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Daniel Halberstam and Eric Stein

**The United Nations, the European Union, and the King of Sweden:
Economic Sanctions and Individual Rights in a Plural World Order**

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**The United Nations, the European Union, and the King of Sweden:
Economic Sanctions and Individual Rights in a Plural World Order**

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Abstract

Reawakened from its decades-long slumber during the Cold War, the UN Security Council has become more active than ever before. Increased UN activity, however, has not always spelled increased accountability. The problem is particularly acute with regard to the UN Security Council's anti-terrorism Resolutions that impose economic sanctions on named individuals who are suspected of sponsoring the Taliban or Al Qaeda. These targeted sanctions, or the process by which they are determined, are in severe tension with international and domestic conceptions of fundamental rights.

When the UN enlists regional organizations and States in freezing the assets of named individuals, the multiplicity of legal actors and systems bearing down on the individual may be a blessing or a curse. The resulting plurality of claims to legal authority may create multiple veto points that check for the protection of fundamental values or may provide myriad opportunities for obstruction, burden shifting, and evasion of responsibility. The difficulty, then, lies in arriving at an approach that can mediate productively between the needs for collective action and the particular perspective of each institutional participant without losing site of fundamental values, such as human rights.

This Article tackles these issues in the European context in which they prominently unfolded. This Article (1) examines the international human rights

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constraints that operate on UN authority, (2) briefly discusses the UN's anti-terrorist sanctions regimes, (3) examines the European Community's powers to implement targeted sanctions, and (4) analyzes the clash of legal orders in the context of recent litigation in the European Courts – especially in the momentous *Kadi* case – surrounding the implementation of UN Security Council Resolution 1267 in the European Union and its Member States.

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INTRODUCTION

In the last decade economic sanctions have become a major instrumentality of the UN Security Council in the struggle against terrorism and lawless violence endangering peace. It is not surprising that innocents would be ensnared, along with culprits, in the nets of the so called “smart” or “targeted” sanctions, which are directed against named individuals and groups (as opposed to delinquent states). In such rare cases, as the individual concerned searches for a legal remedy, significant issues of fundamental human rights may arise at the levels of the international, regional, and national legal orders. This essay explores these issues. After examining broader questions surrounding international legal constraints that operate on UN authority, this Article turns to a discussion of the UN’s sanctions regime and the issues raised in recent litigation in the European courts surrounding implementation of that regime in the European Union and its Member States.

We advance four propositions. First, that the UN Security Council should be considered generally bound by customary international human rights norms and should, moreover, be encouraged to incorporate, in a context-sensitive manner, certain basic rights into the constitutional framework governing the conduct of the UN. Second, that despite significant doctrinal difficulties, the EC Treaty as it currently stands seems to provide the Community the power to issue targeted sanctions against individuals who are unconnected to a particular third country. Third, that the relation between the European legal order and that of the UN is not hierarchical, but marked by multiple competing claims of authority. And finally, that this pluralist relationship should be managed neither by usurpation nor resistance, but by mutual engagement on constitutional as well as international human rights.

This Article proceeds in four parts. Part I discusses the various avenues along which the UN, including the Security Council, should be understood to be bound as a general matter by human rights. Part II describes the economic sanctions regime and the various judicial remedies (or lack thereof) across multiple levels of governance. Part III critically analyzes the litigation in the European courts, with Part III.A. focusing on the question of EC competences, Part III.B. focusing on the general relation between UN and Community law, and Part III.C. focusing on the specific review of fundamental rights compliance. Part IV takes a step back to provide a critical assessment of the possible approaches to the interaction between the EC and UN on economic

sanctions and rights and by sketching out where we believe the various judicial actors fell short. We close with a brief conclusion.

I. Security Council Unlimited?

Reawakened from its decades-long slumber during the Cold War, the UN Security Council has become more active than ever before.¹ The size of UN peacekeeping forces is three times what it was at any time before the fall of the Berlin wall,² the peacekeeping budget has expanded twenty-fold since 1989,³ and the number of vetoes in the Security Council is at an all time low.⁴ The UN has established international courts to try individuals for genocide in Rwanda and in the former territory of Yugoslavia and created an International Criminal Court to prosecute individuals for war crimes more generally. The UN has increasingly taken on the task of administering former state territories.⁵ And the UN has begun to assert jurisdiction over the behavior of non-state actors even when they are unconnected to any governing regime, to regulate their behavior through the imposition of sanctions that freeze individuals' assets.

The newly extended reach of the Security Council has raised questions as to the legal constraints on the Council's enforcement powers under Chapter VII.⁶ Especially in light of the UN's vast powers under Chapter VII, as well as the precedence accorded under Article 103 of the

¹ The literature documenting this fact is voluminous. Despite some ebb and flow during the post-Cold War era, the general expansion of activity certainly as compared to the period before 1987 is enormous. See, e.g., Mingst & Karns, *The United Nations in the Post-Cold War Era*, 2d ed. (Westview, 2000), p.29.

² Global Policy Forum, *Size of UN Peacekeeping Forces: 1947-2007*, <http://www.globalpolicy.org/security/peacekpg/data/pcekprs.htm> (last visited Aug. 25, 2008).

³ Global Policy Forum, *Peacekeeping Operations Expenditures: 1947-2005*, <http://www.globalpolicy.org/finance/tables/pko/expend.htm> (last visited Aug. 25, 2008).

⁴ Global Policy Forum, *Changing Patterns in the Use of the Veto in the Security Council*, <http://www.globalpolicy.org/security/data/vetotab.htm> (last visited Aug. 25, 2008). The number of vetoes must be understood against the backdrop of the greater frequency of abstentions and the greater use of informal decisionmaking at the UN. Nonetheless, the drop in vetoes is overall significant.

⁵ See, e.g., Ratner, "Foreign Occupation and International Territorial Administration: The Challenges of Convergence", 16 *EJIL* (2005) 695, 696-97.

⁶ The Security Council may issue binding decisions under UN Charter Chapters VII, VIII and certain decisions under Chapter VI. For a recent analysis of the Security Council powers particularly in the anti-terrorist area, see C. Denis, *Le Pouvoir Normatif Du Conseil De Sécurité Des Nations Unies: Portée Et Limites*, 133 ff. and *passim* (Ed. Bruylant, 2004); Hilaire, *United Nations Law and the Security Council* (Ashgate 2005), pp. 32-33 and 280-285. For a detailed treatment, see Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge 2007); Herbst, *Rechtskontrolle des Un-Sicherheitsrates* (Peter Lang Frankfurt 1999).

UN Charter to a state's treaty obligations,⁷ the worry is that many other fundamental values, including human rights, are in danger of being ignored. Thus two scholars examining the UN's development of economic sanctions against states, for example, have lamented that the Security Council has a record of "almost complete failure to consider international law standards"⁸

The problem becomes particularly acute in the case of decisions imposing targeted sanctions on individuals.⁹ These sanctions, or the process by which the decisions on sanctions are reached, may be in considerable tension with international as well as domestic conceptions of fundamental rights. And yet, individuals have generally limited recourse against adverse decisions by the Security Council. Given the general lack of "judicial review" of Security Council actions at the UN level¹⁰ – let alone judicial review at the behest of individuals – the targets of these sanctions must generally engage the diplomatic services of their nationality or residence to vindicate their interests that were adversely affected by UN Security Council action.

Whatever may have been the intentions of the founding fathers in 1945, however, clearly the Security Council was not meant to be a Machiavellian prince who could do no wrong.¹¹ A

⁷ Article 103 UN Charter 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."

⁸ Reisman & Stevick, "The Applicability of International Law Standards to United Nations Economic Sanctions Programmes," 9 EJIL (1998), 126; see also L.F. Damrosch, "The Civilian Impact of Economic Sanctions" in L.F. Damrosch (Ed.), *Enforcing Restraint: Collective Interventions in Internal Conflicts*, (Council on Foreign Relations 1993), p. 274. For a more positive view, see Manusama, *The United Nations Security Council in the Post-Cold War Era – Applying the Principle of Legality*, (Martinus Nijhoff, Leiden/Boston, 2006), 115-116, 307. For a strong criticism of the Security Council and EU practice and for suggestions of "minimum procedural standards under the rule of law," see Eur. Parl. Ass., Res. 1597, United Nations Security Council and European Union Blacklists (2008), <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1597.htm> (last visited Oct. 29, 2008).

⁹ Some scholars have suggested that the phenomenon of international terrorism does not fit the traditional concept of threat to, or breach of, peace and that it does not provide proper legal basis for Security Council action under Chapter VII. This is a questionable argument in view of the broad discretion of the Council on this political issue. In any event, this power appears to have been generally accepted. See Andrea Bianchi, "Assessing the Effectiveness of the UN Security Council's Antiterrorist Measures: The Quest for Legitimacy and Cohesion," 17 EJIL (2006), 881, 886-888. In regard particularly to Resolution 1373 (2000), some authors suggest that by dealing with international terrorism in general (not a specific instance), the Council engaged in legislation and in effect imposed obligations of the Convention against Terrorism on non-parties to that Treaty. See generally C. Denis, *supra* n.6 at 148-150; see also C. Ohler, "Die Verhängung von 'smart sanctions' durch den UN-Sicherheitsrat," 2006 EuR 848 at 854-855; N. Angelet, "International Law Limits to the Security Council" in Gowlland-Debbas, *United Nations Sanctions and International Law*, (Kluwer Law International, 2001), pp. 71-82; Mégret & Hoffman, "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities," 25 Human Rights Quarterly (2003), pp. 314-42.

¹⁰ See J. Alvarez, *Judging the Security Council*, 90 AJIL (1996), 1.

¹¹ See Cannizzaro, "The Machiavellian Moment? The UN Security Council and the Role of Law," 3 Int'l Org. L. Rev. (2006), 189, 195; Bowett, "The Impact of Security Council Decisions on Dispute Settlement Procedures," 5 EJIL (1994), 89, 93; Döhring, "Unlawful Resolutions of the Security Council and their Legal Consequences" in Frowein & Wolfrum, 1 *Max Planck Yearbook of United Nations Law* (Kluwer Law International, 1997), pp. 91, 108

strong argument can be made that the Security Council is subject both to the provisions of its own Charter and, as a general matter, to international law – including customary international human rights law. This argument is based on textual and contextual interpretation of the Charter, the opinions of the International Court of Justice, scholarly views, as well as international practice.

A. Restraint by the Charter

The most important source of Security Council restraint derives from the United Nations Charter itself. In sweeping language, the Preamble to the United Nations Charter spells out a general commitment on part of the UN signatories “to reaffirm faith in fundamental human rights [and] in the dignity and worth of the human person” and to “establish conditions under which justice . . . can be maintained.” These general commitments are transposed elsewhere in the Charter into operative purposes, principles, and rules that govern both the UN and its Members. Most of its provisions are well known, but some of the more important passages relevant to our discussion are worth repeating here nonetheless.

As laid out in Article 1, the “Purposes” of the UN include “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹² Article 2 further sets forth seven general “principles” that are designed to guide the organization, including that Members shall “fulfill in good faith the obligations assumed by them in accordance with the present Charter” and that Members shall assist the United Nations “in any action it takes in accordance with the present Charter.”¹³

passim. Many, however, view the extent to which international law limit the Security Council when it acts under Chapter VII as “a most highly controversial question.” See Sandra Bartelt & Helga Elisabeth Zeitler, “‘Intelligente Sanktionen’ zur Terrorismusbekämpfung in der EU,” 14 *EurZW* 712, 716 (2003).

¹² Also, when diffusing by peaceful means situations that might lead to breaches of the peace, these same “Purposes” demand that the organization act “in conformity with the principles of justice and international law.” Art. 1, UN Charter.

¹³ The principles further include that Members shall settle their international disputes peacefully in such a manner that “international peace and security, and justice, are not endangered,” and that Members shall refrain from the threat and use of force against the territorial integrity or political independence of other states “or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter Art.2. The demand of peaceful settlement of disputes and the prohibition against interference in domestic affairs does not prejudice Security Council enforcement measures. See, e.g., Randelzhofer, “Article 2” in Simma (Ed.), 1 *The Charter of the United Nations*, 2d ed., (2002), 64-68; Müller & Kolb, “Article 2(2)” in Simma, *supra*, at 91-100; Delbrück, “Article 24” in Simma, *supra*, at 442-452; see also *Conditions of Admission of a State to the United Nations*, Advisory Opinion, 1948 ICJ Rep. 57. In this context, see also Article 55c of the Charter providing that the UN should promote

These principles and purposes of Articles 1 and 2 figure prominently in more specific obligations of Members and of the UN under later provisions. So, for example, Article 55 creates a specific mandate that the UN “shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Article 56 then provides the corresponding commitment on the part of Members to “pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”¹⁴ The Security Council, in particular, is subject to the same general constraints of the Charter. According to Article 24 of the Charter, the Security Council must act “in accordance with the Purposes and Principles of the United Nations.”¹⁵

To be sure, the Security Council has considerable leeway under Chapter VII to compromise certain interests generally protected under international law. When intervening to end active hostilities, for example, the Security Council, although bound by its own Charter, need not consider general principles of international law regarding the respective legal positions of the belligerent parties.¹⁶ Similarly, according to Article 2(7) the prohibition of UN intervention in “matters which are essentially within the domestic jurisdiction of any state” – a well established general principle of international law – “shall not prejudice” Security Council measures under Chapter VII. Even laboring under the Purposes and Principles, the Security Council has considerable discretion as these tend to “establish guidelines rather than concrete limits for the Council act.”¹⁷

Despite the discretion of the Security Council, we think it clear that, taken together, the various provisions of the Charter indicate a commitment on the part of the UN in general, and the Security Council in particular, to remain within the constitutional bounds of the Charter, which

universal respect and observance of human rights and fundamental freedoms for all. See generally N. Angelet, “International Law Limits to the Security Council,” *supra* n.9.

¹⁴ Art. 56, UN Charter.

¹⁵ Article 25 follows up with the corresponding duty of the Member States “to accept and carry out the decisions of the Security Council *in accordance with the present Charter*.” Art. 25, UN Charter (emphasis added). The wording of Article 25 is rather deficient and its meaning has been the subject of considerable controversy. The italicized clause may indicate a conditional obligation on the part of states to carry out only those Council decisions that respect substantive and procedural provisions of the Charter. The italicized clause may also, however, be read as related only to the states’ obligation to carry out the decisions of the Security Council. See Delbrück, *supra* n. 13, at 455.

¹⁶ Wolfrum, “Article 1“ in Simma, *supra* n. 13, at 43 (noting that the general requirement to consider international law and justice was not applied to the maintenance of international peace and security generally, so as to allow the UN more freedom in the core function of preliminary measures).

¹⁷ Frowein & Krisch, “Introduction to Chapter VII“ in Simma, *supra* n. 13, at 710

includes general respect for international human rights.¹⁸ Taken together, the various provisions similarly impose a corresponding duty on the Members to cooperate with the UN only insofar as the latter remains within these bounds, including respect for human rights. The Principles and Purposes of the Charter, including adherence to human rights, are surely broad and indeed possibly vague. But this is largely a reflection of the state of international human rights development at the time of the Charter's adoption. The UN Charter, which was meant to govern in the wake of the development of stronger international legal regimes, including human rights, must be interpreted with an evolving human rights referent in mind. Support for this idea can be found in both practice and scholarship that interpret Charter concepts such as the Principles and Purposes of the United Nations in the light of modern human rights law (most of which was actually sponsored by the United Nations).¹⁹

This means that even though there is some truth in the idea that “peace takes precedence over justice” under the Charter, Chapter VII measures cannot legally disregard the concerns embodied in basic international human rights and humanitarian law: “[H]umanitarian law and human rights norms, rather than establishing precise limits to Chapter VII powers, form guidelines in the exercise of those powers. Since they form part of the Purposes of the Organization as set out in Art. 1(3) of the Charter, the [Security Council]'s complete disregard for them would violate the Charter. However, it is up to the [Security Council] to strike the

¹⁸ A “curiously eerie debate” has arisen based on the proposed distinction between the “promot[ion] and encourage[ment]” of respect for human rights entrusted to the United Nations, and the “protection” of these rights which allegedly remains the responsibility of the Members. See Mégret & Hoffman, *supra* n. 9, at 333, 318-21 (quoting Georg Schwarzenberg, *Power Politics: A Study of World Society*, 3d ed., (London, 1964), 462). Especially in light of the recent dramatic expansion of UN powers as well as the weakening of state sovereignty, we have serious doubts about such a distinction as it applies to the constraints on actions of the UN itself. See *id.* at 320-326.

¹⁹ One scholar notes: “One could argue that the Security Council is, in principle, bound to respect all human rights contained in the ‘Universal Bill of Human Rights.’ This includes the United Nations Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights ... and the International Covenant on Economic Social and Cultural Rights. Although the UN is not a party to these treaties by means of ratification, they represent the elaboration upon the Charter’s original vision of human rights found in its purposes (Art. 1(3) and Articles 55 and 56.)” Erika de Wet, “Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime,” 14 *Leiden J. Int’l L.* (2001), 284 & n. 49 (citing Normand, Gasser and Fishman in n. 49). The International Court of Justice has held that racial discrimination is “a flagrant violation of the purposes and principles of the Charter.” *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep. 57, para. 131. The ICJ also held that “to deprive human beings of freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.” *Case Concerning United States Diplomatic and Consular Staff in Teheran*, Judgment, 1980 ICJ Rep. 42, para 91.

concrete balance between humanitarian and human rights concerns and the goal of maintaining peace”²⁰ Indeed, international human rights law itself generally recognizes this balancing act, as, for example, in the emergency principles embodied in Article 4 of the International Covenant on Civil and Political Rights.²¹

International tribunals seem to confirm this view. The International Court of Justice recognized over thirty years ago that the Security Council was bound by the Purposes and Principles in Articles 1 and 2 of the Charter.²² More recently, the Appeals Chamber of the International Court for Yugoslavia held that even when acting under Chapter VII, the Security Council’s considerable discretion “does not mean that its powers are unlimited.”²³ As “an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization” the Security Council is “subjected to certain constitutional limitations.”²⁴ As the Appeals Chamber put it: “[N]either the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).”²⁵ This would suggest that even when acting under Chapter VII, the Council must adopt only such measures as are

²⁰ Frowein & Krisch, *supra* n. 17, at 711 (noting also that “during the 1990’s, the latter [human rights concerns] have acquired significantly more weight in this process.”). On Security Council practice in determining what constitutes threat or breach of peace (including a failure to extradite a state’s own citizen), see Erika de Wet, *The Chapter VII Power of the United Nations Security Council*, (Oxford/Portland, 2004), 133-77. She concludes that “grave and systematic violations of human rights . . . cannot be regarded as purely internal matter anymore.” *Id.* at 194.

²¹ See, e.g., Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception* (Nijhoff 1998); Jaime Oraa, *Human Rights in States of Emergency in International Law* (Oxford 1992).

²² See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, *supra* n. 19, at para. 110; see also *id.* at para. 115 (noting that Security Council decisions were in conformity with the Principles and Purposes of the Charter and were “consequently binding on all States Members of the UN, which are thus under obligation to accept and carry them out.”) (emphasis added).

²³ *Prosecutor v. Tadic*, Case No. IT-94-1, International Criminal Tribunal for Yugoslavia Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Oct. 2, 1995), para. 28, <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> (last visited Oct. 30, 2008).

²⁴ *Id.*; see also *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, 1948 ICJ Rep. 57, 64 (“The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.”)

