts engaging in the review of (the scope of) UN Security Council sanctions? Would the same reasoning apply to regional courts?

Erika de Wet, The Hague, April 2009

THE ROLE OF EUROPEAN COURTS IN THE DEVELOPMENT OF A HIERARCHY OF NORMS WITHIN INTERNATIONAL LAW: EVIDENCE OF CONSTITUTIONALISATION?

*Erika de Wet**

1. Defining constitutionalism and its relevance

In the *Kadi* decision of 2005, the European Court of First Instance affirmed the absence of a right to a fair trial of individuals residing in European Union member states and whose assets were frozen, due to their blacklisting by the United Nations Security Council for being suspected of involvement with international terrorism.¹ This decision was an upshot of Security Council Resolutions 1267 (1999) and 1333 (2000), which were adopted in the aftermath of the attacks on the United States' embassies in Kenya and Tanzania and the suspected involvement of Osama Bin-Laden therein.² These resolutions, geared towards pressuring the (then) *de facto* Taliban regime in Afghanistan into extraditing Osama Bin-Laden to the United States, authorised a Security Council Sanctions Committee (the *Al-Qaeda* Committee), to identify and blacklist individuals and entities who are associated with the Taliban, Osama Bin-Laden and *Al-Qaeda* (the *Al-Qaeda* sanctions regime).³ As a result their assets are frozen by their state of residence until such time as the Sanctions Committee itself decides to remove them from the list.

Since the attacks on the United States of 11 September 2001, the *Al-Qaeda* Committee has been very active in expanding the list of targeted persons and entities. Although the Security Council lifted the sanctions against Afghanistan after the fall of the Taliban regime in Resolution 1390 (2002),⁴ this open-ended resolution has maintained the sanctions against the Taliban, Osama Bin-Laden and *Al-Qaeda*. Neither Resolution 1267 (1999)⁵ nor any of its follow-up resolutions explicitly provides for access to an independent judicial body that could provide relief against the listing procedure.⁶ The European Union implemented Resolution

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1 CFI 21 September 2005, Case No. T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities (Kadi case)*; See also the identical case of CFI 21 September 2005, Case No. T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Yusuf case)*.

2 SC Res. 1267 of 15 October 1999, reprinted in 39 *ILM* 2000 p. 235; SC Res. 1333 of 19 December 2000, reprinted in 40 *ILM* 2001 p. 509.

3 SC Res. 1267 (1999), *supra* n. 2; SC Res. 1333 (2000), *supra* n. 2 at para. 8(c); and SC Res. 1390 of 16 January 2002, reprinted in 41 *ILM* 2002 p. 511 at paras. 2(a) and 5(a).

4 SC Res. 1390 (2002), *supra* n. 3.

5 SC Res. 1267 (1999), *supra* n. 2.

6 See M. Bulterman, 'Fundamental Rights and the United Nations Financial Sanctions Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities', 19 *Leiden Journal of International Law*. (2006) p. 753 at p. 755.

1267 (1999)⁷ and subsequent resolutions through Common Positions and Regulations in order to ensure uniform application in all member states.⁸ 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 European Court of First Instance (and subsequently on appeal before the European Court of Justice).

Although this CFI decision was subsequently overturned on appeal, it remains a memorable example of the increasing tension between fundamental human rights norms and other international obligations such as international peace and security in the post-9/11 era. In addition, it is a clear illustration of the direct relevance for individuals of the intensification in the shift of public decision-making away from the nation state towards international actors such as international organisations, as it can no longer be said that these decisions are only of an inter-state nature.

Moreover, the European Court of First Instance's *Kadi* decision⁹ illustrates the increasing difficulty of any of the respective international legal subjects (the United Nations, the European Union, member states) to independently reconcile different sets of international obligations. This perception was enhanced by subsequent developments on appeal, during which the European Court of Justice came to the opposite conclusion and stressed the fundamental importance of the right to a fair trial within the legal order of the European Union.¹⁰ Since the reasoning of the European Court of Justice was based exclusively on EU law and did not address the validity of the European Court of First Instance's arguments from the perspective of public international law, it remained unclear if and to what extent its acknowledgment of the importance of human rights protection resulted in a violation of the member states' obligations pertaining to international security.

These potentially clashing international obligations also represent obligations that traditionally constituted core elements of the exercise of public power within the nation state, namely the protection of public safety versus the protection of individual liberties. The *Kadi* decision¹¹ poignantly illustrates the eroding impact of the continuous (re-)allocation of public power between different international legal subjects on the concept of a "total" constitutional order, where the fundamental substantive and structural norms that constitute the supreme legal framework for the exercise of public power are concentrated in the nation state.¹²

7 SC Res. 1267 (1999), *supra* n. 2.

8 See, *inter alia*, Council Common Position 2002/402/CSFP, *OJ* [2002] L 139/4, 29.5.2002 and Council Regulation 881/2002, *OJ* [2002] L 139/9, 29.5.2002; See extensively Bulterman, *supra* n. 6, at p. 758.

9 *Kadi* decision, *supra* n. 1.

10 ECJ, *Yassin Abdullah Kadi & Al Barkaat International Foundation v Council & Commission*, 3 September 2008, Joined Cases C-402/05 P & C-415/05 P, at para. 316, 326; See also ECJ, Opinion of A.G. Poiares Maduro, 16 January 2008, Case C-402/05 P, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*. Both documents are available at <<http://curia.europa.eu>>, visited 18 February 2009; Cf. S. Besson, 'How International is the European Legal Order? Retracing Tuori's Steps in the Exploration of European Legal Pluralism', 5 *No Foundations*. (2008) p. 50 at p. 59 et seq.

11 *Kadi* decision, *supra* n. 1.

12 C. Walter, 'Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law', 44 *German Yearbook of International Law*. (2001) p. 170 at p. 192.

The decision further underpins the submission that such a supreme legal framework is only possible in a system where national, regional (e.g., the European Union) and functional (e.g., the World Trade Organisation and the United Nations) legal orders complement each other in order to form an international constitutional order.¹³ This order refers to the fundamental structural and substantive norms – unwritten as well as codified – of the international legal order as a whole, which contain the outer limitations for the exercise of public power. The fundamental substantive elements of the international constitutional order primarily include the value system of the international legal order, meaning norms of positive law with a strong ethical underpinning (notably human rights norms) that have acquired a special hierarchical standing *vis-à-vis* other international norms through state practice.¹⁴ The fundamental structural elements include the subjects of the international legal order that collectively form the international community and which provide mechanisms for the enforcement of the international value system. The international community is composed predominantly of states, which still remain central to international law-making and enforcement. Regional and functional organisations with legal personality, e.g., the European Union, the World Trade Organisation and the United Nations, and individuals (albeit to a limited extent) also participate in the membership of the international community.¹⁵

In accordance with this line of argument, the term "constitution" is not exclusively reserved for the supreme legal framework of (sovereign) states, as the fundamental legal framework of any community can be so defined.¹⁶ In the current context the notion of "constitution" is used to describe a system in which the different national, regional and functional regimes form the building blocks of the international community ("international polity") that is underpinned by a core value system common to all communities and embedded in a variety of decentralized legal structures for its enforcement. Constitutionalisation refers to the interaction of the different regimes through which the fundamental legal framework of the international legal order containing the outer limits for the exercise of public power emerges.

This vision of an emerging international constitutional order challenges the networks approach. According to the latter, the international legal order is characterized by the existence of various functional regimes, which would determine the outcome of any inter-regime conflicts.¹⁷ The logical consequence of this line of argument would be that decisions such as those of the European Court of First Instance in the *Kadi* case¹⁸ in which human rights protection of individuals can effectively be abolished by functional regimes pertaining to, *inter alia*, peace and security, are likely to increase in an era where decisions of international

13 E. de Wet, 'The International Constitutional Order', 55 *International & Comparative Law Quarterly*. (2006) p. 51 at 51 et seq.

14 See also P.M. Dupuy 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskeniemi', 16 *European Journal of International Law*. (2005) p. 131 at p. 133.

15 E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', 19 *Leiden Journal of International Law*. (2006) p. 611 at p. 611-612.

16 B. Fassbender, 'The United Nations Charter as Constitution of the International Community' 36 *Columbia Journal of Transnational Law*. (1998) p. 529 at p. 532-538; See also *idem* at p. 555-561.

17 A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Journal of International Law*. (2004) p. 999 at p. 999.

18 *Kadi* decision, *supra* n. 1 and n. 11.

organisations (functional regimes) are increasingly directed at individuals rather than states. This, in turn, is bound to result in a creeping (re-) establishment of absolute public power over private individuals. The approach proposed by the author differs from the networks perspective by arguing that the different functional regimes within the international legal order function as complementary elements of a larger whole. This would be the embryonic international constitutional order within which an international value system characterised by hierarchical elements is emerging, which can provide some guidance for solving potential conflicts between regimes.

The subsequent analysis attempts to illustrate in particular that the existence of a hierarchically superior value system across different regimes (whether domestic, regional functional) can reduce the potential for inter-regime normative conflict. In addition, the analysis draws attention to the potential role of domestic and regional courts in developing this value system. In an era in which international obligations – notably those stemming from international organisations – frequently have direct consequences for individuals, domestic and regional courts will increasingly be confronted with disputes during which these obligations seem to clash with, *inter alia*, human rights obligations.¹⁹ This will typically occur where domestic or regional courts are confronted with challenges to (the legality of) domestic or regional measures that implement an international obligation, such as a Security Council resolution.²⁰ In the process, the court may be confronted with reviewing the scope, meaning and even the legality of the international obligation itself. Such was the situation with the *Kadi* dispute²¹ which was rooted in Security Council Resolutions 1267 of 15 October 1999 and 1333 of 19 December 2000,²² and the measures subsequently adopted within the European Union in order to implement them in a uniform manner throughout all member states.

The analysis first elaborates on the contours of the embryonic international value system, including its relationship with the United Nations and its organs. Given the special nature of Security Council resolutions and the resulting obligations for member states under Article 103 of the United Nations Charter (the Charter),²³ the question of whether an emerging international human rights hierarchy would prevail or perish when conflicting with binding Security Council resolutions, can serve as an indication of the current stage of development of the international value system and its potential viability. In this context, the *Kadi* decision of the European Court of First Instance²⁴ serves as a frame of reference for exploring the relationship between Article 103 of the Charter and peremptory norms of international law (*jus cogens*), as well as the relationship between Article 103 and other international human rights standards. As mentioned, this aspect of the reasoning of the Court of First instance remained untouched by the European Court of Justice. This fact, combined with the fact that the arguments of the Court of First instance pertaining to *jus cogens* have since been taken over by other domestic courts in Europe, means that the decision of the Court of First Instance

19 E. de Wet and A. Nollkaemper, 'Review of the Security Council Decisions by National Courts', 45 *German Yearbook of International Law*. (2003) p. 166 at p. 184 et seq.

20 De Wet and Nollkaemper, *supra* n. 20 at p. 195.

21 *Kadi* decision, *supra* n. 1 and n. 11.

22 SC Res. 1267 (1999) *supra* n. 2; SC Res. 1333 (2000) *supra* n. 2.

23 Charter of the United Nations 1945, 59 Stat. 1031.

24 *Kadi* case, *supra* n. 1.

still remains very relevant from the perspective of public international law – despite the fact that the consequences of the decision were overturned.²⁵ Thereafter the focus shifts to exploring the role of regional and domestic courts in enforcing the international value system.

2. The contours of the international value system and its implications for the United Nations

The rudimentary international value system is of a layered nature, that includes the (sometimes overlapping) layers of universal *jus cogens* norms and *erga omnes* obligations. The fact that most of the international norms qualifying as *jus cogens* and/or *erga omnes* norms are human rights norms supports the view that human rights have developed into the core of the international value system.²⁶ The normatively superior character of *jus cogens* norms was introduced in positive international law through Article 53 of the Vienna Convention on the Law of Treaties of 1969 (the Vienna Convention),²⁷ with the primary aim of placing the deviation from peremptory norms beyond the treaty-making competence of states.²⁸

The concept of *erga omnes* obligations gained recognition through the jurisprudence of the International Court of Justice, when it distinguished between the obligations of a state towards the international community as a whole, and those borne towards other (individual) states. In the *Barcelona Traction* case,²⁹ the International Court of Justice determined that the former obligations are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection: they are obligations *erga omnes*.

25 The reasoning of this decision was subsequently taken over by the Swiss Federal Supreme Court in a case with very similar facts, namely BGE 14 November 2007, No. 1A.45/2007, *Youssef Mustapha Nada v. Staatssekretariat für Wirtschaft (Nada case)*. The *Nada* decision was rendered by the Federal Supreme Court, available at <<http://www.admin.ch/ch/d/sr/sr.html>>, visited 18 February 2009; See also [2005] EWHC 1809 (Admin), 12 August 2005, *R. (on the application of Hilal Abdul-Razzaq Al-Jedda) v. Secretary of State for Defence, Queen's Bench Division (Al-Jedda case)* at para. 55 et seq. On 29 March 2006, the English Court of Appeal relied on the reasoning of the European Court of First Instance *Kadi* case, *supra* n. 1, to justify the interment without trial of a British citizen in Iraq. The Court accepted the state's argument that the SC Res. 1456 of 20 January 2003, reprinted in 42 *International Legal Material (ILM)* 2003 p. 510, allowed the British military to suspend, in effect, individual rights such as the right to contest the lawfulness of one's detention under Art. 5(1) of the European Convention on Human Rights 1950, 213 *United Nations Treaty Series (UNTS)* p. 221 (ECHR). This decision was upheld on appeal, although the House of Lords did not address the arguments of the *Kadi* case, *supra* n. 1, and followed a different reasoning, see [2007] UKHL 58, 12 December 2007, *R. (on the application of Al-Jedda) v. Secretary of State for Defence*.

26 De Wet 2006 (*International Comparative Law Quarterly*), *supra* n. 14. For controversies pertaining to the international value system, including its (lack of) legitimacy, see *ibid* at 71 et seq.

27 Vienna Convention on the Law of Treaties 1969, 1155 *UNTS* p. 331 (the Vienna Convention).

28 See in particular A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford, Oxford University Press 2006); See also S. Kadelbach and T. Kleinlein, 'International Law – a Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles', 50 *German Yearbook of International Law*. (2007), p. 303 at p. 313 et seq.; See also A. Bianchi, 'Human Rights and the Magic of *Jus Cogens*', 19 *European Journal of International Law*. (2008), p. 491 at p. 491 et seq.

29 See ICJ, *Barcelona Traction, Light and Power Company, Limited (Second Phase)* (*Barcelona Traction case*), Judgement, ICJ Reports (1970) p. 3; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) p. 174, available at <www.icj-cij.org>, visited 18 February 2009; See also 'Report of the International Law Commission', 58th Session of the International Law Commission, A/61/10 (2006) at p. 419, available at <<http://www.un.org/law/ilc/>>, visited 18 February 2009.

The notion of *erga omnes* obligations also finds recognition in the Articles on State Responsibility of 2001,³⁰ where a distinction is drawn between breaches of bilateral obligations and obligations of a collective interest nature, which include obligations towards the international community as a whole.³¹

The *Barcelona Traction* decision³² of the International Court of Justice provides authority for the conclusion that *jus cogens* norms would have *erga omnes* effect. Without expressly referring to *jus cogens* the International Court of Justice implied as much by the types of (notably human rights) norms it mentioned as examples of *erga omnes* norms.³³ These included the outlawing of the unilateral use of force,³⁴ genocide and the prohibition of slavery and racial discrimination. Given the fact that these same prohibitions are widely regarded as being of a peremptory nature, one can conclude that a norm, from which no derogation is permitted due to its fundamental nature, will ordinarily be applicable to all members of the legal community.³⁵ One should be careful, however, not to assume that the opposite also applies, namely that all *erga omnes* norms would constitute peremptory norms of international law.³⁶

For example, the human rights obligations contained in the International Covenant on Civil and Political Rights of 1966 (ICCPR)³⁷ and the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR)³⁸ all have *erga omnes* effect to the extent that they have acquired customary international law status.³⁹ Their collective interest nature gives the international community as a whole an interest in their performance and shows that they

30 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries', *Yearbook of the International Law Commission 2001*, Vol. II, part 2. The text is available via <<http://untreaty.un.org/ilc>>, visited 18 February 2009.

31 See the commentary to Art. 42 and Art. 48 in J.R. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, Cambridge University Press 2002); See also 'Report of the International Law Commission', *supra* n. 30, at p. 421; See generally C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge, Cambridge University Press 2005).

32 *Barcelona Traction* case, *supra* n. 30.

33 J.A. Frowein 'Collective Enforcement of International Obligations', 47 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*. (1987) p. 67 at p. 71; See also K. Zemanek, 'New Trends in the Enforcement of *Erga Omnes* Obligations', 4 *Max Planck Yearbook of United Nations Law*. (2000) p. 1 at p. 6-7; See also 'Report of the International Law Commission', *supra* n. 30 at p. 421.

34 The prohibition of the use of force is the only peremptory norm which is of an interstate nature, rather than a human rights norm.

35 J.A. Frowein, 'Obligations *Erga Omnes*', in R. Bernhardt (ed.), *Encyclopaedia of International Law Vol. III* (Amsterdam, Elsevier 1997) at p. 757; See also 'Report of the International Law Commission', *supra* n. 30, at p. 421.

36 See 'Report of the International Law Commission', *supra* n. 30, at p. 421; See also P.M. Dupuy 'L'unité de l'ordre juridique international: cours général de droit international public (2000)', 297 *Recueil des cours de l'académie de droit international*. (2002) p. 9 at p. 385.

37 International Covenant for Civil and Political Rights (16 December 1966) (ICCPR), 999 *UNTS* p. 171

38 International Covenant for Economic, Social and Cultural Rights (16 December 1966) (ICESCR), 993 *UNTS* p. 3

39 Although the extent to which any of these norms acquired customary status remains a contested point, all obligations under the ICCPR and ICESCR would have *erga omnes partes* effect. See Dupuy 2002, *supra* n. 37, at footnote 762, p. 382; See also 'United Nations Human Rights Committee, General Comment No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*', CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 2 available via <<http://www.unhcr.ch.tbs>>, visited 18 February 2009; See also I. Seiderman, *Hierarchy in International Law* (Antwerp, Intersentia 2001) at p. 145.

amount to more than mere “bundles of bilateral obligations”.⁴⁰ In and of itself, however, this fact does not elevate all *erga omnes* human rights obligations to peremptory norms. The peremptory character of the prohibition of genocide and torture resulted from their specific recognition as such by a large majority of states.⁴¹ Customary *erga omnes* norms without peremptory status would therefore constitute a second layer of the international value system, below that of peremptory norms.

Given the limited number of *jus cogens* norms and the uncertainties surrounding the customary status of the rights in the international human rights instruments,⁴² one has to admit that the scope of the international value system remains limited and uncertain. Even so, it is arguable that its scope is significantly more concrete in as far as it relates to the United Nations and its organs. Stated differently, the international value system would also contain a third layer, specifically relating to the United Nations as an organisation. Given the reach of this organisation’s competence - especially when acting under Chapter VII of the Charter - this layer could have significant practical importance. This author has argued extensively that the United Nations organs, including the Security Council, would be bound by the core content of the human rights contained in all United Nations human rights treaties, despite the fact that the United Nations is not a party to any of them.⁴³ This argument is distilled from public international law itself, namely from Article 24(2) of 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, in particular, in Articles 1(1), 1(3) and 2(2) of the Charter.⁴⁴

Article 1(1) of the Charter 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.⁴⁵ Article 2(2) of the Charter requires that the United Nations (and its organs) respects the principle of good faith, whereas Article 1(3) of the Charter 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 had initially been developed in inter-state relations, but also applies to international organisations as a general

40 See Crawford, *supra* n. 32, at p. 258.

41 See ‘Report of the International Law Commission’, *supra* n. 30, at p. 421; For an overview of the jurisprudence concerning the peremptory character of the prohibition of genocide and torture, respectively, see Dupuy 2002, *supra* n. 37, at p. 295-299.

42 See G. Thalinger, ‘Sense and Sensibility of the Human Rights Obligations of the United Nations Security Council’, 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*. (2007), p. 1015 at p. 1022 et seq.

