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The Quest for Fundamental
Rights Protection in the ‘War on
Terror’; from the Yusuf case to
the Lisbon Treaty

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Summary

As the observer of international peace and security, the UNSC has the power to decide upon what constitutes a threat to world peace. By adopting Resolutions, the UNSC creates binding decisions that must be pursued by all members of the UN. Article 103 UN states that the UN Charter prevail over any other treaty obligation, why the EU must follow the decisions of the UNSC due to the obligations of its Member States. Consequently, the EU must implement the UN Resolutions in EC Regulations which become legally binding upon its Member States. Moreover, the EU has the power to decide upon sanctions of its own through its Common Foreign and Security Policy. The primacy of the UN Charter can create complex situations for countries like Sweden, who is a member of the UN but also a Member State of the EU. Not only are the Member States legally bound by the EC Regulations, but they must also observe the decisions of the UNSC.

This thesis has its starting-point in the judgment by the CFI in the Yusuf case where a Swedish citizen, Mr. Yusuf, and an entity based in Sweden, the Al Barakaat Foundation, have their financial assets frozen due to an EC Regulation implementing a UNSC Resolution. The practice of blacklisting individuals through targeted sanctions is a result of the fight against terrorism carried out by the UN. The practice of targeting individuals on blacklists has been an issue of much controversy since the individuals have no right to be heard or to examine the evidence against him. These fundamental rights that are protected both in the Swedish constitution as well as by the EU are constantly being neglected by the international community in the fight against terrorism. The case of the Swedish citizen Mr. Yusuf was no exception.

The CFI judged that in fact the right to a fair hearing and judicial review is a fundamental right protected in the EU, but that it was unable to review the EC Regulation since it had merely implemented the UN Resolution. The supremacy of the UN Charter and the fear of undermining the role of the UNSC were key factors in the judgment. However, the CFI was capable of reviewing the Regulation from a perspective of compliance to peremptory norms of *jus cogens*. After having conducted a proportionality test, the CFI states that neither did the Regulation and the freezing of the funds breach the applicants' right to a fair hearing, nor the right to judicial review.

The EU will accede to the ECHR when the Lisbon Treaty will come into force and hopefully the fundamental rights will have a more secure status in the Community legal system. The international situation also calls upon the members of the UN to demand the adherence to fundamental rights, or else the fight against terrorism will lose all credibility and the 'war on terror' will never be won.

Sammanfattning

Som övervakare av internationell fred och säkerhet har FN:s Säkerhetsråd (SäkR) den yttersta makten att bedöma vad eller vilka situationer som utgör ett hot mot fred i världen. Genom att anta Resolutioner, skapar SäkR bindande beslut som måste beaktas och efterlevas av samtliga FN:s medlemmar. Som ett resultat av FN-stadgans (FNSt) företräde framför alla andra traktat, enligt Artikel 103 FN, måste både EU:s och FN:s medlemsstater följa SäkR-resolutioner. EU är dessutom skyldig att implementera SäkR-resolutioner genom egna EG-förordningar vilka sedan får bindande verkan för EU:s medlemsstater. FNSts företräde över alla andra traktat kan ge upphov till komplexa situationer för länder som Sverige som dels är medlemmar av FN men även av EU. EU:s medlemsstater är inte enbart bundna av EG-förordningar, utan även av de resolutioner som SäkR beslutat om.

Den här examensuppsatsen tar avstamp i Förstainstansrättens dom i Yusuf-fallet. Yusuf, som var svensk medborgare, samt den Sverige-baserade ekonomiska organisationen Al Barakaat, fick sina ekonomiska tillgångar frysta genom en EG-förordning som implementerade en SäkR-resolution. Yusuf och Al Barakaat blev svartlistade av FN genom riktade sanktioner. Tillämpningen av svartlistor genom riktade sanktioner har varit föremål för mycket kritik eftersom de individer och organisationer som hamnat på listorna inte har fått rätten att bli hörda eller att ta del av bevisning tillgodosedd. Dessa grundläggande fri- och rättigheter, som åtnjuter skydd både i svensk grundlag och av EU, försummas totalt av det internationella samfundet i kampen mot terrorism. Yusuf-fallet var inget undantag i det hänseendet.

Förstainstansrätten slog fast i sin dom att även om man ansåg att rätten till en rättvis prövning och lagprövningsrätten utgjorde grundläggande fri- och rättigheter enligt EG-rätten så var domstolen inte behörig att döma över dessa rättigheter eftersom det egentligen var fråga om SäkR-resolution som endast hade implementerats genom en EG-förordning. FNSts företräde samt rädslan att underminera SäkRs makt var de två viktigaste faktorerna som domstolen åberopade i sitt försvar. Inte heller ansågs förordningen strida mot *jus cogens*.

Ett steg mot att säkerställa respekten för de grundläggande fri- och rättigheterna i framtiden kan vara EU:s anslutning till EKMR genom Lissabonfördraget. Det är också viktigt att FN:s medlemmar sätter press på FN att respektera rättigheterna och för FN att efterleva kraven på respekten. Annars riskerar FN att mista mycket av sin trovärdighet i kampen mot terrorismen och 'kriget mot terrorn' riskerar att förloras.

Preface

(...) A society that violates the rights of its citizens cannot expect them to cultivate their talents at home, or to contribute to their nation's prosperity, or to develop their own communities. Without the rule of law, without the protection of the individual, and without the end to corrupt practices, societies cannot sustain in the long run.¹

I would like to thank my supervisor, Professor Gudmundur Alfredsson, for his good support and for being a committed supervisor. I would also like to thank Mr. Anders Kruse, Director for the EU Legal Secretariat at the Ministry for Foreign Affairs for inspiring me to write this thesis.

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Petter Lycke

Lund, 11 June 2008

¹ Former UN Secretary General Mr. Kofi Annan in his address marking the 50th anniversary of the Universal Declaration of Human Rights, 8th of December, 1998.

Abbreviations

AG	Advocate General
The Community	The European Community
Council	The Council of the European Union
CFI	The Court of First Instance
EC	Treaty Establishing the European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11
ECJ	European Court of Justice
ECtHR	The European Court of Human Rights
EU	European Union
EUCFR	Charter of Fundamental Rights for the European Union
ICL	International Law Commission
ICTY	the International Tribunal on War Crimes in Former Yugoslavia
Member States	Member States of the EU
RF	Regeringsformen (Instrument of Government)
TEU	Treaty Establishing the European Union
UDHR	Universal Declaration on Human Rights
UN	United Nations
UN, or UN Charter	Charter of the United Nations
UNGA	United Nations General Assembly
Union	European Union
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Introduction to the Topic

September 11 changed the world in many ways. From an International Law perspective the situation gave rise to a number of new issues which had never been dealt with before. For the international community the incident gave rise to a universal fear of terrorism and widespread suspicion towards Muslims and the ‘war on terror’ became a well-recognized notion. The significance of self-defense ‘if an armed attack occurs’ which is found in Article 51 of the Charter of the United Nations (UN Charter) changed when the US and its allies decided to invade Iraq without the consent of the United Nations Security Council (UNSC). Important fundamental rights that once were considered sacred are now outweighed by the necessity to fight terrorism.

In 1999 the UNSC adopted Resolution 1267 in which it condemned the fact that Afghan territory continued to be used for the sheltering and training of terrorists and planning of terrorist acts. Paragraph 4 (b) of the resolution provides that all the member states of the UN must:

*Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need;*²

A Committee was set up by mandate of the Resolution to make sure the States effectively implement the measures imposed by paragraph 4 of the Resolution and to make periodic reports to the UNSC. Since every member of the UN is bound by Article 103 UN Charter, the Resolution must be implemented by virtue of its own nature.³

On the 14th of February 2000 the EU Council adopted Regulation No 337/2000 EC concerning a freeze of funds and other financial resources in respect of the Taliban regime of Afghanistan on the basis of Articles 60 Treaty Establishing the European Communities (EC) and 301 EC. Every Member State of the EU was now also legally bound by the EU to implement the measures.⁴

² S/RES/1267 (1999) para 4 (b); Judgement of the Court of First Instance in Case T-306/01 (2005), Yusuf Case (Yusuf), para., 10.

³ S/RES/1267 (1999) para., 6; Charter of the United Nations, Article 103.

⁴ Yusuf, para., 13.

By a new resolution by the UNSC 1333 from 2000, the Committee was instructed by the UNSC to maintain and update a list of persons and entities designated as associated with Usama bin Laden and Al-Qaeda. This list was subsequently adopted by the EU through Regulation No 467/2001 replacing Regulation 337/2000.⁵

Among several names and entities on the list provided by Regulation No 467/2001 was the Swedish citizen Ahmed Ali Yusuf. Mr. Yusuf was together with two other Swedish citizens and a financial entity called the Al Barakaat International Foundation blacklisted by the UNSC for suspected connections to Al Qaeda. Eventually, however, the two other citizens were removed from the list by the UNSC in 2002.⁶ Mr. Yusuf and the Al Barakaat contested the legality of the Regulation and filed for an appeal before the Court of First Instance (CFI). This is the case most commonly referred to as the case of the ‘Somali Swedes’.

The UNSC Resolutions as well as the EC Regulations are carried out without a proper trial nor are the individuals enclosed on the list given an opportunity to pronounce oneself on the issue. Clearly this would be a violation of the right to a fair hearing expressed in both the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 6 as well as the Article 10 of the Universal Declaration on Human Rights (UDHR).⁷ The incident of Mr. Yusuf is in no way a one-off, but follows a practice established by the world legal order and where neglect for individuals’ fundamental rights is accepted. Sweden is no exception to this practice and is in fact obliged to carry out the decisions of both the EU as well as the UN due to its treaty obligations.

1.2 Subject and Purpose

In this thesis, I will seek to examine whether the practice of blacklisting individuals is in compliance with the protection of fundamental rights as expressed *inter alia* in the ECHR and the constitutions of the EU Member States.⁸ The starting-point of this research is to analyze the obligations of a Member State as party both to the UN Charter and the Treaties of the EC and EU. The Yusuf case is an obvious example of a situation where a Member State, in this case Sweden, is obliged to follow not only EU law, but also international law under e.g. the UN Charter. Moreover, Sweden is bound by its own constitution where the protection for fundamental rights is clearly stated.⁹

⁵ Ibid. para., 14 ff.

⁶ Ibid. para., 24 ff.

⁷ See ECHR, Article 6; UDHR, Article 10.

⁸ See *inter alia* the Right to a fair trial in Article 6 ECHR.

⁹ RF 2 kap. (Swedish Instrument of Government Act, Chapter 2)

The overall purpose of the thesis is therefore to clear up the difficulties of the right strike between the right balance between the effectiveness in the fight against terrorism and protection of fundamental rights. The main research questions are as follows;

1. Are the UNSC Resolutions in accordance with Sweden's obligations to respect fundamental rights under international law and EU law?
2. Are the EC Regulations or Common Positions in accordance with Sweden's obligations towards the European Union?
3. Is there any way to limit the impact of the UNSC in the international legal order?
4. What are the means for redress for Mr Yusuf and/or Al Barakaat and what can we expect in the future?

1.3 Definitions and Delimitations

The 'War of Terror' is remarkable in the sense that it is a war with no clearly identified parties. Roughly, one could say that the US with the UK and its allies has declared war on terrorism. The problem is that terrorism is no state or regime, but consists of anyone or any organization involved in acts of terror. If there is a war, textually, the rules of war in international humanitarian law ought to apply. The invasion of Iraq in 2003 was clearly a case of war as defined in the Third Geneva Convention from 1949, Article 2.¹⁰ However, for those other individuals or groups of individuals or entities that are subjected to sanctions it remains unclear whether the same rights of humanitarian law applies for them.

¹⁰ *In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

See, Article 2 of the Geneva Convention relative to the Treatment of Prisoners of War, adopted on 12 August 1949 in Geneva.;

The rules of international humanitarian law apply to armed conflicts. The Appeals Chamber of the International Tribunal on War Crimes in Former Yugoslavia (ICTY) defined the notion of armed conflict in the Tadic case.¹¹

The Appeals Chamber laid down that:

*an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached;*¹²

By this definition, it seems like the ‘war on terror’ could fit both the occupation and intervention in Iraq and Afghanistan. The individuals who are, or have been, subjected to UNSC sanctions, could be said to carry out actions of war if one would make a far-reaching interpretation and state that they assist in carrying out the actions of terror, thus forming part of the notion of terrorism as a whole. However, I will not go deeper into analyzing the definition of terrorism, but simply attempt to illustrate the complexity of the notion of the ‘war on terror’.

In this work, I refer to the ‘war on terror’ as the war on terrorism, without going further deeper into the consequences the denotation ‘war’ has on the parties concerned. Like many other scholars, the ‘war on terror’ is used simply as a reference to describe an ongoing condition in the fight against terrorism; though, I am not intending to give the concept a greater significance.

The second definition that needs to be emphasized is the using of the notion of fundamental rights. Since the starting point of this thesis is Sweden and its obligations to the EU and the UN, I will not refer to basic human rights. The focus lies on individuals who are citizens of Sweden and thus, of the EU. Both Sweden and the EU are legitimate polities based on certain agreed values. These values are fundamental rights and create a basic point of reference against which all norms shall be reviewed.¹³

After having elucidated the main concepts, it is appropriate to present the delimitations.

Considering the possible width of the topic the thesis, I am forced to narrow down the subject in as much as possible. The thesis is first and foremost a study on the protection of fundamental rights within the EU context. Since the subject requires also an in depth analyze of factors of international law, I

¹¹ Shaw, Malcolm N, *International Law* 5th ed. Cambridge University Press, 2003, p. 1069.

¹² Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction from 2 October 1995 in the Tadic case (IT-94-1), para. 70.

¹³ Lindfelt, Mats *Fundamental Rights in the European Union – Towards Higher Law of the Land? A Study of the Status of Fundamental Rights in a Broader Constitutional Setting*, Åbo Akademi University Press, 2007, p. 12.

will extend the study to include aspects of the UN, the UNSC and rules of customary international law. However, I have chosen not to become absorbed into other issues of international law such as state responsibility or the right to self-defence. I have further decided not to extend the scope of this study to include the possible review of the ICJ on UNSC Resolutions. This is simply due to the lack of space, even if I believe it is of interest, even for this study. Moreover, I will not go deeper into other possible ways to limit the power of the UNSC by entering a possible discussion on how to reform the whole UN system, as this would extend the scope of the thesis far too much for obvious reasons. I will instead emanate from the existing limitations on the UNSC in my discussion and simply mention some possible, less radical changes.