²⁵ *Tadic*, *supra* n. 23; cf. Organization of African Unity Doc. AHG/Decl.127 (XXXIV), (June 10, 1998) (declining to apply UN sanctions against Libya on the grounds of perceived illegality of the underlying resolution). On Ulpian’s maxim “*Princeps legibus solutus est*,” (“the ruler is unbound by law”), and its development in pre-modern legal theory, see D. Wyduckel, *Princeps Legibus Solutus, Eine Untersuchung zur frühmodernen Rechts- und Staatslehre*, (Berlin, Duncker & Humblot, 1979).

appropriate for removing a threat or suppressing a breach of international security.²⁶ As for human rights, these “now form part of the concept of the international public order.”²⁷

B. Restraint by International Law

The Security Council can be further seen as bound by international law in two ways. The first is simple: as a body of the UN, a legal person in the international legal order,²⁸ the Security Council is bound to observe international law.²⁹ To be sure, the UN is not bound by international human rights treaties, as it has not been a signatory to such treaties. But the UN is bound by customary international law as well as general principles of law, at least to the extent that the UN Charter does not provide otherwise.³⁰ Accordingly, the UN Security Council enjoys a (limited) exemption from the general prohibition on use of force and non-intervention as well as a (limited) exemption from considering general principles of law when intervening to end active hostilities. As for customary international human rights law, however, the Charter seems only to reaffirm their importance to the operation and international legitimacy of the UN. And while many norms of customary international law and general principles of law have traditionally been applied to the actions of states, the UN finds itself increasingly bound by such norms, as its actions approach the familiar rubrics of more traditional exercises of state power.³¹ To be sure, the specific understanding of international human rights standards may well need to be sensitive to the particular context of whatever UN activity in which they are applied.³² But

²⁶ Cf. A. Reinisch, “Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions,” 95 *American J. of Int’l L.* (2001), 851, 858-859. In addressing the question of the “constitutionality” of Security Council actions, the Appeals Chamber’s decision further indicated that when the Security Council creates a judicial organ under Chapter VII, any such tribunal must provide “all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.” *Tadic*, *supra* n. 23, at para. 45. Put another way, constitutive of the legality of the Security’s Council’s measures are the principle of proportionality and the observance of human rights.

²⁷ See I. Brownlie, “The Decisions of Political Organs of the United Nations and the Rule of Law” in R. Macdonald (Ed.), *Essays in Honour of Wang Tieya*, (Dordrecht, 1993), 91, 93-100.

²⁸ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ Rep. 174, 179.

²⁹ See, e.g., *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 1980 ICJ Rep. 73, 89-90; Bianchi, *supra* n. 9, at 886; see also *Restatement (Third) of Foreign Relations Law* § 223.

³⁰ Schermers & Blokker, *International Institutional Law*, 3rd ed., (The Hague/Boston, 1995), 824, 986.

³¹ See, e.g., S. Ratner, “Foreign Occupational and Territorial Administration: The Challenges of Convergence,” 16 *EJIL* (2005), 695 (discussing the application of International Humanitarian Law to UN territorial administration) (hereinafter *Territorial Administration*); B. Fassbender, *Targeted Sanctions and Due Process*, (March 20, 2006), 26 (Study Commissioned by the United Nations Office of Legal Affairs Office of the Legal Counsel).

³² See Alvarez, *International Organizations as Law-makers* (Oxford 2005), at 180 (noting that certain treaty provisions on human rights could not apply to the UN without modification); *Tadic*, *supra* n. 23, at paras. 43-48

the general point about the basic applicability of these norms to the UN as an actor with international legal personality remains.

Second, states cannot simply avoid international human rights law by bringing to life an international organization and charging it with tasks that would violate human rights standards if undertaken by the members of that organization themselves. Once again, the application of standards must be sensitive to the particular international context in which they are applied. But Members cannot circumvent human rights standards by shifting abuses to the UN. Two consequences follow from this observation – which we shall call here the principle of “non-circumvention.”

First, the non-circumvention principle means that states may remain liable for the human rights abuses of an international organization that they direct and control or to which they transfer powers and immunities to act on their behalf.³³ The International Law Commission’s Draft Article 28 on the international responsibility of international organizations, for example, suggests: “A State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.”³⁴ Even when a state no longer controls the decisions of an international organization, the state may incur international responsibility by virtue of having voluntarily agreed as a matter of the state’s domestic law to be bound by the international organization’s exercise of power.³⁵ And if the state takes part in the execution of the international organization’s decisions and policies and thereby assists in the execution of acts that would be unlawful if undertaken by the state alone, additional arguments in

(holding that traditional municipal model of separation of powers cannot be applied to international setting, but that general human rights principles must be preserved).

³³ See Report of the ILC on the work of its 58th Session, 1 May to 9 June & 3 July to 11 August 2006), at 279-82 U.N. Doc. A/61/10 (2006) (“ILC Report”). Roberto Ago, Second report on State responsibility, [1970] 2 Y.B. Int’l L. Comm’n 177, 189, U.N. Doc. A/CN.4/233.

³⁴ Report of the ILC on the work of its 58th Session, 1 May to 9 June & 3 July to 11 August 2006), at 282 U.N. Doc. A/61/10 (2006). See also *Waite & Kennedy v. Germany*, 30 Eur. Ct. H.R. (1999), 261, at para. 67; I. Brownlie, “The Responsibility of States for the Acts of International Organizations”, in M. Ragazzi (ed.), *International Responsibility Today. Essays in memory of Oscar Schachter* (Leiden/Boston: Nijhoff, 2005), 355, at 361,

³⁵ See, e.g., *Matthews v. UK*, 28 Eur. Ct. H.R. 361 (1999), at para. 32 (implicitly rejecting U.K.’s argument that acts adopted by the Community to which U.K. has transferred certain powers could not be attributed to the U.K. by holding that “Member States’ responsibility . . . continues even after such transfer.”); Cf *Sarooshi, International Organizations and Their Exercise of Sovereign Powers* (2005), 101-107.

favor of state responsibility may be made.³⁶ The development of this principle of state responsibility therefore may become particularly important in the implementation of UN Security Council decisions to freeze assets of individuals or to administer international territories.³⁷

Second, the non-circumvention principle also means that the international organization may, at times, find itself indirectly bound by the legal obligations of its Members. The principal idea here is one of functional legal succession.³⁸ First developed in the context of United Nations succession to the League of Nations,³⁹ the theory was applied in the early years of EC participation in GATT 1947 (until it became largely irrelevant in the latter context with the EC's formal accession to the WTO in 1994).⁴⁰ It has also found some (albeit mixed) application in the context of UN territorial administration.⁴¹ The idea of functional succession roughly holds that when an international organization exercises the powers formerly belonging to a state or group of states in the context of a particular international legal regime, then such international organization succeeds that group of states not only in their rights but also in their obligations under that international legal regime.⁴²

³⁶ Cf. ILC Report, *supra*, at 281, Draft Article 25. Cf. Sarooshi, *supra*, at 63-64; *Bosphorus v. Ireland*, 42 Eur. Ct. H.R. (2005), 1, 43-47; *M. & Co. v. Germany*, 64 Eur. Comm'n H.R. Dec. & Rep. (1990), 138 (holding that ECHR signatory state could permissibly transfer powers to international organizations and then carry out their commands provided that fundamental rights protection within such organizations was equivalent to that in ECHR). But see *Behrami v. France*, 45 Eur. Ct. H.R. (2007) (rejecting admissibility of case against France under European Convention of Human Rights in part because underlying actions were attributable to UN).

³⁷ See *infra* at Part II(A); Ratner, "Territorial Administration," *supra* n. 31; but see *Behrami*, *supra*.

³⁸ See, e.g., C. Tomuschat in von der Groeben/Schwarze, *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* Art.281, para. 53, 6th ed., (Nomos, Baden-Baden, 2004). Tomuschat speaks of „funktionelle Rechtsnachfolge," i.e. functional legal succession.

³⁹ *International Statutes of South -West Africa* (Advisory Opinion), 1950 ICJ Rep.128, 132-138 (holding that UN succeeded to certain rights of League of Nations arising out of South African mandate).

⁴⁰ The succession theory was accepted by the European Court of Justice with respect to Member States' obligations under GATT and the Convention on North-East Atlantic Fisheries, but not under the WTO Treaty. See Joined Cases 21-24/72, *International Fruit Company NV v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219, para. 18 ("in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement [on Tariffs and Trade], the provisions of that agreement have the effect of binding the Community."); see generally, R. Schütze, "On 'Middle Ground:' The European Community and Public International Law," European University Institute Working Paper No. 2007/13, 12-13; Ahmed & Butler, "The European Union and Human Rights: An International Law Perspective," 17 EJIL (2006), 771, 778; Reinisch, *supra* n. 26, at 868; E. de Wet & A. Nollkaemper, "Review of Security Council Decisions by National Courts," 45 German Yearbook of International Law (2002), 166, 189. But see S. Bohr, "Sanctions by UN Security Council and the EC," 4 EJIL (1993), 256, 268.

⁴¹ See Stahn, *The Law and Practice of International Territorial Administration* (Cambridge 2008), 492-496.

⁴² Some see in this an application of the principle of the Roman law dictum that one cannot transfer more rights than one has, whereas others view functional succession as a distinct argument. See, e.g., G. Thallinger, "Sense and Sensibility of the Human Rights Obligations of the United Nations Security Council," 67 ZaöRV (2007), 1015, 1026 & n 56; Reinisch, *supra* n. 26, at 858; cf. M. Hilf, "Europäische Union und Europäische

C. Constitutional Absorption

The final avenue for applying human rights to the UN may still largely lie in the future, but it is worth mentioning nonetheless. We call it here the idea of “constitutional absorption.” As the UN’s exercise of power grows in scope – and especially to the extent that it assumes functions traditionally performed by states – the UN may absorb certain fundamental rights principles and other legitimating elements from the constitutional traditions of its Members as well as from regional human rights treaties and other international law norms that do not immediately bind the UN. This comes, to the extent that it does, as an instance of self-creation and self-restraint,⁴³ as this particular application of fundamental rights would be autonomously chosen by the UN (albeit under pressures of gaining legitimacy for its actions).

Constitutional absorption does not prevent the more traditional application of fundamental rights from other legal sources. It does not reject the binding nature of international human right law. As a supplemental and independent source of fundamental rights, however, constitutional absorption differs from classic international law sources of rights. Constitutional absorption differs from the straightforward adherence to, and application of, binding treaty obligations. It differs from the idea of locating international human rights norms in the specific textual restraints imposed on the UN by its signatory states. It differs from the application of binding customary international law or general principles of law. It differs from the functional succession theory. And it differs from the imposition of restraints that accompany the limited delegation of powers from the Member States.

Constitutional absorption of fundamental rights is the incorporation of fundamental rights principles from Member systems as well as international law into the constitutional law of the UN. The application of fundamental rights principles via constitutional absorption may lead to the distinctive development of these principles in the UN context. The UN would autonomously draw on the constitutional and international legal traditions of its Members to distil certain

Menschenrechtskonvention“ in U. Beyerlin/M. Bothe/R. Hofmann/E.-U. Petersmann (Eds.), *Recht zwischen Umbruch und Bewahrung* (1995), 1193, 1197 (arguing that Member States can only transfer their powers to the EC subject to the fundamental rights limitations on those powers); R. Uerpmann, “Völkerrechtliche Nebenverfassungen“ in Bogdandy (Ed.), *Europäisches Verfassungsrecht*, (Springer Verlag, Berlin 2003), 339.

⁴³ On institutional “self-commitment” and territorial administration, see, e.g., Stahn, *supra* n. , at 481-84.

fundamental rights principles to govern the UN system and to provide its exercise of discretion with an independent source of legitimacy. It is, in short, a form of borrowing.

UN practice suggests that some constitutional absorption may already be underway. The source of the borrowing, however, has been hitherto mostly confined to international law. For example, in response to the UN Security Council's request that the United Nations Interim Administration Mission in Kosovo (UNMIK) protect human rights in Kosovo, the Secretary General's report stated: "In assuming its responsibilities, UNMIK will be guided by internationally recognized standards of human rights as the basis for the exercise of its authority in Kosovo. UNMIK will embed a culture of human rights in all areas of activity, and will adopt human rights policies in respect of its administrative functions."⁴⁴ Shortly thereafter, UNMIK's first regulation declared: "In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, color, language religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status."⁴⁵ This was quickly followed by a more sweeping regulation, incorporating a host of specific international human rights conventions and outlawing capital punishment as well.⁴⁶ The United Nations Transitional Administration in East Timor (UNTAET) promulgated nearly identical regulations governing officials there.⁴⁷ Along similar lines, UN Secretary-General Kofi Annan issued a general bulletin in August 1999 "for the purpose of setting out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control."⁴⁸ Without addressing whether the UN is bound by international humanitarian law, the document sets forth rules that "restate the core norms of IHL found in the Geneva Conventions

⁴⁴ Report of the Secretary-General on the United Nations Interim Administration in Kosovo, 12 July 1999, UN Doc. S/1999/779, at para 42.

⁴⁵ UNMIK/REG/1999/1 of 25 July, 1999, available at <http://www.unmikonline.org/regulations/1999/reg01-99.htm>.

⁴⁶ UNMIK/REG/1999/24 of 12 December 1999, available at <http://www.unmikonline.org/regulations/1999/reg24-99.htm> (making the following conventions, among other obligations, applicable to all persons exercising public power in East Timor: The Universal Declaration on 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 the Elimination of All Forms of Discrimination Against Women of 17 December 1979; The Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; The International Convention on the Rights of the Child of 20 November 1989).

⁴⁷ UNTAET/REG/1999/1 of 27 November 1999, available at <http://www.un.org/peace/etimor/untaetR/etreg1.htm>.

⁴⁸ 6 Aug. 1999, UN Doc. ST/SGB/1999/13.

and Protocols.”⁴⁹ The General Assembly, too, has been active in this regard, for example, calling for gender mainstreaming in all areas of their work and chastising the Security Council for the impact of sanctions programs on human rights.⁵⁰

Although some see in these actions an acknowledgement of the UN’s existing international human rights obligations,⁵¹ others remain agnostic as to “whether the matter is a question of legal duty or an *ex gratia* assumption of responsibility.”⁵² Especially inasmuch as some of these declarations incorporate rights that evidently exceed generally applicable international human rights norms, however,⁵³ such declarations seem to represent first steps toward the kind of constitutional absorption we have discussed here. Such declarations, if followed by similar declarations elsewhere and if ultimately enforced,⁵⁴ may contribute to an emerging “practice” that forms an authoritative part of the organic law governing the UN.⁵⁵

The idea of constitutional absorption builds, of course, on an analogy to the development of fundamental rights guarantees within the European Union.⁵⁶ The European Community developed fundamental rights guarantees long before the Treaty of Maastricht, when the protection of rights finally became anchored in the Union’s foundational text. The European Community developed rights that extended well beyond applicable norms of customary international law or general principles of law in the traditional international law sense. And the European Community developed fundamental rights autonomously as a matter of self-restraint (albeit, of course, under the pressure of seeking legitimacy for, and maintaining Member States’ adherence to, its actions). Finally, the European Community developed these principles not

⁴⁹ Ratner, *supra* n. 5, at 705.

⁵⁰ See Alvarez, *International Organizations*, *supra* n. 32, at 169.

⁵¹ See, e.g. de Wet, *The Chapter VII Power*, *supra* n. 20, at 320.

⁵² Alvarez, *International Organizations*, *supra* n. 32, at 179. The significance of these acts of self-commitment are context dependent. See *id.* at 171 (noting instances in which UN incorporation of human rights suggested that the Council or other acting body implied “that the UN itself . . . may be bound by at some [human rights] provision.”); see generally *id.* at 169-183.

⁵³ UNMIK’s regulation, for example, also renders the ECHR and its Protocols applicable, and both the UNMIK and UNTEAT regulations prohibit capital punishment.

⁵⁴ Cf., e.g., Ratner, *supra* n. 5, at 705-06 (noting that the effect of the international humanitarian law directive remains unclear and will depend on the record of enforcement and implementation).

⁵⁵ Cf. Alvarez, *International Organizations*, *supra* n. 32, at 88-89.

⁵⁶ Cf. Fassbender, *supra* n. 31, at 17-19. The literature on the EU’s development of fundamental rights is vast. See, e.g., G. de Burca, “Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union,” 27 *Fordham Int’l L.J.* (2004), 679; J. Weiler, “The Transformation of Europe,” 100 *Yale L.J.* (1991), 2403; J. Weiler, “Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities,” 61 *Wash. L. Rev.* (1986), 1103.

simply by uploading every right observed in every Member State. Instead, the Court interpreted and constructed a common constitutional tradition and also drew on international law, in particular the European Convention on Human Rights, to derive and shape a pan-European constitutional vision of fundamental rights governing the Union.⁵⁷

We do not mean to suggest that the UN is or will ever become the deeply integrated entity that the European Union has become. And we do not mean to suggest turning away from the principal avenue of UN legitimacy via its Members and their domestic political processes. And yet, as the scope of the UN's discretionary power expands, and as the exercise of UN power treads ever farther into domains previously reserved to states, we may witness an accompanying expansion of fundamental rights that operate as part of the organic law of the UN to help provide an independent supplemental justification of UN authority.

Some seem to lament acts of self-commitment as mostly watering down the necessary recognition of the binding nature of customary international human rights norms.⁵⁸ By contrast, we emphasize here that such constitutional absorption allows an international organization such as the UN to develop an organization-specific (and, possibly, situation-specific) catalog of rights that may strengthen the organization and its legitimacy as well as the protection of rights. Constitutional absorption can thus build productively on the floor set by customary international human rights and the (rather limited) common constitutional traditions among its highly diverse Members. In so doing, constitutional absorption (as opposed to the development of generally binding customary international law) can provide a more appropriately tailored approach. As Jose Alvarez has noted, for example, traditional state-based conceptions of human rights as embodied, for example, in certain treaties may “require some adaptation to suit Council-generated sanctions programs, Council-generated forms of adjudication, or the UN's administration of territory.”⁵⁹

This need not, however, invariably spell the dilution of rights. The protection of private property is a good example. Even without rising to the level of a generally binding customary international human right or common constitutional tradition among the UN's highly diverse membership, the right to private property may nonetheless rise to the level of a “constitutional”

⁵⁷ See D. Halberstam, “The Bride of Messina: Constitutionalism and Democracy in Europe,” 30 *Eur. L. Rev.* (2005), 775, 800-01.

⁵⁸ See, e.g., Stahn, *supra* n. , at 483-84; de Wet, *The Chapter VII Power*, *supra* n. 20, at 320.

⁵⁹ Alvarez, *International Organizations*, *supra* n. 32, at 180.

principle worthy of incorporation into the organic law of the UN. As absorbed into the constitutional law of the UN, such a right might become flexible with regard to UN administration of unstable territories while promising more protection in the context of targeted economic sanctions.

II. Economic Sanctions and the Individual: Three against One?

Anti-terrorist measures have become a major component of UN Security Council activity since the late 1990s.⁶⁰ In particular, the Security Council has embraced the concept of targeted or smart sanctions directed at specific persons, groups or sectors, which avoid the broad state-wide embargos that indiscriminately wreak havoc on civilian populations. For citizens and residents of Europe (or persons with assets in Europe), these smart sanctions bring together the state, the European Union, and the UN in the battle against the individual who is suspected of funding terrorism.

