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CURRENT LEGAL DEVELOPMENTS

Fundamental Rights and the United Nations Financial Sanction Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities

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Abstract
Under the UN sanctions regime of Resolution 1267, UN member states are obliged to freeze the assets of persons and entities which are associated with Usama bin Laden, and which therefore reason have been listed by the UN. Within the European Union this 'UN sanctions list' is implemented by means of a Community regulation, having direct effect in all EU member states. The regulation was challenged by several individuals and an organization, which were added to the UN sanctions list on the basis of their association with al Qaeda. The regulation was challenged on two grounds. First, the applicants claimed that the Community did not have the competence to adopt the contested regulation. In the second place, the applicants claimed that the Community regulation infringed their human rights (right to property, right of access to court). Thus the CFI was asked to determine to what extent it is competent indirectly to review measures adopted under the UN Charter. This delicate legal question is answered in a lengthy judgment, the legal reasoning of which is not always convincing.

Key words
counter-terrorism measures; EU implementing measures; financial sanctions; human rights; judicial review; UN Charter

1. Introduction

On 21 September 2005 the Court of First Instance of the European Communities (CFI) decided in two cases concerning the lawfulness of Community law measures implementing UN financial sanctions against persons and entities associated with the Islamic fundamentalist militant Usama bin Laden and his paramilitary organization, al Qaeda.[1] In both cases the CFI had to give a ruling on two questions of evident importance for the application of this sanctions regime in the Community legal order. First, the CFI had to determine whether there was a Community competence to adopt the measures implementing the UN sanctions. This was not self-evident as there is no provision in the EC Treaty which explicitly allows the Community

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1. CFI, 21 September 2005, Case T-306, *Yusuf and Al Barakaat*, and Case T-315, *Kadi*.

to adopt financial measures against specific persons and entities. For this reason the applicants claimed that the Community measures imposing financial sanctions upon them were invalid.

In the second place, in case the CFI should hold that the Community implementing measures had a sound legal basis in the EC Treaty, the applicants claimed that the financial sanctions imposed on them amounted to a breach of their fundamental rights. This claim forced the CFI to decide on a rather delicate issue, concerning a clash between two important legal principles. The first principle at stake concerns the supremacy of the obligations deriving from the UN Charter over any other international obligation (Art. 103 UN Charter). By challenging the lawfulness of the Community regulation implementing the UN financial sanctions regime of Resolution 1267(1999), the applicants in *Yusuf* and *Kadi* in essence were asking the CFI to find an exception to the rule that obligations imposed under the UN Charter take precedence over any other legal obligation. The second principle at stake is the protection of fundamental rights in the context of the Community legal order. The applicants claimed that the financial sanctions imposed upon them infringed their fundamental rights. According to established case law fundamental rights form part of the general principles of Community law, the observance of which the Court of Justice of the European Communities (ECJ) and the CFI ensure. If the CFI were to rule that it had no jurisdiction to review the lawfulness of the contested regulations, it would run the risk of being criticized for failing to uphold the Community level of human rights protection.

Before addressing the ruling of the CFI in *Yusuf* and *Kadi* in more detail,[2] a short overview of the UN counter-terrorism financial sanctions regime and its implementation within the EU is given.

2. The UN financial sanctions regime

Since 11 September 2001, the date of the terrorist attacks on New York and Washington, a variety of measures has been taken – at global, regional, and national level – to ensure that the 'war against terror' has a successful outcome. One of the measures in this war is the so-called 'financial sanctions' imposed by the UN Security Council. These sanctions aim to prevent the funding of terrorist activities, among other means by freezing the assets of terrorists and those of their sponsors. After 11 September existing UN financial sanctions against the Taliban and Usama bin Laden were tightened (section 2.1) and supplemented by a general UN financial sanctions regime (section 2.2). Although the latter regime is not at stake in the cases of *Yusuf* and *Kadi*, its implementation in the EU gives rise to related legal questions.

2.1. The UN financial sanctions against Usama bin Laden c.s.

The UN financial sanctions regime against persons and entities associated with Usama bin Laden c.s. finds its origin in Resolution 1267 of 15 October 1999. In this resolution, which pre-dated the attacks on New York and Washington, financial

2. See for a rather critical analysis of the ruling of the CFI, H. Labayle, 'Architecte ou spectatrice? La Cour de Justice de l'Union dans l'Espace de liberté, sécurité et justice', (2005) *Revue trimestrielle de droit européen* 437.

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sanctions were imposed on the Taliban regime in Afghanistan in response to their refusal to extradite Usama bin Laden to the United States. In December 2000 the sanctions regime of Resolution 1267 was expanded to Usama bin Laden and all persons and entities associated with him, including al Qaeda (Resolution 1333 of 19 December 2000). A committee – Committee 1267, consisting of members of the Security Council – was established and granted the competence to decide which persons and entities fall within the ambit of Resolution 1267. After 11 September 2001 Committee 1267 has been very active in expanding the list of targeted persons and entities. When the Taliban regime fell, the Security Council adopted a new Resolution (Resolution 1390 of 16 January 2002) abolishing the sanctions against Afghanistan and maintaining those against the Taliban, Usama bin Laden and al Qaida. In its supervisory tasks, Committee 1267 is assisted by a monitoring group established pursuant to Security Council Resolution 1363(2001). The UN member states have to report on the steps taken to implement the financial sanctions regime.[3]

Under the sanctions regime of Resolution 1267, the UN member states are called on to freeze the assets of the Taliban, Usama bin Laden, al Qaeda, and all persons or entities associated with them, and to ensure that no funds are made available to them. Committee 1267 decides on receiving 'relevant information' by UN member states on those persons and entities associated with Al-Qaida, Usama bin Laden, or the Taliban. In response to criticism concerning its vagueness,[4] this term was further clarified in Resolution 1617, adopted on 29 July 2005:

> acts or activities indicating that an individual, group, undertaking or entity is 'associated with' Al-Qaida, Usama bin Laden, or the Taliban include:
>
> – participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
>
> – supplying, selling or transferring arms and related material to;
>
> – recruiting for; or
>
> – otherwise supporting acts or activities of:
>
> Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.