1.4 Method and Disposition

There are several legal research methods and the specific topic in this thesis could probably be examined in as many ways. Peter Westberg elaborates two important methodological methods to do legal research, the ‘rule-oriented approach’ and the ‘problem- or interest oriented approach’.¹⁴

The ‘problem- or interest oriented approach’ aims at describing a legal system without having a starting point in legal rules. The method is characterized by a more open approach, in the sense that it aspires to widen the field of sight beyond the law.¹⁵ The problem I intend to examine is primarily a legal issue; however it is at the same time a highly political topic and requires a discussion beyond legal rules to fully understand the major dilemma.

The reference to politics, the critical analysis of the case-law of the CFI as well as the future aspects on the protection of fundamental rights does not imply that there is no reference to the law in the field of EU- and International law, *de lege lata*. The part on EU law as well as International law and Swedish national legislation describes legal systems, *de lege lata*. It is important to emphasize that the described rules are not seen as absolute, but in fact dependant upon aspects such as the international political situation. Nevertheless, it is the non descriptive parts such as the future aspects and the political debate, *de lege ferenda* that suggests that this thesis has more of a ‘problem- or interest oriented approach’.

The thesis is set up around the Yusuf case and the different aspects of the judgment are dealt with in the main Chapters, 2 and 3, with analysis of EU- and international law respectively. The two last Chapters intend to give a broader view of the problem and possible changes for the future. Each main Chapter is based around one of the research questions. Nevertheless,

¹⁴ Westberg Peter *Avhandlingsskrivande och val av forskningsansats – en idé om rättsvetenskaplig öppenhet* in Festskrift till Per-Olof Bolding, 1992, Juristförlaget, p. 423.

¹⁵ *Ibid.*, pp. 423 and 426.

throughout the thesis I have added rhetorical questions in an attempt to guide the reader forward and create a logical consistency. These rhetorical questions should not be mistaken for the main research questions, presented in Chapter 1.2 above.

Chapter two of the thesis intends to give a broader understanding of the rules of EU law that regulates the foreign policy of the EU and its relationship to the UN and international law. The Chapter also seeks to examine the case-law of the CFI and the ECJ with a critical mindset so as to establish a possible pattern for future judgments.

Chapter three deals with international law and aims at clarifying the present system of sanctions and the possibility to limit the power of the UNSC, but also reviews the ways in which international law could be said to have modified.

Chapter four provides for the future aspects on the protection of fundamental rights and enters a discussion on how the fundamental rights can be protected in the EU when the Lisbon Treaty comes into force. The Chapter also attempts to give some solutions for the future securing of fundamental rights.

Finally, Chapter five starts off with a review of Swedish national legislation to implement UN Resolutions and Common Positions of the EU to finalize in a political debate where a multitude of scholars and their views on the problem are highlighted.

1.5 Materials

The broad and relatively new topic required a wide range of materials. I have mainly used primary sources of law, such as various Treaties such as the Treaties of the EU and the EC, the UN Charter and Conventions for the more descriptive parts. Other sources of primary international law have been international case-law and the UNSC Resolutions.¹⁶ Sources of secondary EC law such as the EC Regulations and decisions have also been vital for the description of the problem.

As regards doctrine, there are not many books written on the topic, yet. Perhaps the continuing debate and the fact that the issue is relatively new make the writing of longer publications difficult. When it comes to articles in legal journals there seems to be more activity. I have had great help from various articles in legal journals. These articles have been available over the internet through the library of the Faculty of Law at the University of Lund. It was important to find a great variety of authors and to find the most recent

¹⁶ See International Law – Primary Sources found at Suffolk University Law School Library, available at: <http://www.law.suffolk.edu/library/research/a-z/resguides/intl.cfm>

ones to give the thesis a sense of accuracy. Since the topic is current and still a source of much debate there was a multitude of articles to chose from.

Because the thesis is not a strict legal dogmatic thesis, I have used other sources of material such as various blogs and homepages found on the internet. Among the latter sources, the homepages of international organizations such as the UN are the most reliable ones. Despite the lack of reliability in political blogs, I found it to be interesting to bring the opinions of scholars outside of the formal framework to the spotlight.¹⁷

¹⁷ See Joanne Scott in the International Economic Law and Policy Blog, available at: <http://worldtradelaw.typepad.com/ielpblog/2006/04/index.html>

2 EU Law

2.1 The relationship between the EU and the UN

2.1.1 Introductory remarks

The relationship between the Member States of the EU and the UN is somewhat complex. While EC law prevails over the national law of the member states of the EU, the Charter of the UN prevails over any other international treaty.¹⁸ For a country like Sweden the dilemma is obvious when considering the fact that Sweden is not only a member of the EU but also a member of the UN. When the UNSC so decides upon a matter it considers to be a threat to international peace and security, the world must obey.¹⁹ So what do countries like Sweden do when there's a conflict between its obligations to the UN and the various international treaties that Sweden has ratified²⁰?

2.1.2 Obligations of the Member States of the EU to the UN

The answer could be found in the Vienna Convention on the Law of Treaties (VCLT) Articles 30 and 41. According to these provisions, the UN Charter takes precedence, in case of conflict, over all, at a later date, contracted agreements relative to the UN Charter between any of the UN members, such as the ECHR. For those members being parties first to the ECHR and later to the UN Charter, the Charter will prevail in case of conflict due to the obligation in Article 103 of the UN Charter. All member states of the EU are also members of the UN and consequently, the EU member states cannot claim to have acted in accordance with the ECHR when failing to comply with binding UNSC Resolutions.²¹

Nevertheless, Article 6 (2) TEU confirms that fundamental rights are protected as general principles of Community law as they derive from the

¹⁸ Judgement of the court in Case 6/64, Flaminio Costa v. ENEL [1964] ECR 585, 593; Article 103 UN.

¹⁹ Charter of the United Nations, Articles 24, 25 and 103.

²⁰ See *inter alia* the European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, ratified in 1953, Lysén Göran, *Targeted UN Sanctions: Application of Legal Sources and Procedural Matters* in *Nordic Journal of International Law* 72, 2003: p. 292.

²¹ Lysén Göran, *Targeted UN Sanctions: Application of Legal Sources and Procedural Matters* in *Nordic Journal of International Law* 72, 2003: p. 292.

ECHR and the common constitutional traditions of the member states.²² The provision codified the case-law of the ECJ and turned it into an imperative that the courts of the EU are mandated and instructed to enforce. There exist no other provisions in either the EC or the EU Treaty that contain derogations from the obligation to respect fundamental rights. This means that there are no provisions expressly stating that fundamental rights may be derogated from where this is necessary to respect international law or, especially, UNSC Resolutions.²³

The relationship between the EU and its member states is yet another factor that affects the relationship between the EU and the UN. The issue of pre-accession human rights obligations for the member states of the Union is included in Article 307 EC. According to Article 307 EC all agreements concluded before acceding to the EU between one or more member states and one or several third states shall not be affected by the provisions of the EC Treaty. If however the obligations only concerned member states of the EU then Community law must take priority by virtue of the principle of loyalty in Article 10 EC, even when these treaties were created prior to their entry into the EU. To sum up, Member States legal obligations towards third states continue to exist even after they join the EU.²⁴

Article 307 EC by itself permits states to breach EU law, but read together with Article 103 of the UN Charter, however, Article 307 EC in fact obliges the Member States to breach EU law where this conflicts with the obligations deriving from the UN Charter.²⁵

The EU is not, as an intergovernmental organization, a signatory to the UN Charter, whereas its Member States are. This issue will be discussed more thorough later in this paper, but it is worth mentioning the problem at this point.²⁶ While the EU as such is not bound by the UN, it could not carry out decisions contradictory to the UNSC since that would clearly undermine the authority of the UNSC.²⁷ The nature of the UN Charter as prevailing any other international treaty also implies that the EU could not act contrary to the UN Charter.²⁸

²² See Eeckhout Piet, *Community Terrorism Listings, Fundamental Rights and UN Security Council Resolutions. In Search of the Right Fit*, European Constitutional Law Review 3, 2007, p. 198 and Article 6 (2) TEU.

²³ Eeckhout, p. 198.

²⁴ Tawhida Ahmed and Israel de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, The European Journal of International Law Vol 17 no. 4, 2006, p. 784 ff.

²⁵ Ibid. p. 788.

²⁶ See under Chapters 2.2.1 *Introductory Remarks* and 2.2.3 *Judgment of the CFI*

²⁷ See "Different Attitudes in European Courts to International Law" by Joanne Scott, June 2006 from the International Economic Law and Policy Blog available at:

<http://worldtradelaw.typepad.com/ielpblog/2006/04/index.html>

²⁸ Charter of the United Nations, Article 103.

That leaves us with the problem of how to secure fundamental rights in the EU and how its Member States can live up to their own constitutional obligations regarding the respect for fundamental rights?

2.1.3 The Common Foreign and Security Policy

As regards primary law of the EU, the respect for fundamental rights is expressly mentioned in Article 11(1) of the Treaty Establishing the European Union (TEU).²⁹ In the same article there is a direct referral to the UN Charter. The article specifically states that the Common Foreign and Security Policy (CFSP) shall have as the objective:

to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter

(...)

*to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter(/...)*³⁰

It is the Council that defines the principles and general guidelines for the CFSP. The Council also decides upon the common strategies for the Union including joint actions and common positions for the EU member states.³¹

The Commission is also involved in the work of the CFSP in that it enjoys a right of policy initiative. The Commission and the Council are also jointly responsible for the consistency of EU external relations regarding *inter alia* humanitarian and sanctions regulations.³²

2.2 The legal framework for the implementation of EC Regulations

The Community law-making process is quite extensive and could probably make up of a paper of its own. Therefore I will only briefly go through the basic procedure the Community applies when adopting the Regulations at issue in this paper.

²⁹ “The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be: /.../ - to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”, *see* Article 11 (1) TEU.

³⁰ Article 11(1) TEU.

³¹ External Relations – Common Foreign and Security Policy, available at http://ec.europa.eu/external_relations/cfsp/intro/index.htm#2, *see* also Articles 13 to 15 TEU.

³² *See* External Relations – Common Foreign and Security Policy, available at http://ec.europa.eu/external_relations/cfsp/intro/index.htm#2

When the EU implements its regulations the foundational provision is Article 249 EC. The article gives the institutions of the EU the possibility to act jointly to make regulations. The EU Parliament with the Council, or the Commission with the Council, makes regulations that have general application and are binding and directly applicable in all Member States.

Since regulations have a supra national nature, every regulation must be entered into all national legal systems. This must be either by the national system transferring the measure into national law, or by a shorter national act adopting the relevant international act. The directly applicable nature of the regulations also bring that regulations are part of the national legal systems without the need for transformation or adoption by separate national legal measures.³³

After the adoption of the Treaty Establishing the European Union (TEU), the new three pillar structure provided for a more intergovernmental and less supranational decision-making structure. However the pillars are not completely disconnected from one another since much of the decision-making involves the institutions of the Community, e.g. the decisions on common positions through the CFSP.³⁴

2.3 Case T-306/01, the Yusuf Case

2.3.1 Introductory remarks

The Yusuf Case is significant since the CFI states that the EU was competent to enact regulations for the freezing of funds for persons alleged to be associated with Al-Qaeda and Usama bin Laden. On the other hand the CFI did not consider itself to be able to review the legality of these acts merely in the light of EU's general principles for the protection of human rights. A review on the grounds of the previously mentioned principles would impair an indirect review of the UNSC Resolutions and since the UN Charter has primacy over EC law that would also undermine the authority and uniformity of the acts of the UNSC. As a consequence, the CFI decided it could only review the legality in the light of the conformity of the regulations with the norms of *jus cogens* since these norms are binding upon everybody, including the UNSC.³⁵

³³ Article 15 TEU; Craig, de Búrca Paul Graíne, *EU Law, Text, Cases and Materials*, 4th ed., Oxford University Press, 2008, p. 84.

³⁴ *Ibid.* p. 17.

³⁵ See "Different Attitudes in European Courts to International Law" by Joanne Scott, June 2006 from the International Economic Law and Policy Blog available at: <http://worldtradelaw.typepad.com/ielpblog/2006/04/index.html>

I touched briefly upon the facts of the case earlier in the introduction. It is now time to go through the facts of the case in detail and the discussion that followed in the judgment.

2.3.2 Facts of the Yusuf Case

The Swedish citizens although originally from Somalia, Mr. Yusuf Ahmed Ali and two other individuals, Mr. Abdirisak Aden and Mr. Abdulaziz Abdi Ali, were suspected of connections with the terrorist network Al-Qaeda. They were together with the Barakaat International Foundation included in 2001 on a list issued by the Sanctions Committee, established by the UNSC through the Resolution 1267 from 1999³⁶, with a mission to report to the UNSC with its observations and recommendations on the following tasks:

(a) To seek from all States further information regarding the action taken by them with a view to effectively implementing the measures imposed by paragraph 4 above;

(b) To consider information brought to its attention by States concerning violations of the measures imposed by paragraph 4 above and to recommend appropriate measures in response thereto;

(c) To make periodic reports to the Council on the impact, including the humanitarian implications, of the measures imposed by paragraph 4 above;

*(d) To make periodic reports to the Council on information submitted to it regarding alleged violations of the measures imposed by paragraph 4 above, identifying where possible persons or entities reported to be engaged in such violations;*³⁷

The list of individuals and entities was subsequently amended by the Committee and the two other individuals were removed by the Sanctions Committee in 2002.³⁸

The EU Council adopted on the 14th of February 2000 Regulation No 337/2000 on the basis of Articles 60 EC and 301 EC implementing the provisions of the Resolution by the UNSC³⁹. These Regulations were also amended, following the advice by the Sanctions Committee and the UNSC Resolutions. Regulation (EC) No 467/2001 was adopted by the EU Council on March 6th 2001 defining the notion of “freezing of funds”.⁴⁰ To this regulation was also supplemented the list, set up by the Sanctions Committee, containing the names of the individuals and entities subjected to

³⁶ S/RES/1267 (1999), para., 6.

³⁷ Ibid. para., 6.

³⁸ Yusuf, para., 33.

³⁹ Ibid. para., 13.