A. The Sanctions Regime

Through a series of resolutions, starting with Resolution 1267 (1999),⁶¹ the Security

⁶⁰ See Fourth Report of the Analytical Sanctions and Support Monitoring Team, U.N. Doc. S/2006/154, (Mar. 10, 2006), 5-19. On general history of UN sanctions, see Gowlland-Debbas, "Sanctions Regimes under Article 41 of the Charter" in Gowlland-Debbas (Ed.), *National Implementation of United Nations Sanctions* (Koninklijke Brill, 2004), 3, 7-17. "A total of 18 sanctions regimes have been imposed on states, only two of which predate 1990." Manusama, *supra* n. 8, at 189. On a theory of sanctions, see G. Abi-Saab, "The Concept of Sanction in International Law" in Gowlland-Debbas (Ed.), *United Nations Sanctions and International Law*, (The Hague, 2002), 29-41. On UN-sponsored anti-terrorist treaties and soft law, see P. Kovács, "The United Nations in the Fight Against International Terrorism" in Nanda (Ed.), *Law in the War on International Terrorism*, (Ardsey, 2005), 41-53. See generally, J. Paust, "Responding Lawfully to Al Qaeda," 56 *Catholic U. L. Rev.* (2007), 759, 760-763.

⁶¹ See U.N. Doc. S/RES/1267 (1999). The series of the relevant resolutions of the Security Council also includes: U.N. Doc. S/Res/1333 (2000), 1373 (2001), 1363 (2001), 1390 (2002), 1452 (2002), 1526 (2004), 1617 (2005), 1730 (2006), 1735 (2006). See Al-Qaeda & Taliban Sanctions Committee, Guidelines of the Committee for the Conduct of its Work, U.N. Doc. S/2002/1338 (Adopted Nov. 7, 2002, Amended Apr. 10 2003), http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf (last visited Oct. 30, 2008) (hereinafter Guidelines). For a detailed description, see Frowein, "The Anti-Terrorism Administration and the Rule of Law," in Dupuy et al. (Eds.), *Festschrift für Christian Tomuschat*, (N.P. Engel Verlag, Germany, 2006), 785-95. The Security Council created a new breed of subsidiary and advisory organs to monitor and coordinate sanctions enforcement in states. In addition to the six Sanctions Committees, there are a Counter-Terrorism Committee, restructured as Counter-Terrorism Executive Directorate, a Monitoring Group of Experts, a Sanctions Enforcement Team, Analytical Support and Sanctions Monitoring Team, and most recent, "a focus point" in the UN Secretariat; see Bianchi, *supra* n. 9, at 883, 900-902. On Security Council Resolutions 1193(1998), 1267(1997) and 1333(2000), see Hilaire, *supra* n. 6, at 280-85. On sanctions more generally, see J. Farrall, *The United Nations Sanctions and the Rule of Law*

Council decreed sanctions first against the Taliban, then against Osama bin Laden, and then Al Qaeda and that group's supporters. All states were called upon to freeze assets, ban over-flight and travel, and impose an arms embargo on individuals and groups with ties to Al Qaeda. The Committee 1267 (the Sanctions Committee), composed of members of the Security Council, was established to institute and review periodically a list of names and to monitor the compliance by states. In subsequent resolutions, the Security Council expanded the sanctions, sharpened the requirements for implementation by states and established a Monitoring Group.⁶² As of March 31, 2008, the consolidated list administered by the Sanctions Committee contained 482 entries (370 individuals and 112 entities), with approximately \$85 million in assets frozen in 36 states at the close of 2007.⁶³ Views differ on the degree of effectiveness of the sanctions, which ultimately depend on cooperation by state authorities with vastly different procedures.⁶⁴

According to the Sanctions Committee's guidelines, an individual may petition the government of his citizenship or residence to ask for a review and that government must ask the designating government for more information. If, in the ensuing consultations, the two governments fail to agree, the matter goes before the Sanctions Committee which meets in private and acts by consensus. The issue may be referred to the Security Council.⁶⁵ The Committee is to update the list when new information is received. By way of exemption, states

(Cambridge 2007); T. Meron, *The Humanization of International Law* (Leiden; Boston, 2006), pp. 497-509; Damrosch, *supra* n. 8.

⁶² U.N. Doc. S/RES 1333 (Dec. 19, 2000); U.N. Doc. S/RES/1373 (Sept. 28, 2001); U.N. Doc. S/RES/1390 (Jan. 22, 2002). For subsequent Security Council measures, see Second Report of the Analytical Support and Sanctions Monitoring Team, U.N. Doc. S/2005/83 (Feb. 15, 2005) (hereinafter Second Report); E. Rosand, "The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions," 98 *Am. J. Int'l. L.* (2004), 745; Miller, "The Use of Targeted Sanctions in the Fight Against International Terrorism—What About Human Rights?," 97 *Am. Soc'y Int'l. L. Proc.* (2003), 46.

⁶³ Eighth Report of the Analytical Support and Sanctions Monitoring Team, U.N. Doc. S/2008/324 (May 14, 2008), 12, 19. At the end of 2005, the list administered by the 1267 Sanctions Committee contained 466 names freezing a total of \$94 million in 34 states (205 individuals and 118 entities). Fourth Report of the Analytical Support and Sanctions Monitoring Team, U.N. S/2006/154 (Mar. 10, 2006), pp. 9, 19. Twenty names were delisted by March 2006. *Id.* at 9. In 2007, 8 individuals were added to the list and 2 were delisted as were 12 entities. Report of the Sanctions Committee, Appendix, U.N. Doc. S/2008/25 (Jan. 17, 2008), 11-12. A significant number of listed names had insufficient identifiers to allow enforcement action. Frowein, "The Anti-Terrorism Administration and the Rule of Law," *supra* n. 61, at 791. Only 23 requests for exemptions were made by only eight states, all but 2 from Europe. Watson Institute, "Strengthening Targeted Sanctions Through Fair and Clear Procedures," (2006), 23.

⁶⁴ See Bianchi, *supra* n. 9, at 892-900. For an account of criticism of the sanctions, see Herbst, *supra* n. 6, at 24-27. On the problematic nature of the procedure for exemptions, see *id.* at 26 and P. Conlon, "The UN's Questionable Sanctions Practices," 45 *Aussenpolitik* (1995), 327 (scathing criticism of the administration of sanctions against former Yugoslavia and Iraq). On the implementation of Security Council sanctions see Gowlland-Debbas, *United Nations Sanctions and International Law*, *supra* n. 60, at 251-368.

⁶⁵ See Al-Qaeda & Taliban Sanctions Committee, Guidelines, *supra* n. 61; Miller, *supra* n. 62, at 47, 49-50 (citing to the Security Council resolution and Sanctions Committee's guidelines); E. Hey, "The High Level Summit, International Institutional Reform and International Law," 2 *Int'l L. & Int'l Rel.* (2005), 5, 12.

may release funds for basic expenses and fees, including legal fees, but the Committee must be notified in advance and it may object within 48 hours.⁶⁶

Until 2006 there was no provision for an individual to have direct contact with the United Nations. The individual was dependent entirely on the readiness of her state to press a case in the exercise of diplomatic protection (although under European Community law, the individual might be able to sue her government before a domestic court if it refuses its help).⁶⁷ Responding to the criticism of the de-listing procedure, in December 2006, the Security Council directed the Secretary General to establish “a focal point” within the Secretariat to receive petitions for de-listing for the first time directly from individuals or groups.⁶⁸ The resulting focal point procedures, however, do not allow for the individual to participate either in person or through a personal representative or legal counsel in the process of re-evaluation, nor do they require the UN or any government to provide the petitioner with any information other than the status and disposition of the delisting request. If the publicly available descriptions are any indication, the resolution of any such individual petition is still essentially a diplomatic one in which the presumption seems to lie against individual relief. Such a process does not comport with any reasonable understanding of individual rights. At the time of this writing, there have been ten requests, of which seven have been processed, resulting in two requests being granted.⁶⁹

Unlike the list instituted by the Sanctions Committee under the anti-Taliban Security Council Resolution 1267 just described, the broad anti-terrorist Resolution 1373 does not envisage a central list but relies instead on autonomous lists that states – or the European Union

⁶⁶ See U.N. Doc. S/RES/1452 (Dec. 20, 2002).

⁶⁷ See Case T-315/01, *Kadi v. Council*, [2005] ECR II-03649, para. 270 (approving a suggestion to that effect by the United Kingdom and citing “by analogy” the Order of the President of the Court of First Instance in Case T47/03R, *Sison V. Council*, [2003] ECR II-2047, para 39.) (hereinafter *Kadi* (CFI)).

⁶⁸ U.N. Doc. S/RES/1730 (Dec. 19, 2006). The focal point became operational on March 30, 2007. Al-Qaeda & Taliban Sanctions Committee, Report of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaeda and the Taliban and Associated Individuals and Entities, U.N. Doc. S/2008/25 (Jan. 17, 2008), p.3 n.1 (hereinafter Sanctions Committee Report). The Sanctions Committee amended its Guidelines to specify the procedure before “the focal point.” *Id.* at 2-3; see Al-Qaeda & Taliban Sanctions Committee, Guidelines, *supra* n. 61, at Sec. 8(d). To improve the effectiveness of the sanctions the Sanctions Committee’s Chairman and the Monitoring Team have been visiting states and the Committee has sought to increase contacts not only with states but also with Interpol and other international and regional organizations. Sanctions Committee Report, *supra*, at 6-9. The Monitoring Team has submitted “no fewer than 347 proposed amendments” to the list which “so far resulted in 324 changes being approved.” *Id.* at 8. We noted earlier the criticism of the Security Council for denying listed individuals basic procedural guarantees in a situation some view as akin to criminal prosecution. See *supra* n. 63, and generally *infra* Parts II and III.

⁶⁹ See <http://www.un.org/sc/committees/dfp.shtml> (last visited Oct. 30, 2008)

– establish on their own.⁷⁰ The independent responsibility of states in the creation and maintenance of these latter lists arguably changes the legal calculus. These state-created and state-maintained lists may not conjure up the same questions of conflict between human rights guarantees and observance of the UN regime, since the Security Council has not ordered that the particular assets in question be frozen.⁷¹ The state therefore cannot invoke its obligations under the UN Charter, and in particular under Article 103 of the Charter,⁷² in an effort to justify its actions solely by reference to a UN command.

B. Judicial Remedies

The International Court of Justice (ICJ) has not established any direct power of judicial review of the validity of Security Council acts. As one observer notes: “To date the ICJ has been successful in avoiding a straightforward answer” to the question “whether [it] has jurisdiction to decide on the legality of the [Security] Council’s acts.”⁷³ The ICJ did, however, consider the legality of these and other UN acts incidentally in the context of judging a dispute submitted to it by one or more states or in responding to a request for an advisory opinion.⁷⁴ But both of these procedures are generally beyond the reach of an individual or a group, because only states have access to the Court and requests for advisory opinions are confined to UN organs. Also inaccessible to the targets of smart sanctions is the indirect review that an international tribunal

⁷⁰ Cf. E. Guild, “The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the Terrorist Lists,” 46 J. Comm. Mark. Stds. (2008), 173. As of July 15, 2008, 94 individuals and groups were included on the list maintained by the EU Council. See Council Common Position 2008/586/CFSP, L 188/71.

⁷¹ Case T-228/02, *Organisation des Modjahedines du peuple d’Iran v. Council*, [2006] ECR II-04665, para. 121 (holding EC’s fundamental rights standards fully applicable to EC’s own decision to list certain individuals as subject to asset freeze regime) (*hereinafter* “OMPI”).

⁷² See *supra* n.7.

⁷³ Reinisch, *supra* n. 26, at 865. For an extensive and exceptionally nuanced treatment of this question, see Alvarez, *Judging the Security Council*, *supra* n.10.

⁷⁴ In the *Lockerbie* case, for example, the International Court of Justice implied that it had the power to hold a Security Council decision *ultra vires*, although it ruled that in this instance the Security Council action was valid by operations of the “supremacy clause” in Article 103 of the Charter which trumped Libya’s right under a treaty. *Question of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.)*, 1992 ICJ Rep. 3, at 114 (Provisional Measures of 14 April). For a comprehensive treatment of the ICJ advisory opinion incidental review problems and practice, see Wet, *supra* n. 20, 1-127, 352-357; J. Dugard, “Judicial Review of Sanctions” in Gowlland-Debbas, *United Nations Sanctions and International Law*, *supra* n. 61, at 83-91; Cannizzaro, *supra* n. 11, at 193-97; Herbst, *supra* n. 6, *passim*; see, e.g., P. Tavernier, “L’identification des règles fondamentales, un problème résolu?” in Tomuschat & Thouvenin (Eds.), *The Fundamental Rules of International Law*, (Koninklijke Brill, 2006), 1, 6. For an interesting comparison with *Marbury v. Madison*, see Franck, “The ‘Powers of Appreciation’: Who is the Ultimate Guardian of UN Loyalty,” 86 AJIL (1992), 519.

might conduct in the course of hearing a case brought directly against the individual, as in the prosecution of Dusko Tadic.⁷⁵ As for the state driven system of review, in which the individual figures only as a marginal actor, Simma aptly concludes: “Certainly, an organization based on rule of law indeed cannot, in principle, exempt itself from judicial control. But . . . one should not expect too much of it because such judicial control, if it were undertaken at all, would in most cases come too late, and political pressure on all participants would remain pervasive.”⁷⁶

The individual, in short, has little recourse at the UN level.

Limited remedies exist in domestic courts.⁷⁷ Any attempt to sue the United Nations for acts of the Security Council would be barred by the immunity defense.⁷⁸ Although no comprehensive database appears available, anecdotal evidence suggests that, in general, appeals to domestic courts have failed to provide relief.⁷⁹ Thus for instance an English court, in dismissing the application against the UK Government, held that Security Council Resolutions have qualified any obligations of the U.K. under human rights law except for *ius cogens*, an approach followed – as we shall see – by the EC’s Court of First Instance as well.⁸⁰ A similarly negative outcome has prevailed in the Federal Republic of Germany, in Irish courts, and in Switzerland.⁸¹ Cases are pending in

⁷⁵ Cf. *Tadic*, *supra* n. 23.

⁷⁶ Simma, “Bilateralism and Community Interest Confronted,” 1994 *Académie de Droit International*, (No. 6), 229, 283.

⁷⁷ It should be noted that there are important differences in the role of judicial review from one legal system to another. For example, “the idea that there could be any state activity which may not be challenged in court is alien to German law,” C. Harlow, “Voices of Difference in a Plural Community,” *Am. J. Comp. L.* (2002), 339, 353 (quoting W. Rufner, “Basic Elements of German Law on State Liability,” in Bell & Bradley (Eds.), *Government Liability: A Comparative Study* (1992), 252), while in Sweden and Denmark “judicial review takes second place to the ombudsman.” *Id.* at 352.

⁷⁸ Reinisch, *supra* n. 26, at 866.

⁷⁹ 15 law suits were filed in the national courts in Belgium, U.K., Germany Italy, Switzerland, The Netherlands, Pakistan, Turkey and the United States, most without success. See Third Report of the Analytical Support and Sanctions Monitoring Team, Annex II, U.N. Doc. S/2005/572 (Sept. 9, 2005), pp. 48-49 (hereinafter Third Report) and Fourth Report of the Analytical Support and Sanctions Monitoring Team, Annex, U.N. Doc. S/2006/154 (Mar. 10, 2006), pp. 45-47. On implementation of Security Council Sanctions in Sweden, see T. Andersson et al., “EU Black-listing: The Renaissance of Imperial Power but on a Global Scale,” 14 *Eur. Bus. L. Rev.* (2003), 111, 119; Almqvist, “A Human Rights Critique of European Judicial Review: Counter Terrorism Sanctions,” 57 *ICLQ* (2008), 303.

⁸⁰ *The Queen on Application of Hilal Abdul-Razzaq Ali Al-Jedda v. Secretary of State for Defense*, [2006] EWCA 327, para. 71. Subsequently, another U.K. Court struck down the government’s asset freeze orders as unconstitutional, but only because the government’s orders had not been ratified by Parliament. *A, K, M, Q & G v. H.M. Treasury*, [2007] EWHC 869.

⁸¹ Schmal, “Effektiver Rechtsschutz gegen “targeted sanctions” des UN-Sicherheitsrats?,” 41 *EuR* (2006), 566, 570; Reinisch, *supra* n. 26, at 866; Jacobs, “Constitutional Control of European Elections: The Scope of Judicial Review,” 28 *Fordham Int’l L. J.* (2005), 1049, 1058; Parga, “Bosphorus v. Ireland and the Protection of

Pakistan, Turkey, and the United States.⁸² As an exception, a Brussels Court threatened the imposition of a heavy daily penalty upon the government unless it promptly unblocked the funds owned by the plaintiff who was unjustly accused of terrorist support.⁸³

Member States' human rights resolve might be strengthened at the regional, "all-European" level of the Council of Europe, where applicants could sue the state committing or transposing the alleged violations in the European Court of Human Rights in Strasbourg (ECtHR). Applicants could claim that, by freezing their funds in response to the Security Council Resolution, a state has violated rights guaranteed by the European Convention on Human Rights ("Convention") which was accepted by all 47 members of the Council of Europe. To be sure, the ECtHR will not take jurisdiction over claims against the UN or over actions that are directly attributable to the UN, or state decisions taken within UN bodies. So, for example, the ECtHR has declined jurisdiction over claims against a state that is exercising delegated power from the UN Security Council or lending troops to a subsidiary organ of the UN.⁸⁴ But if the decision to freeze an individual's funds is attributable to a state – even as action taken in an effort to implement a Security Council resolution – the individual can lodge a complaint at the ECtHR after exhausting all judicial remedies (including at the EC level). Accordingly, the ECtHR accepted jurisdiction over a claim that Ireland had violated the European Convention on Human Rights when it carried out its legal obligations under an EC regulation that, in turn, implemented a Security Council Resolution. On the substance, however, the human rights court's review was rather cautious. The European Court of Human Rights rejected the applicants claim by noting that Ireland had acted pursuant to EC law, that following EC law was an important interest, and that, in any event, the EC-

Fundamental Rights in Europe," 31 E.L. Rev. (2006), 251. For two U.S. cases involving the application of U.S. legislation exclusively, see *infra* n. 164.

⁸² See Report of the Chairman of the Sanctions Committee, 5/2008/324, 14 May 2008, at 36-37. In *Al Haramain Islamic Foundation, Inc. v. U.S. et al.* (D. Ore. Nov. 6, 2008), the District Court held that the freezing of plaintiff's assets violated plaintiff's due process right for failure of prior notice and constituted a "seizure" for purposes of the U.S. Constitution's Fourth Amendment.

⁸³ In response, the Belgian Government initiated a delisting request to the Sanctions Committee. See Third Report, *supra* n. 79, at 48-49; see also Gowlland-Debbas, "UN Sanctions and International Law: An Overview" in Gowlland-Debbas (Ed.), *United Nations Sanctions and International Law*, *supra* n. 60, at 22-29.

⁸⁴ See *Behrami*, 45 Eur. Ct. H.R. at 122.

EU standard of protection of human rights was comparable to that assured by the European Human Rights Convention.⁸⁵

This, then, brings us to the conceptually difficult level of action: the regional, but “core-European” level of the European Union, which is sandwiched as an actor between the Member State and the United Nations. As a matter of procedure, the applicant can challenge EC action implementing a Security Council resolution. If the action is of direct and individual concern, as is the case when one’s name is placed on a list of individuals whose assets are to be frozen throughout the EU, the individual may bring suit in the Court of First Instance (“CFI”) to annul the EC implementing regulation as it concerned them as exemplified by the *Kadi* case.⁸⁶ But the substantive picture is more complicated.

By transforming the UN Security Council Resolution into operative EC law, Member States find themselves not only under obligations of international law, but under an added legal obligation of implementation that derives from the EC. The possibility, of course, would remain that Member States will break with their tradition of deference to the EC and invoke their original jurisdiction over fundamental rights.⁸⁷ In the light of Member State’s general responsibility to carry out EC law, however, Member States might, instead, set aside their own review of legality in deference to EC protection of fundamental rights.⁸⁸

We turn, then, to the battle at this most intricate level of action, that is, the level of the European Union in its interaction with the Member States.