It could be questioned whether this clarification resolves all difficulties concerning the scope of the UN financial sanctions regime of Resolution 1267. When is a person or entity 'otherwise supporting acts' of al Quaeda? Is it sufficient that someone expresses his support for the acts of al Quaeda, for instance by wearing a T-shirt portraying Usama bin Laden, to justify his listing on the UN sanctions list? Furthermore, it is not clear what level of evidence is required to list a specific person or entity. In the guidelines of the Committee it is stated that additions to the list

3. The state reports and other relevant documents are published on the internet site of Committee 1267 (http://www.un.org/Docs/sc/committees/1267Template.htm).
4. Second report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004) concerning al Quaeda and the Taliban and associated individuals and entities, 15 February 2005, S/2005/83, 11.

should include 'to the extent possible, a narrative description of the information that forms the basis or justification for taking action'. This is a rather vague criterion as to the substantive requirements that need to be fulfilled to justify adding a specific person or entity to the list. Furthermore, no public information is given on the grounds for adding a person or entity to the list.[5] In view of the security interest involved, there may be good reasons not to disclose this information,[6] but as a consequence we do not know which criteria are being used by the Committee to evaluate the information provided by the member states. Is it sufficient to inform the Committee of a suspicion that a specific person is associated with al Quaeda, or is it necessary to provide the Committee with convincing evidence that proves beyond any reasonable doubt that a person is associated with al Quaeda?

As decisions by the Committee require consensus, all members have to agree that a specific person or entity should be added to the list. The guidelines of the Committee also provide a procedure for the delisting of persons and entities on the UN sanctions list. They may petition the state of residence or citizenship to request review of the case. If the state concerned is willing to do so, it shall first consult the state which originally proposed the listing of the person or entity concerned. After these consultations it may submit its request for delisting to the Committee, pursuant to the no-objection procedure.[7] Although there have been several instances in which this procedure was followed successfully,[8] it is evident that it does not provide the same protection for the listed persons and entities as a judicial remedy. First of all, to be unlisted requires the willingness of the state of residence or nationality to act on behalf of the persons and entities listed. It is obvious that this is a form of protection which is not available to all persons and entities listed. Furthermore, even if a state is willing to take action on behalf of a listed person or entity, what follows is a political procedure and not a (quasi)judicial procedure before an independent body. The case of *Sayadi and Vinck*[9] illustrates that it is very difficult to evaluate this political procedure. Sayadi is president and Vinck is secretary of the Fondation Secours Mondial (FSM), the Belgian branch of the Global Relief Foundation. The latter organization has been on the UN sanctions list since 22 October 2002. Since 3 September 2002 Sayadi and Vinck have been the subject of criminal investigations in Belgium. On 22 January 2003 they were put on the UN list on the basis of information provided by the Belgian state. In February 2004 Sayadi and Vinck asked for a court order before the Brussels Court of First Instance to compel the Belgian state to ask the Sanctions Committee to strike their names from the UN sanctions list. According to the Belgian authorities there was no reason to act on behalf of the applicants, since criminal investigations were still running. The court, however, observed that two and a half years had passed since the opening of the criminal investigations and

5. Resolution 1617, however, authorizes the Committee to release 'the statement of the case' with the prior consent of the designating state.
6. The CFI has accepted that the Council does not provide access to the information related to the EU sanctions list for security reasons. See *infra*, note 21.
7. See the Guidelines of the Committee for the Conduct of its Work, adopted on 7 November 2002, section 8.
8. This happened for instance with respect to two of the original applicants in *Yusuf*. They were delisted after intervention by Sweden on their behalf.
9. Decision of the Tribunal de première instance de Bruxelles, *Sayadi & Vinck v. l'Etat Belge*, 18 February 2005.

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that so far no charges had been made. In these circumstances, the authorities could not reasonably claim that the listing of Sayadi and Vinck was an administrative and temporary measure. In February 2005, therefore, the Brussels Court of First Instance ordered the Belgian state to ask the Sanctions Committee to strike Sayadi and Vinck from the UN sanctions list. Apparently the Belgian authorities did not persuade all members of the Sanctions Committee to delist Sayadi and Vinck: to this date they are still on the list. For what reasons did the intervention of the Belgian authorities fail? Did other states provide convincing evidence of their association with al Quaeda? Or did the Sanctions Committee disagree with the Brussels Court of First Instance that when criminal investigations have not resulted in any evidence they can no longer justify the listing of the persons under investigation? Furthermore, in December 2005 the criminal investigation of Sayadi and Vinck was closed by a final decision by the Brussels Court of First Instance to dismiss the case.[10] Is this a factor to be taken into account by the Sanctions Committee in deciding on a request for delisting?

Originally the financial sanctions regime did not foresee any derogations. This has been changed by Resolution 1452 of 20 December 2002, which introduced the possibility for states to ask approval of the Committee to authorize access to frozen assets to cover basic expenses.[11]

2.2. The general UN financial sanctions in the fight against terrorism

Resolution 1267 has been supplemented by a general financial sanctions regime, imposed by means of Resolution 1373 of 28 September 2001. In this resolution UN member states are called on to freeze all funds and other financial assets or economic resources of terrorists, and to prohibit their nationals or any persons and entities within their territories from making any funds or financial services available for the benefit of terrorists. An important difference between Resolution 1373 and Resolution 1267 is that there is no UN list of the persons and entities that fall under the former resolution. This means that the UN member states determine who qualifies as a terrorist and consequently falls under the scope of Resolution 1373; in the European Union this is decided at EU level, rather than by the individual member states. The implementation of Resolution 1373 is supervised by the Counter-Terrorism Committee (CTC).[12] UN member states have to report regularly to the CTC on the steps they have taken to implement Resolution 1373.[13] The European Union sends in reports supplementing those of its member states.

10. This information is provided in the fourth report of the Analytical Support and Sanctions Monitoring Team of 10 March 2006 (S/2006/154).
11. See also the Guidelines of the Committee for the Conduct of its Work, section 9.
12. The Counter-Terrorism Committee must not be confused with Committee 1267 supervising the implementation of the UN financial sanctions against Usama bin Laden c.s. In order to clarify the respective roles of these committees, on 28 July 2003 a press release was issued approved by both the 1267 Committee and the Counter-Terrorism Committee (SC/7827).
13. The state reports and other relevant documents are published on the internet site of the Counter-Terrorism Committee (http://www.un.org/Docs/sc/committees/1373).