43 See De Wet and Nollkaemper, *supra* n. 19 at 171 ff; See generally also E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford, Hart 2004).

44 See E. de Wet, ‘Holding the United Nations Security Council Accountable for Human Rights Violations through Domestic and Regional Courts: A Case of Beware What You Ask For?’, in J. Farrall and K. Rubenstein (eds.), *Sanctions Accountability and Governance in a Globalised World* (2009, forthcoming).

45 Art 1(1) of the UN Charter, *supra* n. 24, reads: ‘[The Purposes of the United Nations are:] To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression, or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice in international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace [...]’.

principle of law. Where a country or an international organisation has created the legitimate expectation that it would act in a certain manner, it is under a legal obligation to fulfil that expectation.⁴⁶ More concretely, in light of the inter-action 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.⁴⁷

One can draw these core human rights elements from the human rights instruments developed under the auspices of the United Nations itself.⁴⁸ These documents represent an elaboration of the Charter's original human rights vision found in Article 1(3) and Articles 55 and 56 of the Charter. The human rights contained in these documents thus constitute the human rights that, under Article 1(3) of the Charter, the United Nations must promote and respect. The United Nations is not a party to these instruments but was, however, created under their auspices, and has also created 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 aforementioned Covenants are nonetheless bound to the core of the rights contained therein when acting on behalf of the organisation itself.⁴⁹

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 European Court of First Instance's conclusion in the *Kadi* case⁵⁰ that the Security Council is only bound by the very small number of peremptory norms of international law (*jus cogens*).

46 See ICJ, *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports (1974) p. 253, at p. 267.

47 De Wet and Nollkaemper, *supra* n. 20, at p. 8.

48 These include the Universal Declaration of Human Rights of 10 December 1948; the International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto; the International Covenant on Economic, Social and Cultural Rights of 16 December 1966; the Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; the Convention on Elimination of All Forms of Discrimination Against Women of 17 December 1979 and the Protocol thereto; the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984 and the Protocol thereto; the International Convention on the Rights of the Child of 20 December 1989; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990; and the Convention on the Rights of Persons with Disabilities of 13 December 2006 and the Protocol thereto; The text of these and all other United Nations human rights documents cited in this article are available at <<http://www.unhcr.org>>, visited 18 February 2009; See also De Wet and Nollkaemper, *supra* n. 20.

49 See extensively E. De Wet *The Chapter VII Powers of the United Nations Security Council* (Oxford, Hart 2004), in particular ch. 4.

50 *Kadi* case, *supra* n. 1.

The European Court of First Instance's analysis of the Charter framework reflects an insufficient appreciation of the obligation to respect the Charter purposes and principles as articulated in Article 24(1) of the Charter. The European Court of First Instance 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.⁵¹ However, at the same time the European Court of First Instance equated the human rights standards contained in the purposes and principles of the Charter to *jus cogens* obligations. By doing so, the Court severely limited their scope and impact.⁵² This is rather perplexing, since the purposes and principles are drafted in broad language.⁵³ In addition, the concept of *jus cogens* was not generally recognized at the time the Charter was adopted. The concept that was applied by the Court of First Instance was only introduced into positive law through Article 53 of the Vienna Convention.⁵⁴

It thus seems unconvincing to reduce to the scope of the purposes and principles of the Charter to a narrow category of norms whose existence 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 invalidate inter-state treaties that violate peremptory norms of international law. The question therefore also arises whether *jus cogens* would apply at all to decisions of international organisations and their organs.⁵⁵ Current legal doctrine tends to answer this question in the affirmative, as anything else would allow states to circumvent their most fundamental obligations by creating an international organisation.⁵⁶ However, one would have expected the European Court of First Instance to address this issue in a more elaborate manner.⁵⁷

In essence the European Court of First Instance incorrectly limited the international value system applicable to the Security Council to the very narrow layer of peremptory norms. As a result, it significantly reduced the scope of the international value system that applies across regimes and increased the possibility for inter-regime normative conflict. For example,

51 *Kadi* decision, *supra* n. 1, at paras. 228-229; See also *Nada* decision, *supra* n. 9, at paras. 5.4 and 7.

52 For the very restricted list of *jus cogens* norms generally recognized as such, see 'Report of the International Law Commission', *supra* n. 30, at p. 421; For a different opinion, see Orakhelashvili, *supra* n. 29, who defines *jus cogens* much more broadly.

53 For example, in ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, ICJ Reports (1980) p. 3, at para. 91, the ICJ determined that wrongful deprivation of human beings of their freedom and the subjection to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations. This indicates that the purposes and principles contain a broader content than the limited spectrum of *jus cogens* norms.

54 Art. 53 of the Vienna Convention, *supra* n. 28, 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 recognized 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.'

55 The CFI assumes that this was the case in the *Kadi* decision, *supra* n. 1, at para. 226.

56 See E. de Wet, 'The Prohibition of Torture as an International Norm of *Jus Cogens* and its Implications for National and Customary Law', 15 *European Journal of International Law*. (2004) p. 97 at p. 97 et seq.; See also C. Tomuschat, 'Case Note on Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission and Yassin Abdullah Kadi v. Council and Commission', 43 *Common Market Law Review*. (2006) p. 537 at p. 546.

57 In the *Kadi* decision, *supra* n. 1, at para. 231; See also Bulterman, *supra* n. 6, at p. 768-769.

according to the European Court of First Instance's approach the Security Council resolution requiring the suspension of the right to a fair trial conflicted with the human rights obligations of the member states under the United Nations' human rights regime, the European human rights regime and the EU legal regime. Once such a conflict arises, the question becomes whether the Security Council obligations trump other obligations under international law in light of the supremacy clause in Article 103 of the Charter. The European Court of First Instance answered this question in the affirmative.⁵⁸

If one accepts that the Security Council itself is bound by the core content of the right to a fair trial, it is unlikely that the supremacy clause in Article 103 would be triggered in instances where the Security Council obliged member states to suspend this right. Article 25 of the Charter would arguably only apply to decisions that are *intra vires*. As a result, the primacy rule contained in Article 103 would not be applicable to decisions that were taken *ultra vires* and states would not be obliged to implement such decisions.⁵⁹ However, such a determination should not be made lightly, given the Security Council's special role in the maintenance of international peace and security and the presumption of legality attached to its decisions.⁶⁰ Instead, one should attempt to implement the Security Council resolution in manner that takes due account of the need to balance international peace and security with the applicable human rights norms at stake.⁶¹ This would, *inter alia*, imply that a limitation or derogation from human rights norms cannot be assumed unless provided for explicitly.⁶² In the case of Resolution 1267 (1999),⁶³ this would mean that it necessarily (implicitly) allows states the necessary discretion to enforce the respective sanctions regime in accordance with human rights standards such as a right to a fair trial, even though this may not be self-evident from the resolution at first glance.

This solution is preferred to that of the European Court of Justice in the *Kadi* case, which granted comprehensive human rights protection exclusively on the basis of EU law.⁶⁴ By not also addressing the European Court of First Instance's argument's pertaining to the Security Council's relationship with *jus cogens* norms, the purposes and principles of the Charter, as

58 *Kadi* decision, *supra* n. 1, at paras. 183-184; *Nada* decision, *supra* n. 9, at para. 5; See also ICJ, *Questions of the Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Reports (1992) p. 3, at para. 39; See also Tomuschat, *supra* n. 57, at p. 541.

59 See extensively De Wet & Nollkaemper, *supra* n. 20, at p. 186-187; See also Thalinger, *supra* n. 43, at p. 1027 et seq.

60 ICJ, *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Reports (1962) p. 151, at p. 168 et seq.

61 This argument can find support in the work of the report of the Study Group of the International Law Commission, 'Fragmentation of International Law: difficulties arising from the Diversification and Expansion of International Law', 58th Session of the International Law Commission, A/CN.4/L.682, 13 April 2006, available via <<http://www.un.org/law/ilc>>, visited 18 February 2009.

62 See also J.E. Alvarez, 'The Security Council's War on Terrorism: Problems and Policy Options' in E. de Wet and A. Nollkaemper (eds.), *Review of the Security Council by Member States* (Antwerp, Intersentia 2003), p. 119 at p. 134.

63 SC Res. 1267 (1999), *supra* n. 2.

64 *Kadi* decision (ECJ), *supra* n. 11, at para 316 et seq.; See also A.G. Poiares Maduro, *supra* n. 11, at para. 59 et seq.; See also the well-known *Solange* decisions of the German Federal Constitutional Court, BVerfGE 37, 271 (1974) 29 May 1974 (*Solange I*); BVerfGE 73, 339 (1986), 22 October 1986 (*Solange II*); see also BVerfGE 89, 155 (1993), 12 October 1993 (*Maastricht-Urteil*); Judgments are available at <<http://www.bundesverfassungsgericht.de>>, visited 18 February 2009.

well as Article 103 of the Charter, it remains uncertain if and to what extent an inter-regime normative conflict did indeed exist in the present case. As a result, it remains uncertain whether European Union member states that provide extensive judicial protection to individuals when implementing Resolution 1267 (1999)⁶⁵ and its follow-up resolutions would violate Security Council obligations and could face state responsibility claims on in the international level.

3. Enforcing the international value system through regional and domestic courts

The practical value of this layered international value system is closely related to the question of its enforcement. In particular, the question arises whether the international community possesses structures capable of enforcing such a system and resolving potential normative conflicts between these norms and other international obligations. At the current stage of development of the international constitutional order, the international value system has to be enforced within a variety of institutional structures, given the absence of a binding, centralized international judiciary.⁶⁶ It is therefore, *inter alia*, up to regional and functional judicial bodies, as well as domestic courts to enforce the emerging international value system in a decentralized fashion.

The question which arises is if, and to what extent, such judicial bodies are permitted under international law to interpret, apply and even review the legality of international norms generated by another international regime. After all, regional courts such as the European Court of First Instance and the European Court of Justice, functional judicial bodies such as World Trade Organisation dispute or International Centre for Settlement of Investment Disputes panels and domestic courts are principally set up to interpret and enforce the law of their own specific regime. However, this fact in itself would not prevent these bodies from also interpreting and enforcing norms generated by other international regimes – if, and to the extent to which, they are confronted with such norms. This view is supported by practice of the European courts during which they have claimed the competence of incidental review of decisions stemming from other international regimes for themselves.

In the European context such review has become common where the relationship between states' human rights obligations under the European Convention of Human Rights (ECHR) and other treaty obligations is concerned. The fact that neither the European Court of Human Rights nor the respective domestic courts were explicitly established with the purpose of engaging in the incidental review of different sets of international obligations has not prevented them from developing this competence in practice.⁶⁷ The range of cases in which the European Court of Human Rights has reviewed the application of public international law obligations against the obligations in the ECHR range from absolute rights that may not be restricted or derogated from, even in times of war or public emergency, e.g., the prohibitions on torture and cruel, inhuman or degrading treatment and punishment;⁶⁸ to rights that may be

65 SC Res. 1267 (1999), *supra* n. 2.

66 De Wet 2006 (*International Comparative Law Quarterly*), *supra* n. 14, at p. 64 et seq.

67 For relevant cases stemming from domestic courts see De Wet 2006 (*Leiden Journal of International Law*), *supra* n. 16, at p. 618 et seq.

68 ECtHR 7 July 1989, Case No. 14038/88, *Soering v. The United Kingdom*; ECtHR 7 July 2004, Case No. 40653/98, *Iorgov v. Bulgaria*; ECtHR 4 February 2005, Case Nos. 46827/99 and 46951/99, *Mamatkulov*

restricted for narrow purposes such as in times of emergency, e.g., the right to a fair trial;⁶⁹ and rights that may be restricted for broad purposes, such as public safety, the protection of public order, the prevention of crime and the protection of the rights and freedoms of others, e.g., the right to privacy and family life; the right to vote, and the right to property.⁷⁰

When reviewing other international obligations against the obligations in the ECHR, the European Court of Human Rights would first attempt to balance and reconcile the different international obligations at stake and would not easily conclude that there is a conflict between them. This is particularly the case where potential normative conflicts involving binding obligations of international organisations are concerned. For example, as far as the European Union is concerned, the European Court of Human Rights adopted a presumption of conformity of the actions of organs of the European Union with the obligations contained in the ECHR.⁷¹

Where Security Council resolutions are concerned, the European Court of Human Rights has thus far effectively avoided engaging in any incidental review. This was notably the case in the *Behrami* and *Saramati* decisions, where the European Court of Human Rights declared inadmissible a case that could have resulted in a potential conflict between obligations incurred under the ECHR and those resulting from Security Council resolutions.⁷² However, given the extra-territorial nature of these cases, it is uncertain whether they can serve as a precedent for disputes involving Security Council obligations, on the one hand and ECHR obligations on the other hand and which concern events that occurred within the territory of a

& *Askarov v. Turkey*; ECtHR 12 May 2005, Case No. 46221/99, *Öcalan v. Turkey*. All judgments are available at <<http://cmiskp.echr.coe.int>>, visited 18 February 2009; See also J. Dugard and C. Van den Wyngaert, 'Reconciling Extradition with Human Rights', 92 *American Journal of International Law* (1998), p. 187 at p. 210 et seq.

69 ECtHR 18 February 1999, Case No. 26083/94, *Waite and Kennedy v. Germany*; ECtHR 21 November 2001, Case No. 35763/97, *Al Adsani v. United Kingdom*; ECtHR 21 November 2001, Case No. 37112/97, *Fogarty v. United Kingdom*; ECtHR 21 November 2001, Case No. 31253/96, *McElhinney v. Ireland*; ECtHR 20 June 2005, Case No. 45036/98, *Bosphorus Hava Yollari Turzim ve Ticaret AS v. Minister of Transport, Energy and Communications, Ireland and the Attorney General (Bosphorus case)*. All judgments are available at <<http://cmiskp.echr.coe.int>>, visited 18 February 2009.

70 ECtHR 18 February 1999, Case No. 24833/94, *Matthews v. United Kingdom*; ECtHR, 9 July 2003, Case No. 48321/99, *Slivenko v. Latvia*; See also *Bosphorus case*, *supra* n. 70. All judgments are available at <<http://cmiskp.echr.coe.int>>, visited 18 February 2009.

71 See *Bosphorus case*, *supra* n. 70.

72 ECtHR 31 May 2007, Case No. 71412/01, *Agim Behrami and Bekir Behrami v. France* and ECtHR 31 May 2007, Case No. 78166/01, *Ruzhdi Saramati v. France, Norway and Germany*. Both judgments are available at <<http://cmiskp.echr.coe.int>>, visited 18 February 2009. The ECtHR concluded that the actions which were claimed to have violated Art. 2 and Art. 5(1) of the ECHR took place outside the territorial jurisdiction of any of its member states and in the absence of any effective control by a member state over these actions. Although member states such as France and Norway participated in the United Nations Kosovo Force (KFOR) in accordance with SC Res. 1244 of 10 June 1999, reprinted in 38 *ILM* 1999 p. 1451, any alleged human rights violations that occurred in the course of their participation in KFOR had to be attributed to the United Nations. By coming to this rather convoluted conclusion, the ECtHR avoided a situation in which it had to review whether there was a conflict between the obligations of member states under the ECHR and obligations they have incurred in accordance with Security Council Resolution (1999); See extensively K.M. Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', 19 *European Journal of International Law*. (2008), p. 509 at p. 509 et seq.

member state.⁷³ It therefore remains possible that the European Court of Human Rights may, when in future confronted with such a dispute, claim for itself the competence to exercise incidental review.

In contrast to the European Court of Human Rights, the European Court of Justice has – to some extent - engaged in review of Security Council resolutions on several occasions. This practice reveals that one can identify three types of incidental review. In the first scenario, the European Court of Justice had to interpret the scope of the European Union'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 European Court of Justice 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 case 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 resolution. 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 European Union) any discretion in relation to their implementation. As far as the first two scenarios are concerned, the European Court of Justice has not hesitated to exercise its competence in the past, even though such review was not 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.

The first example (pertaining to the first scenario mentioned above) concerns the *Bosphorus* decision.⁷⁴ In that instance, the European Court of Justice had to determine the scope of European Community Regulation 1990/1993⁷⁵ and, in particular, whether it authorised the impoundment by the Irish authorities of two aircrafts leased to the applicant by the former Yugoslav airline Jugoslovenski Aero Transport (JAT). As the respective European Community Regulation implemented a Security Council sanctions regime against the former Federal Republic of Yugoslavia, the European Court of Justice also had to determine the scope of Security Council Resolution 820 of 17 April 1993.⁷⁶ The European Court of Justice 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.⁷⁷ However, neither the legality of European Community Regulation 1990/1993⁷⁸ nor the sanctions regime from which it resulted was in question.

73 See *Kadi* decision (ECJ), *supra* n. 11, at para 312 et seq.; See also A.G. Poiares Maduro, *supra* n. 11, at footnote 42.

74 *Bosphorus* case, *supra* n. 70; See also ECJ 11 October 2007, Case C-117/06, *Gerda Möllendorf and Christina Möllendorf-Niehuus* (*Möllendorf* case).

75 Council Regulation 1990/93, *OJ* [1993] L 102/14, 28.4.1993.

76 SC Res. 820 of 17 April 1993, available via <<http://www.un.org/Docs/scres/1993/scres93.htm>>, visited 18 February 2009; See also *Bosphorus* decision, *supra* n. 70, at para. 15.

77 *Bosphorus* decision, *supra* n. 70, at para. 26; See also Bulterman, *supra* n. 6, at p. 767.

78 Council Regulation 1990/93, *supra* n. 76.

The second example (concerning the second scenario), is that of the *Segi* case.⁷⁹ In this instance the European Court of Justice reviewed the European Union measures implementing Security Council Resolution 1373 of 28 September 2001,⁸⁰ which, *inter alia*, requested United Nations member states to freeze all funds and other financial assets or economic resources to those involved in terrorist activity.⁸¹ In order to ensure consistent implementation of this resolution in its member states, the European Union implemented this resolution through a series of measures that, *inter alia*, resulted in the blacklisting of the Basque organisation *Segi*.⁸² The applicants filed an action for damages as a result of the relevant European Union 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).⁸³ In accordance with their line of argument, the violation resulted from the fact that they had no means of challenging *Segi's* inclusion in 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.⁸⁴

In reviewing the matter and concluding that EU law indeed provided for an avenue of legal protection in this case, the European Court of Justice emphasised the applicants' right to a remedy and access to a court of law.⁸⁵ However, it is important to note that Security Council Resolution 1373 (2001)⁸⁶ 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.⁸⁷ As a result, the question of whether the respective implementing measures were in accordance with the European Union standards of legal protection could be addressed without raising the issue of the possible illegality of Security Council Resolution 1373 (2001)⁸⁸ itself.

79 ECJ 27 February 2007, Case C-355/04, *Segi and others v. Council of the European Union (Segi case)* available via <<http://curia.europa.eu>>, visited 18 February 2009.

80 SC Res. 1373 of 28 September 2001, reprinted in 40 *ILM* 2001, p. 1278.

81 See also Bulterman, *supra* n. 6, at p. 757.

82 See, *inter alia*, Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, *OJ* [2001] L 344/90, 28.12.2001; Council Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, *OJ* [2001] L 344/70, 28.12.2001; Council Decision 2001/927/EC establishing the list provided for in Article 2(3) of Council Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, *OJ* [2001] L 344/83, 28.12.2001; Council Common Position 2002/340/CFSP updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, *OJ* [2002] L 116/75, 3.5.2002; Council Common Position 2002/462/CFSP updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2002/340/CFSP, *OJ* [2002] L 160/32, 18.6.2002.

83 Treaty on European Union (7 February 1992), *OJ* [1992] C 191/1, 29.7.1992.

84 See *Segi* decision, *supra* n. 80, at para. 52 et seq.

85 Council Common Position 2001/931/CFSP, *supra* n. 83; See also *Segi* decision, *supra* n. 80, at paras. 51-52, 54.

86 SC Res. 1373 (2001), *supra* n. 81.

87 See in particular ECJ, Opinion of A.G. Mengozzi, 26 October 2006, Case C-355/04 P, *Segi and others v. Council of the European Union* at para. 57, available at <<http://curia.europa.eu>> under Case C-354/04 P, visited 18 February 2009; See also Bulterman, *supra* n. 6, at p. 757.