⁸⁵ *Bosphorus v. Ireland*, 42 Eur. Ct. H.R. (2005), 1, 43-47; see also *Waite & Kennedy v. Germany*, 30 Eur. Ct. H.R. (2000), 261; I. Canor, “Can Two Walk Together, Except They Be Agreed?” 35 CML Rev. (1998), 137.

⁸⁶ Another alternative would be an action at the same Court for damages caused by the fund blockade and/or loss of business. Several applicants did follow this latter route, albeit without success. See Case C-354/04P, *Gestoras Pro Amnistía v. Council*, [2007] ECR I-01579, para. 48; Case T-49/04, *Hassan v. Council*, http://www.astrid-online.it/eu/Documenti/Giurisprud/TPI_Hassan_luglio06.pdf (last visited Nov. 10, 2008); Case T-338/02, *Segi v. Council*, [2004] ECR II-01647; Case T-184/95, *Dorsch Consult v. Council*, [1998] ECR II-00667, para. 73 (holding that the UN, but not the EC, is responsible for damages caused by an EC regulation implementing a UN resolution); Gudrum Monika Zagel, “Economic Sanctions of the European Community: A Commentary on Art. 301 TEC,” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=862024 (last visited Nov. 10, 2008), 18-19. On the proceedings for interim remedy measures before CFI/ECJ, see Torbjörn Andersson et al., “EU Black-listing: The Renaissance of Imperial Power but on a Global Scale,” 14 Eur. Bus. L. Rev. (2003), 111, 135-137. On problems facing applicants before CFI/ECJ, see *ibid.* at 114-118.

⁸⁷ Several commentator have suggested this as a possibility in the event that the EC fails to control for the abuse of fundamental rights at the EU level. See, e.g., Schmahl *supra* n.81, at 574-76.

⁸⁸ Cf. *Bosphorus*, *supra* n. 85.

III. The EU at the Crossroads of UN Sanctions and Individual Rights

Three questions loom large in the challenge to the European Community's participation in the UN's coercive action against individuals by means of smart sanctions. The first is a rather technical issue about whether the European Community has the power under Articles 60, 301, and 308 EC to implement the EU Council's Common Foreign and Security Policy decision to comply with the UN Security Council resolution to freeze an individual's assets. The second goes to the relation between the United Nations and the European Union's legal order and their respective commitments to human rights. The third and final question examines the actual individual rights claims of the targets. We shall examine these issues in turn as they arose within the extensive litigation in the European courts to date.

The *Kadi* case, upon which we principally focus, involved sanctions against Yassim Abdullah Kadi, a Saudi national residing in Saudi Arabia, and Al Barakaat, a Swedish organization located in Sweden and connected to a Somali financial network. (Three other Swedish citizens were delisted after commencement of their suits.)⁸⁹ The *Kadi* case is one of a series of cases arising out of the EC's implementation of sanctions against individuals who were identified by name in the UN Sanctions Committee itself.⁹⁰ Kadi and Al-Barakaat sued the EU Council and Commission in the Court of First Instance, asking the court to annul – with respect to them – the EU Regulation implementing the UN Security Council anti-terrorism resolutions aimed specifically at the Taliban, Al Qaeda, and Osama bin Laden. When the CFI refused, the

⁸⁹ See Case T-306/01, *Yusuf & Al Barakaat v. Council*, [2005] ECR II-03533 (Yusuf was a Swedish national of Somali origin residing in Sweden and Al Barakaat was an International Foundation established in Sweden) (hereinafter *Yusuf*); see also Case T-306/01R, *Aden, Ali & Yusaf v. Council*, [2002] ECR II-02387 (Aden, Ali, and Yusaf were Swedish citizens of Somali origin). Aden, Ali and Yusaf were delisted. Individuals, Groups, Undertakings and Entities that Have Been Removed from the Consolidated List Pursuant to a Decision by the 1267 Committee, <http://www.un.org/sc/committees/1267/docs/Delisted.pdf> (last visited Nov. 20, 2008).

⁹⁰ See *Kadi* (CFI), *supra* n.67; *Hassan*, *supra* n. 86; Case 253/02, *Ayadi v. Council*, [2006] ECR II-02139 (Ayadi was a Tunisian residing in Dublin, Ireland with wife and two children, Irish nationals); See also Case T-318/01, *Othman v. Council*, Oct. 2006 (legal aid granted); Case T-47/03 R, *Sison v. Council*, [2003] ECR II-02047 (interim relief denied); *Gestoras Pro Amnestía*, *supra* n. 86; *Segi*, *supra* n. 86, (dismissing Segi's action for damages), *affirmed on appeal in* Case 355/04 P, *Segi v. Council*, [2007] ECR I-01657; Case C-117/06, *Möllendorf*, (AG Mengozzi Opinion), [2007] ECR I-08361, para.108, concludes that anti-terrorist Reg. 881/2002 prohibits transfer of listed person's real estate in performance of a preexisting, but unregistered contract. The Court agreed with the Advocate General. Case C-117/06, *Möllendorf*, (Judgment), [2007] ECR I-08361, para. 80. See generally, e.g., E. Defeis, "Targeted Sanctions, Human Rights, and the Court of First Instance of the European Community," 30 *Fordham Int'l L.J.* (2007), 1449. At least 21 cases have been filed with the CFI and ECJ, claiming violations of human rights. *Id.* at 1449 n.3 (citing <http://www.statewatch.org/terrorlists/terrorlists.html>).

plaintiffs appealed to the European Court of Justice, which set aside the CFI judgment and granted the requested relief.⁹¹

A distinct case, *Organisation des Modjahedines du peuple d'Iran (OMPI)*, which we shall mention only in passing, involved the EC's administration of the UN Security Council's more general anti-terrorist sanctions Resolution 1373. As mentioned above, Resolution 1373 does not identify individual targets, but relies instead on separate member state and EU identification regimes.⁹² Here, the CFI upheld OMPI's claim to be removed from the EU Council's list.⁹³ When the U.K. authorities and the EU Council (in a new decision) failed to comply with the court's ruling, the targeted group filed another application and largely prevailed again.⁹⁴ The issue caused a sharp disagreement between the U.K. Proscribed Organizations Appeal Commission and the Home Secretary, with the former calling the latter's refusal to delist the organization unreasonable and "perverse."⁹⁵

We shall discuss the three questions principally with regard to the *Kadi* case, with reference to the differences between that case and others only to the extent that such differences become important to our discussion.

A. The Competence of the Community to Implement Smart Sanctions

To the uninitiated, the competence dispute will undoubtedly seem like a tempest in a teapot. There is no doubt that the current EC Treaty expressly provides the Community with the power to impose economic sanctions on third countries. The only question is the extent to which the Community may impose such measures on individuals. Especially in the light of the fact that the Treaty of Lisbon, if ratified, would settle this issue in favor of the Community,⁹⁶ little seems to be at stake surrounding the competence issue in the long term. This may also explain why every judicial opinion (whether the CFI, the Advocate General, or the full Court) in one way or

⁹¹ C-402/05 P, *Kadi v. Council* (Grand Chamber), Judgment of 3 September 2008, nyr. (hereinafter "Kadi (Grand Chamber)").

⁹² *OMPI*, *supra* n. 71.

⁹³ *Id.* For similar decisions regarding other individuals and organizations, see T-253/04, *Kongra-Gel v. Council*, Judgment of 3 April 2008, nyr; T-229/01, *Ocalan v. Council*, Judgment of 3 April 2008, nyr.

⁹⁴ T-256/07, *People's Mojahedin Organization of Iran v. Council*, Judgment of 23 October 2008, nyr.

⁹⁵ *Id.* at para 168-69.

⁹⁶ Consolidated Version of The Treaty of the Functioning of the European Union, Art. 215, 2008 O.J. (C115) 47, 144 (ex Art. 301 EC, as amended by the Treaty of Lisbon).

another found that the Community had the requisite power under the present Treaty provisions. Nevertheless, some interesting developments lie buried in this dispute. As we see it, the most important conceptual aspects of this dispute are (1) the Court's limited resurrection of Article 308 EC as an implied power provision in the service of rather vaguely defined Community goals, and (2) the question as to the precise level of intent demanded of the Community legislator in exercising Community powers.

1. A Summary of Kadi on Competence

In the *Kadi* litigation, the Court of First Instance draws on the qualifications in Article 60 EC (which authorizes EC implementation of a Common Foreign and Security Policy call for “measures . . . as regards the third countries concerned”), and in Article 301 EC (which similarly authorizes implementation of a CFSP call for measures “to interrupt or reduce . . . economic relations with one or more third countries”) to suggest that the intended target of the sanctions must be one or more third countries.⁹⁷ The CFI would allow sanctions directed against individuals under Articles 301 and 60 EC only in so far as these individual sanctions “actually seek” to limit economic relations “with one or more third countries.”⁹⁸ Only insofar as the targeted individuals are connected with the government and territory of a third country (even if only by providing the governing regime with monetary support), can sanctions against such individuals be viewed as equivalent to sanctions aimed at the third country itself. In the CFI's view, the lack of such a link between Mr. Kadi and any governing regime, however, meant that

⁹⁷ *Kadi* (CFI), *supra* n. 67, at para. 95. According to one commentator, “[t]his is the most obvious and convincing textual reason why Articles 301 and 60 EC cannot serve as a basis for individual sanctions.” C. Eckes, “Judicial Review of European Anti-Terrorism Measures—The Yusuf and Kadi Judgments of the Court of First Instance,” 14 *ELJ* (2008), 74, 78. Article 60 EC reads as follows: “If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned. Without prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest.” Article 301 EC reads as follows: “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 to 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.”

⁹⁸ *Kadi* (CFI), *supra* n. 67, at para. 89.

these particular sanctions fell beyond the scope of Articles 60 EC and 301 EC.⁹⁹ In the CFI's view, Article 308 EC – the residual enabling clause allowing for all “necessary [measures] to attain, in the course of the operation of the common market, one of the objectives of the Community” – could not provide the Community with the necessary power standing alone because the contested regulation served none of the purposes spelled out in Articles 2 EC and 3 EC.¹⁰⁰

Having rejected Articles 60 and 301 EC, on the one hand, and Article 308 EC, on the other, as a proper legal basis, however, the CFI accepted the argument that a combination of all three can sustain the contested regulation. The Court read Articles 60 and 301 EC as providing a general “bridge” between EU objectives and the EC Treaty, whereby the Community may act to advance the common foreign and security objectives of the Union.¹⁰¹ If the specific Community powers are insufficient to serve these particular purposes, the Community may resort to Article 308 EC as an “additional” legal basis to serve the CFSP objectives, which are imported via Article 301 EC into the Community pillar. Hence, in the Court's view, Articles 60, 301, and 308 EC together support the contested regulation.

On appeal, Advocate General Miguel Maduro took a different approach, agreeing with the Commission that Articles 60 and 301 EC alone suffice as the legal basis for the contested regulation. In Maduro's view, economic relations with third countries are inextricably intertwined with economic relations with individuals and groups within that third country. To argue otherwise would be “to ignore a basic reality of international economic life.”¹⁰² In the eyes of the Advocate General, Article 301 EC therefore should not be read to demand a

⁹⁹ Given that the Taliban regime lost control over the government in Afghanistan, the necessary link vanished between the supporters (and associates) of that former regime and the “third country” at which the contested regulation would have to be directed for the purposes of Articles 60 EC and 301 EC, according to the CFI. See *Kadi* (CFI), *supra* n. 67, at para. 93-94.

¹⁰⁰ The measure was not aimed at establishing a common commercial policy, as the measure did not concern relations with a third country, and could not be said to be aimed at preventing the distortion of competition. A mere “theoretical” risk of distortion would not suffice. *Kadi* (CFI), *supra* n. 67, at para. 111. In particular, the Court noted that the specificity of the Security Council resolutions, coupled with the urgency of their implementation, did not raise the specter of distortions due to discrepancies in implementation across Member States. *Id.* at para. 115. Nor could the references to “solidarity,” the “United Nations,” and “peace and liberty” in the preamble to the EC Treaty be combined with the EU Treaty objectives to create a general Community objective to ensure peace and security that would sustain legislation based on Article 308 alone. *Id.* at paras. 76, 117-19.

¹⁰¹ *Id.* at para. 123. On how politics relate to the original pillar design, see Stetter, “Cross-pillar politics: functional unity and institutional fragmentation of EU foreign policies,” 11 *JEPP* (2004), 720.

¹⁰² Case C-402-05 P, *Kadi v. Council* (Opinion of AG Maduro), Opinion delivered 16 January 2008, nyr., at para 13. (hereinafter “*Kadi* (AG Opinion)”).

connection between a country's governing regime and the targeted individual or group residing or operating within that country at all.¹⁰³

The full Court, acting in its Grand Chamber formation, ultimately found yet a different way to sustain the Community's power to implement economic sanctions against individuals that are unconnected to a governing regime or particular country. The Court sided with the CFI (and against the Advocate General) on the limitations of Articles 60 and 301 EC, and also agreed that Article 308 EC could not, standing alone, serve as the legal basis to implement the smart sanctions regime. But it disagreed with the CFI that Article 301 EC could be used as a general bridge to import CFSP objectives wholesale into the Community pillar. Instead, in the Grand Chamber's view, Articles 60 and 301 EC imported a far narrower objective into the Community Pillar:

“Inasmuch as they provide for Community powers to impose restrictive measures of an economic nature in order to implement actions decided on under the CFSP, Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument. That objective may be regarded as constituting an objective of the Community for the purpose of Article 308 EC”¹⁰⁴

According to the Grand Chamber, economic sanctions bear the requisite connection to the common market (as further demanded by Article 308 EC), given that the multiplication of unilateral measures implementing the UN Security Council resolution might well affect the functioning of the common market. Thus, the Grand Chamber held that Articles 60, 301, and 308 EC can serve as the combined legal basis for the sanctions against Mr. Kadi.

2. *Reframing Competence: From Pillars and Bridges to Sinking Levels of Intent?*

The Grand Chamber's decision was clearly an exercise in judicial “statesmanship.” On the one hand, the Grand Chamber was intent to preserve some limits on Article 308 EC and some meaning to the textual reference in Articles 301 EC and 60 EC to “third countries.” On the other

¹⁰³ The Opinion thereby implicitly leaves open the question about competence to impose sanctions against individuals who do not reside in, or operate from within, a third country, although it may reach individuals who are providing funds to recipients who reside within a third country. See *id.* at paras. 13-14.

¹⁰⁴ *Kadi* (Grand Chamber), *supra* n. 91, at para. 226.

hand, it sought a path to the rather common sense conclusion that the coordination of smart sanctions at the EC level vindicates the EC's effective assistance of CFSP policies on economic measures, that such coordination relates to the EC's market functions, and that the Treaty was likely intended to, and will soon by express provision encompass, sanctions targeted at individuals who are unconnected to any particular state. And yet, there are considerable difficulties with the specifics of the Court's reasoning.

The CFI, the AG, and the Grand Chamber all noted that the new CFSP pillar, along with the duty of coherence,¹⁰⁵ cannot constitute the wholesale importation of the CFSP's substantive objectives as freestanding Community objectives.¹⁰⁶ Under this wholesale importation theory, the Community could perform via Article 308 EC much of the work of the CFSP, at least in the area of the common market. Similarly, if CFSP objectives were imported wholesale into the Community pillar by Article 301, Article 308 EC would again make much of the CFSP pillar itself superfluous. Such an expansive reading of the governing provisions should be discouraged absent a clear indication in the text.

The Grand Chamber accordingly seems right to suggest that Article 301 EC provides only a limited bridge between the CFSP and EC pillars. The Court is also correct to conclude that Article 301 EC expresses an "implicit underlying objective" to "make[] it possible to adopt *such* measures through the efficient use of a Community instrument."¹⁰⁷ But what exactly are these measures that Article 301 EC seeks to enable? If, as the Court held, Article 301 EC is limited to country-specific sanctions, then it seems difficult to contend that Article 301 EC at the same time expresses an underlying objective that is broader than enabling the Community take action against specific countries. The Court's description of Article 301 EC as conferring "powers to impose restrictive measures of an economic nature in order to implement actions decided on under the CFSP" glosses over the narrower, country-specific meaning that the Court

¹⁰⁵ See, e.g., Christoph Hermann, *Much Ado about Pluto? The 'Unity of the Legal Order of the European Union' Revisited*, in M. Cremona and B. de Witte (Eds.), *EU Foreign Relations Law* (Hart 2008), 19; M. Cremona, "Defending the Community Interest: the Duties of Cooperation and Compliance," in M. Cremona & B. de Witte, *supra*, at 125.

¹⁰⁶ Looking ahead to the Lisbon Treaty, the current strict separation of objectives between those of the Community and those of the Union may become a thing of the past. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Art. 3 TEU (ex Article 2 TEU, as amended), 2008 O.J. (C115), 1, 13. See also Art. 352 TFEU (ex Art. 308 TEC, as amended), *id.* at 153.

¹⁰⁷ *Kadi* (Grand Chamber), *supra* n. 91, at para. 226 (emphasis added).

itself attributed to Article 301 EC. Its holding that Article 308 EC can fill this gap seems somewhat less than convincing.¹⁰⁸

Unfortunately, the Advocate General's fix may not be much better. Recall that in Maduro's view, economic relations with individuals within a given country are tantamount to economic relations with that country itself, and that to argue otherwise would be to ignore economic reality. So far so good. This means that sanctions against a third country can take the form of sanctions against individuals and groups within a third country despite the fact that those individuals and groups had no particularized connection with the governing regime. The trouble with the sanctions against Mr. Kadi, however, is that they are not at all aimed at undermining economic relations with any particular third country or set of countries. The contested regulation is aimed, instead, at controlling the economic affairs of the targeted individuals and groups wherever they may be.

One possible way that the Advocate General's fix could begin to solve the problem is if we look beyond the disagreement about presumed "basic realit[ies] of international economic life" and turn the disagreement into one about the *level of intention* required for Community action under Article 301 EC. Put another way, the CFI and the Grand Chamber both view Article 301 EC as granting the power to implement sanctions specifically targeted at one or more third countries. This reading of Article 301 EC demands what might be called a "specific intent" to reduce economic relations with a particular third country, which is in keeping with the Court's purposive reading of several other articles, including, for example, Article 95 EC.¹⁰⁹ On the specific intent reading of Article 301 EC, however, there seems to be no way around the fact that the sanctions against Mr. Kadi are not specifically aimed against a third country. Therefore, they do not fit the specific intent that Article 301 EC would demand of the Community legislator,

¹⁰⁸ *Kadi* (Grand Chamber), *supra* n. 91, at para. 226-27. Another question about resort to Article 308 EC is raised by the fact that Article 301 EC already seems to provide the general power to "take the necessary urgent measures" to get whatever job specified by Article 301 EC done. If the only relevant objective to be served derives from Article 301 EC itself, it seems strange that one would need to look beyond Article 301 EC for additional powers of implementation. On the relevance of Article 308, see M. Ličková, "European Exceptionalism in International Law," 19 EJIL (2008), 463, at 471. For a more sympathetic view of reliance on the combination of Articles 60 EC, 301 EC and 308 EC as the legal basis in these circumstances, see P. Koutrakos, *Legal Basis and Delimitation of Competence in EU External Relations*, in Cremona & de Witte, *supra* n.105, 171; Tomuschat, *supra* n. 161, at 540.

