

# When legal systems collide: the judicial review of freezing measures in the fight against international terrorism

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## I. Introduction

It is very true that “claimants, no matter how ignoble, sometimes raise important issues.”<sup>1</sup> This is clearly the case in the dispute that arose between Yusuf and Kadi and the institution of the European Communities (EC). With the decisions rendered on September 21, 2005 in the *Yusuf* and *Kadi* cases,<sup>2</sup> the Court of First Instance of the European Communities (CFI) refused to review the European Regulation 881/2002 that contains the list of individuals and entities whose assets must be frozen, due to suspected

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<sup>1</sup> Michael W. Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT’L L. 83 (1993), at 86.

<sup>2</sup> Court of First Instance [CFI], case T-306/01, *Ahmed Ali Yusuf, Al Barakaat Int’l Found’n v. Council and Commission* (Sept. 21, 2005), [2005] E.C.R. II-3533, *app’d under* case C-415/05, [2006] OJ C48, 11; case T-315/01, *Yassin Abdullah Kadi v. Council and Commission* (Sept. 21, 2005), [2005] E.C.R. II-3649, *app’d under* case C-402/05, [2006] OJ C36, 19. Philippe Weckel, *Chronique de jurisprudence internationale*, 109 REVUE GÉN. DR. INT. PUBLIC 957 (2005).

terrorist links.<sup>3</sup> This measure is part of a large effort to stem terrorist financing.<sup>4</sup> In particular, Regulation 881 had been adopted by the Council of the European Union for regionally implement of the measures that the U.N. Security Council (SC) had enacted since 1999, and that required member states to freeze the assets of individuals and entities affiliated to the Taliban and Al Qaeda. Yusuf, together with the company Al Barakaat and other individuals, filed a petition to the CFI in 2001, seeking the annulment of the Regulation according to article 230 of the European Communities Treaty.<sup>5</sup> They contended that the insertion of their names in the list was inaccurate, and, moreover, that the mechanism of the insertion itself breached their fundamental rights. The CFI held that Regulation 881 and the list may not be challenged, because they derive from SC determinations which bind member states according to the U.N. Charter. Therefore, they cannot be impugned even when translated into European norms, unless they violate *jus cogens*.<sup>6</sup> In this case, however, the Court found no breach of *jus cogens*, since the right to judicial review, while supposedly one of the fundamental rights

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<sup>3</sup> Council Regulation (EC) No. 881/2002 of 27 May 2002, imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation no. 467/2001, OJ L 139 of May 29, 2002, p. 9.

<sup>4</sup> See generally Yas Banifatemi, *La lutte contre le financement du terrorisme international*, 48 *Annuaire français de droit international* 103 (2002), at 113 ff.; INTERNATIONAL MONETARY FUND, LEGAL DEPARTMENT, *SUPPRESSING THE FINANCING OF TERRORISM* (2003), at 4; Mark Pieth, *Financing of Terrorism: Following the Money*, 4 *EUR. J.L. REFORM* 365 (2002).

<sup>5</sup> Treaty Establishing the European Community, consolidated version, art. 230, OJ C 325 of Dec. 20, 2002 (“[t]he Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former”).

<sup>6</sup> As well known, *jus cogens* comprehends all those norms which cannot be derogated by international agreements. See the Vienna Convention on the Law of Treaties, signed on May 23, 1969, 1155 U.N.T.S. 331, art. 53 (“[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”).

contemplated by the *jus cogens*, can be derogated for reasons of international peace and security.

This note wishes to criticize the CFI's analysis of the problem of ensuring a judicial review of measures concerning the freezing of terrorist assets. We will start by describing the way in which the SC enacted the resolutions that represent the legal ground of the European Regulation at stake. Like any other measure affecting individual freedom, also these resolutions, and obviously the related regulations, directly impact human rights protection. Such human rights concerns raise the question of "the possibility individuals have to bring an action to enforce these rights."<sup>7</sup> The first part of the paper will be devoted to a general overview of the U.N. framework (II.A) and the perspective of limiting U.N. actions (II.B). Second, we will address, generally, the regime of EC implementation of U.N. Resolutions, generally (III.A), and from the viewpoint of the *Yusuf* decision (III.B). Third, we will formulate some criticism of *Yusuf* (IV) and, finally, make some concluding remarks (IV).

## II. *The U.N. framework: Security Council resolutions and their implementation*

### A. *General view*

The proceedings that resulted in a freezing of the terrorist assets are part of what are commonly termed "smart sanctions."<sup>8</sup> This definition refers to the sanctions' precision regarding its targets. Smart sanctions are supposedly efficient weapons against terrorism. For instance, on the one hand they allow authorities to maximize prevention in

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<sup>7</sup> Translation from French. Annalisa Ciampi, *L'Union européenne et le respect des droits de l'homme dans la mise en œuvre des sanctions devant la Cour européenne des droit de l'homme*, 90 REVUE GÉN. DR. INT. PUBLIC 85 (2006), at 112 ["la possibilité pour les particuliers affectés d'avoir des recours disponibles pour faire valoir leurs droits"].