88 SC Res. 1373 (2001), *supra* n. 81.

The *Kadi* case⁸⁹ represents the third scenario mentioned above. In these instances the European Court of First Instance and subsequently the European Court of Justice was confronted with a request for an annulment of European Community regulations. However, due to the manner in which these regulations implemented a Security Council sanctions regime, the request for annulment unavoidably also touched on the issue of the legality of the Security Council measures. As these regulations were near literal transpositions of the relevant Security Council resolutions, any review of the substance of the challenged regulations necessarily amounts to indirect review of the relevant Security Council measures.⁹⁰ The European Court of First Instance concluded that it did not have any general competence to exercise such incidental review, the only exception being where *jus cogens* norms were affected.⁹¹ At this point it is necessary to mention that the European Court of Justice drew a similar conclusion. Although its decision turned on EU law, the European Court of Justice did note that it did not have the jurisdiction to review incidentally the lawfulness of a decision adopted by an international body. Moreover, the ECJ was not willing to accept that any exception existed in relation to the compatibility of the international decisions with peremptory norms of international law.⁹²

Both courts drew their conclusion in a categorical fashion that was devoid of substantive reasoning. One would have expected them to provide more extensive motivation as to why they would have the power to both review the *scope* of Security Council decisions and *balance* these obligations against other international (human rights) obligations of states, but not the power to review the *legality* of such decisions. In addition, the European Court of First Instance and the European Court of Justice 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 concerns the *Namibia* opinion of the International Court of Justice,⁹³ in which the latter Court confirmed the power of the General Assembly and the Security Council to terminate a League of Nations mandate. In doing so, the International Court of Justice effectively reviewed the legality of binding Security Council resolutions terminating South Africa's mandate over (the then) South-West Africa. Whilst acknowledging that it was not a court of appeal, the International Court of Justice 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.⁹⁴

Similarly, in the *Tadić* decision,⁹⁵ the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, 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

89 *Kadi* case, *supra* n. 1.

90 Tomuschat, *supra* n. 57. at p. 543.

91 *Kadi* decision, *supra* n. 1, at paras. 221, 225-226; See also *Nada* decision, *supra* n. 9. at para. 6.2.

92 *Kadi* decision (ECJ), *supra* n. 11, para. 287.

93 ICJ, *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (*Namibia* case), Advisory Opinion, ICJ Reports (1971) p. 16.

94 See also Tomuschat, *supra* n. 57, at p. 545.

95 ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal and Jurisdiction, 2 October 1995, Case IT-94-1-AR72, *Prosecutor v. Dusko Tadić a/k/a "Dule"* (*Tadić* case), at para. 27 et seq. The decision is available at <www.un.org/icty/>, visited 18 February 2009.

International Criminal Tribunal for the former Yugoslavia. Relying, *inter alia*, on the *Namibia* opinion of the International Court of Justice,⁹⁶ 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 one has to acknowledge that the European Court of First Instance and European Court of Justice are not in any way bound by these decisions. What is more, the nature of the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia is very different from that of European Court of First Instance and the European Court of Justice. Whereas the two former courts are international institutions, the latter two, given their centralised nature, arguably bear more resemblance to municipal courts.⁹⁷

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. (However, the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia did not let this fact prevent them from claiming an implicit right to review Security Council resolutions.) In addition, they all share two common functions, namely the settlement of disputes in accordance with law and the administration of justice.⁹⁸ A coherent and systemic approach to international law across different regimes would have required the European Court of First Instance and the European Court of Justice to explain whether these facts have any bearing on its own competence to review Security Council resolutions 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 by the European Court of First Instance as to why an exception would exist in relation to *jus cogens* norms. In this respect the position of the European Court of Justice was more consistent, as it did not accept the existence of such an exception.

It is fair to assume that the reluctance of the European Court of First Instance to acknowledge a (broad) competence of review ‘in the exercise of its judicial function’ of Security Council resolutions, relates to the potential undermining effect that this could have on Charter obligations.⁹⁹ For example, it could open the door for states to avoid their Charter obligations by forwarding pre-textual arguments of illegality. At the same time, one should balance this risk against the fact that, in the absence of judicial control by member states, the powers of the Security Council are at risk of becoming absolute. This, in turn, would threaten the legitimacy and the functioning of the United Nations system itself, if it were to result in the upholding of Security Council decisions which undermined the very norms upon which the United Nations was based.¹⁰⁰ For this reason, the author would argue in favour of domestic and regional review, keeping in mind that these courts will attribute significant weight to the presumption

96 *Namibia* case, *supra* n. 94.

97 In addition, the *Tadić* decision, *supra* n. 96, was tainted by the fact that the ICTY had to review the legality of its own creation, which effectively made it a judge in its own case, see De Wet 2004 (*The Chapter VII Powers of the United Nations Security Council*), *supra* n. 50, at p. 65-66.

98 See also C. Brown, *A Common Law of International Adjudication* (Oxford, Oxford University Press 2007), at p. 230 et seq., where this argument is developed in relation to international courts and tribunals and the administration of international justice.

99 See also the *Nada* decision, *supra* n. 9, at para. 6.2; See also A.G. Poiares Maduro, *supra* n. 11, at para. 38.

100 See also Orakhelashvili, *supra* n. 29, at p. 192.

of legality attached to Security Council resolutions and the importance of that organ's role as the primary guardian of international peace and security.¹⁰¹

As far as the European Court of Justice is concerned, the motivations for its conclusion are less clear, given that it did provide for judicial review on the basis of EU law. Even though this approach did not lead to any decision on the legality of the Security Council resolutions as such, it is unlikely that it was motivated by a fear of undermining the Charter system. After all, the annulment of the Community acts that implement binding Security Council resolutions can be equally disruptive - if the efficacy of the Charter system is one's major concern. Such an annulment could effectively result in a non-implementation or mere partial implementation of Charter obligations. It is more likely that that approach of the European Court of Justice to focus exclusively on fundamental values with the EU legal order was motivated by a desire to avoid an open conflict with the Security Council and its permanent members, two of whom are also members of the EU.

4. Conclusion

In light of the above analysis, one can conclude that the European Court of First Instance *Kadi* case¹⁰² has, in principle, confirmed the existence of a hierarchy in international law that would also constitute an outer limit for Security Council action. It has also confirmed (a limited) role for domestic and regional courts in enforcing this hierarchy. This could be regarded as confirmation of a nascent international constitutional order along the lines outlined above in section 1. Closer scrutiny nonetheless reveals that this development does not yet result in any meaningful human rights protection when human rights infringements are likely to result from binding Security Council resolutions.

This relates to the European Court of First Instance's flawed interpretation of the third layer of the international value system identified above, namely the scope of the international human rights obligations applicable to the United Nations and its organs. In doing so, the European Court of First Instance effectively devaluated the standing of this emerging order and increased the possibility of inter-regime conflict whenever both Security Council resolutions and human rights norms are applicable. Under these circumstances meaningful human rights protection would only be possible by applying the more human rights friendly regime - whether of a regional or domestic constitutional nature - at the expense of, for example, an international regime directed at the protection of international peace and security.

This is also the upshot of the approach that was followed by the European Court of Justice during the appeal of the *Kadi* case,¹⁰³ even though it did not address the European Court of First Instance's reasoning pertaining to the human rights obligations binding on the Security Council. By exclusively focussing on (certain aspects of the) the European Union value system in coming to its decision to grant extensive judicial protection, the European Court of Justice enhanced the perception that there indeed may have existed an inter-regime normative conflict, which could only be resolved by protecting either one of the regimes. Similarly,

101 De Wet and Nollkaemper, *supra* n. 20, at p. 196 et seq.

102 *Kadi* case, *supra* n. 1.

103 See *Kadi* decision (ECJ), *supra* n. 11, para. 316, 326; See also A.G. Poiares Maduro, *supra* n. 11.

neither the European Court of First Instance nor the European Court of Justice gave sufficient recognition to the increasing role of regional and domestic courts in enforcing the international value system. Although these courts first and foremost serve to enforce the law of their own legal order, they also have a secondary role in enforcing the emerging international constitutional order.¹⁰⁴

On the positive side, one has to acknowledge, of course that if strong and influential courts like the European Court of Justice were to provide extensive human rights protection in a consistent matter, this may, in time, have a “bottom-up spill over” effect on United Nations organs and other international actors. They would be forced to give better recognition to international human rights standards as a matter of practical reality, as anything else may lead to the non-observance of their decisions. However, on a practical level such an approach leaves unresolved – in the short and medium term – the question of whether and to what extent the United Nations and its organs are bound by international human rights standards (in the sense of a third layer of an international value system) and whether states that do not implement Security Council resolutions that infringe international human rights standards, would actually be in violation of a Security Council resolution. On a conceptual level, it also leaves open the question whether international law has developed in a manner which provides safeguards against the (re-) establishment of absolute public power by international organisations over private individuals.

The better approach for regional and domestic courts would therefore be to acknowledge the more extensive human rights obligations of the United Nations regime and their resemblance to other regional or domestic obligations for human rights protection. On a practical level, this would imply that regional and domestic courts interpret Security Council resolutions in accordance with the Security Council’s own human rights obligations. In the process, they would hold governments to their obligation to implement Security Council obligations whether pertaining to sanctions or otherwise, whilst simultaneously giving effect to the core content of their own international human rights obligations (as well as those of the United Nations). In this manner a zero sum scenario is avoided where international human rights obligations are implemented at the expense of international peace and security, or vice versa. In conceptual terms, such an approach would also contribute to developing a system where the supreme (legal) framework for the (control over) the exercise of public power can be found in the interaction between national, regional and functional regimes and the core value system common to all regimes.

★ APPEARED IN: 5 EUROPEAN CONSTITUTIONAL LAW REVIEW 2009/ 2

104 Cf. Brown, *supra* n. 99, at p. 55, who suggests that the emergence of common standards in the procedure and remedies applied in international adjudication can serve as an indication that international courts are beginning to operate as if they formed part of the same system - despite lacking any formal connections between them.

Yassin Abdullah Kadi & Al Barakaat International Foundation v Council of the European Union and others (Joined Cases C-402/05 P and C-415/05 P, ECJ)

PAR. 310 - PAR. 315 (COMPLETE VERSION IN SUPPLEMENT)

- 310 It has however been maintained before the Court, in particular at the hearing, that the Community judicature ought, like the European Court of Human Rights, which in several recent decisions has declined jurisdiction to review the compatibility of certain measures taken in the implementing of resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, to refrain from reviewing the lawfulness of the contested regulation in the light of fundamental freedoms, because that regulation is also intended to give effect to such resolutions.
- 311 In this respect, it is to be found that, as the European Court of Human Rights itself has noted, there exists a fundamental difference between the nature of the measures concerned by those decisions, with regard to which that court declined jurisdiction to carry out a review of consistency with the ECHR, and the nature of other measures with regard to which its jurisdiction would seem to be unquestionable (see *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* of 2 May 2007, not yet published in the *Reports of Judgments and Decisions*, §151).
- 312 While, in certain cases before it the European Court of Human Rights has declined jurisdiction *ratione personae*, those cases involved actions directly attributable to the United Nations as an organisation of universal jurisdiction fulfilling its imperative collective security objective, in particular actions of a subsidiary organ of the UN created under Chapter VII of the Charter of the United Nations or actions falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter, and not actions ascribable to the respondent States before that court, those actions not, moreover, having taken place in the territory of those States and not resulting from any decision of the authorities of those States.
- 313 By contrast, in paragraph 151 of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, the European Court of Human Rights stated that in the case leading to its judgment in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, concerning a seizure measure carried out by the authorities of the respondent State on its territory following a decision by one of its ministers, it had recognised its competence, notably *ratione personae*, vis-à-vis the respondent State, despite the fact that the source of the contested measure was a Community regulation taken, in its turn, pursuant to a resolution of the Security Council.
- 314 In the instant case it must be declared that the contested regulation cannot be considered to be an act directly attributable to the United Nations as an action of one of its subsidiary organs created under Chapter VII of the Charter of the United Nations or an action falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter.
- 315 In addition and in any event, the question of the Court's jurisdiction to rule on the lawfulness of the contested regulation has arisen in fundamentally different circumstances.

Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Minister for Transport, Energy and Communications and others (Case C-84/95, ECJ)

PAR. 3 – PAR. 5 (COMPLETE VERSION IN SUPPLEMENT)

- 3 The file in the main proceedings shows that the transaction between Bosphorus Airways and JAT was entered into in complete good faith and was not intended to circumvent the sanctions against the Federal Republic of Yugoslavia which had been decided by United Nations resolutions and implemented in the Community by Regulation No 990/93. Furthermore, in application of those sanctions, the rent due under the lease was paid into blocked accounts, and was thus not paid to JAT. Finally, the aircraft were used exclusively by Bosphorus Airways for flights between Turkey on the one hand and several Member States and Switzerland on the other.
- 4 When one of the aircraft was preparing to take off following maintenance operations at Dublin Airport, the Minister directed it to be impounded under Article 8 of Regulation No 990/93 on the ground that it was an aircraft in which a majority or controlling interest was held by a person or undertaking in or operating from the Federal Republic of Yugoslavia.
- 5 The first paragraph of Article 8 of Regulation No 990/93 provides:

"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."

Case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland (Application no. 45036/98, ECtHR)

PAR. 135 – PAR. 167 (COMPLETE VERSION IN SUPPLEMENT)

III. THE COURT'S ASSESSMENT

A. Article 1 of the Convention

- 135 The parties and third parties made substantial submissions under Article 1 of the Convention about the Irish State's Convention responsibility for the impoundment given its Community obligations. This Article provides:

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

- 136 The text of Article 1 requires States Parties to answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their "jurisdiction" (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004-VII). The notion of "jurisdiction" reflects the term's meaning in public international law (see *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99, and 48209/99, § 20, 14 May 2002; *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, §§ 59-61, ECHR 2001-XII; and *Assanidze v. Georgia*, no. 71503/01, § 137, ECHR 2004-II), so that a State's jurisdictional competence is considered primarily territorial (see *Banković and Others*, § 59), a jurisdiction presumed to be exercised throughout the State's territory (see *Ilaşcu and Others*, § 312).

- 137 In the present case it is not disputed that the act about which the applicant company complained, the detention of the aircraft leased by it for a period of time, was implemented by the authorities of the respondent State on its territory following a decision made by the Irish Minister for Transport. In such circumstances the applicant company, as the addressee of the impugned act, fell within the “jurisdiction” of the Irish State, with the consequence that its complaint about that act is compatible *ratione loci, personae and materiae* with the provisions of the Convention.
- 138 The Court is further of the view that the submissions referred to in paragraph 135 above concerning the scope of the responsibility of the respondent State go to the merits of the complaint under Article 1 of Protocol No. 1 and are therefore examined below.

B. Article 1 of Protocol No. 1

- 139 Article 1 of Protocol No. 1 reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

- 140 It was not disputed that there was an “interference” (the detention of the aircraft) with the applicant company's “possessions” (the benefit of its lease of the aircraft) and the Court does not see any reason to conclude otherwise (see, for example, *Stretch v. the United Kingdom*, no. 44277/98, §§ 32-35, 24 June 2003).

1. The applicable rule

- 141 The parties did not, however, agree on whether that interference amounted to a deprivation of property (first paragraph of Article 1 of Protocol No. 1) or a control of the use of property (second paragraph). The Court reiterates that, in guaranteeing the right of property, this Article comprises “three distinct rules”: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not “distinct” in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see *AGOSI*, cited above, p. 17, § 48).
- 142 The Court considers that the sanctions regime amounted to a control of the use of property considered to benefit the former FRY and that the impugned detention of the aircraft was a measure to enforce that regime. While the applicant company lost the benefit of approximately three years of a four-year lease, that loss formed a constituent element of the above-mentioned control on the use of property. It is therefore the second paragraph of Article 1 of Protocol No. 1 which is applicable in the present case

(see AGOSI, cited above, pp. 17-18, §§ 50-51, and Gasus Dossier- und Fördertechnik GmbH v. the Netherlands, judgment of 23 February 1995, Series A no. 306-B, pp. 47-48, § 59), the “general principles of international law” within the particular meaning of the first paragraph of Article 1 of Protocol No. 1 (and relied on by the applicant company) not therefore requiring separate examination (see Gasus Dossier- und Fördertechnik GmbH, pp. 51-53, §§ 66-74).

2. The legal basis for the impugned interference

- 143 The parties strongly disagreed as to whether the impoundment was at all times based on legal obligations on the Irish State flowing from Article 8 of Regulation (EEC) no. 990/93. For the purposes of its examination of this question, the Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law even when that law refers to international law or agreements. Equally, the Community's judicial organs are better placed to interpret and apply Community law. In each instance, the Court's role is confined to ascertaining whether the effects of such adjudication are compatible with the Convention (see, *mutatis mutandis*, Waite and Kennedy, cited above, § 54, and *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 49, ECHR 2001-II).
- 144 While the applicant company alluded briefly to the Irish State's role in the Council of the European Communities (see paragraph 115 above), the Court notes that its essential standpoint was that it was not challenging the provisions of the regulation itself but rather their implementation.
- 145 Once adopted, Regulation (EEC) no. 990/93 was “generally applicable” and “binding in its entirety” (pursuant to Article 189, now Article 249, of the EC Treaty), so that it applied to all member States, none of which could lawfully depart from any of its provisions. In addition, its “direct applicability” was not, and in the Court's view could not be, disputed. The regulation became part of domestic law with effect from 28 April 1993 when it was published in the Official Journal, prior to the date of the impoundment and without the need for implementing legislation (see, in general, paragraphs 65 and 83 above).
The later adoption of Statutory Instrument no. 144 of 1993 did not, as suggested by the applicant company, have any bearing on the lawfulness of the impoundment; it simply regulated certain administrative matters (the identity of the competent authority and the sanction to be imposed for a breach of the regulation) as foreseen by Articles 9 and 10 of the EEC regulation. While the applicant company queried which body was competent for the purposes of the regulation (see paragraph 120 above), the Court considers it entirely foreseeable that the Minister for Transport would implement the impoundment powers contained in Article 8 of Regulation (EEC) no. 990/93.
It is true that Regulation (EEC) no. 990/93 originated in a UNSC resolution adopted under Chapter VII of the United Nations Charter (a point developed in some detail by the Government and certain third parties). While the resolution was pertinent to the interpretation of the regulation (see the opinion of the Advocate General and the ruling of the ECJ – paragraphs 45-50 and 52-55 above), the resolution did not form part of Irish domestic law (Mr Justice Murphy – paragraph 35 above) and could not therefore have constituted a legal basis for the impoundment of the aircraft by the Minister for Transport.
Accordingly, the Irish authorities rightly considered themselves obliged to impound any departing aircraft to which they considered Article 8 of Regulation (EEC) no. 990/93 applied. Their decision that it did so apply was later confirmed, in particular, by the ECJ (see paragraphs 54-55 above).
- 146 The Court finds persuasive the European Commission's submission that the State's duty of loyal cooperation (Article 5, now Article 10, of the EC Treaty) required it to appeal the High Court judgment of June 1994 to the Supreme Court in order to clarify the interpretation of Regulation (EEC) no. 990/93. This was the first time that regulation had been applied, and the High Court's interpretation differed

from that of the Sanctions Committee, a body appointed by the United Nations to interpret the UNSC resolution implemented by the regulation in question.

147 The Court would also agree with the Government and the European Commission that the Supreme Court had no real discretion to exercise, either before or after its preliminary reference to the ECJ, for the reasons set out below.

In the first place, there being no domestic judicial remedy against its decisions, the Supreme Court had to make the preliminary reference it did having regard to the terms of Article 177 (now Article 234) of the EC Treaty and the judgment of the ECJ in CILFIT (see paragraph 98 above): the answer to the interpretative question put to the ECJ was not obvious (the conclusions of the Sanctions Committee and the Minister for Transport conflicted with those of the High Court); the question was of central importance to the case (see the High Court's description of the essential question in the case and its consequential judgment from which the Minister appealed to the Supreme Court – paragraphs 35-36 above); and there was no previous ruling by the ECJ on the point. This finding is not affected by the observation in the Court's decision in Moosbrugger (cited and relied on by the applicant company – see paragraph 116 above) that an individual does not per se have a right to a referral.