¹⁰⁹ See Case C-376/98, *Germany v. Parliament and Council*, [2000] ECR I-8498, I-8524 (Tobacco Advertising) (holding that Community measure must "genuinely have as its object" the prevention or elimination of obstacles to free movement or distortions of competition).

even if we acknowledge Maduro's "basic reality of international economic life." Article 308 EC is no help in this regard either.

On a different reading of the level of purpose needed under Article 301 EC, by contrast, the Community would only need what one might call a "general intent" to reduce economic relations with third countries. Inasmuch as the freezing of Mr. Kadi's assets will naturally reduce economic relations with the third country in which Mr. Kadi lives or to which he dispatches funds, the Community legislator intends for the freezing to reduce these relations in such a manner. But the reduction of the relations with, say, Egypt, is not itself the specific purpose of the action. In Mr. Kadi's case, the Community legislator seems to have the basic intent to reduce economic relations with third countries albeit in the service of a more specific intent of disabling an individual from funding a particular terrorist organization. Similarly, with regard to Al-Barakaat International, the Swedish based outpost of a Somali financial network, sanctions against Al-Barakaat International would naturally reduce economic relations with Somalia. This kind of general intent implies more than the mere consideration of incidental effects. The international aspect of the terrorist funding scheme is not a mere incidental effect, but indeed a central purpose (albeit not a country specific one) of the sanctions regime. Accordingly, if we view the disagreement between the Advocate General and the Court as one regarding the level of intent, and then side with the Advocate General, we might see how this could point to solving the competence riddle.¹¹⁰

Significant difficulties with this proposed solution remain, although, as noted above, there may be some general wisdom in allowing for the expansive interpretation of Article 301 EC (and Article 60 EC). These provisions were meant not to restrict the sphere of Community action, but to place on firmer footing the prior, improvisational act of using Article 133 EC to implement a decision reached in the context of European Political Cooperation. In light of the vulnerability of using Article 133 EC as a means to impose non-trade motivated sanctions on specific third countries, Articles 301 and 60 EC expressly allow for such action. The express reference to actions directed against "*one or more* third countries"¹¹¹ and "*the* third countries

¹¹⁰ In some ways, this debate resembles the old one about the "instrumental" versus "teleological" vision of Article 133, which, alas, may not have become as "irrelevant" with the introduction of Article 301 as some had hoped. See P. Koutrakos, *Trade, Foreign Policy and Defense in EU Constitutional Law*, (Hart Publishing, Oxford-Portland, 2001), 77.

¹¹¹ Article 301, *supra* n. 97.

concerned”¹¹² therefore seems to have been intended not as a limitation on the scope of sanctions, but as an emphatic statement to codify existing practice and remove any constitutional doubt about these particular sanctions.¹¹³ The wording of Articles 301 EC and 60 EC, then, was almost surely not intended to exclude sanctions against individuals who are not connected to a governing regime or country, but was simply intended to place its primary emphasis on country-specific sanctions. An expansive reading of these provisions that requires only a general intent of reducing economic relations with third countries can be said to reflect this understanding.¹¹⁴

B. On the Relation between UN, Community, and Member-States Legal Orders

If the Community has the competence to implement a UN Security Council Resolution that calls for economic sanctions against individuals, must the Community implement that resolution? Does international law or Community law oblige the Community to heed the UNSC Resolution? And to what extent must the Community observe fundamental rights – whether they be its own or those of international law – in the process? These questions all concern, in one form or another, the fundamental relationship between the UN, Community, and Member State legal orders, an issue that was explored most extensively by the Court of First Instance in the *Kadi* case, and then revisited and modified in the course of the Grand Chamber appeal.

As we shall see, in this general discussion of the relation between the international and Community legal orders, the opinions move from a strictly internationalist approach in the CFI to a Community centered approach in the opinion of the Advocate General, and end up closer to the Community’s traditional “middle ground” in the Grand Chamber judgment of the ECJ.¹¹⁵ In

¹¹² Article 60, *supra* n. 97.

¹¹³ See Eeckhout, *External Relations of the European Union*, (Oxford U. Press, USA, 2004), 424-25; Koutrakos, *supra* n.110, at 70.

¹¹⁴ It should be noted that if the sanctions are indeed adequately based on Articles 60 EC and 301 EC alone, the legality of the contested regulation would seem to be undermined by the unnecessary resort to Article 308 EC. Although the Court has held harmless acting pursuant to an erroneous mandate to include the European Parliament, see Case 165/87, *Commission v. Council*, [1988] ECR 5545, para. 20, the Court has consistently condemned the erroneous resort to a mandate of unanimity instead of qualified majority voting, see, e.g., Case C-211/01, *Commission v. Council* (Bulgaria and Hungary Agreements), [2003] ECR I-08913, para. 52.

¹¹⁵ Cf. Schütze, *supra* n. 42. In the following discussion we intentionally avoid the descriptors “monist” or “dualist,” as neither seems apt any longer to capture the complex interactions among multiple legal systems. See A. v. Bodgandy, “Pluralism, Direct Effect, And The Ultimate Say: On The Relationship Between International And Domestic Constitutional Law,” 6 *Int. J. Const. L.* (2008), 397, 400 (noting that “from a scholarly perspective, [the

this portion of the judgment, the ECJ displays a certain sympathy toward international law while nevertheless focusing on fundamental principles of the Community's domestic legal order as the ultimate rule against which the legality of Community action must be judged.

1. The Court of First Instance: From International Law to Community Law

The CFI in *Kadi* begins by identifying two independent sources of primacy of the Member States' obligations under the UN Charter. Under customary international law, codified in the Vienna Convention on the Law of Treaties, a party to a treaty (including constituent instruments of an international organization) may not invoke the provisions of internal law as a justification for its failure to perform a treaty obligation.¹¹⁶ More specifically, Article 103 of the UN Charter provides for the primacy of UN Members' Charter obligations over any other international agreement.¹¹⁷ This primacy extends to decisions of the Security Council which the UN members are required to carry out under Charter Article 25.¹¹⁸

EC law itself, according to the CFI, echoes this primacy of UN obligations.¹¹⁹ Article 307 EC, for example, expressly states that existing obligations between EC Member States and third states (*i.e.*, Charter obligations) are not affected by the EC Treaty.¹²⁰ Another provision, Article 224 (now 297) EC, was "specially introduced into the Treaty in order to observe the rule of primacy defined above."¹²¹ This Article requires Member States to consult on preventing impairment of the common market by measures Member States are required to take for the

terms 'monism' and 'dualism'] are intellectual zombies of another time and should be laid to rest, or 'deconstructed.' The general understanding of the relationship between international law and domestic law should be placed on another conceptual basis.").

¹¹⁶ *Kadi* (CFI), *supra* n. , at paras. 181-82; see *Yusuf*, *supra* n. 90, at para. 272.

¹¹⁷ *Kadi* (CFI), *supra* n. 67, at para 183.

¹¹⁸ See *supra* text at n. 15. The Court cites the Order of the International Court of Justice in the Lockerbie case. See *Kadi* (CFI), *supra* n. 67, at para. 184. In *Behrami*, 45 Eur. Ct. H.R. at 122, the Court found the responsibility of the United Nations for acts of units composed of personnel supplied by member states and NATO to which the Security Council had delegated enforcement functions under Chapter VII of the Charter. The Court cited the *Kadi* series of cases in connection with the interpretation of Art. 103 of the Charter. *Id.* at 92.

¹¹⁹ See *Kadi* (CFI), *supra* n. 67, at paras. 176-208. The Court speaks of "international legal order under the United Nations." *Id.* at paras. 178,180. See generally, Bethlehem, "Regional Interface Between Security Council Decisions and Member States Implementation: The Example of the European Union," in Gowlland-Debbas, *United Nations Sanctions and International Law*, *supra* n. 9, at 291-305.

¹²⁰ *Kadi* (CFI), *supra* n. 67, at paras. 185-86. This provision applies to third-states' agreements concluded before January 1, 1958 or the date of accession for acceding states. On the position of Germany, see *id.* at para. 187. The Court cites case law of the European Court of Justice applying this provision. *Id.* at para. 186.

¹²¹ *Id.* at para. 188.

purpose of maintaining international peace and security. Such measures include the Resolutions of the Security Council.¹²² Accordingly, the CFI reaches the remarkable conclusion that:

“pursuant both to the rules of general international law and to the specific provisions of the Treaty, *Member States* [of the EC-EU] may, and indeed must leave unapplied any provisions of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to their proper performance of their obligations under the Charter of the United Nations.”¹²³

In the CFI’s view, the Community itself, by contrast, is not similarly bound by international law to carry out UN Security Council decisions. To be sure, as a general matter, the Community “must respect international law” and the exercise of Community powers must be interpreted in the light of the relevant rules of international law.¹²⁴ And yet, this does not immediately translate into a Community obligation to obey Security Council decisions. In the CFI’s view, “[t]he reason is that the Community is not a member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor of the rights and obligations of the Member States for the purposes of public international law.”¹²⁵

Having generally dismissed an immediate international legal obligation on the part of the Community to implement UN Security Council decisions, the CFI then proceeds to “communitarize” that duty. Put another way, although the Community is not directly bound by

¹²² *Id.* at para. 189 (citing ECJ case law).

¹²³ *Id.* at para. 190-91 (emphasis added) (citing the Centro-Com Case of the ECJ in paragraph 191). In Resolution 1456 the Security Council declared that “[s]tates must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular international human rights ... law.” Security Council Resolution 1456, U.N. Doc. S/RES/1456 (Jan. 20, 2003), para. 6. But note that the Security Council was not acting under Chap. VII. See *id.* at paras. 1-5. This resolution was adopted about one year after the application of *Kadi* and *Yusuf* and after the adoption of the contested Regulation 881/2002. See *id.* Article 9 of the Regulation provides to the contrary that “[t]his Regulation shall apply notwithstanding any rights conferred or obligations imposed by any international agreement....” See also Eckes, *supra* n. 97, at 89.

¹²⁴ *Kadi* (CFI), *supra* n. 67, at para. 199. Cf. C-286/90, *Anklagemyndigheden v Poulsen and Diva Navigation Corp.*, [1992] ECR I-06019, para. 9. Along with this statement, the CFI points to Charter Art. 48(2), which requires UN members acting through “the appropriate international agencies” to carry out Security Council decisions. *Id.* In *Yusuf*, the same panel of judges elaborates on its findings in *Kadi* and reaches the same conclusion. *Yusuf*, *supra* n. 90, at paras. 228-284. In this case the Court rejects the argument that the Security Council, in adopting the relevant Resolutions, exercises powers delegated to it by the Community. *Id.* at para. 179. In the more recent case of *Organisation des Modjahedines*, the Court, in distinguishing that case from *Kadi* and *Yusuf* on other grounds, confirms its view that the Community, acting through its members, was required merely to transform the Security Council Resolutions into its own legal order. See *OMPI*, *supra* n. 71, at paras. 100-02. For more on that case, see *supra* text at n. 92. .

¹²⁵ *Kadi* (CFI), *supra* n. 67, at para. 192. The Court indicates that this position “follows from the case-law.” *Dorsch Consult*, *supra* n. 86, at para. 74.

the Charter, the EC “must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it.”¹²⁶ To arrive at this position, the Court first begins with the basic proposition that the Member States could not affect their obligation under the Charter by concluding the EC Treaty. It then invokes specific EC Treaty provisions as evidence of the desire of the Member States to fulfill their Charter obligation and as implying a duty of Community institutions not to impede the performance by the Member States of their Charter obligations.¹²⁷ Finally, the CFI resurrects the idea of functional succession.¹²⁸ According to the CFI, once the Member States have transferred to the Community exclusive powers in an area (*i.e.* Common Commercial Policy) governed by the Charter, “the provisions of that Charter have the effect of binding the Community.”¹²⁹ In the CFI’s view, Article 301 EC confirms this view simply by establishing Community competence for the implementation of sanctions.¹³⁰ In short, according to the CFI, the substance of the Charter obligations is the same for the Community as for the Member States.

2. *The European Court of Justice and the Promise of a Constitutional Legal Order*

¹²⁶ *Kadi* (CFI), *supra* n. 67 at para 193; see also *id.* at para. 207.

¹²⁷ *Id.* at para 196; see also Art. 224 & 234(1). Note, however, that Art. 301 speaks expressly of sanctions against “one or more third countries.” See Art. 301, *supra* n.97.

¹²⁸ The doctrine was first developed in the European Union in connection with the EC’s participation in the GATT. See *supra* n. 40 and accompanying text. In *International Fruit*, the Court held that to the extent the EC assumed the competences previously exercised by the Member States, and was recognized as doing so by the Member State’s treaty partners, the EC became bound by that instrument. *International Fruit*, *supra* n. 40, at para. 18. See also *Dorsch Consult*, *supra* n. 86, at para. 74. Moreover, the validity of a Community act may be reviewed by reference to international law if the latter confers rights upon individuals rights that they can invoked in court. *Id.* at para. 19.

¹²⁹ *Kadi* (CFI), *supra* n. 67 at para. 203 (citing, by analogy, the EJC cases *International Fruit*, para 18 on whether the Community is bound by GATT, and *Dorsch Consult*, para 74). Note that in *International Fruit*, the Court suggested that the acceptance of the Member States’ treaty partners played a role in the Community’s functional succession. See *International Fruit*, *supra* n. 40, at para. 16. The CFI in *Kadi* does not, however, address this latter component of functional succession in the context of Security Council sanctions. Furthermore, it bears emphasis that in the CFI’s view, what might be termed “limited” functional succession – that is functional succession in a limited area of Member State activity – creates an obligation only under EC law, and not under public international law, to obey the UN Charter. *Id.* at para. 207 (“it is not under general international law . . . but by virtue of the EC Treaty itself, that the Community was required to give effect to the Security Council resolutions concerned, within the sphere of its powers”). This conclusion also explains the CFI’s choice of words that the Charter provisions have only “the effect” of binding the Community. *Id.* at para. 203.

¹³⁰ See *id.* at para. 202. The Court cites the Common Position 2002/402 of the Council, in which the Council found it necessary to put into effect sanctions against Usama bin Laden, the Al Qaeda network and the Taliban and other associates in accordance with the Security Council Resolutions 1267 (1999), 1333 (2000) and 1390 (2002). *Id.* at para. 205.

On appeal, the Advocate General as well as the Grand Chamber of the European Court of Justice managed largely to avoid the fundamental question of the Community's legal obligations under principles of public international law. Without addressing whether the EC is bound to implement the UN Security Council Resolution to freeze individuals' assets, the Advocate General and the Grand Chamber judgment focused solely on the question whether such implementation could be asked to ignore fundamental rights review at the Community level.

In answering this question, the historic opinion of the Advocate General and judgment of the Court, in our view, complete the original promise of the Court to define the European Community as an "autonomous legal order." For what appears to be the first time in the history of published opinions, we find references to the Community's "municipal" legal order,¹³¹ and to giving "municipal" legal effect¹³² to international legal obligations within the Community, thus using the classic international law term hitherto reserved for a state's domestic legal system. To be sure, this is not the first time the European Court of Justice has acted as if it were a "domestic" court.¹³³ But the clarity with which the Advocate General and the Grand Chamber defend the primacy of the European Legal Order vis-à-vis international law is remarkable nonetheless.

After reiterating the general seriousness with which the Community takes its international legal obligations, both the Advocate General and the Court complete the constitutionalization of the European legal order by declaring emphatically that no obligation under international law can "prejudic[e] the principles of the EC Treaty."¹³⁴ Although there has been scattered precedent for this position in the Court's prior decisions,¹³⁵ the point has never been put quite so starkly. It is now clear that even Article 307 EC, which provides that Member States "rights and obligations"

¹³¹ *Kadi* (AG Opinion), *supra* n. 102, at para.22.

¹³² *Id.* at para. 23.

¹³³ The Court has, numerous times in the past, considered the applicability of international law within the Community's legal order, allowing international legal obligations to be invoked directly in Community and Member State courts. See C-104/81, *Hauptzollamt Mainz v. Kupferberg*, [1982] E.C.R. 3641 (treaties); *Poulsen*, *supra* n. 124 (customary international law).

¹³⁴ *Kadi* (Grand Chamber), *supra* n. 91, at para. 285.

¹³⁵ See C-94/03, *Commission v. Council*, [2006] ECR I-1; C-122/95, *Germany v. Council*, [1998] ECR I-973 (annulling Council decision to approve international agreement that would violate Community nondiscrimination principles). Other precedents cited by the Advocate General do not push the point of Community autonomy nearly as far. See Joined Cases C-317/04 and C.318/04, *Parliament v. Council & Commission*, [2006] ECR I-472; Case C-327/91, *France v Commission*, [1994] ECR I-3641; Opinion 2/94, [1996] ECR I-1759, para. 35. Other cases cited by the Advocate General for duties of cooperation among the Member States in the implementation of international legal obligations do not, of course, stand for the proposition of acting in opposition to those international obligations. See, for instance, Case C-25/94, *Commission v Council*, [1996] ECR I-1469, paras. 40-51; Ruling 1/78, [1978] ECR 2151, para. 33; and Opinion 2/91 [1993] ECR I-1061, paras. 36-8.

under preexisting international treaties “shall not be affected by the provisions of this Treaty” cannot derogate from the fundamental principles of “liberty, democracy, and respect for human rights and fundamental freedoms” upon which the Union is built.¹³⁶ As the Advocate General opined: “[I]n the final analysis, the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law.”¹³⁷ And Community law dictates that the fundamental principles of liberty, democracy, and respect for human rights and fundamental freedoms will not give way.

In this portion of the opinion, the Advocate General takes a rather inward looking approach that concerns itself little with the international legal obligations of the Community and focuses, instead, on the internal constitutional restraints that must govern all Community action. As a result, the Advocate General manages to avoid a host of issues. He avoids revisiting the CFI’s finding that the EC was not an actual “addressee” of the Security Council’s call for sanctions, which was a questionable finding given the actual text of the Resolution.¹³⁸ He avoids re-examining the CFI’s judgment on functional succession, a judgment that, in our view, seems questionable in that (a) functional succession would appear to create duties under public international law as well as EU law,¹³⁹ and (b) a holding of functional succession with regard to any positive duty to implement UN Security Council decisions (as opposed a negative duty to refrain from violating an international norm) seems unwarranted in this case given that Member States retain at least some powers to implement certain targeted economic sanctions on their own.¹⁴⁰ The Advocate General also avoids consideration of the applicability of international

¹³⁶ *Id.* at para. 303; *Kadi* (AG Opinion), *supra* n. 102, at para. 31.

¹³⁷ *Kadi* (AG Opinion), *supra* n. 102, at para. 23.

¹³⁸ See U.N. Doc. S/RES 1333, *supra* n. 62, at para. 17 (“The Security Council ... [c]alls upon all States and all international and regional organizations, including the United Nations and its specialized agencies, to act strictly in accordance with the provisions of this resolution,” which includes a freeze on funds in para 8(c)). The CFI refers to this Resolution prominently. *Kadi* (CFI), *supra* n. 67, at paras. 14, 88 *passim*; see also, e.g., U.N. Doc. S/RES 1390, *supra* n. 62, at para. 7, (urging “all States, relevant United Nations bodies, and, as appropriate, *other organizations* ... to cooperate fully with the [Sanctions] Committee and with the Monitoring Group....”) (emphasis supplied). It is not clear what the CFI would hold if it were to agree that the Community was “an addressee.”

¹³⁹ See *supra* text at n. 38.