<sup>8</sup> The term "smart sanctions" indicates measures taken for numbered purposes against certain subjects. More precisely, "[t]he essence of smart sanction is narrowly targeting the controls at the individual or entity concerned, within or without a particular geography or nation". Peter L. Fitzgerald, *Managing "Smart Sanctions" Against Terrorism Wisely*, 36 NEW ENG. L. REV. 957 (2001-2002), at 961.

order to halt potential attacks by depriving terrorists of their current resources. On the other hand, they are presumably so precise as to avoid collateral harms against third parties who might be indirectly involved in the activity of terrorist organizations. The system of terrorist financing prevention is based on a “proscription lists” (or “blacklists”) model: persons and entities bear some legal consequences with respect to their property rights, as a result of their simple insertion in the list. Originally, this regime had been used by the United States when sanctioning foreign countries, but in the mid-1990s it became the normal protocol for preventing the financing of terrorism.<sup>9</sup> Soon it shifted from a framework inspired by repressive/sanctioning purposes to one of pure preventive aims, and has been adopted by the international community as an expression of its global efforts to prevent terrorist assaults.<sup>10</sup>

The United Nations has adopted the blacklist model since 1999. At that time, the SC reacted to the attacks of August 7, 1998, against the U.S. embassies in Dar es-Salam, Tanzania, and Nairobi, Kenya,<sup>11</sup> by enacting Resolution 1267 (1999).<sup>12</sup> This Resolution sought to sanction the Taliban for hosting Osama bin Laden, and imposed on member states the freezing of all funds and resources owned or controlled by the Taliban.<sup>13</sup> By

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<sup>9</sup> United States used intensely these measures thus far. Indeed, freezing orders originates in that country as a sanction against foreign states and entities. The sanctioning system against terrorists has been enacted by Congress in 1996 with the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), then improved by the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act), Pub. L. No. 107-56, 115 Stat. 272 (2001). Precisely, see Eric Broxmeyer, *The Problems of Security and Freedom: Procedural Due Process and The Designation of Foreign Terrorist Organizations Under the Anti-Terrorism and Effective Penalty Act*, 22 BERKELEY J. INT'L L. 439 (2004), at 444. See Geneviève Burdeau, *Le gel d'avares étrangers*, 124 JOURN. DR. INT. 5 (1997), at 23 ff.

<sup>10</sup> Accordingly, “the movement towards smart sanctions is influencing not only the U.S. and other nations’ unilateral sanctions programs, but also those multilateral sanctions efforts coordinated under the auspices of the Security Council”. Peter L. Fitzgerald, *supra* note 8, at 961.

<sup>11</sup> In its resolution 1189 (1998), the Security Council called upon states to collaborate and support investigations concerning these attacks. See S.C. Res. 1189, § 3, U.N. Doc. S/RES/1198 (Aug. 13, 1998).

<sup>12</sup> S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

<sup>13</sup> Accordingly, “[a]ll states shall 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

the same resolution, the SC created a Committee (“Taliban Committee”, TC), consisting of all Council members, whose function is in short to “designate funds or other financial resources”<sup>14</sup> to be frozen. Resolution 1267 and the appointment of the TC represent the core of the proscription list system against the Taliban regime under the U.N. Charter.

Unsurprisingly, this practice has been progressively extended to Al Qaeda and Usama bin Laden. Resolution 1333 (2000), after imposing new sanctions on Afghanistan for the government’s support of terrorist groups, bound states to freeze the assets of Osama bin Laden and his affiliated organization.<sup>15</sup> Moreover, the SC “request[ed]” that the TC “maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization.”<sup>16</sup>

Other resolutions followed. For instance, Resolutions 1363 (2001),<sup>17</sup> 1390 (2002),<sup>18</sup> and 1455 (2003)<sup>19</sup> implemented the previously cited measures, while

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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”. S.C. Res. 1267, § 4, *supra* note 12.

<sup>14</sup> *Id.*, § 6(e).

<sup>15</sup> S.C. Res. 1333, § 8(c), U.N. Doc. S/RES/1333 (Dec. 19, 2000) (requiring states “[t]o freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization, and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him, and to ensure that neither they nor any other funds or financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly for the benefit of Usama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Usama bin Laden or individuals and entities associated with him including the Al-Qaida organization”).

<sup>16</sup> *Id.*

<sup>17</sup> S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001). This resolution implements the framework of the Committee, on one hand creating a Monitoring Group and a Sanction Enforcement Support Team (*id.*, §§ 4(a) and 4(b)) and, on the other hand, calling all states to enforce the measures established by the previous resolutions through domestic regulations, either legislative or administrative (see *id.*, § 8).