2.3. Implementation of UN sanctions within the European Union

The consecutive UN resolutions imposing financial sanctions against the Taliban and Usama bin Laden and all persons associated with them (Resolution 1267 and further) have been implemented within the European Union as follows. First, a Common Position was adopted under the Second Pillar (the Common Foreign and Security Policy, CFSP) indicating that the UN sanctions are implemented by the EU. Subsequently the financial sanctions were effected by a Community regulation under the First Pillar (the EC Treaty). As EC regulations have direct effect in the EU member states,[14] sanctions against persons and entities on the UN sanctions list are in force from the moment that the EC regulation implementing the UN list enters into force. This does not mean that no action is required of the EU member states; they are obliged to supervise compliance with and to penalize violation of the EC sanction regulation. The financial regime of Resolution 1390(2002) has been implemented by Common Position 2002/402[15] and Regulation 881/2002.[16] This Regulation applies to all individuals and entities designated by Committee 1267 and listed in Annex I. Whenever Committee 1267 changes the UN list, Annex I is amended accordingly.[17] In addition to *Yusuf* and *Kadi*, there are several other cases pending before the CFI concerning the Community implementation of the UN financial sanctions regime against Usama bin Laden c.s.[18] All these cases have been brought before the CFI on the basis of Article 230(4) of the EC Treaty, which gives individuals (limited) legal standing to challenge the lawfulness of a Community act before the CFI.

In the context of the general UN financial sanctions regime of Resolution 1372(2001) (section 2.2 above) an EU list of targeted persons and entities has been established by the Council (Common Position 2001/931[19]). This list may be amended by the Council acting unanimously.[20] Common Position 2001/931 also provides the criteria for listing persons or entities: there should be a decision, such as the instigation of investigation for a terrorist act, taken by a competent authority in respect of the persons or entities concerned. It is further explained that 'competent authority' shall mean a judicial authority, or, where judicial authorities have no competence, an equivalent competent authority in that area. How these criteria operate in practice is unclear, as the grounds for listing a specific person or entity are not made public.

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14. Art. 249 EC states that 'a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States'.
15. Council Common Position 2002/402 of 27 May 2002 Concerning Restrictive Measures against Usama bin Laden, Members of the Al-Qaida Organisation and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with Them and Repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP (OJ 2002, L 139/4).
16. Council Regulation (EC) No 881/2002 of 27 May 2002 Imposing Certain Specific Restrictive Measures Directed against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida Network and the Taliban, and Repealing Council Regulation (EC) No 467/2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan (OJ 2002, L 139/9).
17. See, e.g., Commission Regulation (EC) No 1184/2003 of 2 July 2003 Amending for the 20th Time Council Regulation (EC) No 881/2002 (OJ 2003, L 165/21).
18. See, e.g., Case T-253/02, *Chafiq Ayadi*, OJ 2002, C 289/5; Case T-318/01, *Othman*, OJ 2002, C 68/13.
19. Common Position 2001/931 of 27 December 2001 on the Application of Specific Measures to Combat Terrorism (OJ 2001, L 344/93).
20. The list has been amended by, e.g., Common Positions of 2 May 2002 (OJ 2002, L 116/75) and 27 June 2003 (OJ 2003, L 160/100).

The CFI has ruled that the rights of access to documents as protected by Regulation 1049/2001 cannot be invoked in order to claim access to the documents related to the EU sanctions list.[21]

Regulation 2580/2001 effects the financial sanctions against the persons and entities on the EU list.[22] To complicate matters, however, this regulation applies only to so-called 'extra-EU' terrorists. Within the context of Common Position 2001/931 a distinction is made between 'intra-EU' and 'extra-EU' terrorists. Only the 'extra-EU' terrorists (operating outside the European Union) are subjected to the regime of Regulation 2580/2001. 'Intra-EU' terrorists, such as ETA (the Basque nationalist organization Euzkadi Ta Askatasuna) activists, fall outside the scope of this regulation and are subjected to financial sanction measures adopted directly by the individual EU member states. This distinction is based on the presumption that authority to impose sanctions against 'intra-EU' terrorists falls outside the scope of the Common Foreign and Security Policy.[23] This special treatment of 'intra-EU' terrorists has important repercussions for their protection under EU law.

Neither Common Position 2001/931 nor Regulation 2580/2001 provide any delisting procedure. Persons and entities on the EU sanctions list thus have to have recourse to the general judicial remedies available for individuals affected by acts of the EU institutions. Since the EU Treaty does not foresee this possibility, no legal remedies are available to challenge the Common Position directly before the CFI. Targeted persons and entities can, however, challenge the Regulation effectuating the EU sanctions list in the Community legal order, in the same way as the applicants in *Yusuf* and *Kadi* challenged the Community regulation implementing the UN sanctions list. Such cases have been brought by several of the targeted persons and entities: *PKK*,[24] *People's Mujahidin of Iran*,[25] *Sison*,[26] and *Aydar*.[27] The CFI has not yet given a ruling on the merits in any of these cases.

Since financial sanctions against 'intra-EU' terrorists are not implemented through a regulation but directly by the EU member states, these persons and entities do not have any opportunity to bring a direct action before the CFI. They can only challenge the national measures implementing the Common Position before a national court. This lacuna in the legal protection of 'intra-EU' terrorists has been

21. Joined Cases T-110/03, T-150/03, T-405/03, *Sison*, 26 April 2005.
22. 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 344/70).
23. This was at least suggested by the Dutch Minister of Foreign Affairs. Wijziging van de Sanctiewet 1977 met het oog op de implementatie van internationale verplichtingen gericht op de bestrijding van terrorisme en uitbreiding van het toezicht op de naleving van financiële sanctiemaatregelen, Nota naar aanleiding van het verslag, *Kamerstukken II* 2001/02, 28 251, nr. 5, p. 10. For this reason Common Position 2001/931 has a dual legal basis (Art.15 EU (CFPS) and Art. 34 EU (police and judicial co-operation in criminal matters (the third pillar)).
24. Case T-206/02, OJ 2002, 247/13. This action was declared inadmissible by the CFI on 15 February 2005. The CFI ruled that the Kurdish National Congress (KNC), which had started proceedings on behalf of the PKK (Kurdistan Workers' Party), was not on the EU list itself and therefore not in a position to bring an action for annulment on the basis of Article 230 EC. The action in the related Case 229/02 was declared inadmissible, inter alia, because the representative of the PKK, Ocalan, himself claimed that the PKK no longer existed.
25. Case T-228/02, OJ 2002, C 247/20.
26. Case T-47/03, OJ 2003, C 101/41.
27. Case T-253/04, OJ 2004, C 262/28.

recognized by the CFI in a case brought before it by the Basque youth organization Segi (allegedly linked to ETA):[28]

> S'agissant de l'absence de recours effectif invoquée par les requérants, force est de constater que ces derniers ne disposent probablement d'aucun recours juridictionnel effectif, que ce soit devant les juridictions communautaires ou devant les juridictions nationales à l'encontre de l'inscription de Segi sur la liste des personnes, groupes ou entités impliqués dans des actes de terrorisme.