¹⁴⁰ For an early argument of functional succession in the context of economic sanctions, see P.J. Kuijper, “Sanctions Against Rhodesia: The EEC and the Implementation of General International Legal Rules,” 12 CMLR (1975), 231. Others have more recently argued that some elements of functional succession may apply to economic sanctions, despite the fact that the EC’s powers over economic sanctions – as opposed to a common commercial policy – may not be exclusive. See Eeckhout, *supra* n. 113, at 438. Eeckhout notes, however, that other elements of the *International Fruit* doctrine, such as the recognition of substitution by other treaty partners may not (yet) obtain in the case of economic sanctions. See *Id.* at 439. We are less convinced by the application of functional succession in the absence of exclusive Community powers when the question surrounds a positive international command to take action – as opposed to a negative prohibition against certain forms of action. As long as the EC has not by treaty or

law, including customary international human rights law, to the EC as legal person in the international legal system, which, in our view, would seem to follow from prior case law.¹⁴¹ He avoids exploring the most delicate question whether the UN and the Security Council are bound by fundamental rights and whether the UN Security Council resolution must be interpreted to accord with those rights, which, as we discussed earlier, it must.¹⁴² And he avoids the ultimate question concerning the clash of multiple, overlapping legal systems, that is, whether the Member States or the Community have an *international* legal obligation to implement UN Security Council sanctions that would violate principles of Community law.

In this part of the opinion, the full Court inches somewhat closer to a charitable consideration of international law. The Grand Chamber strives to solve the potential incompatibility of Community resistance with the obligations of the Community or its Member States under the UN Resolution by providing a sympathetic interpretation of the Security Council resolution in question. Unlike the Advocate General, the Grand Chamber specifically considers the compatibility of EC fundamental rights review with the successful implementation of the Security Council Resolution. After stating the primary importance of guarding against violations of Community law, the Court notes that international law does not demand otherwise. The UN Charter, according to the Court, “leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.”¹⁴³ The Court concludes:

“[I]t is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that

secondary legislation displaced Member States’ ability to comply with the international obligation, the EC has not substituted itself for the Member States in that arena. Cf., e.g., M. Nettesheim, “U.N. Sanctions against Individuals – A Challenge to the Architecture of European Union Governance,” 44 CML Rev. (2007), 567, 585; see also Lenaerts & De Smijter, “The United Nations and the European Union: Living Apart Together,” in Wellens (Ed.), *International Law: Theory and Practice*, (Martinus Nijhoff, The Hague, 1998) 439, 447-53. According to these authors, the EC is not bound by the Charter or Security Council Resolution except when “the Community considers itself bound ... through substitution for its Members” where the Community has completely taken over the powers previously exercised by Member States.. *Id.* at 447-48.

¹⁴¹ *Supra* text at note 17. On EC obligations under international human rights law, see Ahmed & Butler, *supra* n. 40, at 772-78 *passim*. The ECJ has expressly acknowledged the applicability of general international law to EC/EU actions in their internal and external relations, but it has yet to determine the applicability of international human rights law to EC and EU. *Id.* at 778 & n.37-38.

¹⁴² See *supra* Part I.

¹⁴³ *Kadi* (Grand Chamber), *supra* n. 91, at para 298.

measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.”¹⁴⁴

Buried in the Court’s decision to make this work, however, is an important assumption. The Court seems to assume that Member States and the Community can indeed find a way consistent with Community law to discharge whatever international legal obligations they may have to implement the UN Security Council resolution. To be sure, the Court’s opinion indicates that if complying with UN obligations in a way that also comports with fundamental principles of Community law turns out to be impossible, Community principles will prevail as a matter of Community law. As set up in the *Kadi* judgment, however, the Court conveniently avoids this ultimate pluralist clash.

C. Fundamental Rights Reviewed: The Promise and Failure of the European Courts

The internationalist approach of the CFI and the various, more domestically minded approaches of the Advocate General and Grand Chamber lead in predictably different directions on fundamental rights review. As the CFI searches for fundamental rights norms in public international law, the Advocate General and the Grand Chamber exclusively apply the Community’s own principles of fundamental rights. In this portion of the opinion, the Advocate General and the Grand Chamber find their roles reversed, with the Advocate General taking a somewhat more open approach than does the Grand Chamber to the competing jurisdictions at the EC and international levels. None of these opinions, however, takes an approach that seriously engages international human rights law. Although each path taken leads to some remarkably strong assertions of judicial review and the protection of rights, each also misses an important opportunity to engage in a cross-system dialogue on international human rights with the United Nations.

1. The Court of First Instance: Bold Small Steps

The Court of First Instance approached judicial review with considerable caution given the “structural limits” imposed by general international law and the EC Treaty itself. Recall that

¹⁴⁴ *Id.* at para. 299.

the CFI considered the contested Regulation freezing Mr. Kadi's assets as implementing the obligation placed by the Security Council on its Member States and then indirectly by the EC Treaty on the Community itself to give effect to the sanctions. In the CFI's view, review of the "internal lawfulness" of the Regulation, especially under the general principles of Community law on the protection of basic rights, would indirectly question the lawfulness of the relevant Security Council Resolutions and therefore could not, as a general matter, be justified under either international law or Community law. On the court's internationalist approach, review should therefore be confined to observance by the Community institutions of "formal and procedural requirements and jurisdiction, the appropriateness and proportionality of the Regulation in relation to Security Council Resolutions," and – rather surprisingly – indirectly to the compatibility with international *ius cogens*, "in particular the mandatory prescriptions concerning the universal protection of the rights of human person."¹⁴⁵

Relying on the Vienna Convention on the Law of Treaties, the court defines *ius cogens* as "a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible."¹⁴⁶ In the court's view, then, the Security Council, no less than any other international actor, is subject to peremptory rules of international law and its resolutions have binding force only to the extent that it complies with these rules. Moreover, citing the UN Charter provisions on human rights, the court – in a sweeping gesture – holds that "mandatory provisions concerning universal human rights" fall within *ius cogens* and thus, "highly exceptionally" within the scope of the court's review power.¹⁴⁷

¹⁴⁵ *Id.* at para 217-231. In *Yusuf*, the Court adds other factors subject to review in an action for annulment: internal consistency and "external lawfulness." *Yusuf*, *supra* n. 90, at paras. 332-339. The Court adds, "it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights . . . [or to assess the] evidence relied on by the Security Council or, subject to the limited extent of [*ius cogens* review,] to check indirectly the appropriateness and proportionality of those measures." *Id.* at paras. 337-38. Such checks would mean "trespassing on Security Council's prerogatives under Chapter VII," which entail political assessment of both the question whether there exists a threat to international peace and what measures are to be adopted against persons concerned. *Id.* at para. 339; see also *Ayadi*, *supra* n. 90, at paras. 115-18.

¹⁴⁶ *Kadi* (CFI), *supra* n. 67, paras. 226-27. The Court cites the Vienna Convention on the Law of Treaties, Art. 5 and 53, on peremptory norms. See *id.* at 227 and *supra* text at nn. 116-118. Cf. Kadelbach, "Jus Cogens, Obligations Erga Omnes and Other Rules – The Identification of Fundamental Norms" in Tomuschat & Thouvenin, *The Fundamental Rules of International Legal Order – Jus Cogens and Obligation Erga Omnes*, *supra* n. 73; C. Tams, *Enforcing Obligation Erga Omnes in International Law*, (Cambridge, 2005).

¹⁴⁷ *Kadi* (CFI), *supra* n. 67, at paras. 227, 231. See also *supra* text at nn. 12-27. The Court refers to the preamble of the Charter (reaffirming faith in fundamental rights), Chapter I (the purpose of the UN to encourage respect for human rights) and Art. 24(2) (the Security Council to act "in accordance with the Purposes and Principles of the Charter."). See *Kadi* (CFI), *supra* n. 67, at paras. 227-28. The Court also cites the Advisory Opinion of the

The court is not explicit about the precise basis for its jurisdiction over the application of *ius cogens* to the Security Council Resolution and contested EC regulation, but we can surmise the extended path of reasoning that leads to the court's conclusion. To be sure, it may simply be that the Court believed certain rules of *ius cogens* had direct effect.¹⁴⁸ More likely, however, the court arrived at the conclusion about its jurisdiction and the effect of *ius cogens* in EC Courts by a more circuitous route. As the judgment tells us:

“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, highly exceptionally, 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 . . .
»¹⁴⁹

Without telling us, the court seems to rest here on the principle of implementation, as developed in the context of the GATT in *Fediol*¹⁵⁰ and *Nakajima*.¹⁵¹ According to this idea, a Community act that is intended to implement a treaty obligation can be judged by reference to those treaty obligations even if the rules of that treaty otherwise lack direct effect.¹⁵² From the CFI's perspective, the analogy to the GATT/WTO on this point would seem apt, given that the court saw the Community as functionally succeeding the Member States in their obligations to implement the Security Council resolution much as the Community had succeeded the Member States with regard to the GATT/WTO.

International Court of Justice of 9 July 1996, *The Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ p.226, para 79 (speaking of “intransgressible principles of international customary law”), and also Advocate General Jacob's Opinion in Case C-84/95 *Bosphorus*, [1996] ECR I-3953 (citing para. 65). See *id.* at 231. For a useful survey of domestic, regional and international practice, see P. Gutherie, “Security Council Sanctions and Protection of Individual Rights,” 60 N.Y.U. Annual Survey of American Law (2004), 491-541.

¹⁴⁸ Cf. C-162/96, *Racke v. Hauptzollamt Mainz*, [1998] E.C.R. I-3655 (Opinion of Advocate General Jacobs), at para. 84 (noting that some rules of customary international law, such as international humanitarian law, intend to confer rights on individuals).

¹⁴⁹ *Kadi* (CFI), *supra* n. 67, at para. 227 (emphasis added).

¹⁵⁰ C-70/87, *Fediol v. Commission*, [1989] E.C.R. 1781.

¹⁵¹ C-69/89, *Nakajima v. Council*, [1991] E.C.R. I-2069.

¹⁵² See, e.g., *Eeckhout*, *supra* n. 113, at 316-24.

To be sure, in *Fediol* and *Nakajima* the ECJ did not apply *ius cogens*, but only those rules found in the GATT/WTO itself. The more recent case of *Racke*,¹⁵³ however, would seem to help fill that gap. In that case, the Court relied on the direct effect of an international agreement that would have benefited the claimant to consider whether a subsequent EC regulation suspending those benefits was consonant with the “fundamental” customary international law principle of changed circumstances (*rebus sic stantibus*).¹⁵⁴ The *Racke* Court insisted that it was not simply giving direct effect to the customary international law principle of changed circumstances. Instead, the customary international law principle of changed circumstances entered the calculus only “incidentally” to challenge an EC Regulation that might be in violation of an international agreement under which the claimant did have direct rights.¹⁵⁵ Accordingly, an individual can invoke fundamental customary international law that is not itself directly effective to challenge the conformity of EC acts with an underlying international legal obligation (such as a treaty obligation) as long as that underlying treaty obligation does have direct effect. In short, fundamental customary international law provides the background against which Community compliance with directly effective international legal obligations may be judged.

Even on the CFI’s view of functional succession, the sanctions case would still be one step removed from *Racke*. This is because, unlike the underlying treaty obligation in *Racke*, the Security Council Resolution did not have direct effect. But here the *Nakajima* principle of implementation comes in again. Given that the contested EC sanctions regulation was ultimately intended to give effect to (what the CFI saw as) the Community’s obligation to implement the Security Council Resolution, we are operating again within the implementation principle. This means that the EC regulation can be reviewed for its compliance with the rules of the Security Council Resolution. And since the rules of the Security Council Resolution are thereby accorded indirect effect, so, too, indirect effect can be given (in line with *Racke*) to the fundamental customary international law (including *ius cogens*) that forms the legal background against which the Security Council Resolutions operate.

¹⁵³ C-162/96, *Racke v. Hauptzollamt Mainz*, [1998] E.C.R. I-3655. For a discussion of this case, see, e.g. J. Wouters and D. Van Eeckhoutte, “Giving Effect to Customary International Law Through European Community Law,” in J. Prins and Annette Schrauwen (Eds.), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Europa 2002), 181; Eeckhout, *supra* n. 113, at 328-33.

¹⁵⁴ *Racke*, *supra*, at para. 48. The Court does not further explain in *Racke* what it considers to be “fundamental” rules of customary international law. *Ius cogens*, however, would seem to qualify.

¹⁵⁵ *Racke*, *supra*, n. 153, at para. 47.

If this train of thought is correct and we are ultimately operating under some form of the *Racke* principle, such indirect consideration of customary international law (and hence of *ius cogens* as well) would examine only “manifest” breaches of law.¹⁵⁶ This, of course, raises the question about which specific human rights have risen to the elevated level of *ius cogens* and whether the EC sanctions regulation violates those norms.

a. On the Right to Use Property

In the CFI’s view, the right to property, “measured by the standard of universal protection of human rights” is covered by *ius cogens*, but it has not been infringed by the freezing of funds. This is so *first*, because of the derogations and exemptions according to which, “on request of the interested person, and unless the Sanctions Committee expressly objects,” the national authorities may lift the freezing to cover basic expenses and fees.¹⁵⁷ And, *second*, there was no arbitrary action because the freezing of funds is an aspect of sanctions by the UN in an important fight against international terrorism endangering peace; the freezing was a precautionary measure rather than confiscation; the Security Council reviews the measure periodically; and finally, the person concerned may present their case “at anytime” to the Sanctions Committee through the Member State of their nationality or residence, and the information will be checked by the Committee and the Security Council.¹⁵⁸ Throughout the consultation and delisting procedure generally the EC Members are bound, the Court points out, in accordance with Article 6 EU Treaty and under Community general principles to respect fundamental human rights “as guaranteed by the European Court on Human Rights,” “given that the respect of those

¹⁵⁶ *Id.* at para. 52.

¹⁵⁷ *Yusuf*, *supra* n. 90, at para 290. The Court mentions exemptions for basic expenses including payments for food stuffs, rent, medicines and medical treatment, taxes, public utilities charges, extraordinary expenses, ensuring avoidance of “inhuman or degrading treatment.” *Id.* at paras. 291-92.

¹⁵⁸ *Id.* at paras. 292-303. In *Kadi* (CFI), *supra* n. 67, at paras. 232-52, the Court follows the same reasoning in rejecting the property rights claim and the claim of a breach of the proportionality principle. In *Ayadi*, *supra* n. 90, at paras. 119-42, the Court responds in some detail to the applicants’ charge of ineffectiveness of the exemptions and derogations and of the impact on his freedom to pursue his business as a taxi driver in Ireland. The Court notices the possibility for the victim of the freeze to sue national authorities in domestic courts, which may be required, under the Community law principles of effectiveness, ultimately to order the national authority to present the information to the Sanctions Committee, contrary to the standard rule against forcing diplomatic protection. *Id.* at paras. 150-152. The Court refers to a case before a Brussels Court. *Id.* at para. 152.

fundamental rights does not appear capable of preventing the proper performance of their obligations under the Charter of the United Nations.”¹⁵⁹

Apart from the apparent conceptual difficulty of finding a *ius cogens* right that is nonetheless derogable for non-arbitrary reasons, the court’s view that the property rights are presently protected by the highest norm of international law is not convincing. The only support for the court’s conclusion cited in the judgment is a reference to the Universal Declaration of Human Rights of 1948, a “non-binding” recommendation by the UN General Assembly.¹⁶⁰ Looking beyond the text of the judgment, there is only mixed support for this elevated status of a right to property among scholars. On the one hand, according to Tomuschat, “[I]t is certainly not too bold to claim that the right to property has evolved as a right under customary law.”¹⁶¹ Here, the argument relies principally on the emergence of regional regimes guaranteeing peaceful enjoyment of property rights not only in Europe but in the Americas and Africa. This conclusion also points to the collapse of the socialist regimes, the most determined opponents of private property, with Russia joining the European Convention on Human Rights.

Other scholars, including James Hathaway, emphatically challenge the view that property rights have reached the protection of “non-conventional” international law (as distinguished from regional regimes of human rights law), let alone the exalted position of *ius cogens*. These scholars read the same history relied on by Tomuschat in a different light. First, because of the basic disagreement during the negotiations for the Covenant on Civil and Political Rights, the property right – although included in the Universal Declaration of 1948 – was relegated to a special protocol. Second, a similar solution prevailed in the negotiations leading up to the European Convention on Human Rights and Fundamental Freedoms. In the following decades,

¹⁵⁹ *Ayadi*, *supra* n. 90, at paras. 145-146. Art. 1, Protocol 1 ECHR qualifies property rights by making the protection subject to the exception of 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” See Andersson et al., *supra* n. 79, at 125 & n.41. According to the three co-authors, even if the freezing is not seen as deprivation at the present time, the longer it continues the more it should be seen as denial/deprivation of property. *Id.* at 125. Moreover, the ECJ should find the freezing regulation invalid as violating the general principle of proportionality. *Id.* at 125-126. For ECJ cases dealing with justification for an interference with property rights, see *id.* at 125 n.40.

¹⁶⁰ In *Yusuf*, *supra* n. 90, at para. 292, the Court cites the Universal Declaration provision limiting the scope of property rights. “Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of the property.” *Id.* According to Bartelt and Zeitler, none of the human rights claimed by the applicants in the cases under discussion have reached the status of *ius cogens*. *Supra* n. 11, at 716. In *Kadi* and *Yusuf*, the CFI “[p]erhaps overgenerously” appeared to consider all human rights as *ius cogens*. Ahmed & Butler, *supra* n. 40, at 780.

¹⁶¹ Tomuschat, “Case Law,” 43 CML Rev. (2006) 537, 547-548.

the cleavage regarding property rights between the West on the one hand and the developing and socialist countries on the other, continued. Despite the dramatic extension of democracy and the market system, the end of the Cold War has not resolved this fundamental tension.¹⁶² “While virtually every state is to some extent committed to the property rights project, many states are not yet prepared to bind themselves to respect both the negative and positive meanings of a right to property.”¹⁶³

b. On the right to be heard – Access to justice

The applicants complained that they were denied the right to be heard by the EC Council as guaranteed by the general principles of Community human rights law, citing rulings by the European Court of Justice. Referring again to its observations on the relationship between “the international legal order under the United Nations” and the Community legal order, the CFI rejected the claim by pointing out that the principles of Community law relating to the right to be heard cannot be applied where the Community institutions are required – without any discretion – to transpose resolutions of the Security Council and decisions of the Sanctions Committee into the Community legal order.¹⁶⁴

¹⁶² J. Hathaway, *The Rights of Refugees under International Law* (Cambridge U. Press, New York, 2005), 518-23 (citing C. Krause, “The Right to Property” in A. Eide et al. (Eds.), *Economic, Social and Political Rights: A Textbook* 143, 144-45 and other literature).

¹⁶³ *Id.* at 520 (citing also the developments in the UN Human Rights Committee and the UN Human Rights Commission at 520-521). The property right is not included in the black-letter section of the Restatement. See *Restatement (Third) of the Foreign Relations Law of the United States: Customary International Law* § 702 (1986). On the other hand, others stress that the last several decades have been marked by economic liberalization including “marketization” parallel toward democratization. See B. Simmons et al., “Introduction: The International Diffusion of Liberalism,” 60 *Int’l Org.* (2006), 781, 782-783. The proportion of democratic countries (presumably with some form of economic liberalization) has climbed between 1980 and 2000 from under 30 percent to about 60 percent (while the number of states also doubled to roughly 200). *Id.* These developments would presumably impact international recognition of property rights. But see L. Diamond, “The Democratic Rollback – The Resurgence of the Predatory State,” 87 *Foreign Affairs* (Apr. 2008), 36 (“Democracy has recently been overthrown or gradually stifled in a number of key states . . .”).