<sup>18</sup> S.C. Res. 1390, at § 2, establishes that all states “shall take the following measures with respect to Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups,

Resolution 1617 (2005) consolidated the existing lists regarding the Taliban and Al Qaeda.<sup>20</sup> On November 7, 2002, the Committee enacted some *Guidelines* concerning the decision-making process, the nature of the lists, and the purposes of the Committee itself.<sup>21</sup>

It is important to distinguish the SC framework from the one that characterises the TC. In formal terms, the latter is an “operational committee,” created by the former

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undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) to be updated regularly by the Committee established pursuant to resolution 1267 (1999) [...]:

- (a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons’ benefit, by their nationals or by any persons within their territory;
- (b) Prevent the entry into or the transit through their territories of these individuals [...];
- (c) Prevent the direct or indirect supply, sale and transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities.”

S.C. Res. 1390, § 2, U.N. Doc. S/RES/1390 (Jan. 16, 2002).

<sup>19</sup> S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003). This resolution implements furtherly the measures already established by the Council with the mentioned resolutions. Specifically, Council asks the Committee to communicate the proscription lists to the states every three months and

“stresses to all Member States the importance of submitting to the Committee the names and identifying information, to the extent possible, of and about members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them so that the Committee can consider adding new names and details to its list, unless to do so would compromise investigations or enforcement actions.”

*Id.*, § 4.

<sup>20</sup> S.C. Res. 1617, § 1, U.N. Doc. S/RES/1617 (July 29, 2005).

<sup>21</sup> SECURITY COUNCIL COMMITTEE ESTABLISHED PURSUANT TO RESOLUTION 1267 (1999) CONCERNING AL-QAIDA AND THE TALIBAN AND ASSOCIATED INDIVIDUALS AND ENTITIES, GUIDELINES OF THE COMMITTEE FOR THE CONDUCT OF ITS WORK (Adopted on Nov. 7, 2002, as amended on April 10, 2003 and revised on Dec. 21, 2005) [hereinafter “Taliban Committee’s Guidelines”], available on the Internet at the address “[www.un.org/Docs/sc/committees/1267/1267\\_guidelines.pdf](http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf).”

according to article 29 of the Charter.<sup>22</sup> Article 1 of the aforementioned Guidelines states that the TC is a “subsidiary organ of the Security Council.”<sup>23</sup> This means, basically, that any responsibility for the TC’s behaviour should be referred back to the SC. In fact, if members cannot deliberate by consensus inside the TC, the decision is adopted by the SC.<sup>24</sup> Moreover, aside from the modification of the *Guidelines*, the TC has no regulatory power. Its unique meaningful power impacts the list: it can “seek” information from states, “update regularly” the list, “cooperate” with other Sanction Committees, “examine the records submitted by member states”, “consider [...] requests concerning the exceptions”, and “consider requests by member states for additional information”.<sup>25</sup> The only area in which the TC seems to “decide” is the relevance of information submitted by states, regional or international organizations,<sup>26</sup> but even here, the Committee “cannot appraise the merit of the information”.<sup>27</sup> Even in the de-listing decisions, the Committee appears to be nothing more than a means of communication between the member states, since a listing or de-listing decision cannot be made without the vote of all states.<sup>28</sup>

Moreover, one must keep in mind the distinction between the TC and the so-called “Counter-Terrorism Committee” (CTC), founded by Resolution 1373 (2001).<sup>29</sup> The

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<sup>22</sup> Likewise Emmanuel Decaux, *Article 29*, in JEAN-PIERRE COT, ALAIN PELLET (EDS.), *LA CHARTE DES NATIONS UNIES. COMMENTAIRE ARTICLE PAR ARTICLE* 975 (3rd ed., 2005), 984.

<sup>23</sup> Taliban Committee’s Guidelines, § 1(2), *supra* note 21.

<sup>24</sup> *Id.*, § 4(a).

<sup>25</sup> See respectively *id.*, § 4(a), (b), (c), (d), (i), (k).

<sup>26</sup> See *Id.*, § 6.

<sup>27</sup> Mauro Megliani, Luca G. Radicati di Brozolo, *Freezing the Assets of International Terrorist Organizations*, in ANDREA BIANCHI (ED.), *ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM* 377 (2004), 382.

<sup>28</sup> This seems to be a common character for some Sanction Committee established by the Security Council. For a precedent, see Martti Koskenniemi, *Le Comité des Sanctions*, 37 ANN. FR. DR. INT. 119 (1991), 122 f.