Secondly, the ECJ ruling was binding on the Supreme Court (see paragraph 99 above).

Thirdly, the ruling of the ECJ effectively determined the domestic proceedings in the present case. Given the Supreme Court's question and the answer of the ECJ, the only conclusion open to the former was that Regulation (EEC) no. 990/93 applied to the applicant company's aircraft. It is moreover erroneous to suggest, as the applicant company did, that the Supreme Court could have made certain orders additional to the ECJ ruling (including a second “clarifying” reference to the ECJ) as regards impoundment expenses, compensation and the intervening relaxation of the sanctions regime. The applicant company's motion and affidavit of October 1996 filed with the Supreme Court did not develop these matters in any detail or request that court to make such supplemental orders. In any event, the applicant company was not required to discharge the impoundment expenses.

The fact that Regulation (EEC) no. 990/93 did not admit of an award of compensation was implicit in the findings of the Advocate General and the ECJ (each considered the application of the regulation to be justified despite the hardship it implied) and in the expenses provisions of the second sentence of Article 8 of the regulation. Consequently, the notions of uniform application and supremacy of Community law (see paragraphs 92 and 96 above) prevented the Supreme Court from making such an award. As noted in paragraph 105 above, Regulation (EC) no. 2472/94 relaxing the sanctions regime as implemented in the European Community from October 1994 expressly excluded from its ambit aircraft already lawfully impounded, and neither the ECJ nor the Supreme Court referred to this point in their respective ruling (of July 1996) and judgment (of November 1996).

148 For these reasons, the Court finds that the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under Community or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from Community law and, in particular, Article 8 of Regulation (EEC) no. 990/93.

3. Whether the impoundment was justified

(a) The general approach to be adopted

149 Since the second paragraph of Article 1 of Protocol No. 1 is to be construed in the light of the general principle enunciated in the opening sentence of that Article, there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised: the Court must determine whether a fair balance has been struck between the demands of the general interest in this respect and the interest of the individual company concerned. In so determining, the Court recognises that the State enjoys a wide margin of appreciation with regard to the means to be employed and to the

question of whether the consequences are justified in the general interest for the purpose of achieving the objective pursued (see AGOSI, cited above, p. 18, § 52).

- 150 The Court considers it evident from its finding in paragraphs 145 to 148 above that the general interest pursued by the impugned measure was compliance with legal obligations flowing from the Irish State's membership of the European Community.
- It is, moreover, a legitimate interest of considerable weight. The Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties, and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI), which principles include that of *pacta sunt servanda*. The Court has also long recognised the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organisations (see *Waite and Kennedy*, §§ 63 and 72, and *Al-Adsani*, § 54, both cited above; see also Article 234 (now Article 307) of the EC Treaty). Such considerations are critical for a supranational organisation such as the European Community (See *Costa v. Ente Nazionale Energia Elettrica (ENEL)*, Case 6/64 [1964] ECR 585). This Court has accordingly accepted that compliance with Community law by a Contracting Party constitutes a legitimate general-interest objective within the meaning of Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *S.A. Dangeville*, cited above, §§ 47 and 55).
- 151 The question is therefore whether, and if so to what extent, that important general interest of compliance with Community obligations can justify the impugned interference by the Irish State with the applicant company's property rights.
- 152 The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue cooperation in certain fields of activity (see *M. & Co.*, p. 144, and *Matthews*, § 32, both cited above). Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party (see *Confédération française démocratique du travail v. European Communities*, no. 8030/77, Commission decision of 10 July 1978, DR 13, p. 231; *Dufay v. European Communities*, no. 13539/88, Commission decision of 19 January 1989, unreported; and *M. & Co.*, p. 144, and *Matthews*, § 32, both cited above).
- 153 On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (see *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, Reports 1998-I, pp. 17-18, § 29).
- 154 In reconciling both these positions and thereby establishing the extent to which a State's action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards (see *M. & Co.*, p. 145, and *Waite and Kennedy*, § 67, both cited above). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see *mutatis mutandis*,

Matthews, cited above, §§ 29 and 32-34, and Prince Hans-Adam II of Liechtenstein v. Germany [GC], no. 42527/98, § 47, ECHR 2001-VIII).

- 155 In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see *M. & Co.*, cited above, p. 145, an approach with which the parties and the European Commission agreed). By “equivalent” the Court means “comparable”; any requirement that the organisation's protection be “identical” could run counter to the interest of international cooperation pursued (see paragraph 150 above). 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.
- 156 If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. 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 European public order” in the field of human rights (see *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, pp. 27-28, § 75).
- 157 It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. The numerous Convention cases cited by the applicant company in paragraph 117 above confirm this. Each case (in particular, *Cantoni*, p. 1626, § 26) concerned a review by this Court of the exercise of State discretion for which Community law provided. *Pellegrini* is distinguishable: the State responsibility issue raised by the enforcement of a judgment not of a Contracting Party to the Convention (see *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, pp. 34-35, § 110) is not comparable to compliance with a legal obligation emanating from an international organisation to which Contracting Parties have transferred part of their sovereignty. *Matthews* can also be distinguished: the acts for which the United Kingdom was found responsible were “international instruments which were freely entered into” by it (see paragraph 33 of that judgment). *Kondova* (see paragraph 76 above), also relied on by the applicant company, is consistent with a State's Convention responsibility for acts not required by international legal obligations.
- 158 Since the impugned measure constituted solely compliance by Ireland with its legal obligations flowing from membership of the European Community (see paragraph 148 above), the Court will now examine whether a presumption arises that Ireland complied with the requirements of the Convention in fulfilling such obligations and whether any such presumption has been rebutted in the circumstances of the present case.

(b) Whether there was a presumption of Convention compliance at the relevant time

- 159 The Court has described above (see paragraphs 73-81) the fundamental rights guarantees of the European Community which apply to member States, Community institutions and natural and legal persons (“individuals”). While the founding treaties of the European Communities did not initially contain express provisions for the protection of fundamental rights, the ECJ subsequently recognised that such rights were enshrined in the general principles of Community law protected by it, and that the Convention had a “special significance” as a source of such rights. Respect for fundamental rights has become “a

condition of the legality of Community acts” (see paragraphs 73-75 above, together with the opinion of the Advocate General in the present case, paragraphs 45-50 above) and in carrying out this assessment the ECJ refers extensively to Convention provisions and to this Court's jurisprudence. At the relevant time, these jurisprudential developments had been reflected in certain treaty amendments (notably those aspects of the Single European Act of 1986 and of the Treaty on European Union referred to in paragraphs 77-78 above).

This evolution has continued. The Treaty of Amsterdam of 1997 is referred to in paragraph 79 above. Although not fully binding, the provisions of the Charter of Fundamental Rights of the European Union were substantially inspired by those of the Convention, and the Charter recognises the Convention as establishing the minimum human rights standards. Article I-9 of the later Treaty establishing a Constitution for Europe (not in force) provides for the Charter to become primary law of the European Union and for the Union to accede to the Convention (see paragraphs 80-81 above).

160 However, the effectiveness of such substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure their observance.

161 The Court has referred (see paragraphs 86-90 above) to the jurisdiction of the ECJ in, *inter alia*, annulment actions (Article 173, now Article 230, of the EC Treaty), in actions against Community institutions for failure to perform Treaty obligations (Article 175, now Article 232), to hear related pleas of illegality under Article 184 (now Article 241) and in cases against member States for failure to fulfil Treaty obligations (Articles 169, 170 and 171, now Articles 226, 227 and 228).

162 It is true that access of individuals to the ECJ under these provisions is limited: they have no *locus standi* under Articles 169 and 170; their right to initiate actions under Articles 173 and 175 is restricted as is, consequently, their right under Article 184; and they have no right to bring an action against another individual.

163 It nevertheless remains the case that actions initiated before the ECJ by the Community institutions or a member State constitute important control of compliance with Community norms to the indirect benefit of individuals. Individuals can also bring an action for damages before the ECJ in respect of the non-contractual liability of the institutions (see paragraph 88 above).

164 Moreover, it is essentially through the national courts that the Community system provides a remedy to individuals against a member State or another individual for a breach of Community law (see paragraphs 85 and 91 above). Certain EC Treaty provisions envisaged a complementary role for the national courts in the Community control mechanisms from the outset, notably Article 189 (the notion of direct applicability, now Article 249) and Article 177 (the preliminary reference procedure, now Article 234). It was the development by the ECJ of important notions such as the supremacy of Community law, direct effect, indirect effect and State liability (see paragraphs 92-95 above) which greatly enlarged the role of the domestic courts in the enforcement of Community law and its fundamental rights guarantees.

The ECJ maintains its control on the application by national courts of Community law, including its fundamental rights guarantees, through the procedure for which Article 177 of the EC Treaty provides in the manner described in paragraphs 96 to 99 above. While the ECJ's role is limited to replying to the interpretative or validity question referred by the domestic court, the reply will often be determinative of the domestic proceedings (as, indeed, it was in the present case – see paragraph 147 above) and detailed guidelines on the timing and content of a preliminary reference have been laid down by the EC Treaty provision and developed by the ECJ in its case-law. The parties to the domestic proceedings have the right to put their case to the ECJ during the Article 177 process. It is further noted that national

courts operate in legal systems into which the Convention has been incorporated, albeit to differing degrees.

165 In such circumstances, the Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, “equivalent” (within the meaning of paragraph 155 above) to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community (see paragraph 156 above).

(c) Whether the presumption in question has been rebutted in the present case

166 The Court has had regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime and to the ruling of the ECJ (in the light of the opinion of the Advocate General), a ruling with which the Supreme Court was obliged to and did comply. It considers it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights.

In the Court's view, therefore, it cannot be said that the protection of the applicant company's Convention rights was manifestly deficient, with the consequence that the relevant presumption of Convention compliance by the respondent State has not been rebutted.

4. Conclusion under Article 1 of Protocol No. 1

167 It follows that the impoundment of the aircraft did not give rise to a violation of Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Dismisses the preliminary objections;
2. Holds that there has been no violation of Article 1 of Protocol No. 1.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 30 June 2005.

Organisation des Modjahedines du peuple d'Iran v Council of the European Union (Case T-228/02, ECJ)

PAR. 1 – PAR. 17; PAR. 89 - PAR. 174 (COMPLETE VERSION IN SUPPLEMENT)

1 As appears from the case-file, the applicant, the Organisation des Modjahedines du peuple d'Iran (People's Mujahidin of Iran, Mujahedin-e Khalq in Farsi), was founded in 1965 and set itself the objective of replacing the regime of the Shah of Iran, then the mullahs' regime, by a democracy. In 1981 it took part in the foundation of the National Council of Resistance of Iran (NCRI), a body defining itself as the 'parliament in exile of the Iranian resistance'. At the time of the facts giving rise to the present dispute, it was composed of five separate organisations and an independent section, making up an armed branch operating inside Iran. According to the applicant, however, it and all its members have expressly renounced all military activity since June 2001 and it no longer has an armed structure at the present time.

2 By order of 28 March 2001, the United Kingdom Secretary of State for the Home Department ('the Home Secretary') included the applicant in the list of organisations proscribed under the Terrorism Act 2000. The applicant brought two parallel actions against that order, one an appeal before the Proscribed Organisations Appeal Commission ('POAC'), the other for judicial review before the High Court of Justice (England and Wales), Queen's Bench Division (Administrative Court) ('the High Court').

- 3 On 28 September 2001, the United Nations Security Council ('the Security Council') adopted Resolution 1373 (2001) laying down strategies to combat terrorism by all means, in particular the financing thereof. Paragraph 1(c) of that resolution provides, inter alia, that all States must freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled by such persons; and of persons and entities acting on behalf of, or at the direction of, such persons and entities.
- 4 On 27 December 2001, taking the view that action by the Community was needed in order to implement Security Council Resolution 1373 (2001), the Council adopted Common Position 2001/930/CFSP on combating terrorism (OJ 2001 L 344, p. 90) and Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).
- 5 According to Article 1(1) of Common Position 2001/931, the latter applies 'to persons, groups and entities involved in terrorist acts and listed in the Annex'. The applicant's name does not appear in that list.
- 6 Article 1(2) and (3) of Common Position 2001/931 defines what is to be understood by 'persons, groups and entities involved in terrorist acts' and by 'terrorist act'.
- 7 According to the terms of Article 1(4) of Common Position 2001/931, the list in the Annex is to be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. 'Competent authority' is understood to mean a judicial authority or, where judicial authorities have no competence in the relevant area, an equivalent competent authority in that area.
- 8 According to Article 1(6) of Common Position 2001/931, the names of persons and entities in the list in the Annex are to be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them in the list.
- 9 According to Articles 2 and 3 of Common Position 2001/931, the European Community, acting within the limits of the powers conferred on it by the EC Treaty, is to order the freezing of the funds and other financial assets or economic resources of persons, groups and entities listed in the Annex and is to ensure that funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly, for their benefit.
- 10 On 27 December 2001, considering that a regulation was necessary in order to implement at Community level the measures described in Common Position 2001/931, the Council adopted, on the basis of Articles 60 EC, 301 EC and 308 EC, Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70). That regulation provides that, except as permitted thereunder, all funds belonging to a natural or legal person, group or entity included in the list referred to in Article 2(3) thereof are to be frozen. Likewise, it is prohibited to make funds available or provide financial services to those persons, groups or entities. The Council, acting by unanimity, is to establish, review and amend the list of persons, groups and entities to which the regulation applies, in accordance with the provisions laid down in Article 1(4), (5) and (6) of Common Position 2001/931.

- 11 The initial list of persons, groups and entities to which Regulation No 2580/2001 applies was established by Council Decision 2001/927/EC of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 (OJ 2001 L 344, p. 83). The applicant's name is not included in that list.
- 12 By judgment of 17 April 2002 the High Court dismissed the action for judicial review brought by the applicant against the Home Secretary's order of 28 March 2001 (see paragraph 2 above), considering, essentially, that the POAC was the appropriate forum to hear the applicant's arguments, including those alleging infringement of the right to be heard.
- 13 On 2 May 2002, the Council adopted, under Articles 15 EU and 34 EU, Common Position 2002/340/CFSP, updating Common Position 2001/931 (OJ 2002 L 116, p. 75). The annex thereto updates the list of persons, groups and entities to which Common Position 2001/931 applies. Point 2 of that annex, entitled 'Groups and entities', includes inter alia the applicant's name, identified as follows : 'Mujahedin-e Khalq Organisation (MEK or MKO) (minus the "National Council of Resistance of Iran" (NCRI)) (a.k.a. The National Liberation Army of Iran (NLA, the militant wing of the MEK), the People's Mujahidin of Iran (PMOI), National Council of Resistance (NCR), Muslim Iranian Students' Society)'.
- 14 By Council Decision 2002/334/EC of 2 May 2002 implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2001/927 (OJ 2002 L 116, p. 33), the Council adopted an updated list of the persons, groups and entities to which that regulation applies. The applicant's name is included in that list, in the same terms as those employed in the Annex to Common Position 2002/340.
- 15 On 17 June 2002, the Council adopted Common Position 2002/462/CFSP updating Common Position 2001/931 and repealing Common Position 2002/340 (OJ 2002 L 160, p. 32) and also Council Decision 2002/460/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 and repealing Decision 2002/334 (OJ 2002 L 160, p. 26). The applicant's name was maintained in the lists provided for by Common Position 2001/931 and by Regulation No 2580/2001 ('the disputed lists' or, in the case of the latter, 'the disputed list').
- 16 By judgment of 15 November 2002 the POAC dismissed the appeal brought by the applicant against the Home Secretary's order of 28 March 2001 (see paragraph 2 above), considering, inter alia, that there was no requirement to hear the applicant's views beforehand, such a hearing being impractical or undesirable in the context of legislation directed against terrorist organisations. According to that same decision, the legal scheme of the Terrorism Act 2000 provides a genuine opportunity for the applicant's views to be heard before the POAC.
- 17 Since then, the Council has adopted a number of common positions and decisions updating the disputed lists. Those in force at the date of the close of the oral procedure were: Common Position 2005/936/CFSP of the Council of 21 December 2005 updating Common Position 2001/931 and repealing Common Position 2005/847/CFSP (OJ 2005 L 340, p. 80), and Council Decision 2005/930/EC of 21 December 2005 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2005/848/EC (OJ 2005 L 340, p. 64). The applicant's name has always been maintained in the disputed lists by the acts thus adopted.

(...)

89 It is appropriate to begin by examining, together, the pleas alleging infringement of the right to a fair hearing, infringement of the obligation to state reasons and infringement of the right to effective judicial protection, which are closely linked. First, the safeguarding of the right to a fair hearing helps to ensure that the right to effective judicial protection is exercised properly. Second, there is a close link between the right to an effective judicial remedy and the obligation to state reasons. As held in settled case-law, the Community institutions' obligation under Article 253 EC to state the reasons on which a decision is based is intended to enable the Community judicature to exercise its power to review the lawfulness of the decision and the persons concerned to know the reasons for the measure adopted so that they can defend their rights and ascertain whether or not the decision is well founded (Case 24/62 *Germany v Commission* [1963] ECR 63, 69; Case C-400/99 *Italy v Commission* [2005] ECR I-3657, paragraph 22; Joined Cases T-346/02 and T-347/02 *Cableuropa and Others v Commission* [2003] ECR II-4251, paragraph 225). Thus, the parties concerned can make genuine use of their right to a judicial remedy only if they have precise knowledge of the content of and the reasons for the act in question (see, to that effect, Case C-309/95 *Commission v Council* [1998] ECR I-655, paragraph 18, and Case T-89/96 *British Steel v Commission* [1999] ECR II-2089, paragraph 33).

90 In the light of the principal arguments put forward by the Council and the United Kingdom, the Court will begin by considering whether the rights and safeguards alleged by the applicant to have been infringed may, in principle, apply in the context of the adoption of a decision to freeze funds on the basis of Regulation No 2580/2001. The Court will then determine the purpose of and identify the restrictions on those rights and safeguards in such a context. Lastly, the Court will rule on the alleged infringement of the rights and safeguards in question, in the specific circumstances of the present case. Applicability of the safeguards relating to observance of the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection in the context of the adoption of a decision to freeze funds on the basis of Regulation No 2580/2001

The right to a fair hearing

91 According to settled case-law, observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question. That principle requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his view of the matters on which the penalty is based (see *Fiskano v Commission*, paragraph 75 above, paragraphs 39 and 40, and case-law cited).

92 In the present case, the contested decision, by which an individual economic and financial sanction was imposed on the applicant (freezing of funds), undeniably affects the applicant adversely (see also paragraph 98 below). That case-law is, therefore, relevant to the present case.

93 It follows from that case-law that, subject to exceptions (see paragraph 127 et seq. below), the safeguarding of the right to be heard comprises, in principle, two main parts. First, the party concerned must be informed of the evidence adduced against it to justify the proposed sanction ('notification of the evidence adduced'). Second, he must be afforded the opportunity effectively to make known his view on that evidence ('hearing').

94 So understood, the safeguarding of the right to a fair hearing in the context of the administrative procedure itself is to be distinguished from that resulting from the right to an effective judicial remedy against the act having adverse effects which may be adopted at the end of that procedure (see, to that effect, Case T-372/00 *Campolargo v Commission* [2002] ECR-SC I-A-49 and II-223, paragraph 36).

The arguments of the Council and the United Kingdom relating to Article 6 of the ECHR (see paragraphs 77 to 79 above) are thus irrelevant to this plea.