⁴⁰ See Yusuf, para., 20 and Article 1 of Regulation No 467/2001.

the sanctions in what was called the Annex I.⁴¹ One year later the UNSC adopted a new resolution, 1452(2002), which included an exception to the obligation to freeze the funds of suspected terrorists. This exception amended Regulation (EC) No 881/2002 by Regulation (EC) No 561/2003.⁴²

After the two other individuals, Mr. Ali and Mr. Aden, decided to discontinue their action only Mr. Yusuf and the Barakaat International Foundation (applicants) went on with their application against the Commission and the EU Council (defendants).⁴³

The applicants, Mr. Yusuf and the Barakkat International Foundation, set out three grounds of annulment, namely that the EU Council was incompetent to adopt the contested regulation (Regulation No 881/2002), infringement of Article 249 EC and a breach of their fundamental rights.⁴⁴ For this thesis, the first and last grounds of annulment are of most importance.

Regarding the alleged breach of the applicants fundamental rights the applicants referred to both Article 6 (2) TEU and to the case-law of the European Court of Justice (ECJ).⁴⁵ The applicants further argued that their right to the use of their property and the right to a fair hearing, as guaranteed by Article 6 of the ECHR, had been violated. The regulation purported to have imposed heavy civil and criminal sanctions although the applicants had not first been heard or given the opportunity to defend themselves. The contested regulation had not either been subjected to any judicial review.⁴⁶

The reason for the applicants to end up on the list in the Annex I was never specified. Neither the council nor the Commission had examined the reasons for which the Sanctions Committee had included Mr Yusuf and Al Barakaat Foundation on the list. The applicants argue further that the source of information received by the Committee is obscure and the reasons why certain individuals have been included on the list without the opportunity to be heard are never mentioned.⁴⁷

The applicants also maintain that the duty to accept and carry out the decisions of the UNSC in Article 25 UN is not an absolute obligation. Neither is Article 103 UN binding except in public international law and does not mean that the members of the UN have no possibility to have regard to their own laws.⁴⁸

⁴¹ Yusuf, para., 22.

⁴² See paragraph 39 of the Case T-306/01, “the Yusuf Case” and Article 2a of Regulation No 561/2003.

⁴³ Yusuf, para., 68.

⁴⁴ Ibid, para 51 and 79.

⁴⁵ See inter alia Case 4/73 Nold v. Commission (1974) ECR 491 and Case 11/70 Internationale Handelsgesellschaft (1970) ECR 1125, Yusuf para., 190.

⁴⁶ Yusuf, para. 190.

⁴⁷ Ibid. para., 191.

⁴⁸ Ibid. para., 206.

The Commission and the Council considered on their behalf that the Community, like the members of the UN, was bound by international law to give effect to resolutions of the UNSC adopted under Chapter VII UN. They also considered that the powers of the Community institutions in this area were limited and that any other international agreement or rule of domestic law bound to hinder the implementation of the regulations must be disregarded. Since the UN is the chief responsible for the maintenance of international peace and security, all actions that the UNSC takes under Chapter VII UN must prevail over every other international obligation. A reference was made to Article 103 UN to come to the conclusion that the previously mentioned provision made it possible to disregard any other provision of international law, whether customary or laid down by convention, in order to apply the resolutions of the UNSC.⁴⁹

The Council and the Commission, in an attempt to make the argumentation waterproof, further argued that the uniformity and effectiveness of the application of the UNSC resolutions could not be maintained if a member of the UN could alter the contents of the UNSC resolutions.⁵⁰

The Commission also argued, based on Article 27 of the VCLT, that:

*If a provision of national law is inconsistent with an obligation under international law, it is for the State concerned to interpret that provision in the spirit of the Treaty or amend its national legislation so as to make it compatible with the obligation under international law.*⁵¹

The Council and the Commission base much of their argumentation on the creation of an *effect of legality* deriving from the supremacy of the UN Charter. Since the Charter prevails over any other provision of international law, the actions taken in the name of the Charter naturally receive an *effect of legality*. The Council further claims that when the Community adopts regulations it reflects the desire of its member states to perform their obligations under the UN Charter. The nature of the Charter necessarily provides the Community the protection to carry out the actions and in particular the *effect of legality*.⁵²

On the point of the possible illegality of the adoption of the contested Regulation, the Council points at some key factors that allow the Community to adopt the contested regulation. Since the Community had decided to act by virtue of a Common Position 2002/402, it was not possible, without infringing its own international obligations, the international obligations of its member states and the duty of loyalty laid down in Article 10 EC, to exclude certain people from the list in Annex I. Neither was it possible to inform these individuals beforehand nor to bring proceedings making it possible to check whether the measures were justified.⁵³

⁴⁹ Ibid., paras. 206 f.

⁵⁰ Ibid., para. 208.

⁵¹ Ibid., para. 209.

⁵² Ibid. paras., 207 and 212.

⁵³ Ibid. para., 215.

The Council claimed that it would be of no difference had the contested regulation been regarded as violating the applicant's fundamental rights. The legal effect applies also with regard to fundamental rights, which may be temporarily suspended in time of an emergency as provided by international treaties. The Council also responded to the applicants request whether the regulation was compatible to the aim of the UN, especially regarding Article 1(3) UN, by referring to a theoretical scenario where the fundamental rights of the victims of terrorism would weigh up the fundamental rights of the victims of the sanctions.⁵⁴

Concerning the judicial review the defendants argued that the Court's (CFI) jurisdiction must be limited or non existing in considering whether the adoption of the contested regulation consisted in a manifest error. A judicial review that would indirect review the measures decided upon by the UNSC would risk undermining one of the foundations of the world order established with the birth of the UN and would cause serious disruptions to the international relations of the Community and its member states.⁵⁵ A judicial review of the legality of the contested regulation would also be open to challenge in the light of Article 10 EC and would conflict with the obligation on the Community to comply with international law. The defendants further claimed that such a review may not be challenged at national or Community level, but only directly before the UNSC, through the Government of the State of which the applicants are nationals.⁵⁶

Finally, the Council and the Commission argued, on the alleged breach of the applicants right to property, that the measures implementing contested regulation did not interfere with the applicants' right to possess their property. According to the defendants, the right to possess property does not enjoy absolute protection and its exercise may be subjected to restrictions if justified by public interest objectives.

2.3.3 Jugement of the CFI

The CFI started out by clarifying that the original claim by the applicants was to seek the annulment of Regulation No 467/2001.⁵⁷ Since that Regulation was amended by Regulation No 881/2002 the Council acknowledged that the applicants were entitled to adapt the original claims in their action so that those claims henceforth sought the annulment of Regulation No 881/2002.⁵⁸

⁵⁴ Ibid. para. 216 f.

⁵⁵ E.g. how the Sanctions Committee places individuals on the lists contained in the UNSC resolutions and the regulations of the EC.

⁵⁶ Yusuf, para., 219.

⁵⁷ Ibid, para 42.

⁵⁸ Ibid. para 51f.

The two regulations were adopted on partly different legal grounds. The adoption of regulation 467/2001 was based on Articles 60 EC and 301 EC while the contested regulation was adopted based on Articles 60 EC 301 EC and 308 EC. The two regulations were also directed at different targets where Regulation No 467/2001 was specifically aimed at targeting a third country, Afghanistan, while Regulation No 881/2002 targets more generally Usama bin Laden, members of the Al-Qaeda and the Taliban and other individuals and entities associated with them.⁵⁹ However, the Court decided to set out the grounds on which it considered the applicants grounds to be unfounded concerning Regulation No 467/2001 in their original claim, since those grounds also constituted one of the premises of its reasoning when examining the legal basis of the contested regulation.⁶⁰

The CFI considered that the Council was competent to adopt Regulation No 467/2001 even when the affected individuals and entities were nationals of a MS. The applicants claimed that the Council was incompetent to adopt such a regulation since there was nothing in the wording of Articles 60 EC and 301 EC that could justify a sanction imposed on nationals of the EU. The sanctions would also be contrary to the free movement of capital since they affected nationals of a MS.⁶¹ The Court pointed to the necessity of efficient application of the Articles 60 EC and 301 EC and stated that

*As the Commission has rightly pointed out, Articles 60 EC and 301 EC would not provide an efficient means of applying pressure to the rulers with influence over the policy of a third country if the Community could not, on the basis of those provisions, adopt measures against individuals who, although not resident in the third country in question, are sufficiently connected to the regime against which the sanctions are directed.*⁶²

The Court subsequently continued by stating that

*the fact that some of those individuals so targeted happen to be nationals of a Member State is irrelevant, for, if they are to be effective in the context of the free movement of capital, financial sanctions cannot be confined solely to nationals of the third country concerned.*⁶³

The Court considered that interpretation to be justified both by effective and humanitarian concerns. The applicants were also considered to come under the scope of the regulation since there was a connection between Usama bin Laden, Al-Qaeda, the Taliban and Afghanistan all of which form a legitimate ground for interrupting or reducing economic relations. Finally, the Court also found the measures provided by the regulation to be proportionate since the sanctions may not go beyond what is appropriate and

⁵⁹ See Council Regulation (EC) No 881/2002 of 27 May 2002, 29.5.2002 Official Journal of the European Communities L 139/9; Summary of the judgement in case T-306/01, “the Yusuf Case”, para 1ff

⁶⁰ Case T-306/01 ” the Yusuf Case” para., 107.

⁶¹ Ibid. para 110 ff.

⁶² Yusuf, para., 115.

⁶³ Yusuf, para., 115.

necessary to the attainment of the objective pursued by the Community legislation imposing them.⁶⁴

At the time of the adoption of the contested regulation (Regulation No 881/2002) the international situation had changed and the US and its allies had intervened in Afghanistan and overthrown the Taliban regime.⁶⁵ In the absence of a direct connection to the Afghan territory, the Council and the Commission considered that Articles 60 EC and 301 EC did not constitute a sufficient legal base for the adoption of Regulation No 881/2002. Both the previously mentioned articles refer specifically to third countries and since the governing regime of the third country in question had disappeared there ceased to be a sufficient link between those individuals and entities and a third country. Therefore, the contested regulation could not be based solemnly on Articles 60 EC and 301 EC but had to be combined with Article 308 EC.⁶⁶

The latter article provides a mechanism for the Council to act on a proposal from the Commission to attain one of the objectives of the Community even where there exists no provision conferring the necessary power to do so⁶⁷. The CFI argued that since there is nothing in the EC Treaty that provided for the adoption of the measures laid down in the contested regulation the conditions for the applicability for Article 308 EC have to be fulfilled. However, neither Article 60 EC, 301 EC nor 308 EC constitute of itself a sufficient legal basis for the contested regulation. The articles must therefore be considered all together for the articles to create a sufficient legal base for the adoption of Regulation No 881/2002.⁶⁸ The CFI continued its argumentation by pointing to the Common Foreign and Security Policy (CFSP) under which the Council can adopt a common position or a joint action.⁶⁹ Economic and financial sanctions on individuals could, when considering all of the above stated legal grounds, be imposed without any connection whatsoever with the territory or governing regime of a third country.⁷⁰ Finally, the Court proclaimed that

*Against that background, recourse to Article 308 EC, in order to supplement the powers to impose economic and financial sanctions conferred on the Community by Articles 60 EC and 301 EC, is justified by the consideration that, as the world now stands, States can no longer be regarded as the only source of threats to international peace and security.*⁷¹

⁶⁴ Ibid. para., 116 ff.

⁶⁵ The armed intervention of Afghanistan under the consent of the UNSC by the US and its allies was launched in October 2001. By the time the UNSC Resolution 1390 (2002) was adopted on January 6th 2002, the allied forces had already overthrown the Taliban regime.

⁶⁶ Ibid. Para., 130 ff.

⁶⁷ Consolidated Version of the Treaty Establishing the European Community, Part XI General and Final Provisions, Article 308; Yusuf para., 135.

⁶⁸ Yusuf, para., 157 f.

⁶⁹ See *inter alia* Articles 11, 12 and 13 of the Consolidated Version of the Treaty on European Union.

⁷⁰ Yusuf, para., 158.

⁷¹ Ibid. para., 169.

The final grounds of annulment are of most importance for this paper. The breach of fundamental rights was divided up into three parts, a breach of the applicants' right to a fair hearing, breach of the right to property and a lack of legal review.⁷²

The CFI started out by stating that it could rule on the plea alleged breach of the applicants' fundamental rights only in so far as it falls within the scope of its judicial review and as it is capable of leading to annulment of the contested regulation. Subsequently the CFI considered the relationship between the legal order under the UN Charter and the domestic or Community legal order. The Court found the UN Charter to clearly prevail over any other obligation of domestic law or international treaty and that Article 103 UN implies that the Charter prevailed also in respect of treaties made earlier than the Charter. According to the rule of primacy in Article 27 of the VCLT a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.⁷³ The primacy of the Charter also extends to decisions contained in a resolution of the UNSC according to Article 25 UN under which all members of the UN agree to accept and carry out the decisions of the UNSC.⁷⁴

To finalize the issue of primacy the CFI drew attention to the relationship between the Member States of the EU and its obligations towards EC law and its obligations under the UN Charter. According to the Court, all member states of the EU were already parties to the UN prior to their accession to the EC or the EU.⁷⁵ The Court further argued that, according to settled case law of the ECJ and Article 307 EC, application of the EC Treaty does not affect the duty to respect the rights of a Third country and to perform its obligations there under. The rule of primacy was further specifically introduced into the EC Treaty through Article 297 EC. The provision urges the member states to consult each other in order to carry out obligations it has accepted for the purposes of maintaining international peace and security.⁷⁶

The Court concluded that, pursuant to both the rules of general international law and to the previously mentioned provisions of the EC Treaty, member states must leave unapplied any provision of Community law that raises any impediment to the proper performance of their obligations under the UN Charter.⁷⁷

⁷² Supra n. 190.

⁷³ The rule of primacy is derived from the principles of customary international law, codified in Article 27 VCLT.

⁷⁴ Yusuf, paras., 232 ff.

⁷⁵ Five of the six signatories to the EC Treaty were already members of the UN and although the Federal Republic of Germany was not formally admitted as a member of the UN until 1973, it still had a duty to perform its obligations under the UN Charter according to agreements signed prior to the signing of the EC Treaty.

⁷⁶ Yusuf, para., 235 ff.

⁷⁷ Eeckhout, p. 185.

The CFI subsequently admitted that the Charter as a matter of international law does not directly bind the Community since it is not a member of the UN. However, the Court found that the Community is bound, in the same way as its member states, by virtue of the EC Treaty, as a matter of Community law. The consequence of this is that the Community may not infringe the obligations imposed on its member states by the Charter or impede their performance and that in the exercise of its powers it is bound to adopt all the measures necessary to enable its member states to fulfil those obligations.⁷⁸

Concerning the lack of judicial review, or rather the legal possibility for the CFI to perform judicial review the CFI considered that it resulted from the proceedings that there were structural limits on its judicial-review capacity. The applicants had sought for the annulment of the contested regulation and the Court considered that:

Any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions. In that hypothetical situation, in fact, the origin of the illegality alleged by the applicant would have to be sought, not in the adoption of the contested regulation but in the resolutions of the Security Council which imposed the sanctions (...).