¹⁶⁴ Hearing the person concerned “could not in any case lead the institution to review its position.” *Kadi* (CFI), *supra* n. 67, at para 258. The Court points out that the ECJ case law on the right to a hearing was developed in areas where the institutions have broad discretion (such as competition, anti-dumping). See *Kadi* (CFI), *supra* n. 67, at paras. 256-257. In *Hassan*, *supra* n. 86, at para. 78, the applicant relied on two judgments of the US Court of Appeals for the D.C. Circuit which held that freezing assets under the Anti-Terrorism and Effective Death Penalty Act of 1996 without prior hearing infringed the constitutional right of due process. See *National Council of Resistance of Iran v. Dept. of State*, 251 F.3d 192 (D.C. Cir. 2001); see also *People’s Mojahedin Org. of Iran v. U.S. Dept of State*, 182 F.3d 17 (D.C. Cir. 1999). This argument was deemed irrelevant by the CFI because the US cases did not involve measures transposing Security Council resolutions but measures taken by the US under its own sovereign powers. *Hassan*, *supra* n. 86, at para. 94; *Defeis*, *supra* n. 90, at 1455-1456.

The CFI then proceeds to examine the alleged violation of the right to be heard by the Sanctions Committee. Since that right as well as the right to property and judicial review are not absolute, but are subject to restrictions in important public interest (citing the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and decisions of the European Human Rights Court), the Court inquires whether such restrictions apply in the circumstances of this case. In the light of “mandatory provisions of the public international law” as articulated by the decisions of the Security Council and the Sanctions Committee, “it is normal that the right of persons [whose funds were frozen] to be heard should be adapted to an administrative procedure on several levels, in which national authorities ... play an indispensable part.”¹⁶⁵ Community law itself “recognizes the lawfulness of such procedural adaptations” in the context of economic sanctions.”¹⁶⁶ The Court then describes in some detail the elaborate delisting procedure; exchange of information and consultation between “the petitioner” government which represents the individual concerned and the opposing government – within and outside the Sanctions Committee – with a decision by consensus within the Committee or, ultimately the Security Council itself.¹⁶⁷

Perhaps in an effort to bolster the protective potential of the delisting procedure, the court took a rather unusual position on the role of the state. In response to the arguments that an individual had no standing before the Sanctions Committee and was dependent on the good will of his government, the Court asserted that a national of an unwilling state could compel his state through action in domestic court to bring his case before the Sanctions Committee. The idea that a state has a legal duty, instead of discretion, in the exercise of its right of diplomatic protection is a novelty of some significance.¹⁶⁸ In any event, emphasizing the temporary “precautionary”

¹⁶⁵ *Kadi* (CFI), *supra* n. 67, at para. 268.

¹⁶⁶ *Kadi* (CFI), *supra* n. 67, at para. 269 (citing by analogy the Court of First Instance Case T-189/00, *Invest Import and Export v. Commission* [2000] ECR II-2993).

¹⁶⁷ According to Erika de Wet, the Sanctions Committee, a political body, cannot be viewed as an independent and impartial body and the de-listing procedure before it can hardly be described as neutral. “This situation clearly constitutes violation of the basic due process principles that underpin Article 1(1) of the Charter and Article 14 [of the International Covenant on Civil and Political Rights].” de Wet, *The Chapter VII Power*, *supra* n. 20, at 354. She concludes that the core of human rights – “notably the right to life, the right to health, the right to self determination and the right to fair hearing are established under customary international law, as well as the applicable international and regional human rights treaties....” The states must secure proper judicial avenues to deal with the violations but the final responsibility rests with them. *Id* at 379.

¹⁶⁸ *Kadi* (CFI), *supra* n. 67, paras 261-291. The Court supports its position by pointing to the information offered by the United Kingdom to the effect that the applicants have the opportunity “to bring an action for judicial review based on domestic law, indeed even directly on the contested regulation and the relevant resolution of the Security Council which it puts into effect, against any wrongful refusal by the competent national authority to submit their

character of the freezing measure and “grounds concerning the international community’s security,” the Court rejects the applicants’ claims.¹⁶⁹

We note that unlike the property right, the right to fair and public hearing is included not only in the Universal Declaration but also in the Covenant on Civil and Political Rights.¹⁷⁰ And it is guaranteed by the European Convention on Fundamental Rights and Freedoms as well as by the human rights regime of the European Union.¹⁷¹ It is also broadly recognized in national constitutions. In our view, it is therefore plausible to argue that such a right has acquired the status of non-conventional international law. But that hardly makes it part of *ius cogens*.¹⁷² In a more general vein, we note that the CFI does not follow any traditional inquiry into the legal sources that would give rise to nonconventional human rights in international law.

2. *The Advocate General & the Grand Chamber: To Pluralism and Back Again*

The Advocate General’s opinion and the Grand Chamber’s judgment avoid the debate about international human rights law by considering only the fundamental rights of the

cases to the Sanctions Committee for re-examination.” *Kadi* (CFI), *supra* n. 67, para 270 (emphasis added) (citing by analogy the Order of the President of the Court of First Instance in Case T-44/03R, *Sison v. Council*, [2003] ECR II-2047, para 9). Despite the U.K. government’s submission in *Kadi*, however, the viability of such a claim in the U.K. as a matter of domestic and public international law seems rather mixed. See, e.g., *R. (Al Rawi and others) v. Secretary of State for Foreign and Commonwealth Affairs and another* [2006] EWCA Civ 1279 (*Al Rawi*); *R. (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs and another*, [2002] EWCA Civ 1598, [2003] U.K.H.R.R. 76.

¹⁶⁹ *Kadi* (CFI), *supra* n. 67, at para. 274.

¹⁷⁰ International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), at Art. 14(1), U.N. Doc. A/RES/2200(XXI); Universal Declaration of Human Rights, G.A. Res. 217 (III), at Art. 10, U.N. Doc. A/RES/217(III) (Dec. 12, 1948). In the Covenant, the right refers to a criminal charge or a suit of law, but a UN subsidiary organ would extend it to “an action[] or inaction[] taken or purported by a public authority” UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/24 (June 3, 1994), Annex II, para 4 (cited by Hathaway, *supra* n. 162, at 648, n. 1744).

¹⁷¹ Art. 47 of the Charter on Fundamental Rights of the EU, proclaimed by the Nice European Council on 26 February 2001 on a non-binding basis, 2000/C 364/1, 20, parallels European Convention on Human Rights Art 6(1) providing a right to an effective remedy before a tribunal while Art 41 includes in para 2 the right to a hearing and reasoned decision. Some suggest that freezing of funds, because of its punitive nature, severity and stigmatization, and because it may lead to criminal charges at the national level, should trigger all the guarantees applicable to a criminal trial. Wet & Nollkaemper, *supra* n. 40, at 177. The authors argue that a right to a fair hearing is not derogable. *Id.* at 179.

¹⁷² Manusama seems to consider the right to fair hearing as *ius cogens*, citing only the *Yusuf* judgment of the Court of First Instance. *Supra* n. 8, at 125-126. Another author cites the UN Human Rights Committee General Comment 29 as implying that “fundamental principles of fair trial” are *ius cogens*. See A. Orakhelashvili, “Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions,” 16 EJIL (2005), 59, 65. The UNHRC document, however, appears to be limited to the non-derogable nature in states of emergency of principles of fundamental fairness in criminal trials. See U.N. Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

Community's domestic legal order. This, of course, makes the substantive questions regarding the fundamental rights violations far easier than those the CFI chose to confront under its *ius cogens* analysis. The Advocate General's opinion and the Grand Chamber's judgment both look to the domestic legal order of the Community for the regulation of both the relationship with international law as well as the fundamental rights protection that govern all Community action.¹⁷³ As the Advocate General puts it: "The duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community."¹⁷⁴

In reviewing the fundamental rights claim, the Advocate General takes significant steps toward acknowledging the pluralist interplay among the Community's legal order and international law: "In an increasingly interdependent world, different legal orders will have to endeavor to accommodate each other's jurisdictional claims. As a result, the Court cannot always assert a monopoly on determining how certain fundamental rights interests ought to be reconciled."¹⁷⁵ The AG indeed acknowledges that the Security Council may "sometimes [be] better placed to weigh those fundamental interests."¹⁷⁶ Such deference, however, will only apply in a situation of a "shared understanding of these values" and a "mutual commitment to protect them."¹⁷⁷

The Advocate General thus implicitly invokes the "*Solange*" paradigm under which Member States allowed the Community to become effective within their domestic legal systems. After the standoff between the German Federal Constitutional Court and the European Court of Justice regarding fundamental rights review, the German court ultimately gave in and deferred to the European Community on fundamental rights issues given that the Community had developed an adequate record of rights protection. The German court announced that it would continue to defer to the European Court of Justice "as long as" (in German, "*so lange*") the latter maintained this practice of protecting rights. In the case of targeted sanctions, the *Solange* predicate was not satisfied at the level of the United Nations, however, and so the Advocate General recommended

¹⁷³ Cf. *Kadi* (AG Maduro Opinion), *supra* n. 102, at para. 24.

¹⁷⁴ *Id.* at para. 37.

¹⁷⁵ *Id.* at para. 44.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

striking down the Community's regulation that gave effect to the UN Security Council's resolution.¹⁷⁸

Reminiscent of the Member State decisions in the *Solange* and *Brunner* cases, the Advocate General assures us that the legal effect of the ruling striking down the Community's sanctions regulation remains confined to the Community's own legal order.¹⁷⁹ The Advocate General does not, however, leave it open to Member States to circumvent the Community entirely and to implement the UN Security Council Resolution directly. He reminds Member States that they are bound by the Community's regime of fundamental rights whenever they act within the scope of Community law (whether they act pursuant to the Community's legislative command or not).¹⁸⁰

The Grand Chamber similarly relies on the "basic constitutional charter" that is the EC Treaty as providing the relevant fundamental rights constraints to Community action.¹⁸¹ As did the Advocate General, the Grand Chamber confines its holding against the lawfulness of the Community regulation to the realm of Community law, while eschewing the idea that this would have implications for the legality of the Security Council Resolution to which the Community measure is intended to give effect.¹⁸² Indeed, the Grand Chamber specifically rejects the idea that Community courts have jurisdiction to rule on the latter question, even if only confined to review of *ius cogens*.¹⁸³

In this portion of the opinion, the Grand Chamber appears less willing to engage the potential multiplicity of authority over rights than was the Advocate General. With a somewhat cryptic statement, the Grand Chamber holds that the re-examination procedure "cannot give rise to generalized immunity from jurisdiction within the internal legal order of the Community."¹⁸⁴ It is not clear what the Grand Chamber means by this, but by stating categorically that it "cannot" give rise, as opposed to, for example, that it "does not give rise in this particular case,"

¹⁷⁸ In the words of Advocate General Maduro: "Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order." *Id.* at para. 54.

¹⁷⁹ *Id.* at para. 39. Cf. *Brunner et al. v. Maastricht Treaty*, decision of 12 October 1993, BVerfGE 89, 155; In Re: *Wünsche Handelsgesellschaft*, decision of 22 October 1986, BVerfGE 73, 339 ("Solange II").

¹⁸⁰ *Id.* at para. 30.

¹⁸¹ *Kadi* (Grand Chamber), *supra* n. 91, at para. 281.

¹⁸² *Id.* at para. 286.

¹⁸³ *Id.* at para. 287.

¹⁸⁴ *Id.* at para. 321 (emphasis added).

the Grand Chamber seems to be signaling that it rejects even the theoretical possibility of any *Solange*-type deference to which the Advocate General alluded earlier. This rejection of *Solange* (even as a possibility in another case) is further implied by the combination of this statement with the subsequent paragraph in the judgment, which notes: “Indeed, such immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty, appears unjustified, for clearly that re-examination procedures does not offer the guarantees of judicial protection.”¹⁸⁵ To be sure, reasonable minds can disagree about the precise import of these two paragraphs and translation issues may exacerbate the hermeneutic exercise. But the sequence of these two paragraphs combined with the choice of words seems to suggest that the Grand Chamber *first* rules out the possibility of *Solange*-type deference in general, and only then adds, by way of *additional* (as opposed to necessary) argument, that even if one were inclined to accord such deference, it would be misplaced in this particular case. As for what the Grand Chamber really meant (or will want to have meant), we must wait for the day when a more acceptable UN mechanism for the protection of rights comes before the Court.

Moving to the substance, the Grand Chamber holds that the Regulation of the Council of the European Community violated the appellants’ rights of defense, by failing to communicate any grounds for the listing either before or after the fact.¹⁸⁶ By the same token, the appellants’ right of effective legal remedy has been violated because the Court was unable to conduct any meaningful review of the listing decision.¹⁸⁷ Although the restrictions on appellants’ property might be justifiable in principle, these procedural shortcomings undermine the legality of the property deprivation as well.¹⁸⁸ The Grand Chamber thus annuls the contested regulation, although it allows it to remain in effect for three months in order to prevent potentially “serious[] and irreversibl[e] prejudic[e to the] effectiveness of the restrictive measures imposed by the regulation.”¹⁸⁹

¹⁸⁵ *Id.* at paras. 322-25.

¹⁸⁶ *Id.* at paras. 331-48.

¹⁸⁷ *Id.* at paras. 349-51.

¹⁸⁸ *Id.* at paras. 354-71.

¹⁸⁹ *Id.* at paras. 373-76. In response to the judgment, the Commission’s latest amendment of the relevant Regulation commits the Commission to “communicate the grounds on which [the] Regulation is based to the individuals concerned, provide them with the opportunity to comment on these grounds and review [the] Regulation in view of the comments and possible available additional information.” Commission Regulation (EC) 1109/2008 of 6 November 2008, OJ L 299/23, at para. 5.

IV. Critical Coda: Thin Internationalism, Constitutional Resistance, and a Third Way

In today's plural world order, a diverse array of jurisdictions and levels of governance increasingly raise competing claims of ultimate legal authority. In these clashes, institutions and actors situated within particular regimes are called upon to confront fundamental questions of public legitimacy that may make sense only from a more universal perspective. The difficulty, then, lies in arriving at an approach that can mediate productively between the universal and the particular without losing site of certain fundamental values, such as human rights.

The Kadi case, both in what the various actors do and in what they fail to do, illustrates this tension well. Whereas the Court of First Instance would largely capitulate to the universal in virtual disregard of human rights, the Grand Chamber vindicates rights largely from the perspective of the particular. And while the Advocate General strives to mediate between the two, he leaves out important aspects of the universal as well.

A. Internal and External Constitutionalism: The Autonomy of the European Legal Order

At a personal level, Kadi's story illustrates the inadequacy of the United Nations procedure to protect basic rights, at least as that procedure existed before the 2006 amendment of the Guidelines and most likely as it continues to this very day. The CFI's internationalist approach, however, does not provide effective access to justice. The restriction of the scope of review to *ius cogens* takes back with one hand what it gives with the other, as that largely indeterminate concept covers not more than a handful of egregious violations.¹⁹⁰ Thus, to employ *ius cogens* in this context is little more than a symbolic gesture of acknowledging fundamental rights.

Not only does this "internationalist" approach ultimately undermine the protection of rights, but it also undermines the autonomy of the European legal order. Until *Kadi*, the story of European constitutionalism has focused largely on establishing the Community's legal order as autonomous from those of the Member States. With few exceptions, the constitutional gaze has been inward looking, that is, setting off the Union's legal order from, and integrating it with,

¹⁹⁰ Accord Eckes, *supra* n. 97, at 90.

those of the Member State. However powerful, this “internal dimension” of European constitutionalism is only half the promise of an autonomous legal order. The internal dimension speaks only to the relationship between the Union’s legal order and that of the Member States without directly addressing the relationship between the Union’s legal order and that of international law.

To assert its constitutional integrity, the Union must not only challenge the superiority of national constitutional law but also tug at the umbilical cord that ties the Union to the Grundnorm of international law. Call this the “external dimension” of European constitutionalism. The tension between the Community’s autonomy and its connection to international law was already plain when, after coining the idea of a “new legal order of international law,” the Court was quick to drop the reference to “international law.”¹⁹¹ And so it has been ever since. Just as understanding the Union as subordinate to the Member States’ legal orders would render the Union a simple tool in the hands of Member State governments, so, too, understanding the Union as immediately beholden to international law would render the European enterprise an empty vessel for international governance writ large. The idea of “constitutional integration”¹⁹² – even when applied to the European Union – suggests an element of political self-creation and autonomy that is incompatible with viewing the Union as a mere instrument of either the national or international legal orders. Properly understood, the Union is neither.

The external and internal dimensions of European constitutionalism thus go hand in hand. Indeed, even as a matter of practical necessity, the external dimension of European constitutionalism is required to maintain the Union’s internal emancipation from the Member State legal orders. To put the matter concretely, by yielding to a purported international law command in violation of the European Community’s internal fundamental rights regime, the CFI would seriously risk Member State defiance of Community law. After all, the lacuna of rights protection (and rights review) proposed by the CFI would be tantamount to rejecting the mutual arrangement with the Member States under the *Solange* compromise.

The Advocate General’s Opinion and the Grand Chamber judgment, by contrast, seem to recognize this fact as they vindicate the autonomy of the Community’s legal order. Acting

¹⁹¹ See Case 90/63, *Commission v. Luxembourg & Belgium*, [1964] ECR 625.

¹⁹² D. Halberstam, “Comparative Federalism and the Role of the Judiciary,” in K. Whittington, D. Kelemen, and G. Caldeira (Eds.), *The Oxford Handbook of Law and Politics* (Oxford Univ. Press, 2008), 142, 154.

against the background of the European Union's own "constitutional absorption" of fundamental rights to bolster the legitimacy of the Union,¹⁹³ the Advocate General and the Grand Chamber strive to preserve this hard won element of Union authority. By rejecting the CFI's subordination of the EC's legal order to that of the UN and suggesting that the Union will uphold the protection of rights in the event of a real clash, the Advocate General and the Grand Chamber place fundamental rights at the apex of the Community's legal order. In so doing, they help ensure the protection of individual rights as well as Member State adherence to Community law more generally.

B. From Resistance to Dialogue

Both the Grand Chamber and the Opinion of the Advocate General do more than protect the autonomy of the European legal order. The Grand Chamber informs the UN of an interpretive possibility to accommodate the Court's constitutional resistance, i.e. its particularistic judgment about the protection of local rights. By interpreting the Charter charitably as allowing room for the kind of rights review the Court conducts,¹⁹⁴ the Grand Chamber gently but firmly suggests that it would behoove the UN to accept the ECJ's interpretation of the UN Charter and make way for the protection of rights. If we are correct in reading the Grand Chamber as rejecting the possibility of *Solange*, however, then this is not an invitation to a dialogue, but strictly a one way communication. By rejecting the *Solange* possibility, the Court insists on the European protection of Europe's particular version of rights, and the UN Charter better be flexible enough to allow for this or else UN commands risk being ignored in Europe.

In contrast to the Court's subtle but firm ultimatum, the Advocate General reaches further to suggest the possibility of a true dialogue *à la Solange* with the UN. On this version of the interaction between the UN and the EU, the temporary insistence on ECJ adjudication of Europe's domestic version rights is merely the result of the current lack of commitment within the UN Security Council to any kind of shared understanding (and to the protection) of rights. This shortcoming can be cured, however, without simply uploading European rights to the UN

¹⁹³ See *supra* text at nn.56-57.