In the context of the general UN financial sanctions regime it is also up to the UN member states to formulate exceptions to the application of the UN financial sanctions regime. Articles 5 and 6 of Community Regulation 2580/2001 provide that the 'competent authorities of a Member State' may grant specific authorizations to use frozen funds; to make funds available to a person, entity, or body included in the EU sanctions list; or to render financial services to such person. Originally, no such possibility was foreseen in Community Regulation 881/2002 implementing the UN financial sanctions against the Taliban and Usama bin Laden, since Resolution 1267(1999) did not foresee the possibility of making exceptions to the UN financial sanctions regime. However, as stated above, in response to criticism concerning the rigour of the UN financial sanctions regime, certain exceptions to the Resolution 1267 sanctions regime have been introduced (mainly in Resolution 1452). The necessary amendments to EC Regulation 881/2002 were introduced by means of a regulation adopted on 27 March 2003.[29]

3. The *Yusuf* and *Kadi* cases

3.1. The factual and legal background

On 9 November 2001 Mr Aden, Mr Ali, Mr Yusuf, and the Al Barakaat International Foundation were added to the UN sanctions list by Committee 1267. All three persons are of Somalian origin and living in Sweden. Al Barakaat is an association which facilitates money transfers from Sweden to Somalia. The financial sanctions against them were effected within the EU by means of the adoption of Regulation 2199/2001.[30] This Regulation was challenged by the targeted persons and entity before the CFI. As they were later included in the sanctions list annexed to Regulation 881/2002, the latter Regulation (the contested regulation) became the subject of the case before the CFI. In the meantime, while this case was pending before the CFI, the Swedish authorities made efforts to persuade Committee 1267 to remove the applicants from the UN list. On 26 August 2002 Committee 1267 decided to delist Aden and Ali. On the request of these applicants their names were removed from

28. Case T-338/02, OJ 2003, C 7/24. An appeal is currently pending before the ECJ (Case C-355/04 P, OJ 2004, C 251/10). See for a more detailed analysis of *Segi* I. Tappeiner, 'The Fight against Terrorism. The List and the Gaps', (2005) *Utrecht Law Review* 97, at 115.
29. Council Regulation (EC) No 561/2003 of 27 March 2003 Amending, as Regards Exceptions to the Freezing of Funds and Economic Resources, Regulation (EC) No 881/2002 Imposing Certain Specific Restrictive Measures Directed against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida Network and the Taliban (OJ 2003 L 82/1).
30. Council Regulation 2199/2001 of 12 November Amending, for the Fourth Time, Regulation 467/2001 (OJ 2001 L 295/16).

the register of the case before the CFI. A parallel case to *Yusuf* was brought before the CFI on 18 December 2001 by Kadi. Kadi is a Saudi Arabian businessman who was put on the UN sanctions list by Committee 1267 on 19 October 2001. The financial sanctions imposed upon him were implemented by EC Regulation 2062/2001, which was then challenged by Kadi before the CFI. In this case also Regulation 881/2002 was the relevant Community legislation in force at the time of review by the CFI.

Applications in both *Yusuf* and *Kadi* were launched in the last months of 2001. It thus took the CFI four years to deliver a judgment. While this is not abnormally long in comparison with other cases before the CFI, it nevertheless is a long time in terms of the interests of the applicants at stake, and the impact of the financial sanctions on their private lives. In the case of Yusuf c.s. a request for interim relief was made. It was dismissed by the president of the CFI since the condition relating to urgency was not fulfilled.[31] With respect to the financial implications of the sanctions, the CFI president held that whether the applicants had sufficient financial resources to enable them to meet their day-to-day needs should be examined. This seemed to be the case, since the Swedish authorities were providing social assistance to the applicants. It did not matter in that respect that the social assistance so provided was illegal under the Swedish and Community law measures implementing the UN financial sanctions regime. As regards the non-material damage, that is, the harm to the applicants' reputation, honour and dignity, the president held that suspension of the contested regulation might remedy this non-material damage, but no more than would annulment of that regulation in the main action.

Both cases were referred to the second chamber of the CFI, in extended composition (five judges). The United Kingdom was given leave to intervene in support of the Commission and the Council. In view of the interests at stake – the scope of Community external competence, the relation between European Community law and the UN legal order – it is remarkable that no other member state decided to intervene. On 21 September 2005 the CFI gave a ruling in both cases. First, the Court examined the legal basis for the adoption of the contested regulation (section 3.2 below). In the second place, as mentioned in the introductory part of this article, the applicants claimed that the contested regulation infringed their fundamental rights. In dealing with this claim the CFI first examined the relation between the obligations deriving from the UN Charter and the Community legal order (section 3.3), it then determined the scope of its review of the lawfulness of the contested regulation (sections 3.4 and 3.5), and finally it evaluated the alleged breaches of the applicants' fundamental rights (section 3.6).

3.2. Community competence to implement UN counter-terrorism financial sanctions

It follows from the principle of attribution of powers as laid down in Article 5 of the EC Treaty that Community action requires specific authorization: the European Community can only act where given the power to do so in the EC Treaty.[32] According

31. Case T-306/01 R *Aden a.o.*, [2002] ECR II-2387.
32. See, e.g., *Opinion 2/94 (Re European Convention on Human Rights)* [1996] ECR I-1061, para. 23.

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to the Council, the legal basis for the contested regulation was to be found in Articles 60, 301, and 308 of the EC Treaty. Article 301 states,

> Where it is provided in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.

This provision codifies the practice as established under European Political Cooperation concerning the implementation by the then European Economic Community (EEC) of sanctions – in general imposed by the UN Security Council – against third countries. First the member states took the political decision to subject a specific country to economic sanctions. Subsequently this political decision was implemented by a Council decision on the basis of Article 113 of the EEC Treaty (now, after amendment, Art. 133 EC).[33] Article 60 of the EC Treaty authorizes the European Community to implement financial sanctions against third countries decided upon under the CFSP. Article 308, the so-called 'flexibility clause', provides a legal basis for Community action, if this action is necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and there is no other legal basis for this action in the EC Treaty.