- 95 Moreover, the safeguard relating to observance of the actual right to a fair hearing, in the context of the adoption of a decision to freeze funds on the basis of Regulation No 2580/2001, cannot be denied to the parties concerned solely on the ground, relied on by the Council and the United Kingdom (see paragraphs 78 and 79 above), that neither the ECHR nor the general principles of Community law confer on individuals any right whatsoever to be heard before the adoption of an act of a legislative nature (see, to that effect and by analogy, *Yusuf*, paragraph 29 above, paragraph 322).
- 96 It is true that the case-law relating to the right to be heard cannot be extended to the context of a Community legislative process culminating in the enactment of legislation involving a choice of economic policy and applying to the generality of the traders concerned (Case T-521/93 *Atlanta and Others v Council and Commission* [1996] ECR II-1707, paragraph 70, upheld on appeal in Case C-104/97 P *Atlanta v Commission and Council* [1999] ECR I-6983, paragraphs 34 to 38).
- 97 It is also true that the contested decision, which maintains the applicant in the disputed list, after the applicant had been included by the decision initially contested, has the same general scope as Regulation No 2580/2001 and, like that regulation, is directly applicable in all Member States. Thus, despite its title, it is an integral part of that regulation for the purposes of Article 249 EC (see, by analogy, order in Case T-45/02 *DOW AgroSciences v Parliament and Council* [2003] ECR II-1973, paragraphs 31 to 33, and case-law cited, and *Yusuf*, paragraph 29 above, paragraphs 184 to 188).
- 98 In the instant case, however, the contested regulation is not of an exclusively legislative nature. Whilst being of general application, it is of direct and individual concern to the applicant, to whom it refers by name as having to be included in the list of persons, groups and entities whose funds are to be frozen pursuant to Regulation No 2580/2001. Since it is an act which imposes an individual economic and financial sanction (see paragraph 92 above), the case-law cited in paragraph 96 above is therefore irrelevant (see, by analogy, *Yusuf*, paragraph 29 above, paragraph 324).
- 99 It is, moreover, appropriate to mention the aspects which distinguish the present case from the cases which gave rise to the judgments in *Yusuf* and *Kadi*, paragraph 29 above, where it was held that the Community institutions were not required to hear the parties concerned in the context of the adoption and implementation of a similar measure freezing the funds of persons and entities linked to Osama bin Laden, Al-Qaeda and the Taleban.
- 100 That solution was justified in those cases by the fact that the Community institutions had merely transposed into the Community legal order, as they were required to do, resolutions of the Security Council and decisions of its Sanctions Committee that imposed the freezing of the funds of the parties concerned, designated by name, without in any way authorising those institutions, at the time of actual implementation, to provide for any Community mechanism whatsoever for the examination or re-examination of individual situations. The Court inferred therefrom that the Community principle relating to the right to be heard could not apply in such circumstances, where a hearing of the persons concerned could not in any event lead the institution to review its position (*Yusuf*, paragraph 29 above, paragraph 328, and *Kadi*, paragraph 29 above, paragraph 258).
- 101 In the present case, by contrast, although Security Council Resolution 1373 (2001) provides inter alia in Paragraph 1(c) that all States must freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts, of entities owned or controlled directly or indirectly by such persons, and

of persons and entities acting on behalf of, or at the direction of, such persons and entities, it does not specify individually the persons, groups and entities who are to be the subjects of those measures. Nor did the Security Council establish specific legal rules concerning the procedure for freezing funds, or the safeguards or judicial remedies ensuring that the persons or entities affected by such a procedure would have a genuine opportunity to challenge the measures adopted by the States in respect of them.

102 Thus, in the context of Resolution 1373 (2001), it is for the Member States of the United Nations (UN) – and, in this case, the Community, through which its Member States have decided to act – to identify specifically the persons, groups and entities whose funds are to be frozen pursuant to that resolution, in accordance with the rules in their own legal order.

103 In that connection, the Council maintained at the hearing that, in the implementation of Security Council Resolution 1373 (2001), the measures that it adopted under circumscribed powers, which thereby benefit from the principle of primacy as contemplated in Articles 25 and 103 of the United Nations Charter, are essentially those provided for by the relevant provisions of Regulation No 2580/2001, which determine the content of the restrictive measures to be adopted in relation to the persons referred to in Paragraph 1(c) of that resolution. However, unlike the acts at issue in the cases which gave rise to the judgments in *Yusuf* and *Kadi*, paragraph 29 above, the acts which specifically apply those restrictive measures to a given person or entity, such as the contested decision, do not come within the exercise of circumscribed powers and accordingly do not benefit from the primacy effect in question. The Council submits that the adoption of those acts falls instead within the ambit of the exercise of the broad discretion it has in the area of the CFSP.

104 These submissions may, in substance, be approved by the Court, subject to the potential difficulties in applying Paragraph 1(c) of Resolution 1373 (2001) which may arise owing to the absence, to date, of a universally-accepted definition of the concepts of ‘terrorism’ and ‘terrorist act’ in international law (see, on this point, Final Document (A/60/L1) adopted by the UN General Assembly on 15 September 2005, on the occasion of the world summit celebrating the 60th anniversary of the UN).

105 Lastly, the Council stated at the oral hearing that, as the Community institution which adopted Regulation No 2580/2001 and the decisions implementing that regulation, it did not consider itself to be bound by the common positions adopted as part of the CFSP by the Council in its capacity as the institution composed of the representatives of the Member States, although it did consider it appropriate to ensure that its actions were consistent with the CFSP and the EC Treaty.

106 The Council adds, rightly, that the Community does not act under powers circumscribed by the will of the Union or that of its Member States when, as in the present case, the Council adopts economic sanctions measures on the basis of Articles 60 EC, 301 EC and 308 EC. That point of view is, moreover, the only one compatible with the actual wording of Article 301 EC, according to which the Council is to decide on the matter ‘by a qualified majority on a proposal from the Commission’, and that of Article 60(1) EC, according to which the Council ‘may take’, following the same procedure, the urgent measures necessary for an act under the CFSP.

107 Since the identification of the persons, groups and entities contemplated in Security Council Resolution 1373 (2001), and the adoption of the ensuing measure of freezing funds, involve the exercise of the Community’s own powers, entailing a discretionary appreciation by the Community, the Community institutions concerned, in this case the Council, are in principle bound to observe the right to a fair hearing of the parties concerned when they act with a view to giving effect to that resolution.

108 It follows that the safeguarding of the right to a fair hearing is, as a matter of principle, fully applicable in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001.

The obligation to state reasons

109 In principle, the safeguard relating to the obligation to state reasons provided for by Article 253 EC is also fully applicable in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001, a point which has not been questioned by any of the parties.

The right to effective judicial protection

110 As to the safeguard relating to the right to effective judicial protection, it should be borne in mind that, according to settled case-law, individuals must be able to avail themselves of effective judicial protection of the rights they have under the Community legal order, as the right to such protection is part of the general legal principles deriving from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the ECHR (see Case T-279/02 *Degussa v Commission* [2006] II-0000, paragraph 421, and case-law cited).

111 This also applies particularly to measures to freeze the funds of persons or organisations suspected of terrorist activities (see, to that effect, Article XIV of the Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers of the Council of Europe on 11 July 2002).

112 In the present case, the only reservation expressed by the Council, in relation to the applicability of the principle of that safeguard, is that the Court has no jurisdiction to review the internal lawfulness of the relevant provisions of Regulation No 2580/2001, because they were adopted by virtue of powers circumscribed by Security Council Resolution 1373 (2001) and therefore benefit from the principle of primacy referred to in paragraph 103 above.

113 It is not, however, necessary for the Court to rule on the well-foundedness of that reservation because, as will be discussed below, the present dispute can be resolved solely on the basis of a judicial review of the lawfulness of the contested decision, and none of the parties deny that that indeed comes within the Court's competence.

Purpose of and restrictions on the safeguards relating to the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection in the context of the adoption of a decision to freeze funds under Regulation No 2580/2001

The right to a fair hearing

114 It is appropriate first, to define the purpose of the safeguard of the right to a fair hearing in the context of the adoption of a decision to freeze funds under Article 2(3) of Regulation No 2580/2001, distinguishing between an initial decision to freeze funds referred to in Article 1(4) of Common Position 2001/931 ('the initial decision to freeze funds') and any subsequent decision to maintain a freeze of funds, following a periodic review, as referred to in Article 1(6) of that common position ('subsequent decisions to freeze funds').

115 In that context, it should be noted, first, that the right to a fair hearing only falls to be exercised with regard to the elements of fact and law which are liable to determine the application of the measure in question to the person concerned, in accordance with the relevant rules.

- 116 In the circumstances of the present case, the relevant rules are laid down in Article 2(3) of Regulation No 2580/2001, according to which the Council, acting by unanimity, is to establish, review and amend the list of persons, groups and entities to which that regulation applies, in accordance with the provisions laid down in Article 1(4) to (6) of Common Position 2001/931. Thus, in accordance with Article 1(4) of Common Position 2001/931, the list is to be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. 'Competent authority' is understood to mean a judicial authority, or, where judicial authorities have no jurisdiction in the relevant area, an equivalent competent authority in that area. Moreover, the names of persons and entities in the list are to be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them in the list, as provided for by Article 1(6) of Common Position 2001/931.
- 117 As rightly pointed out by the Council and the United Kingdom, the procedure which may culminate in a measure to freeze funds under the relevant rules therefore takes place at two levels, one national, the other Community. In the first phase, a competent national authority, in principle judicial, must take in respect of the party concerned a decision complying with the definition in Article 1(4) of Common Position 2001/931. If it is a decision to instigate investigations or to prosecute, it must be based on serious and credible evidence or clues. In the second phase, the Council, acting by unanimity, must decide to include the party concerned in the disputed list, on the basis of precise information or material in the relevant file which indicates that such a decision has been taken. Next, the Council must, at regular intervals, and at least once every six months, ensure that there are grounds for keeping the party concerned in the list. Verification that there is a decision of a national authority meeting that definition is an essential precondition for the adoption, by the Council, of an initial decision to freeze funds, whereas verification of the consequences of that decision at the national level is imperative in the context of the adoption of a subsequent decision to freeze funds.
- 118 Accordingly, the observance of the right to a fair hearing in the context of the adoption of a decision to freeze funds is also liable to arise at those two levels (see, to that effect and by analogy, *'Invest' Import und Export and Invest Commerce v Commission*, paragraph 69 above, paragraph 40).
- 119 The right of the party concerned to a fair hearing must be effectively safeguarded in the first place as part of the national procedure which led to the adoption, by the competent national authority, of the decision referred to in Article 1(4) of Common Position 2001/931. It is essentially in that national context that the party concerned must be placed in a position in which he can effectively make known his view of the matters on which the decision is based, subject to possible restrictions on the right to a fair hearing which are legally justified in national law, particularly on grounds of public policy, public security or the maintenance of international relations (see, to that effect, Eur. Court H.R., *Tinnelly & Sons Ltd and Others and McElduff and Others v United Kingdom*, judgment of 10 July 1998, Reports of Judgments and Decisions, 1998-IV, §78).
- 120 Next, the right of the party concerned to a fair hearing must be effectively safeguarded in the Community procedure culminating in the adoption, by the Council, of the decision to include or maintain it on the disputed list, in accordance with Article 2(3) of Regulation No 2580/2001. As a rule, in that area, the party concerned need only be afforded the opportunity effectively to make known his views on the legal conditions of application of the Community measure in question, namely, where it is an initial decision to freeze funds, whether there is specific information or material in the file which shows that a decision meeting the definition laid down in Article 1(4) of Common Position 2001/931

was taken in respect of him by a competent national authority and, where it is a subsequent decision to freeze funds, the justification for maintaining the party concerned in the disputed list.

- 121 However, provided that the decision in question was adopted by a competent national authority of a Member State, the observance of the right to a fair hearing at Community level does not usually require, at that stage, that the party concerned again be afforded the opportunity to express his views on the appropriateness and well-foundedness of that decision, as those questions may only be raised at national level, before the authority in question or, if the party concerned brings an action, before the competent national court. Likewise, in principle, it is not for the Council to decide whether the proceedings opened against the party concerned and resulting in that decision, as provided for by the national law of the relevant Member State, was conducted correctly, or whether the fundamental rights of the party concerned were respected by the national authorities. That power belongs exclusively to the competent national courts or, as the case may be, to the European Court of Human Rights (see, by analogy, Case T-353/00 *Le Pen v Parliament* [2003] ECR II-1729, paragraph 91, upheld on appeal in Case C-208/03 P *Le Pen v Parliament* [2005] ECR I-6051).
- 122 Nor, if the Community measure to freeze funds is adopted on the basis of a decision by a national authority of a Member State concerning investigations or prosecutions (rather than on the basis of a decision of condemnation), does the observance of the right to a fair hearing require, as a rule, that the party concerned be afforded the opportunity effectively to make known his views on whether that decision is ‘based on serious and credible evidence or clues’, as required by Article 1(4) of Common Position 2001/931. Although that element is one of the legal conditions of application of the measure in question, the Court finds that it would be inappropriate, in the light of the principle of sincere cooperation referred to in Article 10 EC, to make it subject to the exercise of the right to a fair hearing at Community level.
- 123 The Court notes that, under Article 10 EC, relations between the Member States and the Community institutions are governed by reciprocal duties to cooperate in good faith (see Case C-339/00 *Ireland v Commission* [2003] ECR I-11757, paragraphs 71 and 72, and case-law cited). That principle is of general application and is especially binding in the area of JHA governed by Title VI of the EU Treaty, which is moreover entirely based on cooperation between the Member States and the institutions (Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 42).
- 124 In a case of application of Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001, provisions which introduce a specific form of cooperation between the Council and the Member States in the context of combating terrorism, the Court finds that that principle entails, for the Council, the obligation to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, both in respect of the issue of whether there are ‘serious and credible evidence or clues’ on which its decision is based and in respect of recognition of potential restrictions on access to that evidence or those clues, legally justified under national law on grounds of overriding public policy, public security or the maintenance of international relations (see, by analogy, Case T-353/94 *Postbank v Commission* [1996] ECR II-921, paragraph 69, and case-law cited).
- 125 However, these considerations are valid only in so far as the evidence or clues in question were in fact assessed by the competent national authority referred to in the preceding paragraph. If, on the other hand, in the course of the procedure before it, the Council bases its initial decision or a subsequent decision to freeze funds on information or evidence communicated to it by representatives of the Member States without it having been assessed by the competent national authority, that information

must be considered as newly-adduced evidence which must, in principle, be the subject of notification and a hearing at Community level, not having already been so at national level.

- 126 It follows from the foregoing that, in the context of relations between the Community and its Member States, observance of the right to a fair hearing has a relatively limited purpose in respect of the Community procedure for freezing funds. In the case of an initial decision to freeze funds, it requires, in principle, first, that the party concerned be informed by the Council of the specific information or material in the file which indicates that a decision meeting the definition given in Article 1(4) of Common Position 2001/931 has been taken in respect of it by a competent authority of a Member State, and also, where applicable, any new material referred to in paragraph 125 above and, second, that it must be placed in a position in which it can effectively make known its view on the information or material in the file. In the case of a subsequent decision to freeze funds, observance of the right to a fair hearing similarly requires, first, that the party concerned be informed of the information or material in the file which, in the view of the Council, justifies maintaining it in the disputed lists, and also, where applicable, of any new material referred to in paragraph 125 above and, second, that it must be afforded the opportunity effectively to make known its view on the matter.
- 127 At the same time, however, certain restrictions on the right to a fair hearing, so defined in terms of its purpose, may legitimately be envisaged and imposed on the parties concerned, in circumstances such as those of the present case, where what are in issue are specific restrictive measures, consisting of a freeze of the financial funds and assets of the persons, groups and entities identified by the Council as being involved in terrorist acts.
- 128 The Court therefore finds, as held in *Yusuf*, paragraph 29 above, and as submitted in the present case by the Council and the United Kingdom, that notification of the evidence adduced and a hearing of the parties concerned, before the adoption of the initial decision to freeze funds, would be liable to jeopardise the effectiveness of the sanctions and would thus be incompatible with the public interest objective pursued by the Community pursuant to Security Council Resolution 1373 (2001). An initial measure freezing funds must, by its very nature, be able to benefit from a surprise effect and to be applied with immediate effect. Such a measure cannot, therefore, be the subject-matter of notification before it is implemented (*Yusuf*, paragraph 29 above, paragraph 308; see also, to that effect and by analogy, the Opinion of Advocate General Warner in Case 136/79 *National Panasonic v Commission* [1980] ECR 2033, 2061, 2068, 2069).
- 129 However, in order for the parties concerned to be able to defend their rights effectively, particularly in legal proceedings which might be brought before the Court of First Instance, it is also necessary that the evidence adduced against them be notified to them, in so far as reasonably possible, either concomitantly with or as soon as possible after the adoption of the initial decision to freeze funds (see also paragraph 139 below).
- 130 In that context, the parties concerned must also have the opportunity to request an immediate re-examination of the initial measure freezing their funds (see, to that effect, in the case-law of the Community civil service, Case T-211/98 *F v Commission* [2000] ECR-SC I-A-107 and II-471, paragraph 34; Case T-333/99 *X v ECB* [2001] ECR-SC II-3021, paragraph 183, and *Campolargo v Commission*, paragraph 94 above, paragraph 32). The Court recognises, however, that such a hearing after the event is not automatically required in the context of an initial decision to freeze funds, in the light of the possibility that the parties concerned also have immediately to bring an action before the Court of First Instance, which also ensures that a balance is struck between observance of the fundamental rights of the persons included in the disputed list and the need to take preventive measures

in combating international terrorism (see, to that effect and by analogy, the Opinion of Advocate General Warner in *National Panasonic v Commission*, paragraph 128 above, [1980] ECR 2069).

- 131 It must be emphasised, however, that the considerations just mentioned are not relevant to subsequent decisions to freeze funds adopted by the Council in connection with the re-examination, at regular intervals, at least every six months, of the justification for maintaining the parties concerned in the disputed list, provided for by Article 1(6) of Common Position 2001/931. At that stage, the funds are already frozen and it is accordingly no longer necessary to ensure a surprise effect in order to guarantee the effectiveness of the sanctions. Any subsequent decision to freeze funds must accordingly be preceded by the possibility of a further hearing and, where appropriate, notification of any new evidence.
- 132 The Court cannot accept the viewpoint put forward by the Council and the United Kingdom on this point at the oral hearing, to the effect that the Council need only hear the parties concerned, in the context of the adoption of a subsequent decision to freeze funds, if they have previously made an express request to that effect. Under Article 1(6) of Common Position 2001/931, the Council may only adopt such a decision after having ensured that maintaining the parties concerned in the disputed list remains justified, which implies that it must afford them the opportunity effectively to make known their views on the matter.
- 133 Next, the Court recognises that, in circumstances such as those of this case, where what is at issue is a temporary protective measure restricting the availability of the property of certain persons, groups and entities in connection with combating terrorism, overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude the communication to the parties concerned of certain evidence adduced against them and, in consequence, the hearing of those parties with regard to such evidence, during the administrative procedure (see, by analogy, *Yusuf*, paragraph 29 above, paragraph 320).
- 134 Such restrictions are consistent with the constitutional traditions common to the Member States, as submitted by the Council and the United Kingdom, who have pointed out that exceptions to the general right to be heard in the course of an administrative procedure are permitted in many Member States on grounds of public interest, public policy or the maintenance of international relations, or when the purpose of the decision to be taken is or could be jeopardised if the right is observed (see the examples referred to in paragraph 72 above).
- 135 They are, moreover, consistent with the case-law of the European Court of Human Rights which, even in the more stringent context of adversarial criminal proceedings subject to the requirements of Article 6 of the ECHR, acknowledges that, in cases concerning national security and, more specifically, terrorism, certain restrictions on the right to a fair hearing may be envisaged, especially concerning disclosure of evidence adduced or terms of access to the file (see, by way of example, *Chahal v United Kingdom*, judgment of 15 November 1996, Report 1996-V, § 131, and *Jasper v United Kingdom*, judgment of 16 February 2000, No 27052/95, not published in Reports of Judgments and Decisions, §§ 51 to 53, and case-law cited; see also Article IX.3 of the Guidelines adopted by the Committee of Ministers of the Council of Europe, referred to in paragraph 111 above).
- 136 In the present circumstances, those considerations apply above all to the ‘serious and credible evidence or clues’ on which the national decision to instigate an investigation or prosecution is based, in so far as they may have been brought to the attention of the Council, but it is also conceivable that the restrictions on access may concern the specific content or the particular grounds for that decision, or even the identity of the authority that took it. It is even possible that, in certain, very specific

circumstances, the identification of the Member State or third country in which a competent authority has taken a decision in respect of a person may be liable to jeopardise public security, by providing the party concerned with sensitive information which it could misuse.