In particular, if the Court were to annul the contested regulation, as the applicants claim it should, although that regulation seems to be imposed by international law, on the ground that that act infringes their fundamental rights which are protected by the Community legal order, such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicants ask the Court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order.⁷⁹

The CFI was not willing to review the legality of the regulation since it did not consider it to have jurisdiction solely on the grounds of general principles of Community law. Neither could the CFI indirectly review the legality of the resolutions of the UNSC in the light of Community law since the Community is bound to interpret and apply Community law in a manner compatible with the obligations of the member states under the UN Charter.⁸⁰

The CFI did not stop there, since it probably realized that if they did it would seem like there was no remedy whatsoever.⁸¹ So in the end the Court found that it could none the less check, indirectly, the lawfulness of the resolutions of the UNSC in question. After all, the EC regulations were based on the UNSC resolutions.⁸² The Court found a ground for jurisdiction with the motivation that *jus cogens*, as a set of rules of public international law binding on all subjects of international law, allows for no derogation.

⁷⁸ Ibid. p. 186.

⁷⁹ Yusuf, paras., 267 f.

⁸⁰ Supra n. 62 and Yusuf, para., 276.

⁸¹ See Eeckhout, p. 186.

⁸² See supra n. 23 and 26.

Therefore, if the UNSC resolutions failed to respect *jus cogens*, they would bind neither the members of the UN, nor the Community.⁸³

After the ascertainment of the ground for judicial review, the Court moved forward to review the alleged breach of the applicants' right to a fair hearing and a right to property.

The CFI carried out a careful examination of the different arguments. The Court made no distinction between the individual Mr Yusuf and the entity Al Barakaat but rather reviewed their rights in the light of *jus cogens*. I will not go through all the different arguments that the Court examined. However, and most importantly, the Court referred to the principle of proportionality to judge whether the regulation breached their fundamental rights.

Since the contested regulation, amended by Regulation No 561/2003, adopted Resolution 1452 (2002), which allowed for the national authorities to declare the freezing of funds to be inapplicable to the funds necessary to cover basic expenses for foodstuffs, rent etc, it was not considered disproportionate to the purpose.⁸⁴ The freezing of the funds did further not affect the very substance of the property but only the use thereof. Thus, there was no breach of the right to property according to the rules of *jus cogens*⁸⁵.

Concerning the right to a fair hearing the CFI considered that the right for the individuals on the list, to address a request to the Sanctions Committee through the national authorities, amounted in a possibility to oppose the decision. The Swedish Government had in fact heard the applicants and as a result, two of the original applicants were subsequently excluded from the list.⁸⁶

The Court acknowledged the right to make view on the evidence upon which the sanction is imposed as a fundamental principle of Community law. However, this fundamental principle was developed through case law in areas such as competition law, anti-dumping action and State aid. According to case law the right of the person concerned to make his point of view known is correlated to the exercise of discretion by the authority which is the issuer of the act, i.e. the UNSC. The Community could therefore not review the applicant's right to a fair hearing based on general principles of Community law and was further not obliged to hear the applicants before the contested regulation was adopted.⁸⁷

⁸³ Eeckhout, p. 187, Yusuf, para., 276 f.

⁸⁴ See supra n. 26.

⁸⁵ Yusuf, 290 ff.

⁸⁶ Ibid. paras., 33 and 318.

⁸⁷ Ibid. paras., 325 – 329.

The denial of judicial review by the CFI has been criticised widely.⁸⁸ The fact that the Court did not consider itself to be able to challenge the contested regulation according to the general principles of Community law left it with a review solely on the grounds of *jus cogens*, which does not offer the same standard of review as Community law.

On the 21 November 2005, Mr Yusuf and Al Barakaat appealed the judgment of the CFI before the ECJ. While the case was still pending, the Sanctions Committee decided to remove Mr Yusuf from the list why he decided to discontinue his action. In the case C-415/05, which is still pending before the ECJ, only Al Barakaat has pursued the appeal.⁸⁹

2.4 Case-law of the CFI; the Kadi, Ayadi and Organisation des Modjahedines du peuple d'Iran cases

2.4.1 Introductory remarks

The CFI has been faced with several cases such as the Yusuf case, contesting decisions by the Community that in one way or the other have breached the applicants fundamental rights. The Yassin Abdullah Kadi v Council and Commission (Kadi) case was joined together with the Yusuf case since the both the cases sought the annulment of Regulation No 881/2002. Mr. Kadi also claimed his fundamental rights to be breached due to the sanctions imposed on him. As in the Yusuf case the CFI came to the conclusion that it could neither review the contested regulation nor was there a breach of the applicants fundamental rights in the light of *jus cogens*.⁹⁰ I will therefore not go through the Kadi case further but instead move forward to the other cases mentioned in the title of this chapter since the judgments in those cases differ from the ones in Kadi and Yusuf.

⁸⁸ See inter alia Eeckhout, p. 187.

⁸⁹ Opinion of the Advocate General Poires Maduro in Case C-415/05 P, Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, para. 9.

⁹⁰ See Chapter 2.2.2 Facts of the Yusuf case and Summary of the case T-315/01 Yassin Abdullah Kadi v Council and Commission (2005) ECR II-3639 (Kadi), paras., 6-8.

2.4.2 The Ayadi case

The CFI confirmed much of the reasoning from the Yusuf and Kadi cases in the Ayadi v Council and Commission (Ayadi) case from 2006.⁹¹ The difference was that the CFI went further in providing for a certain level of the protection for fundamental rights. The case also concerned the freezing of funds and the applicant sought the annulment of Regulation No 467/2001 and plead for a breach of his fundamental rights. Mr. Ayadi's name was included on a list in Regulation No 467/2001 and later 881/2002 and was subjected to a freezing of his funds according to the regulations and the resolutions from the UNSC as in the previous cases.⁹²

Mr. Ayadi argued that the exemptions from the freezing of the funds to cover basic expenses were ineffective since he found it difficult to carry on a business. The CFI was willing to recognize that the freezing of funds was a particularly drastic measure which was capable of obstructing the individual from leading a normal social life and of making the individual wholly dependent on public assistance. However, the Court found the aims pursued by the contested regulation outweighed the effects of the sanctions on the individual. The CFI held that the regulation did not prevent Mr. Ayadi from leading a satisfactory personal, family and social life since he could still earn money and carry on a business.⁹³

The Court continued its argumentation by stressing the possible diplomatic remedies available for individuals listed in the UNSC resolutions. Any individual can petition their government to intervene on their behalf at UN level. The Court shift some of the burden of compliance with fundamental rights when it stresses that the member states of the EU have an obligation to act on behalf of its nationals to request them to be removed from the list. These obligations were said to stem from the member states duty to respect fundamental rights as general principles of Community law. To sum up the Court once again considered the Community to be able to adopt regulations imposing economic sanctions on individuals based on the provisions of the EC Treaty.⁹⁴

2.4.3 The Organisation des Modjahedines du peuple d'Iran Case

The first case from the CFI where the Court annulled a Community measure concerning the freezing of funds was the Organisation des Modjahedines du

⁹¹ In the doctrine it is also frequently mentioned another case, the Hassan v Council and Commission case, which is almost identical to the Ayadi case in its reasoning why I chose not to mention that case.

⁹² T-253/02 Chafiq Ayadi v Council and Commission (2006) ECR ECR II-2139 (Ayadi) paras., inter alia 29 and 38.

⁹³ Eeckhout, p. 187.

⁹⁴ Ibid. p. 188.

people d' Iran (OMPI) case from 2006.⁹⁵ The case is significant since it offers a noteworthy contrast to the Yusuf and Kadi cases.

In short, the case concerned the listing of an organization, not by the UNSC but by the EU itself.⁹⁶ The CFI annulled the Community act which was a Council decision implementing an EC Regulation since it violated the right to a fair hearing, the right to an effective judicial remedy, and the obligation to state reasons.⁹⁷

The court held that:

*the right to a fair hearing applies in all proceedings against a person which are liable to culminate in a measure adversely affecting that person, and that the freezing of funds constitutes such a measure.*⁹⁸

The consequence of this is that the individuals concerned must be informed of the evidence, and must be granted the possibility to make known his view on that evidence. To safeguard the surprise effect of the sanctions the notification of the evidence and a hearing of the individuals may be carried out subsequent to the adoption of the regulations. Some restrictions may also be considered when adopting the regulations. Evidence must be notified along with or as soon as possible after the adoption of the initial decision and individuals must have the possibility to request an immediate re-examination. Overriding security or international relations considerations may also preclude the communication to the parties concerned of certain evidence against them.⁹⁹

The Court further stressed the importance of the obligation to state reasons. This is especially important when the party concerned was not afforded the opportunity to be heard prior to the decision to freeze the funds. However, as in the example of the presentation of the evidence stated above, the overriding security or international relations considerations may again restrict the obligation to state reasons.¹⁰⁰

On the issue of judicial review the CFI held that the review was tremendously vital since it constituted the only procedural safeguard ensuring that a fair balance was struck between the need to combat international terrorism and the protection of fundamental rights.¹⁰¹

The Court went on its argumentation by stating that:

Since the restrictions imposed by the Council on the right of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial (...), the

⁹⁵ T-228/02 Organisation des Modjahedines du peuple d' Iran (2006) (OMPI) ECR II-4665

⁹⁶ OMPI, Para., 14.

⁹⁷ Eeckhout, p. 188.

⁹⁸ Supra n. 80.

⁹⁹ Eeckhout, p. 188 f.

¹⁰⁰ Ibid. p., 189.

¹⁰¹ OMPI, para., 155.

*Community Courts must be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential.*¹⁰²

The CFI applied the above stated principles to the judgement in the OMPI case, thus leading it to the annulment of the contested Decision.¹⁰³ Nevertheless, the Court pointed out that, in fact even after the oral procedures had ended, it was not in a position to review the lawfulness of the decision, since it had no evidence or information about the reasons for OMPI's listing, or even about which national decision the listing was based on. As a result, not only did the Decision, leading to the contested regulation, breach the applicant's fundamental rights, but it also did not provide satisfactory background information, thus preventing the Court to carry out a judicial review.¹⁰⁴

Once again it seems like the Community courts found a way to circumvent a proper judicial review; but what would happen if the Courts could extent their jurisdiction to the intergovernmental dimension, i.e. the EU?

2.5 The review of legality and the impact of the ECJ in the intergovernmental dimension

2.5.1 Introductory remarks

The most important provisions for the review of legality, or judicial review, are Article 230, 288 and 234 EC. Articles 230 and 288 EC are provisions under which individuals have the *locus standi* to seek judicial review, while Article 234 EC offers an indirect judicial review through the preliminary ruling system. I will not go deeper into these basic provisions of judicial review but instead focus on recent CFI and ECJ case law and how the ECJ has chosen to consider itself qualified to perform judicial review of acts which normally would be exempted from a review of legality.

¹⁰² Ibid. para., 155.

¹⁰³ Council Decision 2005/930/EC of 21 December 2005 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2005/848/EC, OMPI, para., 17.

¹⁰⁴ OMPI, paras., 165 f.; Eeckhout p. 189 f.

2.5.2 Judicial review in the intergovernmental dimension: OMPI, Segi and the impact of the ECJ

In OMPI there was another aspect, apart from the review of EC measures, of the review of legality that is of great interest for this paper. In OMPI the applicant had not only urged the CFI to review the legality of the EC measure but also the legality of the Common Position. Thus, demanding the Court to extend its jurisdiction to cover not only the EC dimension but also the intergovernmental dimension.¹⁰⁵

The Union courts are not competent to review Common Positions: neither directly, through an action for annulment, nor indirectly by giving preliminary rulings to a national court. Therefore, the CFI refused to review the legality of the Common Position in OMPI.¹⁰⁶

The same conclusion had been reached in the case, *Segi v Council (Segi)* from 2004. The circumstances were identical to the OMPI case and it seemed like the review of Common Positions were to be kept out of the jurisdiction of the Union courts.¹⁰⁷ However, the *Segi* case was appealed before the ECJ who, contrary to the CFI, considered it to be able to review the Common Position.¹⁰⁸ Hence, the ECJ extended the judicial control in the intergovernmental pillars of the EU; from the EC pillar to the second pillar.¹⁰⁹

The ECJ found its way to review the common position in the TEU. The Court argued that the TEU never was meant to give the legal base for the review of Common Positions since these measures were not supposed to produce legal effects in relation to third parties. According to Article 35 of the TEU, review of legality is granted to all measures that do produce such effects. Since the Common Position was intended to produce such effects, the Common Position was consequently open for review by the Union courts. As a result of the nature of the TEU, the treaty only allows for indirect review through preliminary rulings in national courts before the ECJ or directly before the ECJ by a Member State or the Commission. Individuals are not allowed to challenge the validity of the Common Positions. The applicants were unsuccessful in their appeal to challenge the Common Position directly for the latter reasons.¹¹⁰

¹⁰⁵ OMPI, paras., 17 f.

¹⁰⁶ Hinarejos Alicia, *Recent Human Rights Developments in the EU Courts: The Charter of fundamental Rights, the European Arrest Warrant and Terror Lists*, Human Rights Law Review, 2003, p. 17; T-338/02 *Segi v Council* (2004) ECR II-1647 (CFI *Segi*).

¹⁰⁷ The circumstances were identical, except that there was no EC Regulation implementing a common position: just a common position containing a list of terrorist organizations, Hinarejos, p. 17.

¹⁰⁸ C-355/04 P *Segi v Council* (2007) (ECJ *Segi*)

¹⁰⁹ Hinarejos, p. 18.

¹¹⁰ *Ibid.* p. 18.

The lack of possibilities for individuals to claim direct review of the decisions affecting them in the Common Positions puts all hope for those affected to indirect review. This may not be ideal from a legal certainty perspective since it puts much faith in the national implementation of the decisions in order to have access to a national court. The individual has further on no right to a reference to the ECJ and no influence on how the question for the preliminary ruling is framed. The preliminary reference procedure is also not available with the same features in all Member States.¹¹¹

In the end of its judgment the Court stressed the importance for every Member State to make it as easy as possible to have access to indirect action:

*Finally, it is to be borne in mind that it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered.*¹¹²

Even if the individuals failed to contest the Common Position the ECJ opened up for a vital extended jurisdiction over the judicial control in the intergovernmental pillars.¹¹³ In the ongoing war on terror a multitude of anti-terror measures are being adopted in these areas, affecting the rights of many individuals. The problem demonstrates the insufficiency of the TEU when it comes to judicial control in the intergovernmental dimension. By its judgment, the ECJ shows that it is aware of this and that it is willing to push the boundaries to some extent.¹¹⁴

¹¹¹ Ibid. p. 18.