The CFI first examines whether Articles 60 and 301 of the EC Treaty in themselves provided a sufficient legal basis for the adoption of the contested regulations. It concludes that this is not the case, since both provisions only authorize the Community to take measures against third countries. The CFI recognizes that the UN financial sanctions regime originally had the Taliban regime of Afghanistan as its target. But after the collapse of this regime, there is no longer a sufficient link with a third country to justify recourse to Articles 60 and 301 of the EC Treaty. Subsequently, the CFI examines whether Article 308 on its own constitutes an adequate legal basis. According to the CFI this is not the case, since the imposition of economic and financial sanctions in respect of persons and entities suspected of contributing to the funding of terrorism is not an objective which the EC Treaty entrusts to the European Community. The CFI then examines whether the contested regulations could be adopted on the cumulative legal bases of Articles 60, 301, and 308 of the EC Treaty. Here, the line of reasoning of the CFI is less straightforward than its analysis of the possibility to have recourse to Articles 60 and 301, or to Article 308 on its own, for the adoption of the contested regulation. The CFI first observes that Articles 60 and 301 of the EC Treaty are 'wholly special' provisions of the EC Treaty, in that they authorize the Community to act in order to achieve not one of the objectives of the Community itself, but rather of the European Union. The CFI then makes reference to the requirement of consistency of the Union's activities as laid down in Article 3 of the EU Treaty. It subsequently observes that just as powers provided for by the

33. See in more detail on the development of this practice P. J. Kuyper, 'Trade Sanctions, Security and Human Rights and Commercial Policy', in M. Maresceau (ed.), *European Community's Commercial Policy after 1992: The Legal Dimension* (1993), 389.

EC Treaty may be insufficient to attain one of the objectives of the Community, so the powers to impose economic and financial sanctions provided for by Articles 60 and 301 of the EC Treaty may prove to be insufficient to allow the institutions to attain the objective of the CFSP, in view of which those provisions were specifically introduced into the EC Treaty. It then concludes,

> There are therefore good grounds for accepting that, in the specific context contemplated by Articles 60 EC and 301 EC, recourse to the additional legal basis of Article 308 is justified for the sake of the requirement of consistency laid down in Article 3 EU, when those provisions do not give the Community institutions the power necessary, in the field of economic and financial sanctions, to act for the purpose of attaining the objective pursued by the Union and its Member States under the CFSP.[34]

The question as to the legal basis in the EC Treaty for the adoption of the Community regulations implementing the UN financial sanctions against Yusuf and Kadi might seem to be relevant only for scholars and practitioners who are interested in the doctrine of the European Community's external powers. But there is more to it than that. The legal basis for the adoption of the contested regulation is debatable because the wording of the relevant provisions of the EC Treaty (Arts. 60 and 301 EC) is tailored to the requirements of international law and politics at the time of their introduction in the EC Treaty. The fact that both provisions only refer to restrictive measures against states and not to restrictive measures against individuals is not a deliberate attempt of the drafters of the EC Treaty to restrict the Community's external competence. It is simply a consequence of the fact that at the time of drafting the possibility that individuals could be the direct addressee of international sanctions was not considered. This discrepancy between the text of the EC Treaty and today's requirements of the European Community when it is implementing UN sanctions would have been mended in the Constitutional Treaty.[35]

The European Community is not the only organization which has been required to accommodate existing legal frameworks to the introduction of the financial sanction as an instrument to protect international peace and security. This is also the case at UN level. The UN financial sanctions are adopted by the UN Security Council exercising its power under Chapter VII of the UN Charter, which enables the Security Council to take action 'with respect to threats to the peace, breaches of the peace, and acts of aggression'. Chapter VII was originally designed for action against *states* that

34. *Kadi*, section 128; *Yusuf*, section 164.
35. Article III-322 provides:

> 1. Where a European decision, adopted in accordance with Chapter II, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the Union Minister for Foreign Affairs and the Commission, shall adopt the necessary European regulations or decisions. It shall inform the European Parliament thereof.
>
> 2. Where a European decision adopted in accordance with Chapter II so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-state entities.
>
> 3. The acts referred to in this Article shall include necessary provisions on legal safeguards (Treaty Establishing a Constitution for Europe, OJ 2004, C 310).

pose a threat to international peace and security. This has not prevented the Security Council, however, from making use of its powers under Chapter VII to adopted financial sanctions which have *individuals* as their target. This has happened not only in the context of the fight against terrorism. In general, the 'targeted sanction' has replaced the classical 'economic sanction' as the appropriate response of the UN Security Council to threats to international peace and security.[36] These 'targeted' or 'smart' sanctions are generally aimed at persons involved in the regime of the state that is the target of the sanction or at militant groups. They are imposed in order to ensure that the addressee changes its behaviour in accordance with its obligations under international law.

The counter-terrorism financial sanctions are imposed on specific individuals and entities which are deemed to endanger international peace and security. They are imposed, however, without a clear demand on the target of the sanction to change its behaviour. This is clearly visible when a comparison is made between Resolution 1267 of 15 October 1999 and Resolution 1390 of 16 January 2002. In the former resolution the Taliban regime is called on to extradite Usama bin Laden. In case of compliance with this request the sanctions regime would have been lifted. In Resolution 1390, adopted after the fall of the Taliban regime, the Taliban and al Quaeda are condemned for their involvement with terrorism and the UN member states are called on to impose financial sanctions on the persons and entities designated by Committee 1267. The resolution does not request these persons and entities to abstain from engaging in terrorist activities. This is an important deviation from the classical sanctions regime, where the addressee is in a position to ensure that the sanctions are lifted by meeting the requirements set by the UN Security Council in its resolution.

Chapter VII clearly was not written taking into account the possibility that the UN Security Council would have recourse to Article 41 to impose sanctions directly on specific individuals and entities. It could be argued that the wording of Article 41 of the UN Charter is sufficiently broad to allow the UN Security Council to impose such sanctions. Nevertheless, the question remains of the extent to which this new dimension of the role of the UN Security Council under Chapter VII requires that new forms of protection are introduced for the individuals and entities affected.[37] It seems to be generally recognized in legal doctrine that the current functioning of the UN financial sanctions regime is not in accordance with the international human rights standard.[38] The question seems not to be whether human rights considerations should be taken into account, but what balance should be struck

36. See, in general, on the legal aspects of the development from the classical economic sanction to the smart sanction, T. J. Berserker, S. E. Eckert, A. Helga, and P. Romania, 'Consensus from the Bottom Up? Assessing the Influence of the Sanctions Reform Processes', in P. Wildenstein and C. Stabenow (eds.), *International Sanctions – Between Words and Wars in the Global System* (2005), 15.

37. See on this issue I. Cameron, 'Protecting Legal Rights: On the (In)security of Targeted Sanctions', in Wildenstein and Stabenow, *supra* note 36, at 181.