- 137 It follows from all of the foregoing that the general principle of observance of the right to a fair hearing requires, unless precluded by overriding considerations concerning the security of the Community or its Member States, or the conduct of their international relations, that the evidence adduced against the party concerned, as identified in paragraph 126 above, should be notified to it, in so far as possible, either concomitantly with or as soon as possible after the adoption of an initial decision to freeze funds. Subject to the same reservations, any subsequent decision to freeze funds must, in principle, be preceded by notification of any new evidence adduced and a hearing. However, observance of the right to a fair hearing does not require either that the evidence adduced against the party concerned be notified to it before the adoption of an initial measure to freeze funds, or that that party automatically be heard after the event in such a context.

The obligation to state reasons

- 138 According to settled case-law, the purpose of the obligation to state the reasons for an act adversely affecting a person is, first, to provide the person concerned with sufficient information to make it possible to determine whether the act is well founded or whether it is vitiated by an error which may permit its validity to be contested before the Community Courts and, second, to enable the Community judicature to review the lawfulness of the decision (Case C-199/99 P *Corus UK v Commission* [2003] ECR I-11177, paragraph 145, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraph 462). The obligation to state reasons therefore constitutes an essential principle of Community law which may be derogated from only for compelling reasons (see Case T-218/02 *Napoli Buzzanca v Commission* [2005] ECR II-0000, paragraph 57, and case-law cited).
- 139 The statement of reasons must therefore in principle be notified to the person concerned at the same time as the act adversely affecting him. A failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the Community Courts (Case 195/80 *Michel v Parliament* [1981] ECR 2861, paragraph 22, and *Dansk Rørindustri and Others v Commission*, paragraph 138 above, paragraph 463). The possibility of regularising the total absence of a statement of reasons after an action has been started might prejudice the right to a fair hearing because the applicant would have only the reply in which to set out his pleas contesting the reasons which he would not know until after he had lodged his application. The principle of equality of the parties before the Community Courts would accordingly be affected (Case T-132/03 *Casini v Commission* [2005] ECR II-0000, paragraph 33, and *Napoli Buzzanca v Commission*, paragraph 138 above, paragraph 62).
- 140 If the party concerned is not afforded the opportunity to be heard before the adoption of an initial decision to freeze funds, compliance with the obligation to state reasons is all the more important because it constitutes the sole safeguard enabling the party concerned, especially after the adoption of that decision, to make effective use of the legal remedies available to it to challenge the lawfulness of that decision (Case T-237/00 *Reynolds v Parliament* [2005] ECR II-0000, paragraph 95; see also, to that effect, Joined Cases T-371/94 and T-394/04 *British Airways and British Midland Airways v Commission* [1998] ECR II-2405, paragraph 64).
- 141 The Court has consistently held that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and to the context in which it was adopted. It must disclose in a clear

and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review of the lawfulness thereof. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to specify all the relevant matters of fact and law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the reasons given for a decision are sufficient if it was adopted in circumstances known to the party concerned which enable him to understand the scope of the measure concerning him (Case 125/80 *Arning v Commission* [1981] ECR 2539, paragraph 13; Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-301/96 *Germany v Commission* [2003] ECR I-9919, paragraph 87; Case C-42/01 *Portugal v Commission* [2004] ECR I-6079, paragraph 66; and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-435, paragraphs 278 to 280). Moreover, the degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision (see *Delacre and Others v Commission*, paragraph 83 above, paragraph 16, and case-law cited).

- 142 In the context of the adoption of a decision to freeze funds under Regulation No 2580/2001, the grounds for that decision must be assessed primarily in the light of the legal conditions of application of that regulation to a given scenario, as laid down in Article 2(3) thereof and, by reference, in Article 1(4) or Article 1(6) of Common Position 2001/931, depending on whether it is an initial decision or a subsequent decision to freeze funds.
- 143 The Court cannot accept the position advocated by the Council that the statement of reasons may consist merely of a general, stereotypical formulation, modelled on the drafting of Article 2(3) of Regulation No 2580/2001 and Article 1(4) or (6) of Common Position 2001/931. In accordance with the principles referred to above, the Council is required to state the matters of fact and law which constitute the legal basis of its decision and the considerations which led it to adopt that decision. The grounds for such a measure must therefore indicate the actual and specific reasons why the Council considers that the relevant rules are applicable to the party concerned (see, to that effect, Case T-117/01 *Roman Parra v Commission* [2002] ECR-SC I-A-27 and II-121, paragraph 31, and *Napoli Buzzanca v Commission*, paragraph 138 above, paragraph 74).
- 144 That entails, in principle, that the statement of reasons of an initial decision to freeze funds must at least refer to each of the aspects referred to in paragraph 116 above and also, where applicable, the aspects referred to in paragraphs 125 and 126 above, whereas the statement of reasons for a subsequent decision to freeze funds must indicate the actual and specific reasons why the Council considers, following re-examination, that the freezing of the funds of the party concerned remains justified.
- 145 Moreover, when unanimously adopting a measure to freeze funds under Regulation No 2580/2001, the Council does not act under circumscribed powers. Article 2(3) of Regulation No 2580/2001, read together with Article 1(4) of Common Position 2001/931, is not to be construed as meaning that the Council is obliged to include in the disputed list any person in respect of whom a decision has been taken by a competent authority within the meaning of those provisions. This interpretation, endorsed by the United Kingdom at the oral hearing, is confirmed by Article 1(6) of Common Position 2001/931, to which Article 2(3) of Regulation No 2580/2001 also refers, and according to which the Council is to

conduct a 'review' at regular intervals, at least once every six months, to ensure that 'there are grounds' for keeping the parties concerned in the disputed list.

- 146 It follows that, in principle, the statement of reasons for a measure to freeze funds under Regulation No 2580/2001 must refer not only to the statutory conditions of application of that regulation, but also to the reasons why the Council considers, in the exercise of its discretion, that such a measure must be adopted in respect of the party concerned.
- 147 The considerations set out in paragraphs 143 to 146 above must nevertheless take account of the fact that a decision to freeze funds under Regulation No 2580/2001, whilst imposing an individual economic and financial sanction, is, like that act, also regulatory in nature, as explained in paragraphs 97 and 98 above. Moreover, a detailed publication of the complaints put forward against the parties concerned might not only conflict with the overriding considerations of public interest which will be discussed in paragraph 148 below, but also jeopardise the legitimate interests of the persons and entities in question, in that it would be capable of causing serious damage to their reputation. Accordingly, the Court finds, exceptionally, that only the operative part of the decision and a general statement of reasons, of the type referred to in paragraph 143 above, need be in the version of the decision to freeze funds published in the Official Journal, it being understood that the actual, specific statements of reasons for that decision must be formalised and brought to the knowledge of the parties concerned by any other appropriate means.
- 148 Moreover, in circumstances such as those of this case, it must be recognised that the overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of the specific and complete reasons for the initial or subsequent decision to freeze their funds, just as they may preclude the evidence adduced against those parties from being communicated to them during the administrative procedure. In that connection the Court refers to the considerations set out above, in particular in paragraphs 133 to 137 above, regarding the restrictions on the general principle of observance of the right to a fair hearing which may be permitted in such a context. Those considerations are valid, *mutatis mutandis*, in respect of the restrictions which may be imposed on the obligation to state reasons.
- 149 Although it is not applicable to the circumstances of the present case, the Court also considers that inspiration may be drawn from the provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, corrigendum OJ 2004 L 229, p. 35, corrigendum to the corrigendum OJ 2005 L 197, p. 34). Article 30(2) of that directive provides that 'the persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision [restricting the freedom of movement and residence of a citizen of the Union or a member of his family] taken in their case is based, unless this is contrary to the interests of State security'.
- 150 In accordance with the settled case-law of the Court of Justice (Case 36/75 Rutili [1975] ECR 1219, and Case 131/79 Santillo [1980] ECR 1585) concerning Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117), repealed by Directive 2004/38, Article 6 of which was essentially identical to Article 30(2) of the latter, any person enjoying the protection of the provisions quoted must be entitled to a twofold safeguard, consisting of notification to him of the grounds on which any restrictive

measure has been adopted in his case and the availability of a right of appeal. Subject to the same reservation, in particular, this requirement means that the State concerned must, when notifying an individual of a restrictive measure adopted in his case, give him a precise and comprehensive statement of the grounds for the decision, to enable him to take effective steps to prepare his defence.

151 It follows from all of the foregoing that, unless precluded by overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, and subject also to what has been set out in paragraph 147 above, the statement of reasons for an initial decision to freeze funds must at least make actual and specific reference to each of the aspects referred to in paragraph 116 above and also, where applicable, to the aspects referred to in paragraphs 125 and 126 above, and state the reasons why the Council considers, in the exercise of its discretion, that such a measure must be taken in respect of the party concerned. Moreover, the statement of reasons for a subsequent decision to freeze funds must, subject to the same reservations, state the actual and specific reasons why the Council considers, following re-examination, that the freezing of the funds of the party concerned remains justified.

The right to effective judicial protection

152 Lastly, with respect to the safeguard relating to the right to effective judicial protection, this is effectively ensured by the right the parties concerned have to bring an action before the Court against a decision to freeze their funds, pursuant to the fourth paragraph of Article 230 EC (see, to that effect, Eur. Court H.R., *Bosphorus v Ireland*, judgment of 30 June 2005, No 45036/98, not yet published in the Reports of Judgments and Decisions, § 165, and decision in *Segi and Others and Gestoras pro Amnistia v The 15 Member States of the European Union*, judgment of 23 May 2002, Nos 6422/02 and 9916/02, Reports of Judgments and Decisions, 2002-V).

153 Thus the judicial review of the lawfulness of a decision to freeze funds taken pursuant to Article 2(3) of Regulation No 2580/2001 is that provided for in the second paragraph of Article 230 EC, under which the Community Courts have jurisdiction in actions for annulment brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application or misuse of powers.

154 As part of that review, and having regard to the grounds for annulment put forward by the party concerned or raised by the Court of its own motion, it is for the Court to ensure, inter alia, that the legal conditions for applying Regulation No 2580/2001 to a particular scenario, as laid down in Article 2(3) of that regulation and, by reference, either Article 1(4) or Article 1(6) of Common Position 2001/931, depending on whether it is an initial decision or a subsequent decision to freeze funds, are fulfilled. That implies that the judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based, as the Council expressly recognised in its written pleadings in the case giving rise to the judgment in *Yusuf*, paragraph 29 above (paragraph 225). The Court must also ensure that the right to a fair hearing is observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that the overriding considerations relied on exceptionally by the Council in disregarding those rights are well founded.

155 In the present case, that review is all the more imperative because it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights. Since the restrictions imposed by the Council on the right of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial (see, to that effect, Case C-341/04 *Eurofood* [2006] ECR I-3813, paragraph 66), the

Community Courts must be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential.

- 156 Although the European Court of Human Rights recognises that the use of confidential information may be necessary when national security is at stake, that does not mean, in its view, that national authorities are free from any review by the national courts simply because they state that the case concerns national security and terrorism (see Eur. Court H.R., *Chahal v United Kingdom*, paragraph 135 above, § 131, and case-law cited, and *Öcalan v Turkey*, judgment of 12 March 2003, No 46221/99, not published in the Reports of Judgments and Decisions, § 106, and case-law cited).
- 157 The Court finds that, here also, inspiration may be drawn from the provisions of Directive 2004/38. As noted in the case-law referred to in paragraph 150 above, Article 31(1) of that directive provides that the persons concerned are to have access to judicial and, where appropriate, administrative means of redress in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health. Moreover, Article 31(3) of that directive provides that the means of redress are to allow for an examination of the lawfulness of the decision, as well as of the facts and circumstances on which the proposed measure is based.
- 158 The question whether the applicant and/or its lawyers may be provided with the evidence and information alleged to be confidential, or whether they may be provided only to the Court, in accordance with a procedure which remains to be defined so as to safeguard the public interests at issue whilst affording the party concerned a sufficient degree of judicial protection, is a separate issue on which it is not necessary for the Court to rule in the present action (see nevertheless Eur. Court H.R., *Chahal v United Kingdom*, paragraph 135 above, §§ 131 and 144; *Tinnelly & Sons and Others and McElduff and Others v United Kingdom*, paragraph 119 above, §§ 49, 51, 52 and 78; *Jasper v United Kingdom*, paragraph 135 above, §§ 51 to 53; and *Al-Nashif v Bulgaria*, judgment of 20 June 2002, No 50963/99, not published in the Reports of Judgments and Decisions, §§ 95 to 97, and also Article IX.4 of the Guidelines adopted by the Committee of Ministers of the Council of Europe, cited in paragraph 111 above).
- 159 Lastly, it is true that the Council enjoys broad discretion in its assessment of the matters to be taken into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60 EC, 301 EC and 308 EC, consistent with a common position adopted on the basis of the CFSP. Because the Community Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the Council's assessment of the factors as to appropriateness on which such decisions are based (see paragraph 146 above and, to that effect, Eur. Court H.R., *Leander v Sweden*, judgment of 26 March 1987, Series A No 116, § 59, and *Al-Nashif v Bulgaria*, paragraph 158 above, §§ 123 and 124).

Application to the present case

- 160 The Court notes, first, that the relevant legislation, namely Regulation No 2580/2001 and Common Position 2001/931 to which it refers, does not explicitly provide for any procedure for notification of the evidence adduced or for a hearing of the parties concerned, either before or concomitantly with the adoption of an initial decision to freeze their funds or, in the context of the adoption of subsequent

decisions, with a view to having them removed from the disputed list. At most, Article 1(6) of Common Position 2001/931 states that ‘the names of persons and entities in the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list’, and Article 2(3) of Regulation No 2580/2001 provides that ‘the Council ... shall ... review and amend the list ... , in accordance with the provisions laid down in Article 1 ... (6) of Common Position 2001/931’.

161 Next, the Court finds that at no time before this action was brought was the evidence adduced against the applicant notified to it. The applicant rightly points out that both the initial decision to freeze its funds and subsequent decisions, up to and including the contested decision, do not even mention the ‘specific information’ or ‘material in the file’ showing that a decision justifying its inclusion in the disputed list was taken in respect of it by a competent national authority.

162 Thus, even though the applicant learned that it was soon to be included in the disputed list, and even though it took the initiative to contact the Council in an attempt to prevent the adoption of such a measure (see paragraph 69 above), it had not been apprised of the specific evidence adduced against it in order to justify the sanction envisaged and was not, therefore, in a position effectively to make known its views on the matter. In those circumstances, the Council’s argument that it heard the applicant before proceeding with the freezing of funds cannot be accepted.

163 The foregoing considerations, concerning verification of respect for the right to a fair hearing, are also applicable, *mutatis mutandis*, to the determination of whether the obligation to state reasons has been fulfilled.

164 In the circumstances of the present case, neither the contested decision nor Decision 2002/334, which it updates, satisfies the requirement of a statement of reasons as set out above; they merely state, in the second recital in their preamble, that it is ‘desirable’ to adopt an up-to-date list of the persons, groups and entities to which Regulation (EC) No 2580/2001 applies.

165 Not only has the applicant been unable effectively to make known its views to the Council but, in the absence of any statement, in the contested decision, of the actual and specific grounds justifying that decision, it has not been placed in a position to avail itself of its right of action before the Court, given the aforementioned links between safeguarding the right to a fair hearing, the obligation to state reasons and the right to an effective legal remedy. It must be borne in mind that the possibility of regularising the total absence of a statement of reasons after an action has been started is currently viewed in the case-law as prejudicing the right to a fair hearing (see paragraph 139 above).

166 Moreover, neither the written pleadings of the different parties to the case, nor the file material produced before the Court, enable it to conduct its judicial review, since it is not even in a position to determine with certainty, after the close of the oral procedure, exactly which is the national decision referred to in Article 1(4) of Common Position 2001/931, on which the contested decision is based.

167 In its application, the applicant merely maintained that it was included in the disputed list ‘apparently solely on the basis of documents produced by the Tehran regime’. In its reply, it added, in particular, that ‘there was nothing by way of explanation as to why it was entered’ in the disputed list and that ‘the reasons for its inclusion were most likely diplomatic’.

168 In its defence and rejoinder, the Council refrained from taking any position on this issue.

- 169 In its statement in intervention, the United Kingdom stated that ‘the Applicant [did] not allege, and there [was] nothing to suggest, that the Applicant [had] not [been] included in the Annex on the basis of [a decision adopted by a competent authority identifying the applicant as being involved in terrorist activities]’. That same statement also appears to indicate that, in the view of the United Kingdom, the decision in question was that of the Home Secretary of 28 March 2001, confirmed by decision of that Home Secretary of 31 August 2001, then, in an action for judicial review, by judgment of the High Court of 17 April 2002 and, lastly, on appeal, by decision of the POAC of 15 November 2002.
- 170 In its observations on the statement in intervention, the applicant did not specifically refute or even comment upon those observations of the United Kingdom. However, in the light of the applicant’s pleas and general arguments and, more specifically, its allegations referred to in paragraph 167 above, it is not possible simply to accept the United Kingdom’s position at face value. At the hearing, moreover, the applicant reiterated its position that it did not know which competent authority had adopted the national decision in respect of it, nor on the basis of what material and specific information that decision had been taken.
- 171 Furthermore, at the hearing, in response to the questions put by the Court, the Council and the United Kingdom were not even able to give a coherent answer to the question of what was the national decision on the basis of which the contested decision was adopted. According to the Council, it was only the Home Secretary’s decision, as confirmed by the POAC (see paragraph 169 above). According to the United Kingdom, the contested decision is based not only on that decision, but also on other national decisions, not otherwise specified, adopted by competent authorities in other Member States.
- 172 It is therefore clear that, even at the end of the oral procedure, the Court is not in a position to review the lawfulness of the contested decision.
- 173 In conclusion, the Court finds that the contested decision does not contain a sufficient statement of reasons and that it was adopted in the course of a procedure during which the applicant’s right to a fair hearing was not observed. Furthermore, the Court is not, even at this stage of the procedure, in a position to review the lawfulness of that decision.
- 174 Those considerations must therefore lead to the annulment of the contested decision, in so far as it concerns the applicant, without it being necessary to rule, as part of the action for annulment, on the last two parts of the first plea or on the other pleas and arguments put forward in the action.

Agim Behrami and Bekir Behrami v France and Ruzhdi Saramati v France, Germany and Norway (Application no. 78166/01, ECtHR)
PAR. 121 – PAR. 135 (COMPLETE VERSION IN SUPPLEMENT)

E. THE COURT’S ASSESSMENT

- 121 The Court has adopted the following structure in its decision set out below. It has, in the first instance, established which entity, KFOR or UNMIK, had a mandate to detain and de-mine, the parties having disputed the latter point. Secondly, it has ascertained whether the impugned action of KFOR (detention in *Saramati*) and inaction of UNMIK (failure to de-mine in *Behrami*) could be attributed to the UN: in so doing, it has examined whether there was a Chapter VII framework for KFOR and UNMIK and, if so, whether their impugned action and omission could be attributed, in principle, to the UN. The Court has used the term “attribution” in the same way as the ILC in Article 3 of its draft Articles on the Responsibility of International Organisations (see paragraph 29 above). Thirdly, the Court has then

examined whether it is competent *ratione personae* to review any such action or omission found to be attributable to the UN.

122 In so doing, the Court has borne in mind that it is not its role to seek to define authoritatively the meaning of provisions of the UN Charter and other international instruments: it must nevertheless examine whether there was a plausible basis in such instruments for the matters impugned before it (*mutatis mutandis*, *Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993, Series A no. 258-B, § 72).

It also recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. It must also take into account relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity and harmony with the governing principles of international law of which it forms part, although it must remain mindful of the Convention's special character as a human rights treaty (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; and the above-cited decision of *Banković and Others*, at § 57).