¹¹² Segi, para., 56.

¹¹³ Ibid. Para., 57.

¹¹⁴ Hinarejos, p. 18 f.

3 International law

3.1 Targeted Sanctions of the UN

3.1.1 Introductory Remarks

The UNSC has the primary responsibility for the maintenance of international peace and security according to Article 24(1) of the UN Charter. When the UNSC considers a situation to be a threat, or a breach, of the peace, the UNSC acting under Article 39 UN and 40 UN, can order its members to undertake provisional measures. These measures may be non-forcible, e.g. sanctions, under Article 41 UN or military under Article 42 UN. By stating that the UNSC is “acting under Chapter VII” the UNSC is not obliged to specify under which provision of the UN Charter it has based its resolution.¹¹⁵

The definition of a targeted sanction is not generally accepted but the notion typically includes e.g. the freezing of financial assets; the suspension of credits and aid; flight bans and the denial of international travel, visas and educational opportunities.¹¹⁶

Not all sanctions involve targeting individuals. However, when this is the case, as with the sanctions concerning Afghanistan/Al-Qaeda, it is primarily done by means of a “blacklist”. The UNSC adopts a resolution and delegates to a sanctions committee, consisting of all the members of the UNSC, the task of drawing up a list of blacklisted persons.¹¹⁷

3.1.2 The background to the Discussion on Targeted Sanctions

The practice of targeted sanctions began with the UNITA sanctions in 1997 and 1998.¹¹⁸ Following these sanctions the UNSC issued a number of resolutions imposing sanctions. The focus of all of these sanctions was government/rebel leaders who could easily be identified and the discussion

¹¹⁵ Cameron Iain, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, Nordic Journal of International Law, 2003, p. 159 f.

¹¹⁶ Ibid. p. 160.

¹¹⁷ Ibid. p 160.

¹¹⁸ Resolution 1127 (1997) imposed travel bans on UNITA leaders and their immediate family members. Resolutions 1173 and 1176 (1998) imposed financial sanctions on UNITA members. The UNITA (União Nacional para a Independência Total de Angola) was a guerrilla in the civil war of Angola; Cameron, p 163; www.un.org

concerned mainly how to identify reliably the scope of the government/rebel circle.¹¹⁹

When the Al-Qaeda and Taliban regime started to become more active in global terrorism the UNSC brought in sanctions by means of Resolution 1267 (1999) and 1333 (2000).¹²⁰ These sanctions were directed at the Taliban regime in Afghanistan and were targeted at the financing of the regime. The main reasons for this were the Taliban regime's encouragement of opium growing and its refusal to extradite Usama bin Laden to the US.¹²¹

3.1.3 UN Sanctions at the Present State

There are many different international sanctions directed against terrorism. The regimes for the resolutions implementing certain economic sanctions also differ somewhat. The economic sanctions against individuals and entities stems, *inter alia*, from UNSC Resolutions 1267 (1999), 1333 (2000) and 1390 (2002), all concerning the freezing of funds of those individuals and organizations suspected of having connections with the Taliban regime, Al-Qaeda and Usama bin Laden. These organizations and individuals are identified on a list which is continuously updated by the Sanctions Committee under the UNSC. There is also the UNSC Resolution 1373 (2001) imposing the obligation on all members of the UN to freeze the funds of those individuals connected with terrorist activities in general. This resolution contains no blacklist of individuals. An obligation to freeze the funds is also found in Article 8 of the International Convention for the Suppression of Terrorism.¹²²

A majority of the members of the UN, including all the member states if the EU, have decided to administer a legal framework which simply copies the lists from the UNSC Resolutions. The listing is a very effective tool since it gives effect immediately as the decision is taken by the UNSC to freeze the funds. Under Article 25 and 48 of the UN Charter, all UN members are obliged to implement these measures. As previously mentioned, Article 103 UN also secures the full implementation of the sanctions since they precede all other international treaty obligations.¹²³

Since the listing of individuals and entities associated with al-Qaeda, as Resolution 1267 (1999) puts it, many names of individuals and entities have passed through the lists. At present, there are 142 individuals associated

¹¹⁹ Cameron, p. 163.

¹²⁰ Usama bin Laden was (and is still) suspected of having been behind the bombing of the US embassies in Nairobi and Dar-es-Salem; Cameron, p. 163.

¹²¹ Cameron, p. 163.

¹²² Kruse Anders, *Financial and Economic Sanctions – From a Perspective of International Law and Human Rights*, Journal of Financial Crime, 2005, p. 217; Cameron, p. 164.

¹²³ *Ibid*, p. 218.

with the Taliban, 230 individuals associated with Al-Qaeda and 112 entities and organizations associated with al-Qaeda on the list.¹²⁴

3.1.4 The Drawing up of a Blacklist Proceedings

The drawing up of a blacklist involves primarily identifying the targets. This procedure is easy when the targets are governmental officials. When the circle expands it becomes more difficult as the targets could be anyone with a connection to terrorism, e.g. businesspersons involved in supporting the targeted government.¹²⁵

The UN Secretariat, which assists the sanctions committee in the blacklisting of individuals, lacks both capacity and expertise in identifying persons supporting, or are influential in relation to, a targeted government. The sanctions committee therefore receives information elsewhere, primarily from those member states that have both an interest in the matter and sufficient diplomatic and intelligence gathering capacity. Other sources of information can be expert panels established by sanctions committees to monitor the implementation of sanctions and finally public sources.¹²⁶ It is also not always clear which states have proposed which individuals. The typical situation is that the state that has economic and/or historical interests in the targeted state takes the lead in the blacklisting. The main source of the names on the Afghanistan/Al-Qaeda lists appears to have been the US.¹²⁷

According to the practice of US blacklisting the formal basis is often a public source, company registers or newspaper reports. Other, perhaps more liable sources of information can be secret intelligence material or confidential material such as embassy reports. This information is often used as a primary source of information and a suggestion for further investigation. The confidential nature of the material from secret intelligence and embassy reports makes it almost impossible for anyone to take part of the information forming the basis for the listing.¹²⁸

¹²⁴ Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities, Consolidated list pursuant to the latest update on April 21st 2008, available at <http://www.un.org/sc/committees/1267/consolist.shtml> (www.un.org)

¹²⁵ Cameron, p. 165.

¹²⁶ Ibid, p 165.

¹²⁷ Ibid, p. 165.

¹²⁸ Occasionally, information might be given on a bilateral basis where the designating state trusts the requesting state to maintain the confidentiality of the information. Cameron, p. 165 f.

3.1.5 The Problem of the Evidence for the Blacklisting

When states submit names of individuals the sanctions committees are more or less in a position to having to trust the states in submitting the names.¹²⁹ There are no obvious criteria to measure the evidence against these individuals since the supposed activity, involving a threat to international peace and security is never defined. Consequently, the sanctions committee have never, or rarely, evaluated the evidence against the individuals.¹³⁰

The problem of not evaluating the evidence against the individuals becomes flagrant when considering the rapid procedure of the adoption of the sanctions.¹³¹ The speed of the process is necessary to retain the element of surprise, but it leaves very little or no time to check if they have any intelligence on the individuals concerned. The often large number of individuals proposed at the same time, makes it hard, even for states with major intelligence, to check the proposed list. Moreover, once a name is on the list any member of the UNSC can block its removal since the procedure *de facto* is a decision of the UNSC. The approval of a blacklist provides no, or little, means for any member of the UN to challenge the decision at national level.¹³²

This still leaves us with no clear answer to the question whether there are any means of redress to secure the legal certainty for the individuals ending up on the blacklists?

3.1.6 Resolution 1730 (2006) – A Guarantee for a Fair and Clear Procedure?

Resolution 1730 was adopted on the 19th of December in 2006 by the UNSC. The Resolution focuses on a de-listing possibility for individuals and entities on sanctions lists. The UNSC emphasizes that the implemented resolution is a part of its commitment to ensure that fair and clear

¹²⁹ Three major sanctions committees are established under the UNSC in connection with the fight against terrorism: the 1267 Committee, the “CTC” (Counter-Terrorism Committee) and the 1540 Committee. Available at <http://www.un.org/sc/committees/1267/index.shtml>

¹³⁰ Cameron, p. 166.

¹³¹ The sanctions against individuals are notified to the UNSC members and, occasionally, to the state of nationality, 48 hours before the sanctions are adopted. Cameron, p. 166.

¹³² Cameron, p. 166.

procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.¹³³

The UNSC also requested the Secretary-General to establish within the Secretariat (Security Council Subsidiary Organs Branch), a focal point to receive de-listing requests and perform the tasks described in the annex to Resolution 1730. Petitioners can submit their requests through their state residence or citizenship. A state can also decide that its nationals or residents should address their de-listing requests directly to the focal point.¹³⁴

The government of the designating state or the focal points subsequently refers the petition to the Chairman of the Sanctions Committee who will place the de-listing request on the Committee's agenda. Any member of the Sanctions Committee may however recommend a de-listing after the consultation with the designating government, even if the designated government reviewed the de-listing to be justified. If no Committee member recommends a de-listing after a certain period of time (up to four months) the petition shall be deemed rejected. The focal point subsequently has to inform the petitioner of its decision¹³⁵.

It is hard to imagine this procedure as a guarantee for a fair and clear procedure at this point. The possibility for individuals and entities to petition for a de-listing, in other words opposing a UNSC decision, directly (or through the state of citizenship or residence) is a step closer to securing legal certainty. However, the de-listing procedure provided for in Resolution 1730 grants the petitioner neither a right to give his view on the evidence against him, nor a possibility to explain or defend himself. This is obvious considering the fact that the procedure is not a proper hearing, but only a petition proceeding. The procedure does not provide the satisfactory degree of judicial review since it still grants much of the power to the Sanctions Committee and leaves little, or no, option for the individuals to influence the decision. The petitioner is forced to rely on the accuracy of the Committee work and that the decision not to de-list was based on proper intelligence or clear evidence.

¹³³ Focal Point for De-listing established pursuant to Security Council resolution 1730 (2006), available at: <http://www.un.org/sc/committees/dfp.shtml>; *See also* the Preamble to S/RES/1730 (2006).

¹³⁴ Focal Point for De-listing established pursuant to Security Council resolution 1730 (2006), available at: <http://www.un.org/sc/committees/dfp.shtml>; *See also* the De-listing procedure in S/RES/1730 (2006).

¹³⁵ S/RES/1730 (2006), Articles 6-7.

3.2 The binding nature of the UN Charter

3.2.1 Introductory remarks

The binding nature of the UN Charter was confirmed by the CFI in the Yusuf case. As previously mentioned, the Court took the view that the Community was unable to review an EC Regulation since it did not possess the power to perform such a review. The question is nevertheless if respect for international law commands the CFI to declare that a listing in an EC Regulation cannot be reviewed in the light of general principles of Community law?¹³⁶

3.2.2 Two dimensions to the binding nature of the UN Charter

In international law the binding nature of the UN Charter is embodied in Article 103 UN. It acts for the member states of the EU in the sense that in case of conflict between their obligations under the EC Treaty and those under the UN Charter, the latter prevails. This is fully accepted and also confirmed by Articles 297 and 307 EC. Hence, to state that the Charter is binding is not equivalent to excluding judicial review of a regulation based on primary EC law.¹³⁷

Presume the CFI would review and annul an EC Regulation, implementing a UNSC Resolution. The legal basis for the Community for freezing the assets of the various applicants would have disappeared, as the Regulation would have been null and void under EC law. However, the freezing measures operate at national level wherefore the member states would no longer be bound by the EC Regulation but continue to be bound by its UN obligations. As sovereign states they have the required legal means for continuing to apply those measures. Therefore, the annulment could by no means suggest that the member states are prohibited from freezing the funds of the individuals on the blacklists.¹³⁸

The second dimension of the binding nature of the UN Charter is that the binding nature in fact governs the acts of the Community institutions, not of the member states. It narrows those institutions' powers. The EC Treaty demands respect for fundamental rights, but this demand is overridden by

¹³⁶ Eeckhout, p 190. *See supra* n. 63.

¹³⁷ *Ibid.* p. 191.

¹³⁸ *Ibid.* p. 192.

the need to comply with the obligations under the UN Charter. As a result, member states could not even be confronted with the conflicts. The institutions of the EU need to ensure that they respect UN Resolutions even if it implies violating general principles of Community law. The Courts are equally not able to review any such violations, which are imposed by a UN Resolution.¹³⁹

So, if the binding nature of the UN Charter narrows the powers of the EU institutions, is there any way to narrow the powers of the UN organs? The following chapters will examine the issue further.

3.3 The Legitimacy of the Actions Under the UN Charter

3.3.1 Introductory Remarks

*It was to keep the peace and not to change the world order that the Security Council was set up*¹⁴⁰

3.3.2 The Security Council as a World Law-maker

The UN Charter offers a wide measure of discretion for the UNSC. It has the sole power to determine whether a situation constitutes a threat to international peace and security or not and what measures to be used against such a threat. However, the UNSC does not legitimately operate outside the law but is acting in accordance with the law to the governance of world affairs.¹⁴¹

The idea when the UN Charter was drafted was that the political approach would have predominance over the legal approach. The preparatory works reveals that the UNSC, as a political organ, was merely meant to act as dispute settler under Chapter VI and as peace enforcer under Chapter VII. Therefore the limit to the UNSC's power is peace enforcement and must not

¹³⁹ Ibid. p. 192.

¹⁴⁰ Judge Sir Gerald Fitzmaurice in his dissenting opinion attached to the ICJ's Advisory Opinion on Namibia (South West Africa) in 1971, ICJ Rep 291, at 294. para. 115.