38. See I. Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights', (2003) *Nordic Journal of International Law* 159. L. van den Herik and N. Schrijver, 'Collective Sanctions by the UN Security Council – Do Human Rights Play a Role At All?', in *Proceedings Toga Research School of Human Rights* (forthcoming).

between the interest of having an adequate human rights protection of the persons and entities on the UN sanctions list and the interest of enabling the UN Security Council to adopt effective measures in the fight against terrorism.

However, not all scholars perceive the current functioning of the UN financial sanctions regime system as violating human rights. Lysen, for instance, claims that the deviation from the human rights set out in the various international documents by the UN Security Council is in accordance with the legal obligations incumbent on the United Nations under international law.[39] He suggests, however, that national courts have jurisdiction to lift financial sanctions if the suspicions on the part of the listed persons or entities are removed in national proceedings.

3.3. The binding nature of UN Security Council resolutions for the EC

In order to determine to what extent it is competent to review the lawfulness of the contested regulation, the CFI considers it necessary first to make some general statements on the relationship between the international legal order under the UN Charter and the domestic or Community legal order. In previous cases concerning the relation between obligations deriving from the UN Charter and Community law, the CFI and ECJ have always to a certain extent avoided answering the question of the extent to which the European Community is bound by the obligations under the UN Charter.[40] In *Yusuf* and *Kadi* the CFI explicitly recognizes the binding nature of the obligations deriving from the UN Charter for the European Community itself. It observes that from an international law perspective the obligations of the UN member states under the UN Charter prevail over every other obligation of domestic law, or of international treaty law, including the obligations under the European Convention on Human Rights (ECHR) and under the EC Treaty. The primacy of the obligations of the EU member states under the UN Charter over European Community law is recognized in Articles 297[41] and 307[42] of the EC Treaty. The Community itself, however, is not a party to the UN Charter. According to the CFI, the EC is not bound by the Charter under general international law, but by virtue of the EC Treaty itself. The CFI comes to this conclusion applying the principles

39. G. Lysen, 'Targeted UN Sanctions: Application of Legal Sources and Procedural Matters', (2003) *Nordic Journal of International Law* 291, at 296, 301.
40. See, e.g., Case T-184/95 *Borsch Consult Ingenieurgesellschaft*, [1998] ECR II-667.
41. 'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.'
42. 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.'

formulated by the ECJ in the celebrated *International Fruit Company* case.[43] In that case the ECJ held that the EEC – although not a contracting party – was bound by the obligations under the GATT. The CFI now rules that the Community is bound by the obligations under the UN Charter taking into account similar factors.

3.4. Finding of no competence to review compliance with human rights protected in EC legal order

Having established that the European Community is bound by the obligations of the EU member states under the UN Charter, the CFI examines the scope of the review of the legality of the Community regulation effecting the financial sanctions imposed by the UN against the applicants. In principle, Community legislation can be challenged before the EC for non-compliance with the human rights recognized as general principles of Community law. These principles, however, cannot be relied on by the applicants in *Yusuf* and *Kadi*:

> In particular, if the Court were to annul the contested regulation, as the applicant claims it should, although that regulation seems to be imposed by international law, on the ground that that act infringes his fundamental rights which are protected by the Community legal order, such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicant asks the Court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order.[43a]

The CFI concludes that it has no jurisdiction to review indirectly the lawfulness of the decision of the Security Council according to the standard of protection of fundamental rights as recognized in the Community legal order. This seems to be a departure from previous case. It is interesting to compare this observation of the CFI with the ruling of the ECJ in the case of *Bosphorus*.[44] In that case the Turkish air charter company Bosphorus complained of infringement of its right to property when one of the aircraft it had leased from the Yugoslavian airline company JAT was impounded by the Irish authorities while the aircraft was in Dublin for maintenance. The aircraft was impounded because it was owned by the Yugoslavian airline company JAT and thus fell within the scope of Regulation 990/93, implementing the UN economic sanctions against Yugoslavia. Article 8 of this regulation provided that all aircraft in which a majority or controlling interest was held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (FRY, now Serbia and Montenegro) should be impounded by the competent authorities of the member states. As the lease agreement between Bosphorus had been entered into *bona fide* long before the outbreak of civil war in Yugoslavia, and as the rent due under the lease was paid into blocked accounts, Bosphorus claimed that the impoundment constituted an infringement of its fundamental rights, in particular of its right to peaceful enjoyment of its property. It challenged the impoundment on this ground before

43. Joined Cases 21/72 to 24/72 *International Fruit Company and Others* ('*International Fruit*'), [1972] ECR 1219.
43a. *Kadi*, section 216; *Yushuf*, section 267.
44. Case C-84/95 *Bosphorus*, [1996] ECR I-3953.

the Irish national court, which decided to refer the matter to the European Court of Justice by means of preliminary questions. The Court of Justice held that the aircraft fell within the scope of Article 8 of Regulation 990/93. With respect to Bosphorus's claim that its right to peaceful enjoyment of its property had been violated, the ECJ observed that 'any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions'.[45] It continued that the importance of the aims pursued by the regulation, that is, putting an end to the state of war in the region and the violation of human rights in the republic of Bosnia-Herzegovina, justified the negative consequences for some operators. The ECJ did not consider that its jurisdiction to review the lawfulness of the contested regulation was restricted as a consequence of the fact that this regulation was a mere implementation of the UN sanctions regime against the FRY. The fact that the contested regulation was adopted to implement this sanctions regime only played a role in the balancing exercise carried out by the ECJ.

Bosphorus has also brought a case before the European Court of Human Rights (ECtHR). However, like the ECJ, the ECtHR in its ruling in *Bosphorus* did not pay much attention to the origin of the sanctions regime.[46] In the case before the ECtHR the main question was whether an EU member state can be held responsible under the ECHR if it is implementing its obligations under EU law. The ECtHR introduced a marginal review, not because the Irish measure was taken to implement UN sanctions, but because of the Community law dimension of the case. The ECtHR thus managed to avoid answering the question of the extent to which the contracting parties are bound by their obligations under the ECHR when they implement sanctions imposed by the UN Security Council. In *Yusuf* and *Kadi*, the CFI gives a very clear answer to this question. It opines that the obligations under the UN Charter prevail over every other obligation of domestic law or of international law, including the obligations under the ECHR.[47] Obviously, this ruling of the CFI is only relevant for the hierarchical relation between the UN Charter and the ECHR under European Community law. Hopefully, the ECtHR will be given (and make use of) the opportunity to clarify the way in which this important issue should be dealt with under the ECHR.