1. The entity with the mandate to detain and to de-mine

123 The respondent and third party States argued that it made no difference whether it was KFOR or UNMIK which had the mandate to detain (the *Saramati* case) and to de-mine (the *Behrami* case) since both were international structures established by, and answerable to, the UNSC. The applicants maintained that KFOR had the mandate to both detain and de-mine and that the nature and structure of KFOR was sufficiently different to UNMIK as to engage the respondent States individually.

124 Having regard to the MTA (notably paragraph 2 of Article 1), UNSC Resolution 1244 (paragraph 9 as well as paragraph 4 of Annex 2 to the Resolution) as confirmed by FRAGO997 and later COMKFOR Detention Directive 42 (see paragraph 51 above), the Court considers it evident that KFOR's security mandate included issuing detention orders.

125 As regards de-mining, the Court notes that Article 9(e) of UNSC Resolution 1244 provided that KFOR retained responsibility for supervising de-mining until UNMIK could take over, a provision supplemented by, as pointed out by the UN to the Court, Article 11(k) of the Resolution. The report of the SG to the UNSC of 12 June 1999 (paragraph 53 above) confirmed that this activity was a humanitarian one (former Pillar I of UNMIK) so UNMIK was to establish UNMACC pending which KFOR continued to act as the *de facto* coordination centre. When UNMACC began operations, it was therefore placed under the direction of the Deputy SRS of Pillar I. The UN submissions to this Court, the above-cited Evaluation Report, the Concept Plan, FRAGO 300 and the letters of the Deputy SRS of August and October 1999 to KFOR (paragraphs 55 and 57 above) confirm, in the first place, that the mandate for supervising de-mining was *de facto* and *de jure* taken over by UNMACC, created by UNMIK, at the very latest, by October 1999 and therefore prior to the detonation date in the *Behrami* case and, secondly, that KFOR remained involved in de-mining as a service provider whose personnel therefore acted on UNMIK's behalf.

126 The Court does not find persuasive the parties' arguments to the contrary. Whether, as noted by the applicants and the UN respectively, NATO had dropped the CBUs or KFOR had failed to secure the site and provide information thereon to UNMIK, this would not alter the mandate of UNMIK. The reports of the SG to the UNSC (53 above) cited by the applicants may have referred to UNMACC as having been set up jointly by KFOR and the UN, but this described the provision of assistance to UNMIK by the previous *de facto* co-ordination centre (KFOR): it was therefore transitional assistance which accorded with KFOR's general obligation to support UNMIK (paragraphs 6 and 9(f) of UNSC

Resolution 1244) and such assistance in the field did not change UNMIK's mandate. The report of the International Committee of the Red Cross relied upon by the applicants, indicated (at p. 23) that mine clearance in Kosovo was coordinated by UNMACC which in turn fell under the aegis of UNMIK. Finally, even if KFOR support was, as a matter of fact, essential to the continued presence of UNMIK (the applicants' submission), this did not alter the fact that the Resolution created separate and distinct presences, with different mandates and responsibilities and, importantly, without any hierarchical relationship or accountability between them (UN submissions, paragraph 118 above).

127 Accordingly, the Court considers that issuing detention orders fell within the security mandate of KFOR and that the supervision of de-mining fell within UNMIK's mandate.

2. Can the impugned action and inaction be attributed to the UN?

(a) The Chapter VII foundation for KFOR and UNMIK

128 As the first step in the application of Chapter VII, the UNSC Resolution 1244 referred expressly to Chapter VII and made the necessary identification of a "threat to international peace and security" within the meaning of Article 39 of the Charter (paragraph 23 above). The UNSC Resolution 1244, inter alia, recalled the UNSC's "primary responsibility" for the "maintenance of international peace and security". Being "determined to resolve the grave humanitarian situation in Kosovo" and to "provide for the safe and free return of all refugees and displaced persons to their homes", it determined that the "situation in the region continues to constitute a threat to international peace and security" and, having expressly noted that it was acting under Chapter VII, it went on to set out the solutions found to the identified threat to peace and security.

129 The solution adopted by UNSC Resolution 1244 to this identified threat was, as noted above, the deployment of an international security force (KFOR) and the establishment of a civil administration (UNMIK).

In particular, that Resolution authorised "Member States and relevant international organisations" to establish the international security presence in Kosovo as set out in point 4 of Annex 2 to the Resolution with all necessary means to fulfil its responsibilities listed in Article 9. Point 4 of Annex 2 added that the security presence would have "substantial [NATO] participation" and had to be deployed under "unified command and control". The UNSC was thereby delegating to willing organisations and members states (see paragraph 43 as regards the meaning of the term "delegation" and paragraph 24 as regards the voluntary nature of this State contribution) the power to establish an international security presence as well as its operational command. Troops in that force would operate therefore on the basis of UN delegated, and not direct, command. In addition, the SG was authorised (Article 10) to establish UNMIK with the assistance of "relevant international organisations" and to appoint, in consultation with the UNSC, a SRSG to control its implementation (Articles 6 and 10 of the UNSC Resolution). The UNSC was thereby delegating civil administration powers to a UN subsidiary organ (UNMIK) established by the SG. Its broad mandate (an interim administration while establishing and overseeing the development of provisional self-government) was outlined in Article 11 of the Resolution.

130 While the Resolution referred to Chapter VII of the Charter, it did not identify the precise Articles of that Chapter under which the UNSC was acting and the Court notes that there are a number of possible bases in Chapter VII for this delegation by the UNSC: the non-exhaustive Article 42 (read in conjunction with the widely formulated Article 48), the non-exhaustive nature of Article 41 under which territorial administrations could be authorised as a necessary instrument for sustainable peace; or implied powers under the Charter for the UNSC to so act in both respects based on an effective interpretation of the Charter. In any event, the Court considers that Chapter VII provided a framework for the above-described delegation of the UNSC's security powers to KFOR and of its civil

administration powers to UNMIK (see generally and inter alia, White and Ulgen, “The Security Council and the Decentralised Military Option: Constitutionality and Function”, *Netherlands Law Review* 44, 1997, 386; Sarooshi, “The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII powers”, Oxford University (1999); Chesterman, “Just War or Just Peace: Humanitarian Intervention and International Law”, (2002) Oxford University Press, pp. 167-169 and 172); Zimmerman and Stahn, cited above; De Wet, “The Chapter VII Powers of the United Nations Security Council”, 2004, pp. 260-265; Wolfrum “International Administration in Post-Conflict Situations by the United Nations and other International Actors”, *Max Planck UNYB* Vol. 9 (2005), pp. 667-672; Friedrich, “UNMIK in Kosovo: struggling with Uncertainty”, *Max Planck UNYB* 9 (2005) and the references cited therein; and *Prosecutor v. Duško Tadić*, Decision of 2.10.95, Appeals Chamber of ICTY, §§ 35-36).

131 Whether or not the FRY was a UN member state at the relevant time (following the dissolution of the former Socialist Federal Republic of Yugoslavia), the FRY had agreed in the MTA to these presences. It is true that the MTA was signed by “KFOR” the day before the UNSC Resolution creating that force was adopted. However, the MTA was completed on the express basis of a security presence “under UN auspices” and with UN approval and the Resolution had already been introduced before the UNSC. The Resolution was adopted the following day, annexing the MTA and no international forces were deployed until the Resolution was adopted.

(b) Can the impugned action be attributed to KFOR?

132 While Chapter VII constituted the foundation for the above-described delegation of UNSC security powers, that delegation must be sufficiently limited so as to remain compatible with the degree of centralisation of UNSC collective security constitutionally necessary under the Charter and, more specifically, for the acts of the delegate entity to be attributable to the UN (as well as Chesterman, de Wet, Friedrich, Kolb and Sarooshi all cited above, see Gowlland-Debbas “The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance” *EIL* (2000) Vol 11, No. 2 369-370; Niels Blokker, “Is the authorisation Authorised? Powers and Practice of the UN Security Council to Authorise the Use of Force by “Coalition of the Able and Willing”, *EJIL* (2000), Vol. 11 No. 3; pp. 95-104 and *Meroni v. High Authority* Case 9/56, [1958] ECR 133).

Those limits strike a balance between the central security role of the UNSC and two realities of its implementation. In the first place, the absence of Article 43 agreements which means that the UNSC relies on States (notably its permanent members) and groups of States to provide the necessary military means to fulfil its collective security role. Secondly, the multilateral and complex nature of such security missions renders necessary some delegation of command.

133 The Court considers that the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated. This delegation model is now an established substitute for the Article 43 agreements never concluded.

134 That the UNSC retained such ultimate authority and control, in delegating its security powers by UNSC Resolution 1244, is borne out by the following factors.

In the first place, and as noted above, Chapter VII allowed the UNSC to delegate to “Member States and relevant international organisations”. Secondly, the relevant power was a delegable power. Thirdly, that delegation was neither presumed nor implicit, but rather prior and explicit in the Resolution itself. Fourthly, the Resolution put sufficiently defined limits on the delegation by fixing the mandate with adequate precision as it set out the objectives to be attained, the roles and responsibilities accorded as well as the means to be employed. The broad nature of certain provisions (see the UN submissions, paragraph 118 above) could not be eliminated altogether given the constituent nature of such an instrument whose role was to fix broad objectives and goals and not to describe or interfere with the

detail of operational implementation and choices. Fifthly, the leadership of the military presence was required by the Resolution to report to the UNSC so as to allow the UNSC to exercise its overall authority and control (consistently, the UNSC was to remain actively seized of the matter, Article 21 of the Resolution). The requirement that the SG present the KFOR report to the UNSC was an added safeguard since the SG is considered to represent the general interests of the UN.

While the text of Article 19 of UNSC Resolution 1244 meant that a veto by one permanent member of the UNSC could prevent termination of the relevant delegation, the Court does not consider this factor alone sufficient to conclude that the UNSC did not retain ultimate authority and control.

- 135 Accordingly, UNSC Resolution 1244 gave rise to the following chain of command in the present cases. The UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO (in consultation with non-NATO member states) the power to establish, as well as the operational command of, the international presence, KFOR. NATO fulfilled its command mission via a chain of command (from the NAC, to SHAPE, to SACEUR, to CIC South) to COMKFOR, the commander of KFOR. While the MNBs were commanded by an officer from a lead TCN, the latter was under the direct command of COMKFOR. MNB action was to be taken according to an operational plan devised by NATO and operated by COMKFOR in the name of KFOR.

A, K, M, Q & G v H.M. Treasury [2008] EWHC 869 (Admin)
PAR. 1 – PAR. 3; PAR. 34 – PAR. 49 (COMPLETE VERSION IN SUPPLEMENT)

1. All five applicants have been subjected to freezing orders over their assets in accordance with the Terrorism (United Nations Measures) Order 2006 (2006 No.2657) (the TO). In G’s case, there is also an order against him by virtue of the Al-Qaida and Taliban (United Nations Measures) Order 2006 (2006 No. 2952) (the AQO). Each order contains a provision (Article 5(4)) whereby :-

“The High Court ... may set aside a direction on the application of –

- (a) the person identified in the direction, or
- (b) any other person affected by the direction.”

The applications before me are made under those Articles. However, as will become apparent, in G’s case he cannot rely on Article 5(4) of the AQO and so his application will have to be changed to a claim for judicial review of the direction made against him. Although this was not raised in the course of the hearing, Mr Crow, Q.C. did not seek to contend that G should not have any remedy if there was one available simply because he had relied on Article 5(4). Accordingly, I propose to treat the application as if it were a claim for judicial review, grant permission, dispense with all requirements of CPR 54 and reach a decision on the merits of the claim.

2. The hearing before me resulted from an order I made by consent setting out a number of preliminary issues which should be determined. These are:-

“Schedule of Issues for Preliminary Determination

A. Under the Terrorism (United Nations Measures) Order 2006

1. Is the Order ultra vires the United Nations Act 1946 and/or incompatible with Convention rights enjoyed under Schedule 1 of the Human Rights Act and/or unlawful by reference to the principle of legality?
2. Is it lawful to apply the Special Advocate procedure to applications under Article 5(4) of the Order?
3. Where a party is challenging a designation to Article 5(4) of the Terrorism Order, is the burden of proof on the Applicant to demonstrate that the designation should be set aside, or does the burden of proof rest upon the Respondent to demonstrate the existence of threshold conditions for designation?
4. On a hearing of an application under Article 5(4) of the Terrorism Order, what is the applicable standard of proof?
5. What is the role of the High Court, and the test to be applied by it, when determining an application under Article 5(4)?

B. Under the Al Qaida and Taliban (United Nations Measures) Order 2006

1. Does the Court have any power to set aside a designation made under Article 3(1)(b) of the Order?
2. If the Court has no such power under Article 5(4), does it have any other power to set aside such a designation?
3. As per issues A1-5.”

In argument, they were expanded to cover a general attack upon the lawfulness of each order and upon the freezing orders and more particularly upon the criminal offences created by the Orders which could be committed by those who were aware that an individual was subject to a freezing order.

3. Both Orders were made under powers conferred by s.1 of the United Nations Act 1946. This provides, so far as material:-

- “(1) If, under Article forty-one of the Charter of the United Nations signed at San Francisco on the twenty-sixth day of June, nineteen hundred and forty five (being the Article which relates to measures not involving the use of armed force) the Security Council of the United Nations call upon His Majesty’s Government in the United Kingdom to apply any measures to give effect to any decision of that Council, His Majesty may by Order in Council make such provision as appears to Him necessary or expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provision for the apprehension, trial and punishment of persons offending against the Order ...
- (4) Every Order in Council made under this Section shall forthwith after it is made be laid ... before Parliament.”

It is to be noted that, although it must be laid before Parliament, there is no procedure which enables Parliament to scrutinise or to amend any Order, although no doubt an individual Member could seek to initiate a debate if he or she felt that an Order was unsatisfactory. Each order was laid before Parliament the day after it was made and came into force on the following day.

(...)

34. In *R (Al-Jedda) v Defence Secretary* [2008] 2 W.L.R. 31, the House of Lords considered whether internment of a British Citizen in Iraq pursuant to a Security Council resolution permitting such internment if it was ‘necessary for imperative reasons of security’ overrode the rights conferred by Article 5 of the ECHR. Lord Bingham in Paragraph 33 drew attention to the possibility that the Security Council could adopt resolutions couched in mandatory terms in which case Article 25 of the Charter bound Member State to comply with them. But he accepted that, while maintenance of international peace and security is a fundamental purpose of the UN, so too is the promotion of respect for human rights. In Paragraph 39, Lord Bingham dealt with the means whereby the clash between the power or duty to detain on the express authority of the Security Council and the fundamental human right enshrined in Article 5 of the ECHR can be reconciled. He said this:-

“There is in my opinion only one way in which they can be reconciled: by ruling that the U.K. may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by [the relevant resolutions], but must ensure that the detainee’s rights under Article 5 are not infringed to any greater extent than is inherent in such detention.”

This reasoning is clearly applicable to the inevitable breaches of property rights and infringement of Article 8 rights resulting from the freezing orders.

35. Lord Carswell in Paragraph 136 stated:-

“I would emphasise ... that that power [viz: to detain] has to be exercised in such a way as to minimise the infringements of the detainees’ rights under Article 5(1) ...”

36. Much as I would like to, I do not think I can go as far as the Advocate General in *Kadi*. These cases concern the means whereby the freezing orders necessarily resulting from the listing under the AQO or the application of Paragraph 1(c) of Resolution 1373/2001 under the TO are put into effect. Article 25 of the Charter obliges the U.K. to freeze the assets of a person listed by the UN Committee and so the shortcomings in the procedure to challenge such listing cannot of themselves constitute a bar to freezing. Thus any right to challenge the factual basis for listing has to recognise that obstacle. Nevertheless, there is in my judgment a real practical benefit that can be afforded to the listed person by the ability of this court to consider the facts and to judge whether the necessary threshold has been met. If on considering all relevant material the court concluded that there was not evidence to justify listing, that conclusion would bind the Government to pursue a delisting application to the Security Council. It follows that I reject the approach of the Government recorded by the Advocate General in *Kadi* at paragraph 35 that judicial review ‘should be only of the most marginal kind’. Mr Crow in the course of argument accepted – or rather, he was not instructed to oppose – the view I expressed that there should be a power in the court to decide whether the basis for listing existed which would then bind the Government to support de-listing.
37. However, for reasons which will become clear, this does not save the AQO. Counsel for the applicants have submitted that the means used to apply the obligations imposed by the UN Resolutions is unlawful. Parliament has been bypassed by use of Orders in Council. But in deciding the appropriate way in which the obligations should be applied and in particular in creating the criminal offences set out in the Orders it was necessary that Parliamentary approval should be obtained. Those submissions are in my judgment entirely persuasive.
38. The obligation to apply the Resolutions necessarily involves consideration of how that can be achieved. Since there is a breach of fundamental rights, the application must involve the least possible interference with such rights. Parliament can of course decide what measures are needed and can go as far as it considers necessary to achieve the avoidance of funds being made available for terrorist purposes. The purpose of the UN Resolution is to ensure so far as possible that funds are not made available to assist terrorism by placing constraints on the ability of those who are involved in terrorist activities or who support such activities to provide funds for them.
39. S.1 of the 1946 Act enables an Order in Council to be used rather than legislation to be put through Parliament only where it appears to Her Majesty that it is ‘necessary and expedient’ for enabling the measure to be effectively applied to do so. Thus it is in my judgment necessary, if Parliament is not to be involved, that the Order in Council goes no further than to apply what the Resolution requires. Paragraph 1(c) of Resolution 1373/2001 requires the freezing of financial assets or economic resources of “persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts”. The TO confers power to designate where the Treasury have “reasonable grounds for suspecting that the person is or may be a person who commits etc”.
40. The threshold is thus a very low one. While I can see the force of an argument that reasonable suspicion may suffice (and it is to be noted that both the CFI and the Advocate General use the word) to implement the requirement of Paragraph 1(c) of 1373/2001, it is impossible to see how the test could properly be as low as reasonable suspicion that a person may be a person who commits etc. I do not accept - indeed the applicants do not argue – that it is to be limited to those who are proved by conviction to be committing or attempting to commit acts of terrorism. But it is impossible to see how the test applied in the TO can constitute a necessary means of applying the resolution. Mr Crow submits that it is expedient, which has a wider meaning. In *R(Gillan) v Commissioner of Metropolitan Police* [2006] 2 A.C. 307, the distinction between necessary and expedient was considered in the context of powers of random search conferred by s.44 of the Terrorism Act 2000. Lord Bingham at paragraph 14

said that Parliament had used the word deliberately recognising that the powers were desirable in the interest of combating terrorism. But Lord Bingham drew attention to the close regulation of the exercise of the statutory power. There is no such regulation here and I do not accept that the extension to those who are suspected of possible involvement is properly within the scope of what is authorised by s.1 of the 1946 Act.

41. There is another cogent reason for saying that it is not expedient. It is rightly accepted by Mr Crow that the TO in terms and the AQO through judicial review allows consideration of whether the person affected is on the facts properly within the test to be applied. This means that all material must be available to the court, whether closed or open. I have some experience both as an ex-chairman of SIAC and in considering Control Orders cases of the evidence upon which reliance is placed by the Security Services and so available to the Treasury. This will usually – in my experience invariably – include intercept material. Section 17 of the Regulation of Investigatory Powers Act 2000 (RIPA) excludes such evidence from any legal proceedings. Exceptions to this exclusionary rule are contained in s.18, but they do not extend to applications or judicial review claims against orders made under the TO or the AQO. Thus the court is disabled from considering such material. This means that a fair and just consideration of the question whether the individual applicant is one who should be subjected to an order is likely to be impossible in most cases. Fairness works for the Crown as it does for the applicant. Thus the Treasury will be unable to rely on inculpatory intercept material just as the applicant will be unable to rely on exculpatory intercept material. This cannot be in the interests of justice or indeed of ensuring that the right people are made subject to these orders. Thus it is in my view impossible to say that the use of an Order in Council is expedient unless it can provide an exception to s.17 of RIPA. It cannot nor does it purport to do so.
42. It is submitted that the orders are unlawful in establishing criminal offences which go far beyond what is reasonably required and offend against the principle of legal certainty. The very wide definition of economic resources makes it impossible for members of the family of the designated person in particular to know whether they are committing an offence or a licence is needed. Article 8(1) of the TO applies to any asset which could in theory be used to obtain funds. The solicitor for the applicants A, K and M was concerned to ascertain on their families' behalf what could and could not be provided without the need for a licence and I gather that those in the Treasury who have to deal with those matters have had to consider whether licences should be granted on more than 50 occasions. A specific query arose, and it is a good illustration of the absurdity which can result, in relation to the loan of a car to an applicant to enable him to go to the supermarket to get the family's groceries. After some delay, the Treasury (in my view wrongly) decided that a licence was needed. The car was an economic resource and could be used to obtain or deliver goods or services. This was only resolved by the Treasury after seeking ministerial consideration. Similar concerns have been raised in relation to an Oyster card to enable the applicant to travel and any borrowing of items for any purpose. Since the possible penalty on conviction is severe, the concerns are understandable and the effect on the applicant and his family, whose human rights are also in issue, is serious.
43. In *Norris v USA* [2008] UKHL 16, the House of Lords has recently considered the principle of legal certainty in the context of criminal offences. *Norris* was an extradition case. A question before their Lordships was whether price fixing was a common law offence. They decided it was not and it would be wrong in principle to decide that it was. The Appellate Committee in a report which comprised its composite opinion said this at paragraphs 53 and 54:-

“53. In *R v Rimmington* [2006] 1 A.C. 459, Para 33 Lord Bingham of Cornhill said that there were two “guiding principles” relevant in that case, namely:

“no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done”.