¹⁴¹ Bianchi Andrea, *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, The European Journal of International Law Vol 17 no. 5 2007, p. 885.

be trespassed. The issue becomes somewhat problematic when considering the fact that the UNSC also decides what is necessary to keep or restore world peace.¹⁴²

In the backwash of the ‘War on Terror’ attention to the limits of the UNSC’s exercise of its powers under Chapter VII has been directed at the alleged violation of fundamental rights brought about by targeted sanctions. International legal scholars have stressed the purposes and principles of the UN Charter which would limit the UNSC power under Article 24(2) UN.¹⁴³ The principle of good faith and Article 1 UN would also further prohibit the organs of the UN from behaving contrary to the core elements of the human rights norms behind Article 1(3) UN.¹⁴⁴

Another possibility to the limitation of the UNSC’s power follows from the above stated by claiming that Articles 55 and 56 UN would imply that the UNSC is also bound by declarations adopted by the General Assembly (UNGA) e.g. the UDHR as well as the ICCPR. These two international conventions would implement instruments of the obligations laid down in Articles 55 and 56 UN.¹⁴⁵

The UN is also said to be bound by general rules of international law. The UN, and the UNSC in particular, was judged to be bound by the peremptory norms of *jus cogens* in the Yusuf case. The reasoning follows the logic argumentation that if states may not derogate from these peremptory norms, neither should international organizations. If not, states could use international organization as an excuse for not acting in accordance with *jus cogens*.¹⁴⁶

¹⁴² Ibid, p. 886.

¹⁴³ “In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.” Article 24(2) UN.

¹⁴⁴ Bianchi, p. 886.

¹⁴⁵ Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members 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.

See also Bianchi, p. 886.

¹⁴⁶ Bianchi, p. 887.

When adopting its resolutions, the UNSC acts as a world law-maker. This has not always been the case however. In the mid 1940's when the UN Charter was drafted, no one had anticipated that the subsequent practice of the organ would evolve to encompass a law-making activity to face international threats to the international legal order.¹⁴⁷

As the nature of the threats to the international legal order has changed, so has the scope for the UNSC's actions changed. With the threat of terrorism being constantly present on the global scene, the UNSC has taken drastic measures such as targeted sanctions and blacklists in the attempt to fight terrorism. The ultimate test of the legitimacy of the UNSC's actions now remains at the level of acceptance of its practice by the member states of the UN.¹⁴⁸

3.3.3 The Legal Status of the UNSC Resolutions

In the chapter above on the UN as a world law-maker, the discussion on how the UNSC's power could be limited concerned the limitation of power for the UN organs in respect for fundamental rights, as protected by the Charter itself. In this part, I will revise whether the legally binding UNSC resolutions enjoys the same legal status as the Charter itself?

The UNSC Resolutions could be regarded as part of the UN Charter system since the Charter is a framework treaty that has to be implemented by secondary legislation. The reasoning follows from the fact that a breach of the obligations in a Resolution may be seen as a breach of the provisions in the Charter empowering the UNSC to issue the resolution. Another view is that the UNSC Resolutions amend the Charter, thus a breach of the Resolutions would amount to a breach of the amended Charter. In any case, the members of the UN are prevented from ignoring the decisions of the UNSC and of breaching the provisions of the Charter by means of successive treaties according to Articles 25 and 103 UN respectively.¹⁴⁹

When having ascertained the obligations of the members of the UN under the Charter the question of what law is binding on the UN still remains unanswered.

The issue of whether there exists any law that is binding on the UN is highly debated. As previously mentioned in Chapter 3.2.2, the UN could in fact be bound to follow human rights obligations due to the principle of good faith and Article 1(3).¹⁵⁰ On the other hand, in accordance with Article 103 UN, the Charter prevails over any other obligation unless specifically stated. The

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Lysén, p. 293.

¹⁵⁰ See Chapter 3.2.2

following reasoning follows the idea that there is nothing binding the UN unless explicitly stated.¹⁵¹

To start with, the UN is not bound by its members' obligations under international law unless it is stated in the Charter. Neither is the UN bound by any treaty it has not ratified, according to Article 34(1) of the VCLT.¹⁵² A consequence of this would be that the UN is not even bound by the UDHR or the ICCPR, since the UN has not declared itself to be bound.¹⁵³ The UNSC therefore has a great discretion when it comes to implementing resolutions. However, the notion that the UNSC as a UN organ would be bound by human rights obligation is not too far fetched considering the obligation to respect human rights stated in the UN Charter e.g. in Article 1(3) UN and the preemptory norms of *jus cogens*.

3.4 A Change in International Law?

3.4.1 Introductory Remarks

Every legal system needs to be able to develop its rules to take into account the evolution and changing exigencies of the society it regulates. The international legal system is characterized by the absence of a body specifically entitled to create legal rules binding on all its subjects. Instead, international law is created by states and therefore also changed by states.¹⁵⁴ The UN system is of no difference. The question of greatest interest for this thesis is whether the international legal system has changed due to the threat of terrorism? And if yes, could one use the possible change in international law to justify the breach of fundamental rights?¹⁵⁵

¹⁵¹ See Lysén, Chapter 3. What law is binding of the UN? P. 293 ff.

¹⁵² "A treaty does not create either obligations or rights for a third State without its consent." Article 34 of the VCLT.

¹⁵³ Lysén, p. 293.

¹⁵⁴ Duffy Helen, *The "War on Terror" and the Framework of International Law*, Cambridge University Press 2005, p 7.

¹⁵⁵ The issue may be the subject for a completely new paper, however, it is interesting in this context to examine the possibility that one could make out a change in the international legal system and ultimately if the rules protecting fundamental rights can be changed?

3.4.2 The Change of Customary International Law

The change of treaty-based rules of international law, as defined in Article 31 VCLT, is fairly straight forward. The customary rules of international law, however, require a more thorough procedure. Customary international law comes into existence when most states of the international community follow a certain course of action believing that it is required by a legal norm. When these states cease to support the consistent and general practice and the *opinion juris* supporting those ceases, the rules lose their binding force and eventually changes.¹⁵⁶

In the aftermath of 9/11, the practice of the states responding to the incidents, and the reactions to those responses, assumes particular significance in a system where departure from existing legal standards may ultimately impact on those standards.¹⁵⁷ However, it is important to stress that not every violation of an international rule automatically leads to a change in the law. In most cases, not even consistent patterns of violations imply that a rule has been superseded, as the obligatory nature of a rule of customary law is lost only if the behavior of those states which refuse to comply with the rule, and the reactions of other states, are supported by the belief that the rule is no longer binding.¹⁵⁸

Some rules of customary international law are particularly difficult to change. The peremptory norms, or *jus cogens* norms, have been defined by the ILC as:

*Substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.*¹⁵⁹

A norm of *jus cogens* character can be changed only by a subsequent norm of general law having the same character according to Article 53 of the VCLT. To determine a norm of *jus cogens* to be changed or no longer existing requires a universal state practice and strong evidence indicating that the value it protects is no longer considered fundamental by the international community. Basic human rights e.g. are therefore extremely difficult to change.¹⁶⁰

¹⁵⁶ Duffy, p. 8.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ ILC Commentaires to Articles on State Responsibility, Commentary to Article 40(3); Duffy, p. 8, note 32.

¹⁶⁰ Duffy, p. 9.

Having the judgment of the CFI in the Yusuf case in mind, the Community does not seem to regard the right to a fair hearing or any other fundamental right to be changed or none existing. However, the protection of fundamental rights has undoubtedly had to make way for the protection of international peace and security. What is also clear is that the practice of “blacklisting” has created a legal uncertainty when it comes to e.g. the presentation of evidence. To state the obvious, the situation for the universal protection of fundamental rights has, if not changed, at least been modified to fit the fight against terrorism.

4 Future aspects on the protection of fundamental rights

4.1 The European Charter of Fundamental Rights and the Lisbon Treaty

4.1.1 Introductory Remarks

The introduction of fundamental rights in Community law has greatly influenced the Community, granting the citizens of the Union a wide range of protection as well as limiting the Community institutions' powers. As previously mentioned, fundamental rights have derived from constitutional traditions of the Member States and from various international treaties as well as from the judgments of the European Court of Human Rights (ECtHR). The result of this development is that nowadays we deal not only with fundamental freedoms, but we also distinguish fundamental rights in the Community context. The latter, opposed to fundamental freedoms concentrate on the individual, instead of the common market. It is important to emphasize that the newly developed rights are considered equally important. The ECJ in order to uphold the fundamental freedoms found it necessary to refer to human rights. In result, the ECJ's grounds for jurisdiction were broadened. The rights were introduced by the ECJ as a restraint upon the Community institutions, and not as a restraint of the powers of the Member States.¹⁶¹

The development of the protection of fundamental rights has been a subject of much controversy with the failure of the Constitution of Europe, where the Charter of Fundamental Rights of the European Union (EUCFR) was included.¹⁶² The Lisbon Treaty, as agreed upon in December 2007, will only contain a reference to the Charter. The reference is found in Article 6 of the Lisbon Treaty where it is also stated that the EU will accede to the ECHR. I will go deeper into this issue later on in this chapter. First, it is vital to examine whether the introduction of the EUCFR into primary Community

¹⁶¹ Craig Paul and De Búrca Gráinne, p. 381.

¹⁶² The Constitutional Treaty was rejected by France and the Netherlands in 2005, found on the EU Institutional Reform webpage, available at: http://europa.eu/institutional_reform/index_en.htm

law will enable for countries like Sweden to live up to its commitments to fully respect fundamental rights?¹⁶³

4.2 The Introduction of the Charter of Fundamental Rights of the European Union

4.2.1 Background to the Elaboration of the Charter of Fundamental Rights

The Council elaborated the EUCFR during the German presidency in 1999. The idea was to include a fundamental rights charter into the EU to clarify that Community law is based on shared values that would include fundamental rights and civil rights common to the Member States. A Charter of Fundamental Rights would be the best way of securing the future protection of fundamental rights within the Community legal order.¹⁶⁴

From the beginning, the EUCFR was never intended to be a legally binding document, but simply a political commitment. Even at the time of its signing, by the European Parliament and the European Council jointly, in December 2000 the adoption was still a political declaration without any legal force. However, as time progressed the EUCFR has proven to be a source of inspiration for both national courts and Community courts, including the CFI as well as the ECJ.¹⁶⁵

The EUCFR as such is based upon the fundamental rights and freedoms recognised by the European Convention on Human Rights, the constitutional traditions of the EU Member States, the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers and other international conventions to which the European Union or its Member States are parties.¹⁶⁶

I will not go into detail of the set of rules contained in the EUCFR, but merely stress the importance of the legally binding effect of a fundamental rights charter for the safeguarding of civil, political, economic and social rights of European citizens.¹⁶⁷

¹⁶³ The Lisbon Treaty, Article 6(1) and (2); *The Treaty at a Glance*, official homepage of the Treaty of Lisbon, available at: http://europa.eu/lisbon_treaty/glance/index_en.htm.

¹⁶⁴ Lindfelt, p. 4 ff. *See supra*. n. 11.

¹⁶⁵ Lindfelt, p. 7.

¹⁶⁶ The European Parliament's official homepage for the Charter of Fundamental Rights of the European Union, available at: http://www.europarl.europa.eu/charter/default_en.htm.

¹⁶⁷ *Ibid*. The importance here is not to state every rule of the EUCFR and thoroughly examine these, since that theme is enough for a thesis of its own, but instead show the

4.2.2 The Effect of the Adoption of the Charter of Fundamental Rights

By including the charter of fundamental rights, it will give legal binding effect to the fundamental rights. Therefore, the Treaty of Lisbon will add a new dimension to the EC as such and in particular to the jurisprudence of the ECJ. Hence, the Court will be provided with more solid grounds for their judgments, as far as fundamental rights are concerned.

Without going deeper into the specific provisions for the protection of certain rights, it could be of interest to mention that the right to a fair trial, the presumption of innocence, the principle of legality and proportionality of penalties as well as the right to an effective remedy, will become binding upon the Community institutions through the adoption of the Lisbon Treaty.¹⁶⁸

Even if the Treaty provides the Community courts with a catalogue of rights which they must protect, the Lisbon Treaty itself asserts no new power or task for the EC or the EU. This can be deduced from Article 51(2) EUCFR. However, the legally binding nature presents a minimum standard of protection for fundamental rights in the EU. Article 52(1) EUCFR states that any limitation of the exercise of the rights and freedoms contained in the Charter must be provided for by law.¹⁶⁹ Limitations must also meet the requirements of proportionality and must be:

*(...)necessary and genuinely meet objectives of general interest recognized by the Union, or the need to protect the rights and freedoms of others.*¹⁷⁰

With the new powerful protection of fundamental rights in the EU, and the continuous jurisdiction of the ECtHR as an observer of fundamental rights protection, we have a situation where two courts will apply two different catalogues. The question is whether the extended protection will create a greater legal certainty for the citizens of the EU?

impact of a legally binding catalogue of fundamental rights on the Community legal system. The EUCFR becomes legally binding when the Lisbon Treaty will be ratified in every Member State. According to the Swedish Parliament's Information Centre for the EU (EU upplysningen), the ambition is for the Treaty to come into force in 2009, available at www.eu-upplysningen.se.

¹⁶⁸ Article 47 EUCFR ; Craig and de Búrca, p. 414.

¹⁶⁹ Craig and de Búrca, p. 415.

¹⁷⁰ Article 52(1) EUCFR; Craig and de Búrca, p. 415.

4.2.2.1 The ECJ and the ECtHR – Dual Protection of Fundamental Rights?

The relationship between the ECHR, other international human rights instruments, national constitutional provisions, and the new Charter is addressed in Articles 52(3) and 53 EUCFR. The relationship between the EUCFR and the ECHR is a source for much debate. For instance, questions such as whether a right contained in the new Charter should necessarily be interpreted in the same way as a similar right contained in the ECHR, or of the proper relationship between the ECJ and the ECtHR, are worth emphasizing.¹⁷¹

Article 52(3) relates specifically to the former issue and intends to harmonize the provisions of the ECHR and the EUCFR.¹⁷² The provision promotes harmonization while not preventing the EU from developing more extensive protection than is provided for under the ECHR.¹⁷³ To avoid diverging interpretations of provisions similar in content with the new Charter and the ECHR, as well as with the ECJ and the ECtHR, the scope of the guaranteed rights are included within the case law of the ECtHR and the ECJ as stated in the preamble to the EUCFR.¹⁷⁴

The ECHR is to be seen as a set of minimum standards, in relation to the EUCFR, and therefore the level of protection in the new Charter can never be inferior regardless of the wording of the Charter.¹⁷⁵ It is however clear that the dual system for the protection of fundamental rights could be troublesome at times, in particular if the ECJ is faced with issues that have not previously been dealt with by the ECtHR. Nevertheless, it is important to remember that the ECHR and the EUCFR have great resemblance and the EUCFR is based on fundamental rights already applicable within the Community legal order. The new Charter will not replace the present system of the protection of fundamental rights, but merely make the present system more visible.¹⁷⁶

4.2.3 Accession to the ECHR

The introduction of the Lisbon Treaty will lead to another significant change – the EU will become a party to the ECHR. The same Article of the

¹⁷¹ Craig and de Búrca, p. 416.