¹⁹⁴ Kadi (Grand Chamber), *supra* n. 91, at 298-299.

level. Instead, the *Solange* analogy suggests a dialogue to arrive at some mutually satisfactory version of rights that should govern at the UN level. As in the case of the constitutional absorption of rights within the EU, constitutional absorption of rights at the UN level may lead to the development of a unique understanding of substantive and procedural rights that are peculiarly suited for the UN context in which they are deployed.¹⁹⁵

And yet, we wonder whether the Advocate General's reach for a third way might not still miss an important element, as he, too, fails to engage the United Nations system positively in a deeper dialogue that includes *international* human rights. To do so, the Court need not usurp the role of UN institutions and affirmatively judge the legality of the UN Security Council Resolution as a matter of international law. Instead, the Court could engage international law indirectly by judging the legality of the Community's implementation measures (purely as a matter of Community law) by reference to the UN Charter, substantive considerations of *ius cogens*, as well as customary international human rights law.

1. *The Jurisdictional Contours of Dialogue*

As we discussed in reconstructing the reasoning that might have animated the CFI's extension of review to *ius cogens*,¹⁹⁶ the Court has chosen the path of indirect consideration of international law many times. To reiterate briefly here, the Court in *Fediol* and *Nakajima* has drawn on the rules of non-directly effective international agreements as governing the legality of Community measures intended to fulfill the Community's international legal obligation to implement those agreements.¹⁹⁷ Similarly, the Court in *Racke* has interpreted and applied non-directly effective principles of customary international law to judge the legality of a Community measure that compromised a directly effective international agreement in possible violation of those fundamental international law norms.¹⁹⁸ Putting these two principles together, we arrived at the following novel conclusion: the Court can draw indirectly on the rules of the UN Charter as well as non-directly effective customary international human rights law to judge the validity

¹⁹⁵ Cf. Part I.C., *supra*.

¹⁹⁶ See *supra* text at nn. 147-156.

¹⁹⁷ See *Fediol*, *supra* n.150, and *Nakajima*, *supra* n.151.

¹⁹⁸ See *Racke*, *supra* n.153.

of an EC measure intended to discharge an EC obligation to implement a UN Security Council Resolution.

Two limitations and two innovations are buried in this doctrinal conclusion. First, the limitations. The Court's decision in *Racke* would allow for the indirect consideration only of "fundamental" rules of customary international law, not all rules. Here, one might argue that the human rights norms at issue are sufficiently fundamental to qualify for whatever restriction the *Racke* Court may have had in mind.¹⁹⁹ In addition, one might argue that the incorporation of international human rights law via the Principles and Purposes of the UN Charter turns international human rights law into "fundamental" rules governing the functioning of the UN. Another limitation imported from the *Racke* decision is that only "manifest" violations of international law will register in the course of this kind of indirect review.²⁰⁰ Although the Court has come under criticism for this qualification, there may be some wisdom in this moderation in the course of indirect review.

Now to the doctrinal innovations. First, the jurisdictional conclusion set forth above goes beyond *Racke*, *Fediol*, and *Nakajima* by stacking these principles. Recall that *Racke* invoked customary international law against a Community act to protect a directly effective international agreement. And recall that *Fediol* and *Nakajima* considered only the rules of the international agreement itself – not those of customary international law – in judging the Community measure implementing that agreement. In the sanctions case, by contrast, we propose that a combination of *Racke*, *Fediol*, and *Nakajima* allows for the consideration of general rules of international law to judge the EC's implementation of the Security Council Resolution notwithstanding the fact that neither of these international norms has direct effect.

Second, recall that in *Fediol* and *Nakajima*, the Community seemed to be implementing the Community's *international* legal obligation by virtue of the principle of functional succession. In the case of a UN Resolution, by contrast, the Community may not be operating under any an international legal obligation at all. In our view, however, the Community's obligation under Article 301 EC to implement the Common Foreign and Security Policy call for economic sanctions should suffice to commit the Community's implementing measure to the observance of international law. After all, by coming together in the context of the CFSP pillar

¹⁹⁹ Recall that *Racke* does not give us any criteria for divining the limits of what constitutes "fundamental" norms of customary international law. See *supra* n. 154.

²⁰⁰ See *supra* n.156 and accompanying text.

to call for the Community's implementation of economic sanctions, the Member States sought to discharge their international legal obligations. Because the CFSP provisions envision just this kind of action, and the Community is legally bound under Article 301 EC to implement the CFSP measure, the Community's implementing measure as it pertains to individuals should be held to heed the underlying rules of international law as well.

To sum up this doctrinal conclusion on jurisdiction: The Community measure at issue was intended to give effect to a CFSP Common Position, which, in turn, was specifically intended to give effect to the international legal obligations of the Member States in light of the Security Council Resolution. Under these circumstances, it would, in our view, have been entirely proper for the Court to extend its review indirectly to the applicable rules of international law as governing the legality of the EC's implementation measure. Furthermore, as we pointed out earlier,²⁰¹ these rules in one way or another should be understood to include the principles of customary international human rights law.

2. The Promise of Dialogue

There is, to be sure, some justified concern that even indirect review of Security Council resolutions might have a "destabilizing effect" on the international legal system by suggesting the possibility of second-guessing the UN Security Council and by jeopardizing the uniform application of sanctions. Perhaps bowing to this concern, the Grand Chamber sought to protect individual rights to the fullest extent practicable without unnecessarily placing in jeopardy the authority of the Security Council more generally.

In our view, however, these objections ultimately prove to be insufficient here. As a practical matter, disregard of the UN is inevitable when the UN trenches upon core principles that legitimize the use of coercive public power. There will always be some courts that will interpose their fundamental rights norms between a purported international command and domestic execution. The United Nations will therefore always face an uneven yield in the execution of its sanctions orders unless the United Nations adopts some mechanism to fill the gap caused by the denial of direct individual access to the United Nations organs. The question,

²⁰¹ See *supra* Part I.

then, is not how to lead the way toward blind obedience of the UN Security Council, but how to forge a path toward productive engagement with the larger system of global governance.

The Grand Chamber safeguards the particular European rights of the particular individuals involved in this case, but otherwise pays little heed to the productive development of global governance more generally. This failure is significant. By engaging in local constitutional resistance, the Grand Chamber conducts its communication with the United Nations from an exclusively European perspective. And by engaging *only* in local constitutional resistance, the Grand Chamber in effect washes its hands of any illegality that the UN Security Council might perpetrate elsewhere around the globe with the help of a more willing accomplice.

The approach of the Grand Chamber judgment in this regard indeed mirrors that of the United States Supreme Court in the recent series of cases surrounding the Vienna Convention on Consular Relations (VCCR).²⁰² In these cases, the United States Supreme Court protected the United States system of criminal justice against the petitioners' claim of direct effect of international norms. Contrary to the interpretation of the International Court of Justice, the U.S. Supreme Court took the VCCR as allowing the full preservation of domestic procedures in the implementation of international obligations under the Treaty.²⁰³ And when the argument was finally pressed that the International Court of Justice's own determination that the United States had violated the VCCR rights of a named individual was binding on U.S. courts, the Supreme Court simply read the UN treaty (as ratified by Congress) as not rendering the I.C.J.'s judgment self-executing.²⁰⁴ These cases, together with long-standing Supreme Court precedent that the United States will not give effect to a treaty that violates the U.S. bill of rights,²⁰⁵ rather closely resemble the Grand Chamber's approach of constitutional resistance.²⁰⁶ Both courts preserve domestic rights and procedures in all their particularity and then permissively read the UN

²⁰² *Medellin v. Texas*, 552 U.S. ___, 128 S. Ct. 1346 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Breard v. Greene*, 523 U.S. 371 (1998).

²⁰³ *Sanchez-Llamas*, *supra* n. 202, at 350-360.

²⁰⁴ *Medellin*, *supra* n. 202, at 1357-62.

²⁰⁵ *Reid v. Covert*, 354 U.S. 1, 15-16 (1957).

²⁰⁶ Accordingly, Eric Posner was able to conclude: "Nothing remarkable here for an American lawyer, who is accustomed to the idea that constitutional rules take precedence over international law. The European Court is a creature of the European treaty system, not the UN; what else is it to do when European law and international law conflict? However, Europeans have long complained of the American practice of declaring that all U.S. treaty obligations are limited by the U.S. Constitution. And it takes a bit of legerdemain to convert regional treaty obligations into a "constitution," but this is an old story. It turns out that Europeans, too, will not allow international law to supersede their fundamental values. Good for them!" Posner, "A Defeat for International Law and Victory for Progressive Values," *The Volokh Conspiracy* (blog) (Sept. 3, 2008), <http://www.volokh.com/posts/1220493190.shtml> (last visited Nov. 10, 2008).

Charter and other international instruments as allowing for this kind of flexibility in implementation.

As the highest tribunal of a legal system with deep historical and structural commitments to the international legal order, the European Court of Justice might have been expected to demonstrate greater concern for the development and maintenance of international law. In addition to finding its origins in international law, both the European Community and the overarching European Union are formally, as well as practically, committed to the international rule of law. Given the expressed concern for international cooperation in the foundational Treaties,²⁰⁷ the historical centrality to European integration of international agreements from such things as Stabilization and Association Agreements²⁰⁸ to European Political Cooperation²⁰⁹ to Schengen and Prüm,²¹⁰ as well as the continued importance of international law to the functioning of the second and third pillars of the Union, international law still forms an important part of the “operating system” of the Union as a whole. As a Court with responsibility for legality within the Union as a whole, one would think that the European Court of Justice bears a special responsibility to uphold, and contribute to the development of, the international rule of law.

Instead of taking the constitutional status of the Community’s legal order simply as license to engage in local constitutional resistance, the Court might have provided a model for how domestic courts should interact responsibly with the international legal order. In the absence of a robust centralized judicial infrastructure, the international system of law depends on the decentralized interpretation, enforcement, and application of international law via domestic tribunals. Tempering the excesses of purported international commands by interposition may, at times, be important and appropriate to preserve rights locally. But engaging productively with international law and developing human rights as a fundamental part of the international rule of law is a critical task that must not be ignored. Accordingly, in our view, the Court should have moved beyond its particularized constitutional resistance toward broader mutual engagement. It should have reached for a *Solange* type dialogue and grounded this exchange not in Europe’s

²⁰⁷ See, e.g., Article 11 TEU (listing as one of the objective of the Common Foreign and Security Policy: “to promote international cooperation”).

²⁰⁸ See generally Koutrakos, *EU International Relations Law* (Hart 2006), 365-71

²⁰⁹ Nuttall, *European Political Cooperation* (Clarendon 1992).

²¹⁰ R. Bellanova, “The ‘Prüm Process:’ The Way Forward for EU Police Cooperation and Data Exchange,” in Guild and Geyer *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate 2008).

domestic bill of rights alone, but in a broader discussion about international human rights as well.

CONCLUSION

It may be useful to recall San Francisco of 1945. Along with the general commitment to the observance and promotion of basic rights and the prohibition against the use of force, the Charter enshrined the general prohibition on UN interference in matters essentially within the domestic jurisdiction of any state. All but forgotten are the bitter, endless debates in the early years of the General Assembly on whether just placing an item on its agenda in such matters as self-determination of people in Algeria, Morocco, Rhodesia, the treatment of people of Indian origin in the Union of South Africa, and finally the internal apartheid policy in that country would violate the principle of non-intervention.²¹¹ Today one is left to wonder what remains of the principle of non-intervention in view of the developments, such as the emerging Responsibility to Protect,²¹² that intrude profoundly into the most “domestic” tie between the state and its own citizens²¹³ and raise questions about the traditional concept of state sovereignty.

UN activity has expanded on many fronts. While the diplomats in San Francisco could not agree on a list of fundamental rights, three years later the General Assembly adopted such list

²¹¹ Under the pressure of the European colonial powers, the United States had consistently abstained on resolutions dealing with such items – until Henry Cabot Lodge, the U.S. Ambassador to the UN, persuaded President Eisenhower to overrule the Department of State opposition to cosponsoring an anti-apartheid resolution which the United States helped to draft. It refers for the first time to the concept of “integration” of races. After General Assembly debate, see, e.g., G.A. Res. 2054(XX) (Dec. 15, 1965), the Security Council adopted U.N. Doc. S/RES 134 (Apr. 1, 1960). For a recent review of Security Council practice, see Manusama, *supra* n. 8, at 51-62 *passim* (concluding that most disputes dealt with in the Council since 1990 have been internal in character).

²¹² See UN General Assembly, 2005 World Summit Outcome, GA Res 60/1, UN GAOR, 60th Sess., UN Doc. A/RES/60/1 (2005), at para. 139. For a critical review, see J. Brunnee and S. Toope, “Norms, Institutions and UN Reform: The Responsibility to Protect,” *J. Int. L. and Int. Rel.* (2006), 121.

²¹³ The debate on the reach of Article 2(7) reverberates from time to time in the Security Council as its jurisdiction under Chapter VII is challenged (unsuccessfully as in the case of the changed regime in Haiti) on the ground that the situation in question was purely internal and did not rise to the level of a threat or breach of the peace. *See* S.C. Res. 841, U.N. Doc. S/RES/841 (Jun. 16, 1993). As an example of the continuing radiation of the principle of non-intervention, the Representative of China in the Security Council explaining his veto of a draft resolution on Myanmar, spoke of “interfering in their internal affairs” and “the issue was mainly an internal affair of a sovereign State.” 5619th Security Council Meeting, U.N. Doc. S/PV.5619 (Jan. 12, 2007), 3. Qatar’s Representative encouraged “the best solution for Member States without interfering in their internal affairs.” Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Myanmar, Owing to Negative Votes by China, Russian Federation, U.N. Doc. SC/8939 (Jan. 12, 2007). For an early debate, see “The Spanish Question” in 1 *The United Nations Security Council Official Records* (London, 1946), 155-200. See generally T. Franck, *Fairness in International Law and Institutions* 220 *passim* (Oxford U. Press, New York, 1996).

in the form of a “non-binding” recommendation supported by a broad consensus (albeit with some important abstentions).²¹⁴ There followed a long line of broadly accepted multilateral Covenants and treaties on fundamental rights, a surge in UN peace keeping missions, and the setting up of tribunals dealing out justice to individual criminals.

Increased UN activity has not always spelled increased accountability and control. Especially when the UN enlists regional organizations and states in taking action against specific individuals, the multiplicity of institutions may be a blessing or a curse. On the one hand, the multiplicity of levels of governance may work to create multiple veto points that may improve accountability and check for conformity of UN actions with fundamental fairness. In implementing their obligations under the UN Charter, states and regional institutions might take into account the perceived limitations on the Security Council’s powers as well as the legitimacy concerns surrounding the Security Council in its present composition acting under its present procedure.²¹⁵ As a subcommittee of the Committee on Legal Questions at San Francisco soberly suggested: “It is to be understood . . . that if an interpretation made by any organ of the Organization . . . is not generally acceptable it will be without binding force.”²¹⁶ On the other hand, the multiplicity of actors may equally create opportunities for shirking, burden shifting, and the evasion of responsibility. As a matter of politics and policy, disobeying the Security Council poses a grave risk for the uniform, effective response to terrorism, as well as the stability of the entire international legal apparatus to help ensure peace and security among nations. The stakes – both systemic and individual – are high.

As we discussed in this piece, there are several potential avenues along which the UN in general, and the Security Council, in particular, might be legally bound to observe fundamental principles of fairness in meting out draconian measures on individuals. One idea is that to the extent the Security Council’s discretionary powers and scope of operations expand, the Council might create its own fundamental rights principles by constitutional absorption, that is, by incorporating some of the principles that underpin the legitimacy of its Members (both

²¹⁴ Saudi Arabia, South Africa and the Communist states abstained. Schopen et al., *Nations on Record: United Nations General Assembly Roll-Call Votes (1946-1973)* 30, 358-62 (Canadian Peace Research Institute, 1975).

²¹⁵ See *supra* text at n. 56 through n. 57. Cf. Cannizzaro, *supra* n. 11, at 191 (offering arguments in favor of judicial review by domestic courts); Defeis, *supra* n. 90, at 1449 & n.3 (citing instances of such review). According to Orakhelashvili, *supra* n. 172, at 85, in *Certain Expenses* the ICJ “implicitly recognizes the right of Member States to pass judgment on Security Council Resolutions.”

²¹⁶ Subcommittee IV/2/B, Doc. 750 IV/2/B/1, XIII United Nations Conference on International Organization: Documents, (June 2, 1945), p. 832. Cf. Alvarez, *International Organizations*, *supra* n. 32, at 79.

domestically and internationally) into the governing law of the UN Charter. That avenue of fundamental rights protection, however, still remains largely speculative. At the present time, more traditional considerations may ground the UN's requirement to abide by internationally recognized human rights. As we have argued, whether by virtue of the Charter itself, UN international legal personality, or some version of functional succession, the United Nations Security Council is already now legally bound to observe customary international human rights law. The Security Council operates within a considerable margin of appreciation under Chapter VII, but it must remain within the outer bounds of human rights law nonetheless.

Although the UN procedures for placing individuals or groups on the list of terrorists or supporters have been progressively improved, there remains a danger of innocent victims being included and deprived of their basic rights. As the UN's Analytical Support and Sanctions Monitoring Team sums up the problem: "The Committee has made a series of incremental improvements to its procedures which have addressed many of the concerns expressed about the fairness of the sanctions but one major issue remains: the suggestion that listing decisions by the Committee be subject to review by an independent panel. It is difficult to imagine that the Security Council could accept any review panel that appeared to erode its absolute authority to take action on matters affecting international peace and security, as enshrined in the Charter."²¹⁷ The root of the difficulty, then, seems to be the UN Security Council's current understanding of the "absolute" nature of its authority under the Charter.

In our view, at least until such time when the UN has clearly articulated and secured its human rights obligations, regional and national courts, are in a position to review indirectly Security Council measures for compatibility not just with the rather limited principles of *ius cogens*, but with customary international human rights law as well as general principles of law derived from the constitutions and practice of states (including human rights treaties). In exercising this indirect power of review, regional and national courts are bound to give full force to the presumption of validity of Security Council acts and to balance claims of individual rights violations against the important interests of the international community in peace and security.

Like a cubist painting, each of the three pronouncements in the *Kadi* case – the judgment of the Court of First Instance, the opinion of the Advocate General, and the judgment of the Grand Chamber – contains a different element of the jagged mosaic for the productive

²¹⁷ Eighth Annual Report, *supra* n. 63, at 17.

engagement with the international legal order. After a rather strained interpretation of Community powers, the Court of First Instance engaged in the indirect review of the Security Council Resolution for compatibility with *ius cogens*; the Advocate General suggested the possibility of the European Court of Justice's jurisdictional restraint if adequate safeguards were developed at the UN level; and the Grand Chamber interpreted the Security Council Resolution charitably to avoid a conflict with the protection of fundamental rights within the EU. Each of these reflects a bold and valuable view. And yet, in their partial perspectives, each of these was also incomplete: whereas the Court of First Instance appeared to abandon the autonomy of the Community legal order, the Advocate General and the Grand Chamber seemed overly focused on Community law alone. In one way or another, (aside from the CFI's consideration of *ius cogens*) customary international human rights law seemed to drop out of sight.

The final judgment of the European Court of Justice must be commended for protecting fundamental rights and possibly even triggering some broader, beneficial reform at the UN level. And yet, the European Court of Justice, in our view, might have demonstrated a greater solicitude for the broader concerns of the international legal order. In considering the legality of the Community's implementing actions, the Court acts not only as a court of the Community, but also as a court of the international legal system. As guardian of the legal order of the European Union, the European Court of Justice sits at the intersection of domestic and international legal systems like no other court in the world. Instead of taking the path of particularistic constitutional resistance, the European Court of Justice might therefore have chosen an avenue of broader dialogue. The Court could have challenged the United Nations on its lack of protection of fundamental rights in the spirit of *Solange*, and done so by looking not only to Europe's domestic bill of rights but also to customary international law. In so doing, the Court would have led the way beyond European particularism toward a more productive engagement with international law for all.