3.5. Competence to review from the perspective of *jus cogens*

The CFI's analysis does not end with the observation that it lacks jurisdiction to review the contested regulation for compliance with the human rights protected in the EC legal order. What follows is definitely the most controversial part of the judgment from an international law perspective. Although the CFI holds that it cannot review the lawfulness of the Community regulations from the perspective

45. Ibid., section 22.
46. ECtHR 30 May 2005, *Bosphorus v. Ireland*. For comment, see S. Douglas-Scott, (2006) *Common Market Law Review* 243.
47. *Kadi*, section 181; *Yusuf*, section 231.

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of the fundamental rights as general principles of Community law, it considers itself to be competent to check, indirectly, the lawfulness of the resolutions from the perspective of *jus cogens*, 'understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible'. It gives no authority for this interpretation of *jus cogens*, which seems to be different from *jus cogens* as understood in the terms of Article 53 of the Vienna Convention on the Law of Treaties. There *jus cogens* is described as a peremptory norm of general international law, that 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'. In case of infringement of *jus cogens* norms, the CFI continues, the obligations deriving from the UN Security Council resolutions would not bind the member states of the United Nations.

But is the UN Security Council bound by *jus cogens*? The answer to this question is not provided by the UN Charter, nor has it been answered by the ICJ.[48] Only recently, in *Congo/Rwanda*, has the ICJ explicitly recognized the existence of norms of *jus cogens*.[49] In legal doctrine various views on the meaning of *jus cogens* for the UN Security Council prevail.[50] In his separate opinion in *Congo/Rwanda* ad hoc Judge Dugard observes, 'It has been suggested that a Security Council Resolution will be void if it conflicts with a norm of *jus cogens*'. That the norms of *jus cogens* apply to the UN Security Council thus is not as self-evident as the CFI suggests it to be.

More problematic, however, is the fact that the CFI considers itself competent to review whether these norms are respected. This (indirect) review obviously endangers the universal application of the UN Security Council resolutions and may undermine the role of the Security Council as the guardian of international peace and security. On the other hand, the protection of human rights is of evident importance, both within the Community legal order and under international law. With respect to this conflict of legal interest a comparison can be made with the position of the national constitutional courts of several EC member states which decided to review Community acts for compliance with the fundamental rights guaranteed in the national constitutions. From a Community law perspective this was not acceptable, since Community law prevails over national law, also over provisions in national constitutions. The principle of supremacy of EC law is one of the basic principles of European Community law. However, in the absence of any human rights protection at Community level, the national constitutional courts were compelled to evaluate Community acts on the basis of the fundamental rights recognized in the national legal order. In response to these challenges of Community law, the ECJ introduced human rights as general principles of Community law. Or at least, the

48. See for a more general analysis of the norms binding on the UN, E. de Wet, 'The International Constitutional Order', (2006) ICLR 51.

49. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006, General List No. 126.

50. B. Fassbender, 'Review Essay: *Quis Judicabit*? The Security Council, Its Powers and Its Legal Control', (2000) 11 (1) EJIL 219.

establishment of a clear doctrine of human rights protection within the Community legal order took away the pressure on the national constitutional courts to evaluate Community acts in the light of fundamental rights guaranteed in the national legal order.[51]

Evidently the obligations deriving from the UN Charter are of a different nature than the obligations deriving from the EC Treaty. Nevertheless, there may be compelling reasons for regional courts, such as the CFI, to review the UN sanctions regime in the light of *jus cogens*.[52] It is not to be expected that as an immediate result of the review of UN Security Council measures by regional and national courts judicial protection at UN level will be introduced. Obviously, within the context of the UN system there is not a court which can respond directly to the challenges to the supremacy of the obligations under the UN Charter by ensuring that at UN level human rights protection is introduced. On the other hand, it is obvious that the political authorities need to act in order to ensure that the integrity of the UN financial system is restored by ensuring that judicial protection is available at UN level. In short, in view of the importance of human rights protection under Community law and international law it is understandable that the CFI considers itself competent to review the contested regulation for compliance with *jus cogens*. The way in which this review is carried out by the CFI, however, is less easy to understand. It concludes with respect to the scope of its review of the legality of the contested regulation:

> The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, in some circumstances, extend to determining whether the superior rules of international law falling within the ambit of *jus cogens* have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute 'intransgressible principles of international customary law' (Advisory Opinion of the International Court of Justice of 8 July 1996, The Legality of the Threat or Use of Nuclear Weapons, Reports 1996, p. 226, paragraph 79; see also, to that effect, Advocate General Jacobs's Opinion in *Bosphorus*, paragraph 239 above, paragraph 65).[53]

Here, the CFI seems to mix up international human rights, international humanitarian law, *jus cogens*, and customary international law. The reference to the ICJ's Advisory Opinion on the legality of the threat or use of nuclear weapons seems to suggest that the ICJ in that case recognized the *jus cogens* nature of human rights. This evidently is not the case. In its Advisory Opinion, the ICJ only stated that norms of international *humanitarian* law constitute customary law. It explicitly refused to answer the question to what extent these norms form part of *jus cogens*. And it did not say anything about the status of human rights under general international law. As mentioned above, only recently, in *Congo* v. *Rwanda*, has the ICJ explicitly accepted

51. See for a more detailed analysis of the development of human rights protection within the Community legal order, N. A. Neuwahl, 'The Treaty on European Union: A Step Forward in the Protection of Human Rights', in N. A. Neuwahl and A. Rosas (eds.), *The European Union and Human Rights* (1995), 1.
52. For a similar view see de Wet, *supra* note 48, at 70.
53. *Kadi*, section 231; *Yusuf*, section 282.

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the existence of norms of *jus cogens* and recognized the prohibition of genocide as a norm of *jus cogens*. There thus is no support in the case law of the ICJ for the CFI's conclusion that the universally recognized human rights norms form part of *jus cogens*. This obviously is a weak point in the decision of the judgments of the CFI. The CFI suggests that its scope of review of the contested regulation is restricted to compliance with the norms of *jus cogens*, understood as 'a body of higher rules of public international law', but it then gives an interpretation of these norms which finds hardly any support in international legal practice or doctrine.

3.6. No breach of *jus cogens*

In the final part of its judgments, the CFI examines to what extent the alleged breaches of the applicants' fundamental rights, that is, their right to make use of their property, their right to a fair hearing, and their right to an effective judicial remedy, amount to a breach 'of the standard of universal protection of the fundamental rights of the human person falling within the ambit of *jus cogens*'.