¹⁷² “3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.” Article 52(3) EUCFR.

¹⁷³ Craig and de Búrca, p. 416.

¹⁷⁴ Lindfelt, p. 147.

¹⁷⁵ Ibid, p. 144.

¹⁷⁶ Ibid, p. 148 f.

EUCFR that acknowledges the adoption of the EUCFR also contains a provision for the EU to accede to the ECHR.¹⁷⁷ Consequently, the ECHR and the case-law of the ECtHR will constitute solid grounds for legal judgments of the ECJ. Accession to the ECHR could also lead to greater legal certainty for the citizens of the Union. The previous practice of referring to the constitutional traditions of the Member States was arguably contradictory to the idea of equality and legal certainty. With the introduction of the official catalogue of fundamental rights such practice will be avoidable.

The argument from the European Parliament, the Commission and several Member States of the EU was that the adoption of the Charter and accession by the EU to the ECHR would complement each other in a similar fashion as Member States have their own constitutions.¹⁷⁸

The accession to the ECHR will further imply a transfer of competences from sovereign states to international organizations. The Member States of the EU will transfer competences to the EU while at the same time being contracting parties to the ECHR. This way Member States will not risk being held responsible for the infringement of fundamental rights, falling within the competences of the institutions of the EU.¹⁷⁹ Accession would further contribute to a coherent protection of fundamental rights in Europe. The problems of conflicting interpretations by the ECJ and the ECtHR would be less frequent since the two courts would be more dependent upon each other and work more closely. The ECtHR could have the possibility to review the compatibility of acts adopted by the EU institutions and the ECHR. Consequently, the responsibility to defend acts of the EU institutions would shift from national level to EU level.¹⁸⁰

So, with a watertight protection for fundamental rights within the EU, does the same apply for the citizens of the EU at a universal level?

4.2.4 The Lisbon Treaty – A Legal Safeguard for the Future Protection of Fundamental Rights?

When the EU accedes to the ECHR and the EUCFR becomes legally binding the EU has every potential to go its own way in the protection of fundamental rights, even if it implies opposing the UNSC.

As demonstrated previously in this paper, the ECJ was willing to review the Common Position in the *Segi* case. The critic might state that the ECJ was

¹⁷⁷ See supra n. 149.

¹⁷⁸ Lindfelt, p. 262.

¹⁷⁹ Lenaerts, K in Lindfelt, p. 263.

¹⁸⁰ Lindfelt, p. 263.

only willing to review the legality of the blacklist since it did not originate from a UNSC Resolution, but from a Common Position.¹⁸¹ It is true that the ECJ was willing to review the Common Position (even if it refrained from it in the end) perhaps mostly because it had no direct obligation to the UNSC. Nonetheless, it illustrates how the Community courts are willing to secure the protection for fundamental rights when it concerns internal EU decisions.

In the future it will become even more important that the EU also considers itself to be able to review acts of the UN, despite the obligation to comply with the decisions of the UNSC. The Member States have equally a responsibility to stand up for the protection of fundamental rights for their citizens.

Professor Iain Cameron at the University of Uppsala is particularly concerned with the negligence of fundamental rights protection in the EU. He considers that the Member States must take action and vindicate its competence. However, Cameron recognizes the difficulty for the national courts of the Member States to go against Community law. Therefore, it would be of greatest importance if the ECJ would judge, and thereby elucidate, the blacklisting of Al Barakaat and Mr Yusuf to violate fundamental rights.¹⁸²

Finally, the accession to the ECHR will nonetheless imply that the EU as an organization is legally bound to respect human rights. In the past the EU has integrated the ECHR and the fundamental rights protection in the constitutional traditions of the Member States in its judgments. However, the ECJ has theoretically still had a significant independence in its field of application. The supervisory character of the ECtHR could well secure the observance of fundamental rights protection within the institutions of the EU. Most Member States have a well founded protection system in their national constitutions and with the same level of protection at the EU level it seems like fundamental rights protection will see a brighter future. In the end, much will depend upon the willingness of both the EU and its Member States to comply with the level of protection established within the Union.

The legal system for the protection is still vulnerable in that it creates no guarantee that the EU or certain Member States will not go against the ECHR, EUCFR or constitutions of the Member States to comply with the decision of the UNSC.

¹⁸¹ See Chapter 2.5.2.

¹⁸² Knutson, Tom *Tveksamt om EG-domstolen ger Somaliasvenskar upprättelse*, Advokaten, No. 4 2008 Vol. 74, found at: http://www.advokatsamfundet.se/templates/CommonPage_Advokaten.aspx?id=8181.

4.3 The Future Aspect – What Can Be Done?

4.3.1 Introductory Remarks

It is important at this stage to emphasize the necessity of creating a practice for the protection of fundamental rights that involves the respect for international law and human rights. Anders Kruse holds that if we are ever going to win the war on terror we need to secure the genuine support of ordinary citizens in the societies involved. Unless ordinary men and women are convinced that the war is carried out under the rule of law and respect for the fundamental rights, it can never be won.¹⁸³ Kruse finalizes the argumentation by stating that:

*Respect for the rule of law establishes legitimacy, and legitimacy is needed for a successful fight against terrorism.*¹⁸⁴

By acceding to the ECHR and adopting the EUCFR as legally binding, we are closer than ever to have a complete system for the protection of fundamental rights in the EU. The Community courts can no longer only refer to particular constitutional provisions of the Member States or provisions in the ECHR, but will in fact be forced to respect the provisions of international treaties such as the ECHR. This implies a strong sense of legitimacy for actions taken by the Member States and the institutions of the EU, in particular. Still, the mere fact that the EU will accede to the ECHR is perhaps not a guarantee to secure the respect for fundamental rights. So to use the phrasing of Kruse, what needs to be done?¹⁸⁵

4.3.2 How to Secure the Protection of Fundamental Rights and Still Fight Terrorism?

To sum up what have been discussed previously in this paper, and to state what Kruse has proposed, the first thing would be to make sure there is a satisfactory level of evidence before undertaking any kind of measures against alleged terrorists. The thresholds are too low and the level of

¹⁸³ Kruse, p. 217.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid. 219.

connection to Al-Qaeda or other terrorist groups in the Resolutions of the UNSC gives no clear guidance due to its vagueness.¹⁸⁶

The second necessary change is to grant every individual who is targeted by the Resolution blacklists the right to be heard and defend himself against the allegations.¹⁸⁷ To increase the credibility with the blacklisting system it is vital that the individuals are granted the same rights as any other individuals in a democratic state. Even though many of the individuals on the blacklists might be responsible for the funding of terrorist actions, I do not see how democratic states can ever battle terrorism with the same methods as non-democratic states. Therefore, the basis of the allegations must be presented to these individuals and the use of secret evidence e.g. intelligence material must be reduced as much as possible.¹⁸⁸

The possibility to defend oneself and take part of evidence would have no effect if there is no access to court or an equivalent legal body. The possibility to access a court of law is therefore necessary to establish a full judicial protection for the targeted individual. An independent legal body must be given the opportunity to review the decisions of the EU to establish a credible system. For decisions taken by the UN or UNSC the idea to create a separate body within the UN system with the task of reviewing the legality of the decisions is not too far fetched.¹⁸⁹

These three major changes could amount to a far better protection for fundamental rights in the future.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid. s 219 f.

5 Swedish national legislation concerning the fight against terrorism and the political debate in the aftermath of the Yusuf case

5.1 Swedish National Legislation on Terrorism

5.1.1 Introductory Remarks

As a member of both the EN and the EU, Sweden is obliged to pursue the decisions of both organizations. When the EU issues Common Positions, these are not immediately binding, but needs to be implemented through national legislative measures. However, when it comes to economic sanctions, these are under the competence of the Community. The regulations that conclude on the freezing of funds are therefore directly binding upon the Member States at the time of the issuance.¹⁹⁰ Under international law, Sweden is in fact prohibited from taking actions of its own to carry out economic sanctions since these falls under the scope of the competence of the Community. Only when the EU is averted from carrying out the decisions may the Member States act on its own. However, as a Member State, Sweden has the responsibility to take measures against anyone who violates the provisions of the sanctions.¹⁹¹

Since every state is sovereign, states can only be bound by international law through the consent of the supremacy of international law, including EU law. Like any other member of the UN and the EU, Sweden has given its consent to be bound by the provisions of the Treaties of the EU and the EC, as well as the UN Charter. The consent is to be found in the Instrument of Government (RF) 10 ch. 5§ of the Swedish constitution.¹⁹² Sweden is therefore a dualistic country in the sense that it takes specific internal

¹⁹⁰ Swedish Government Official Reports on International Sanctions, 2006:41 (Internationella Sanktioner, SOU 2006:41), p. 54.

¹⁹¹ Ibid. p. 47.

¹⁹² The provision gives that the Government of Sweden can transfer power of the right of decision to the EU except in the area concerning the polity, RF 10:5.

judicial measures to enable the application of international treaty provisions internally in the national judicial system.¹⁹³

Under the 1267-regime, states are not obliged to do more than simply make sure that the Resolutions are followed and that those individuals on the blacklist have their assets frozen. The procedure requires no active legislative process from the Member States of the EU, but instead its implementation depends on the EU. The Community adopts Regulations, containing the lists, which become directly applicable in every Member State. To reiterate what has been previously mentioned in this paper, the EU is bound by the UNSC decisions as a result of the Member States' transfer of power to the EU; in this case in the area of financial sanctions on third states.¹⁹⁴

Under the second regime, the 1373-regime, the UN does not provide the members with any lists, but instead the members are incumbent to criminalize willful funding of terrorist actions.¹⁹⁵ The EU can decide to adopt Regulations or Common Positions, which it has done including the setting up of its own blacklists.¹⁹⁶ The Member States may also adopt laws to carry out the decisions of the UN or the EU.

To live up to the obligations under international law Sweden has adopted several laws aiming at carrying out the decisions of the UNSC and the EU. For the purpose of this thesis simply the laws that concern the financing of terrorism will be touched upon. The political debate that has aroused since the Yusuf case and the question whether there are any means to oppose the UNSC will also be examined.

5.1.2 The Prerequisite for the Implementation of National Legislative Measures

As mentioned above, the provision where Sweden has transferred power to legislate to the EU is found in 10 ch. 5§ RF. The provision also applies to decisions of the UNSC. Furthermore, the paragraph contains a stipulation that the respect for fundamental rights in the area of co-operation to which the power have been transferred to, is equivalent to the level of protection provided by the RF and the ECHR.¹⁹⁷

Shortly after the time of the freezing of the funds for the three Somalia Swedes and the Al Barakaat, the Swedish Government opposed the decision

¹⁹³ Ibid. p. 193.

¹⁹⁴ Ibid. p. 87; *See also* Chapter 3.1.3.

¹⁹⁵ Internationella Sanktioner, SOU 2006:41, p. 98.

¹⁹⁶ The EU has since the Common Position 2001/931/GUSP carried out its own lists containing the names of individuals and entities suspected of having engaged in terrorist activities, Internationella Sanktioner, SOU 2006:41, p. 101.

¹⁹⁷ Ibid. p. 72.

by the UNSC on the grounds that it violated Sweden's constitutional obligations as well as the ECHR.¹⁹⁸ However, the Swedish Government has also stated that even though it considers the work of the Committee under Resolution 1267 to lack in respect for fundamental rights it is still self-evident that Sweden will remain loyal to the decisions of the UNSC.¹⁹⁹ I will get back to this issue at a later stage.

When it comes to the authorization of the Member States to act nationally concerning international sanctions, the TEU provides the Member States with directions for their foreign policy. If the EU has decided upon a Common Position it is indicative for the actions of the Member States. Article 15 TEU states that Member States must make sure their foreign policy is in line with the Common Positions of the EU. If the issue falls under the scope of the Community the Member States are prohibited from taking actions of their own. This is the case with economic sanctions, as mentioned above. The logic of this reasoning is that the Member States are free to decide upon sanctions when there is no Common Position. The freedom is not unlimited, however, since Article 11 TEU provides the Member States with general rules that narrows the competence to act. According to the latter provision, the EU shall affirm and realize a common foreign- and security policy. The Member States shall actively and loyally support the policy and the Member States are further on encouraged to work jointly in a sense of solidarity with the Union as well as one another.²⁰⁰

The previously stated implies that the Member States must refrain from acting in a way that would be at variance with the politics of the EU.

5.1.3 Sanktionslagen (1996:95) and Finansieringslagen (2002:444) – The Swedish Sanctions Act and the Swedish Financing Act²⁰¹

Both the Sanctions and the Financing Acts intend to criminalize acts of terrorism under Resolution 1373. When the EU implements Resolution 1373 and creates a joint list for targeted individuals and entities it differs between EU citizens and non-EU citizens. The EU has complete mandate to realize the duties of the Member States regarding the implementation of the sanctions when it comes to non-EU citizens. As regards the EU-citizens it is up to the Member States to carry out the sanctions.²⁰²

¹⁹⁸ The Swedish Government requested to the Sanctions Committee, through two *note verbales*, to have the three Swedish citizens and the entity removed from the blacklist. The request resulted in a hearing before the Committee where two of the suspected terrorists were removed from the list. See Yusuf, paras. 317-18.

¹⁹⁹ Internationella Sanktioner, SOU 2006:41, p. 72.

²⁰⁰ Ibid. p. 67.

²⁰¹ The English translation is solely my own and has as far as I know no official translation.

²⁰² Ibid. p. 102.

Sanktionslagen (1996:95) gives the Government of Sweden the mandate to carry out the necessary actions as regards the observance of the sanctions. However, by 2006, the Swedish Government had not yet realized any sanctions towards EU-citizens in accordance with Resolution 1373.²⁰³

Without going into detail of the specific provisions of the Act it is only worth while mentioning that the scope of application is somewhat diffuse since it is not clear whether individuals can be targeted or only states, regimes or other third states.²⁰⁴

Finansieringslagen (2002:444) contains provisions for the implementation of the International Convention for the Suppression of the Financing of Terrorism. The Swedish Act implies a right for Swedish authorities to penalize those who supplies or receives money or other assets with the intention of using these to commit acts of terrorism.²⁰⁵

The conclusion of the existing provisions in the Swedish Acts is that at present Sweden is not able to fully carry out the freezing of assets as Resolution 1373 requires. The national procedural and criminal law does not provide the sufficient provisions to freeze assets, why the full implementation is unsatisfactory.²⁰⁶ Sweden has neither a satisfactory legislation to enable immediate freezing of assets under the 1267-regime. During the time of the actual listing by the Sanctions Committee to the time of action by the EU, there is a gap of a few of days. During these couple of days the individuals can dispose non-restrictively over the assets before the EU acts and implements the list as binding upon the Member States. As previously mentioned, the Member States have obligations to carry out decisions by the UN, in spite of the actions by the EU. Therefore, a commission of inquiry on the possibility to allow for interlocutory orders to freeze the assets was appointed by the Swedish Government in 2006. The outcome is still pending.