As he went on to say in the next paragraph, those principles are “entirely consistent with Article 7(1) of the European Convention”. At paragraph 35, he discussed a number of decisions of the Strasbourg Court on the topic, which established that, while “absolute certainty is unattainable, and might entail excessive rigidity”, and “some degree of vagueness is inevitable” particularly in common law systems, “the law-making function of the courts must remain within reasonable limits”.

54. In *R v Jones (Margaret)* [2007] 1 A.C. 136, Lord Bingham took the matter a little further when he identified, at Paragraph 29 “what has become an important democratic principle in this country: that it is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties. One would need very compelling reasons for departing from that principle”.

Lord Hoffmann said much the same at Paragraph 60.”

Those observations are pertinent in considering whether the offences created under the Orders offend against the principle of legal certainty.

44. *R v Jones* [2007] 1 A.C. 136, concerned the meaning to be attached to ‘offence’ within the meaning of s.68(2) of the Criminal Justice and Public Order Act 1994 in relation to convictions for acts of civil disobedience by opponents of the Iraq war at military institutions. At paragraph 28, Lord Bingham said:-

“ ... [T]here now exists no power in the courts to create new criminal offences, as decided by a unanimous House in *Kneller v Director of Public Prosecutions* [1973] A.C. 435 ... Statute is now the sole source of new criminal offences.”

In Paragraph 62, Lord Hoffmann said this, in the context of incorporating new crimes in international law:-

“New domestic offences should in my opinion be debated in Parliament, defined in a statute and come into force on a prescribed date. They should not creep into existence as a result of an international consensus to which only the executive of this country is a party.”

45. I recognise that this dictum relates to offences which international bodies consider should exist. And Mr Crow submits that s.1 of the 1946 Act gives express power to provide for the trial and punishment of persons offending against any Order. But the principle of maximum certainty (as identified by Professor Ashworth in his *Principles of Criminal Law* at p.24 et seq) requires that a citizen must be able to have an adequate indication of the legal rules applicable. That follows from the decision of the ECtHR in *Sunday Times v U.K.* (1979) EHRR 245 at paragraph 49. On p.76, Professor Ashworth states:-

“... [A] person’s ability to know of the existence and extent of a rule is fundamental: respect for a citizen as a rational autonomous individual and as a person with social and political duties requires fair warning of the criminal law’s provisions and no undue difficulty in ascertaining them.”

46. The purpose of asset freezing is to ensure that funds are not made available for terrorist purposes. Thus any criminal liability which could fall on those who make any assets available to a designated person should depend on whether it was or ought to have been known to the supplier that the asset in question could result in funds being available for terrorist purposes. That at the very least seems to me to be an appropriate limitation on criminal liability. How the requirements of the Sanctions Committee should be put into law is, as it seems to me, having regard to the principles to which I have referred a matter for Parliamentary consideration. Thus I am satisfied that neither Order in Council represents a necessary or expedient means of giving effect to the obligations imposed by the Committee.

47. A further attack is made in that no procedure is set out to deal with the inevitable reliance on closed material. It is said by Mr Crow that there is no reason why the Court should not sanction the use of special advocates: it has that power in the exercise of its inherent jurisdiction: see *R(Roberts) v Parole Board* [2005] 2 A.C. 738. It is to be noted that as long ago as October 2006, the then Economic Secretary to the Treasury said, in connection with the TO on the day it was made:-

“The Treasury has agreed ... to use closed source evidence in asset freezing cases where there are strong operational reasons to impose a freeze, but insufficient open source evidence available. The use of closed source material will be subject to proper judicial safeguards. The Government intend to put in place a special advocates procedure to ensure that appeals and reviews in these cases can be heard on a fair and consistent basis.”

That was 18 months ago. There is no such procedure in force. It is not for the court to devise a procedure particularly as it cannot deal with the constraints imposed by RIPA and there are resource considerations in the use of special advocates. Roberts case related to cases in which use of such material would be exceptional; cases under the Orders will regularly involve such material.

48. Finally, I come to the burden and standard of proof. I regard this as an unnecessary and unhelpful approach. In judicial reviews of the AQO and applications under Article 5(4) of the TO, the approach should be the same. It should follow that laid down by the Court of Appeal in *Secretary of State for the Home Department v MB* [2007] QB 415 at paragraph 67. This requires the court to consider all the evidence put before it and decide whether, taken as a whole, it shows that the grounds for making the order are established.

49. The result of this judgment will, I think, be that both the Orders must be quashed. This is not to say that freezing orders cannot be made to comply with the UN resolutions. But in my view it is essential that Parliament considers the way in which what is required should be achieved and it is not proper to do it by relying on s.1 of the 1946 Act. However, I will hear counsel on the appropriate order that I should make.

R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) [2007] UKHL 58

PAR. 22 – PAR. 39 (COMPLETE VERSION IN SUPPLEMENT)

22. Against the factual background described above a number of questions must be asked in the present case. Were UK forces placed at the disposal of the UN? Did the UN exercise effective control over the conduct of UK forces? Is the specific conduct of the UK forces in detaining the appellant to be attributed to the UN rather than the UK? Did the UN have effective command and control over the conduct of UK forces when they detained the appellant? Were the UK forces part of a UN peacekeeping force in Iraq? In my opinion the answer to all these questions is in the negative.
23. The UN did not dispatch the coalition forces to Iraq. The CPA was established by the coalition states, notably the US, not the UN. When the coalition states became occupying powers in Iraq they had no UN mandate. Thus when the case of Mr Mousa reached the House as one of those considered in *R(Al-Skeini and others) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26, [2007] 3 WLR 33 the Secretary of State accepted that the UK was liable under the European Convention for any ill-treatment Mr Mousa suffered, while unsuccessfully denying liability under the Human Rights Act 1998. It has not, to my knowledge, been suggested that the treatment of detainees at Abu Ghraib was attributable to the UN rather than the US. Following UNSCR 1483 in May 2003 the role of the UN was a limited one focused on humanitarian relief and reconstruction, a role strengthened but not fundamentally altered by UNSCR 1511 in October 2003. By UNSCR 1511, and again by UNSCR 1546 in June 2004, the UN gave the multinational force express authority to take steps to promote security and stability in Iraq, but (adopting the distinction formulated by the European Court in para 43 of its judgment in *Behrami and Saramati*) the Security Council was not delegating its power by empowering the UK to exercise its function but was authorising the UK to carry out functions it could not perform itself. At no time did the US or the UK disclaim responsibility for the conduct of their forces or the UN accept it. It cannot realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant.
24. The analogy with the situation in Kosovo breaks down, in my opinion, at almost every point. The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN. The multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite true that duties to report were imposed in Iraq as in Kosovo. But the UN's proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to me significant that in each case the UN reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so.
25. I would resolve this first issue in favour of the appellant and against the Secretary of State.

THE SECOND ISSUE

26. As already indicated, this issue turns on the relationship between article 5(1) of the European Convention and article 103 of the UN Charter. The central questions to be resolved are whether, on the facts of this case, the UK became subject to an obligation (within the meaning of article 103) to detain the appellant and, if so, whether and to what extent such obligation displaced or qualified the appellant's rights under article 5(1).

27. Article 5(1) protects one of the rights and freedoms which state parties to the European Convention have bound themselves to secure to everyone within their jurisdiction. It has been recognised as a right of paramount importance. It is one to which, by virtue of the Human Rights Act 1998, UK courts must give effect. Its terms are familiar: “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:...” There follows a list of situations in which a person may, in accordance with a procedure prescribed by law, be deprived of his liberty. It is unnecessary to recite the details of these situations, since none of them is said to apply to the appellant. In the absence of some exonerating condition, the detention of the appellant would plainly infringe his right under article 5(1).
28. The Charter of the United Nations was signed in June 1945 as the Second World War, with its horrific consequences in many parts of the world, was drawing to a close. It is necessary to review its terms in a little detail. In the preamble the parties expressed their determination to save succeeding generations from the scourge of war and to reaffirm faith in fundamental human rights. Its objects, expressed in article 1, were (among others) to maintain international peace and security and, to that end, to take effective collective measures for the prevention and removal of threats to the peace; and to promote and encourage respect for human rights. Member states bound themselves (article 2) to fulfil in good faith the obligations assumed by them in accordance with the Charter, and to give the UN every assistance in any action it might take in accordance with the Charter. By article 24 the Security Council has primary responsibility for the maintenance of peace and security and acts on behalf of member states in discharging that responsibility. Member states agree (article 25) to accept and carry out the decisions of the Security Council in accordance with the Charter.
29. Chapter VII governs “Action with respect to threats to the peace, breaches of the peace, and acts of aggression”. It opens (article 39) by providing that the Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and decide what measures should be taken in accordance with articles 41 and 42 to maintain or restore international peace and security. Article 41 is directed to measures not involving the use of armed force. More pertinently, article 42 empowers the Security Council, if it considers that article 41 powers were or would be inadequate, to take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. By article 43, member states undertake, in order to contribute to the maintenance of international peace and security, to make available to the Security Council on its call and in accordance with a special agreement or agreements, armed forces, assistance and facilities necessary for the purpose of maintaining international peace and security. Such agreements were to govern the number and types of forces, including their location, readiness and facilities and were to be negotiated as soon as possible on the initiative of the Security Council. No such agreements have, in practice, ever been made, and article 43 is a dead letter.
30. It remains to take note of article 103, a miscellaneous provision contained in Chapter XVI. It provides:

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

This provision lies at the heart of the controversy between the parties. For while the Secretary of State contends that the Charter, and UNSCRs 1511 (2003), 1546 (2004), 1637 (2005) and 1723 (2006), impose an obligation on the UK to detain the appellant which prevails over the appellant’s conflicting right under article 5(1) of the European Convention, the appellant insists that the UNSCRs referred to, read in the light of the Charter, at most authorise the UK to take action to detain him but do not oblige it

to do so, with the result that no conflict arises and article 103 is not engaged.

31. There is an obvious attraction in the appellant's argument since, as appears from the summaries of UNSCRs 1511 and 1546 given above in paras 12 and 15, the resolutions use the language of authorisation, not obligation, and the same usage is found in UNSCRs 1637 (2005) and 1723 (2006). In ordinary speech to authorise is to permit or allow or license, not to require or oblige. I am, however, persuaded that the appellant's argument is not sound, for three main reasons.
32. First, it appears to me that during the period when the UK was an occupying power (from the cessation of hostilities on 1 May 2003 to the transfer of power to the Iraqi Interim Government on 28 June 2004) it was obliged, in the area which it effectively occupied, to take necessary measures to protect the safety of the public and its own safety. Article 43 of the Hague Regulations 1907 provides, with reference to occupying powers:

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country”.

This provision is supplemented by certain provisions of the Fourth Geneva Convention. Articles 41, 42 and 78 of that convention, so far as material, provide

- “41. Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of articles 42 and 43...
42. The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary...
78. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment”.

These three articles are designed to circumscribe the sanctions which may be applied to protected persons, and they have no direct application to the appellant, who is not a protected person. But they show plainly that there is a power to intern persons who are not protected persons, and it would seem to me that if the occupying power considers it necessary to detain a person who is judged to be a serious threat to the safety of the public or the occupying power there must be an obligation to detain such person: see the decision of the International Court of Justice in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 116, para 178. This is a matter of some importance, since although the appellant was not detained during the period of the occupation, both the evidence and the language of UNSCR 1546 (2004) and the later resolutions strongly suggest that the intention was to continue the pre-existing security regime and not to change it. There is not said to have been such an improvement in local security conditions as would have justified any relaxation.

33. There are, secondly, some situations in which the Security Council can adopt resolutions couched in mandatory terms. One example is UNSCR 820 (1993), considered by the European Court (with reference to an EC regulation giving effect to it) in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2005) 42 EHRR 1, which decided in paragraph 24 that “all states shall impound all

vessels, freight vehicles, rolling stock and aircraft in their territories...”. Such provisions cause no difficulty in principle, since member states can comply with them within their own borders and are bound by article 25 of the UN Charter to comply. But language of this kind cannot be used in relation to military or security operations overseas, since the UN and the Security Council have no standing forces at their own disposal and have concluded no agreements under article 43 of the Charter which entitle them to call on member states to provide them. Thus in practice the Security Council can do little more than give its authorisation to member states which are willing to conduct such tasks, and this is what (as I understand) it has done for some years past. Even in UNSCR 1244 (1999) relating to Kosovo, when (as I have concluded) the operations were very clearly conducted under UN auspices, the language of authorisation was used. There is, however, a strong and to my mind persuasive body of academic opinion which would treat article 103 as applicable where conduct is authorised by the Security Council as where it is required: see, for example, Goodrich, Hambro and Simons (eds), *Charter of the United Nations: Commentary and Documents*, 3rd ed (1969), pp 615-616; *Yearbook of the International Law Commission* (1979), Vol II, Part One, para 14; Sarooshi, *The United Nations and the Development of Collective Security* (1999), pp 150-151. The most recent and perhaps clearest opinion on the subject is that of Frowein and Krisch in Simma (ed), *The Charter of the United Nations: A Commentary*, 2nd ed (2002), p 729:

“Such authorizations, however, create difficulties with respect to article 103. According to the latter provision, the Charter—and thus also SC resolutions—override existing international law only insofar as they create ‘obligations’ (cf. Bernhardt on article 103 MN 27 et seq.). One could conclude that in case a state is not obliged but merely authorized to take action, it remains bound by its conventional obligations. Such a result, however, would not seem to correspond with state practice at least as regards authorizations of military action. These authorizations have not been opposed on the ground of conflicting treaty obligations, and if they could be opposed on this basis, the very idea of authorizations as a necessary substitute for direct action by the SC would be compromised. Thus, the interpretation of article 103 should be reconciled with that of article 42, and the prevalence over treaty obligations should be recognized for the authorization of military action as well (see Frowein/Krisch on article 42 MN 28). The same conclusion seems warranted with respect to authorizations of economic measures under article 41. Otherwise, the Charter would not reach its goal of allowing the SC to take the action it deems most appropriate to deal with threats to the peace—it would force the SC to act either by way of binding measures or by way of recommendations, but would not permit intermediate forms of action. This would deprive the SC of much of the flexibility it is supposed to enjoy. It seems therefore preferable to apply the rule of article 103 to all action under articles 41 and 42 and not only to mandatory measures.”

This approach seems to me to give a purposive interpretation to article 103 of the Charter, in the context of its other provisions, and to reflect the practice of the UN and member states as it has developed over the past 60 years.

34. I am further of the opinion, thirdly, that in a situation such as the present “obligations” in article 103 should not in any event be given a narrow, contract-based, meaning. The importance of maintaining peace and security in the world can scarcely be exaggerated, and that (as evident from the articles of the Charter quoted above) is the mission of the UN. Its involvement in Iraq was directed to that end, following repeated determinations that the situation in Iraq continued to constitute a threat to

international peace and security. As is well known, a large majority of states chose not to contribute to the multinational force, but those which did (including the UK) became bound by articles 2 and 25 to carry out the decisions of the Security Council in accordance with the Charter so as to achieve its lawful objectives. It is of course true that the UK did not become specifically bound to detain the appellant in particular. But it was, I think, bound to exercise its power of detention where this was necessary for imperative reasons of security. It could not be said to be giving effect to the decisions of the Security Council if, in such a situation, it neglected to take steps which were open to it.

35. Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in article 103 to “any other international agreement” leaves no room for any excepted category, and such appears to be the consensus of learned opinion. The decisions of the International Court of Justice (*Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie* [1992] ICJ Rep 3, para 39; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [1993] ICJ Rep 325, per Judge ad hoc Lauterpacht, pp 439-440, paras 99-100) give no warrant for drawing any distinction save where an obligation is *jus cogens* and according to Judge Bernhardt it now seems to be generally recognised in practice that binding Security Council decisions taken under Chapter VII supersede all other treaty commitments (Simma (ed), *The Charter of the United Nations: A Commentary*, 2nd ed (2002), pp 1299-1300).
36. I do not think that the European Court, if the appellant’s article 5(1) claim were before it as an application, would ignore the significance of article 103 of the Charter in international law. The court has on repeated occasions taken account of provisions of international law, invoking the interpretative principle laid down in article 31(3)(c) of the Vienna Convention on the Law of Treaties, acknowledging that the Convention cannot be interpreted and applied in a vacuum and recognising that the responsibility of states must be determined in conformity and harmony with the governing principles of international law: see, for instance, *Loizidou v Turkey* (1996) 23 EHRR 513, paras 42-43, 52; *Bankovic v Belgium* (2001) 11 BHRC 435, para 57; *Fogarty v United Kingdom* (2001) 34 EHRR 302, para 34; *Al-Adsani v United Kingdom* (2001) 34 EHRR 273, paras 54-55; *Behrami and Saramati*, above, para 122. In the latter case, in para 149, the court made the strong statement quoted in para 21 above.
37. The appellant is, however, entitled to submit, as he does, that while maintenance of international peace and security is a fundamental purpose of the UN, so too is the promotion of respect for human rights. On repeated occasions in recent years the UN and other international bodies have stressed the need for effective action against the scourge of terrorism but have, in the same breath, stressed the imperative need for such action to be consistent with international human rights standards such as those which the Convention exists to protect. He submits that it would be anomalous and offensive to principle that the authority of the UN should itself serve as a defence of human rights abuses. This line of thinking is reflected in the judgment of the European Court in *Waite and Kennedy v Germany* (1999) 30 EHRR 261, para 67, where the court said:

“67. The court is of the opinion that where states establish international organisations in order to pursue or strengthen their co-operation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the contracting states were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and

effective ...”

The problem in a case such as the present is acute, since it is difficult to see how any exercise of the power to detain, however necessary for imperative reasons of security, and however strong the safeguards afforded to the detainee, could do otherwise than breach the detainee’s rights under article 5(1).

38. One solution, discussed in argument, is that a state member of the Council of Europe, facing this dilemma, should exercise its power of derogation under article 15 of the Convention, which permits derogation from article 5. However, such power may only be exercised in time of war or other public emergency threatening the life of the nation seeking to derogate, and only then to the extent strictly required by the exigencies of the situation and provided that the measures taken are not inconsistent with the state’s other obligations under international law. It is hard to think that these conditions could ever be met when a state had chosen to conduct an overseas peacekeeping operation, however dangerous the conditions, from which it could withdraw. The Secretary of State does not contend that the UK could exercise its power to derogate in Iraq (although he does not accept that it could not). It has not been the practice of states to derogate in such situations, and since subsequent practice in the application of a treaty may (under article 31(3)(b) of the Vienna Convention) be taken into account in interpreting the treaty it seems proper to regard article 15 as inapplicable.
39. Thus there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled? There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by UNSCR 1546 and successive resolutions, but must ensure that the detainee’s rights under article 5 are not infringed to any greater extent than is inherent in such detention. I would resolve the second issue in this sense.