With respect to the alleged breach of the applicants' right to make use of their property, the CFI refers to Article 17 of the Universal Declaration of Human Rights, which recognizes the right to property and specifies that 'no one shall be arbitrarily deprived of his property'. This means that 'in so far as respect for the right to property must be regarded as forming part of the mandatory rules of international law, it is only an arbitrary deprivation of that right that might, in any case, be regarded as contrary to *jus cogens*'.[54] According to the CFI, there is no arbitrary interference with the right to property of the applicants. It comes to this conclusion taking into account the objective of the UN financial sanctions regime, the temporary and precautionary nature of the sanctions measure, the regular review by the Security Council of the overall system of sanctions, and the possibility of review of the measures against the applicants through the member state of their nationality or that of their residence. It could be questioned whether the UN financial sanctions really have a temporary nature. The UN sanctions list does not expire after a date set by the UN Security Council. It is true that the sanctions regime is reviewed by the UN Security Council regularly, but any change to it requires unanimity among the members of the Security Council. Furthermore, as the cases of *Sayadi* and *Vinck* demonstrate, the possibility of review of individual cases through the member state of nationality or residence might not be as good an alternative as the CFI suggests. From the information which is made publicly available there seem to be no compelling reasons to keep Sayadi and Vinck on the list. At least, that was the opinion of the *Tribunal de première instance de Bruxelles* which therefore ordered the Belgian state to ask for the delisting of Sayadi and Vinck.

With respect to the right to be heard, the applicants complain that they were not heard by the Council before the contested regulations were adopted. In addition, they complain of not having been heard by the Sanctions Committee before they were included on the UN sanctions list. As far as the right to be heard by the Council of

54. *Kadi*, section 242; *Yusuf*, section 293.

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Ministers is concerned, the CFI observes that such a right only exists if the author of the act at issue enjoys certain discretion. While adopting the contested regulations, the Council clearly did not enjoy any discretion as to the appropriateness of adopting sanctions against the applicants. Therefore the Council was not obliged to hear the applicants before adopting the contested regulations. As far as the right to be heard by the Sanctions Committee is concerned, the CFI recognizes that such a right currently does not exist. However, in view of the possibility for review which is available to persons and entities listed through their member state of nationality or residence, the CFI considers this restriction to be justified. Again, it is submitted that the CFI is very lenient in recognizing the delisting procedure as an appropriate alternative to an individual right of the persons listed.

Finally, the CFI examines the applicants' claim that their right to effective judicial review had been infringed. The CFI recognizes that there is a lacuna in the judicial protection available to persons and entities listed, since they cannot challenge the decisions taken by Committee 1267 before an independent court. This lacuna, however, is not contrary to international *jus cogens*. It then refers to case law of the ECtHR, in which the ECtHR has accepted that certain exceptions are inherent in the right of access to the court, such as the limitations following from the doctrine of state immunity. According to the CFI, the limitation of the applicants' right of access to a court, as a result of the immunity of jurisdiction enjoyed as a rule by resolutions of the Security Council, is inherent in that right as it is guaranteed by *jus cogens*. This limitation is justified both by the nature of the decisions of the Security Council under Chapter VII of the UN Charter and by the legitimate objective pursued. Furthermore, the CFI considers that the possibility of review available to the applicants through their state of residence constitutes 'another reasonable method of affording adequate protection of the applicant's fundamental rights as recognized by *jus cogens*'.[55]

Again, the CFI's line of reasoning is not easy to follow. It seems to accept that there is an infringement of the applicants' right of access to court and that this infringement is justified by the immunity of jurisdiction enjoyed by the resolutions of the Security Council. But is the doctrine of immunity of jurisdiction relevant for the issue before the CFI? This does not seem to be the case. One of the decisions of the ECtHR referred to by the CFI is *Waite and Kennedy*.[56] Waite and Kennedy had brought proceedings against their employer, the European Space Agency (ESA), before a German court. The German court refused to review their case, since, as an international organization, the ESA enjoyed immunity from German jurisdiction. Before the ECtHR Waite and Kennedy claimed that the refusal of the German court to offer legal protection amounted to a breach of Article 6 of the ECHR (access to court). The ECtHR held that this was not the case. It is difficult to see the direct relevance of this decision for the applicants' claim in *Yusuf* and *Kadi* that their right to effective judicial review has been infringed. They do not claim that it should be possible to bring the UN or Security Council before a national or regional court.

55. *Kadi*, section 290; *Yusuf*, section 345.
56. ECtHR, 18 February 1998.

What they complain about is the fact that there was no legal remedy available to them at UN level to challenge the decision to put them on the list. Furthermore, if *Waite and Kennedy* is considered to be of relevance in *Yusuf* and *Kadi*, it is important to note that an important reason for the ECtHR to conclude that the immunity of jurisdiction of the ESA before the German Court did not amount to a breach of Article 6 of the ECHR, was the fact that sufficient legal protection was available to Waite and Kennedy within the organization itself. This obviously is not the case within the context of the UN financial sanctions regime.

4. Conclusion

From a formal legal perspective, the CFI approach in *Yusuf* and *Kadi* is not always convincing. First it stated that it was not competent to review the contested regulation on the basis of the fundamental rights recognized under Community law, but could only review compliance with the norms of *jus cogens*. Subsequently the CFI gives a rather generous interpretation of the concept of *jus cogens*, bringing within its scope principles which have not yet been recognized as *jus cogens* by the ICJ or legal doctrine. Then, when it comes to the review of the observance of these principles, the CFI seems to be reluctant to engage in a strict review of the UN sanctions system. In view of the complicated legal issues involved and the absence of any guidance on how to answer these questions by an authority such as the ICJ, it may come as no surprise that the CFI delivers a judgment which displays difficulties in reconciling the various interests involved. It is submitted, however, that the CFI could – and should – have made a more serious effort to apply the principles of international law involved in a consistent manner.

The ruling of the CFI in *Yusuf* and *Kadi* obviously does not put an end to the debate on the possibility of challenging Community legislation implementing UN sanctions. With this judgment the discussion has only started. In both cases appeals have been launched before the ECJ. In the second place, there are also cases pending before the CFI which concern challenges to the EU sanctions list, adopted by the EU pursuant to Resolution 1373. Here, the complication concerning the supremacy of the UN Charter does not arise, or does to a lesser extent. Presumably, in those cases, the CFI can review in full whether the contested legislation complies with the fundamental rights protected in the Community legal order. But such a stringent review would give rise to yet another set of delicate legal questions, such as: to what extent is the CFI competent to review the (political) decision of the Council of Ministers to list a specific person or entity? Can the Council be required to put forward the information on the grounds of which the applicants were put on the EU list? How is the CFI going to balance the different interests involved – access to information for the applicant and security interests – without providing this information?