²⁰³ Ibid.

²⁰⁴ See 2§ of Sanktionslagen (1996:95).

²⁰⁵ See 1-3§§ of Finansieringslagen (2002:444).

²⁰⁶ Internationella Sanktioner, SOU 2006:41, p. 106 f.

5.2 In the Aftermath of the Yusuf Case – The Political Debate and the Possibility For Redress

5.2.1 Introductory Remarks

The Yusuf and the Kadi cases were the first cases where a Community court judged upon the validity of UNSC sanctions, although contested through a Regulation adopted by the EU. The issue is multi-faceted in that it touches upon many legal areas and dimensions of international politics thus, giving rise to much controversy. The EU has by resigning from the observance of the protection of fundamental rights, declared that the EU has no power to secure the protection of these. I believe the EU has a responsibility for its citizens given the fact that the Member States have voluntarily given up part of their sovereignty and entrusted the EU with a task to act on their behalf, including the securing of fundamental rights.

One could easily argue that the area of politics is not really relevant for a legal thesis. On the other hand to argue that politics is separate from law would be to state the untrue. To use the opinions of Professor Inger Österdahl at Uppsala University, politics and law are separated only by a very thin line.²⁰⁷ In the Yusuf case this was particularly blunt since the CFI argued it could neither review the Regulation nor lay down that the basic fundamental rights in our constitutional state had been violated. The decisions of the UNSC and the EU, in the field of international sanctions, affect countless people daily, not only in the parts of the world where the battle against terrorism is fought, but also here in our democratic part of the world.

So what could the political debate give the future as regards better protection for fundamental rights and is there any way for Mr. Yusuf or Barakaat to hope for redress?

5.2.2 The Political Debate

After having studied the political debate in Sweden in several journals it is clear that most authors do not accept the judgment of the CFI, neither the fact that the Swedish Government carried out the decision to freeze the assets of the three individuals without any heavy protesting.

²⁰⁷ Österdahl, Inger *FN, EU, sanktioner och mänskliga rättigheter – domen i EU:s Förstainstansrätt*, SvJT 2006 s. 377.

Thomas Hammarberg, the Commissioner for Human Rights at the Council of Europe, holds that Sweden should have been disobedient and refused to carry out the sanctions. Sweden had the choice to protect human rights, which form part of Sweden's constitution, but instead chose to follow the UN, thus breaching its own constitution. Mr Hammarberg does not consider the refusal to follow UNSC Resolutions to undermine the authority of the UN. On the contrary, he considers that our obedience with the decision of the UNSC and the consequences it has conducted would undermine the UN far more.²⁰⁸

Professor Österdahl considers that the passive approach to review the the UNSC decisions is not exclusive to the CFI. According to Österdahl, the ECtHR is surprisingly passive when it comes to accepting the UNSC as the guardian for international peace and security. In response to the judgment in the Yusuf case, the ECtHR considered that the primary means of legal redress was the national courts, why the ECtHR argued that it was up to the national courts, and in the end Community courts, to secure the protection of fundamental rights in the EU.²⁰⁹

Like Mr Hammarberg, Professor Österdahl argues further that the CFI did not have to disclaim its mandate to review the legality of the Regulation in the Yusuf case. The CFI argued in its judgment that to judge whether Mr Yusuf constituted a threat to international peace and security would be too political, why it chose to refrain from such a review. However, Österdahl argues that since the UNSC's power is not absolute but in fact limited by international law as well as the UN Charter, the CFI was wrong in that it was undue to perform such a review.²¹⁰ The CFI could instead have claimed a right to evaluate whether the judgment was within the limits of the power of the UNSC.²¹¹

Professor Cameron, goes along the same line as the two previous scholars and is perhaps even more explicit in his views of the judgment in the Yusuf case, which he refers to as a "judicial abdication".²¹² Cameron argues that if one would interpret the judgment literally there are no limits to the decisions of the UNSC, genocide excluded, and the Member States of the EU are obliged to pursue the decisions. Cameron also fears that if we grant too much power to the UNSC this could have severe consequences for the future, given the growing political influence of semi- or non-democratic states such as Russia or China.²¹³

Cameron believes that the balance of power in the international community will never strike even if not the ECJ clearly opposes the UNSC. He is not

²⁰⁸ Truedson, Lars, "Härvan av kränkningar måste röjas upp" *Fredstidningen PAX*, Svenska freds, Issue 4-5 2006, found at: <http://www.svenskafreds.se/pax/tidigare/06-4-5/senaste.shtml>.

²⁰⁹ *Supra*. n. 186.

²¹⁰ *See*, *inter alia*, Chapter 3.3.2.

²¹¹ Österdahl, s. 378.

²¹² *Supra*. n. 169.

²¹³ *Ibid*.

too optimistic, however, given the amount of pressure the ECJ is under to remain loyal to the UNSC when judging in the appeal by Al Barakaat sometime during the fall of 2008.²¹⁴

5.2.3 The Possibility for Redress

Mr. Yusuf was without legal rights for over five years. He could neither travel or work nor make use of his financial assets. In any case, Mr. Yusuf was taken off the list before the appeal to the ECJ why his case will not be tried in the Court. Of the original claim, only the organization Al Barakaat remains on the blacklist and the ECJ will give its judgment sometime during the fall 2008.²¹⁵

The Advocate General (AG) Poires Maduro argues in the Opinion to the pending case C-415/05 from January 23, 2008 that as long as there is no rule of law regarding the review of the sanctions within the UN, it is for the EU to provide such review. The AG considers the Regulation, under which the Al Barakaat was targeted, conflicted with the right to judicial review and shall therefore be declared null and void. The Swedish Government has hitherto remained negative to the opinion of the AG and adheres to the idea that the protection for fundamental rights must be secured within the UN system, not at an EU or national level.²¹⁶

There are a few examples of states where the Governments have opposed the decisions of the UNSC and simply refused to carry out the sanctions. One example that received much attention was the case of the Canadian citizen Liban Hussein, who was put on the sanctions list and had his resources frozen. Canada, as opposed to Sweden, refused to carry out the freezing of the funds and annulled the sanction decision. This was performed after viewing the evidence against him. The decision was subsequently followed by the UN, who removed him off the list.²¹⁷

The case illustrates the possibility to successfully oppose the UNSC. If it has created a greater legal certainty is hard to say, but in the particular case one could easily state that it has.

²¹⁴ Mr. Yusuf has been removed from the list, thus only Al Barakaat that remains on the list can appeal the judgment in the original Yusuf case. Knutson, http://www.advokatsamfundet.se/templates/CommonPage_Advokaten.aspx?id=8181. The appeal C-415/05 is still pending.

²¹⁵ Hårdh Robert, Wengmark Anna, Klasén Bo, de Geer Sten, *Gottgörelse till de rättslösa* Svenska Helsingforskommittén Newsdesk, found at: http://www.newsdesk.se/pressroom/svenska_helsingforskommitten_foer_maenskliga_raetti_gheter/pressrelease/view/gottgoerelse-till-de-raettsloesa-206766.

²¹⁶ Ibid.

²¹⁷ Supra. n. 207.

In any case, the outcome in the case that is pending before the ECJ at the moment is hard to predict. The ECJ can either chose to follow the AG or remain loyal to the UNSC. One thing is clear; if states continue to follow the UNSC without objection we will probably not see an increasing legal certainty for targeted individuals in the near future.

6 Conclusions

6.1 Conclusions of the Thesis

So what are the possibilities for countries like Sweden to live up to its obligations to EU- and International law as well as its own constitution? As a member of both the EU and the UN, Sweden has transposed much of its sovereignty and judicial powers to intergovernmental organizations. Even if Sweden would want to act in accordance with the respect for fundamental rights it is difficult to give effect to without also breaching international- or EU law. The Yusuf case is perhaps one of the best examples to illustrate the complexity of the situation.

While Sweden has a long tradition of protecting fundamental rights, it has proven inevitable for Sweden to give way on some of these accounts. The increasing threats of terrorist acts around the world have created a world where the fear for terrorism has grown to enormous proportions. In the view of the incidents of 9/11 that fear is justified. However, we seem to have forgotten about the basic fundamental rights along the way. Like most other EU countries, Sweden has a constitution where the respect for fundamental rights is specifically stated. As the Yusuf case has demonstrated, the respect for national constitutions must sometime submit to the obligations of international Treaties. In as much as the EU and the UN are organizations once founded as giant peace projects, they also have the power to decide upon its members' foreign policy. Further on, the UNSC has even been trusted with the specific role of deciding upon what situations constitute of a threat to international peace and security. This is the package deal of acceding to intergovernmental organizations.

So, how can Sweden protect fundamental rights or to reiterate one of the research questions, are the UNSC Resolutions in accordance with Sweden's obligations to respect fundamental rights as under international law and EU law? The question is complex in itself since Sweden has legal obligations to its own constitution as well as under international- and EU law. At the same time, both the EU and the UN have obligations to observe fundamental rights according to the TEU, the EC Treaty and the UN Charter. The role of the UNSC as the international observer of peace and security and the prevailing nature of the UN Charter has nevertheless created a legal safeguard for the institutions of the UN to circumvent the obligations somewhat. Undoubtedly the international community has agreed to grant the UNSC with the power to observe international peace and security, why the actions of the latter can never be contradictory to the mission of securing international security.

However, neither the UNSC, nor the UN has an unrestrained power to act upon. The purpose of the UN is for every member to act with respect to

international peace and justice which includes the respect for human rights. This can be deduced from Article 1 UN where the principle of good faith would prohibit the organs of the UN from behaving contrary to the core elements of the human rights norms behind Article 1(3) UN. Another possibility to the limitation of the UNSC's power follows from Article 24(2) which affirms that the UNSC must act in accordance with the purpose of the UN.

According to Bianchi, the UN itself could also be legally bound by declarations adopted by the UNGA such as the UDHR as well as the ICCPR in accordance with Articles 55 and 56 UN. These two international conventions would implement instruments of the obligations laid down in Articles 55 and 56 UN. On the other hand, scholars like Lysén have argued that the UN never can be legally bound by any Treaty obligation it has not consent to and finds the legal base for his arguments in Article 34 VCLT and Article 103 UN.

To go so far as to maintain that international law has changed would be to go too far. For a norm of *jus cogens* to be said to have changed or become null and void it would require a universal state practice and strong evidence indicating that the value it protects is no longer considered fundamental by the international community. Even if states would refuse to comply with some customary rules of international law it is too early to state that there has been such profound change in the practice of states as to give evidence to a change of fundamental rights protection. The argument that we would have a new set of rules of *jus cogens* that would replace the current ones is just not legally credible.

I believe that the UN must be said to be held responsible for breaching fundamental rights with reference to the purpose of the UN as well as the peremptory rules of *jus cogens*. If we slip too much power to the UNSC there could be a danger for the future. To recite Cameron, the problem with a too strong UNSC could be even more manifestable in the future when Russia and China, who are not known for their adherence to the protection of fundamental rights, will have an increase of power globally.

If we go back to the Yusuf case and the question whether EC Regulations or Common Positions are in accordance with Sweden's obligations to the EU the answer at first glance would be, yes. Sweden is obliged to follow EC Regulations and to act in accordance with Common Positions by virtue of Sweden's treaty obligations, i.e. the TEU and the EC Treaty. The principle of loyalty in Article 10 EC obliges every Member State to carry out the decisions of the Community with loyalty to the latter. Article 103 UN and the dubious judgment by the CFI in the Yusuf case further implies that not only are Member States obliged to follow EC Regulations, but the EU itself is also obliged to follow the UNSC Resolutions. The CFI ascertained that the blacklisting in the Resolutions (under the 1267-regime) had created an 'effect of legality' due to the supreme nature of the UN Charter. To analyze the statement further, the Court is almost implying that the UNSC could

decide upon anything and the supremacy of the UN Charter would immediately grant the decision an 'effect of legality'. Perhaps the ultimate test of the legitimacy of the UNSC Resolutions would be the acceptance of the Member States who are also members of the UN. If members of the UN would begin to oppose the UNSC more clamorously it might lead to an increasing respect for fundamental rights.

However, in as much as Sweden has obligations under EU law to comply with the CFSP and Regulations of the EU, the EU itself is obliged to protect fundamental rights. The willingness is well illustrated in cases where the Community courts have to consider decisions taken by the EU itself, such as in the OMPI or Segi cases. Even if neither courts were able to review the legality of the decisions to freeze the funds of the individuals, due to lack of clear evidence for the listing in the case of the OMPI and a procedural failure in the Segi case, the Courts laid down that the right to a fair trial and judicial review were vital fundamental rights.

The introduction of the EUCFR and the accession to the ECHR will most definitely create a better legal protection for fundamental rights in the EU, given Article 52(1) of the EUCFR as one example. The provision states that imitations to the protection of fundamental rights must be provided for by law. When acceding to the ECHR the Member States transfer powers to the EU institutions thus creating a duty for the institutions of the Union to acknowledge fundamental rights in every decision.

Regarding the means for redress for Mr. Yusuf and Al Barakaat, Mr. Yusuf has the possibility of being compensated by the Swedish government ex-gratia. However, considering the fact that the Swedish Government seems unwilling to challenge the UN and settle for simply stating that it does not agree with the decision to freeze the funds, I am not too optimistic. As regards the appeal by Al Barakaat which is still pending before the ECJ a possible redress seems more hopeful considering the Opinion of AG Poires Maduro.

I believe that in the end it comes down to the question of how what kind of society we want to live in? The constant threat of terrorism has made institutions such as the UNSC to take on drastic measures to fight terrorism. It has gone so far that fundamental rights are completely omitted in the 'war on terror'. Like Kruse, I believe that the 'war on terror' never can be won without the consent of ordinary citizens. The war will simply lack in credibility if one would maintain the same flagrant infringements of fundamental rights as we have seen up until today.

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