<sup>29</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

CTC is asked “to monitor the implementation of this resolution,”<sup>30</sup> but it has no decisional power with respect to any names of terrorists or entities connected with them. The reason for this lack of power is easily understandable. While there is a general consensus at an international level on the danger of the Taliban and Al Qaeda, there is still confusion about a general definition of “terrorism”<sup>31</sup> and, accordingly, uncertainty on the appropriateness of targeting other groups. Outside the context of Al Qaeda and Osama bin Laden, states still do not agree globally on what “terrorism” is.<sup>32</sup> This ambiguity clearly affects the measures’ precision and thus the real accuracy of “smart sanctions”. Moreover, such doubts impact the effectiveness of Resolution 1373 framework, since without a common definition, states could devise their own in order to escape the obligations stated by the SC.<sup>33</sup> The role of the CTC thus becomes nothing

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<sup>30</sup> S.C. Res. 1373, *supra* note 29, at § 6.

<sup>31</sup> On this problem see Christian Walter, *Defining Terrorism in National and International Law*, in CHRISTIAN WALTER ET AL., *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* 23 (2004), 33 ff.; Eric Hugues, *La notion de terrorisme en droit international: en quête d’une définition juridique*, 129 JOURN. DR. INT. 753 (2002); Krzysztof Skubiszewski, *Definition of Terrorism*, 79 ISR. YEARB. HUM. RIGHTS 39 (1989), at p. 43; Geoffrey Levitt, *Is Terrorism Worth Defining?*, 13 OHIO NORTH. UNIV. L.R. 97 (1989), at p. 109 ff.; John F. Murphy, *Defining International Terrorism: A Way Out the Quagmire*, 19 ISR. YB HUM. RIGHTS 13 (1989), at p. 22.

<sup>32</sup> The lack of consensus in the definition of terrorism is due to the problematic distinction between freedom movements and terrorist organizations. As known, according to classic international law the fight for freedom of peoples should be considered a lawful purpose for States do not want to agree on a definition of terrorism that could arise their individual responsibility for having refrained to combat a specific organization. See Mauro Megliani, Luca G. Radicati di Brozolo, *supra* note 27, at 397 (“there is still no consensus on a proper definition of the term, mostly because of the difficulty in drawing a distinction between international terrorism and freedom movements”); Christian Walter, *supra* note 31, at 35 ff.; ADRIAN GUELKE, *THE AGE OF TERRORISM AND THE INTERNATIONAL POLITICAL SYSTEM* (1995), at 80; Denis G. Touret, *Terrorism and Freedom in International Law*, 2 HOUS. J. INT’L L. 363 (1979-1980), at 368 ff.; Geoffrey Levitt, *supra* note 31, at 109, notes that “governments that have a strong political stake in the promotion of ‘national liberation movements’ are loath to subscribe a definition of terrorism that would criminalize broad areas of conduct habitually resorted of such groups, and on the other end of the spectrum, governments against which these groups’ violent activities are directed are obviously reluctant to subscribe to a definition that would criminalize their own use of force in response of such activities or otherwise”. See recently RICHARD H. SHULTZ JR., AND ANDREA J. DEW, *INSURGENTS, TERRORISTS, AND MILITIAS: THE WARRIORS OF CONTEMPORARY COMBAT* (2006).

<sup>33</sup> The lack of a definition of “terrorism”, even in the framework of the CTC, generates a problem in the concrete implementation of SC Resolutions, from the standpoint of the prosecution of organizations that even only one state refuses to consider as a terrorist one. On this point, see Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism*, 97 AM. J. INT’L L.



more than a forum for dialogue, despite its usefulness in determining the terms of assistance for states. From this standpoint, unlike the TC, the CTC is not an operational entity depending on the SC; rather, it is an independent technical agency, that does not report to the SC and is only designed to help states to implement the Resolution's standards their domestic legislations toward.<sup>34</sup> However, like the TC, the CTC cannot evaluate the merits of any decision made by a state to include certain persons in the definition of "terrorist organization".<sup>35</sup>

### *B. Challenging the SC Resolutions under a human rights perspective*

What happens when individual rights are violated by a SC Resolution? In the case of the abovementioned resolutions concerning the financing of terrorism, they affect the property rights of the individuals and entities whose names are reported on the blacklist. How can those parties challenge the list and obtain its review if it contains mistakes? The question brings up several issues.

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333, 340 (2003) (arguing that "[i]t is possible that the CTC could run into a situation where a state is not prosecuting an individual or group for acts that the majority of countries on the CTC believe are terrorist acts, but that the country in question does not. Should the CTC turn a blind eye to this problem, with the understanding that it is not for the CTC to decide which individuals or groups are in fact "terrorists"? If the CTC begins to broaden its focus from building technical capacity to monitoring implementation of the laws and executive machinery designed to deal with terrorism, it may find itself engaged in the same definitional debate that the General Assembly is involved in, and thus run the risk of losing the broad support and cooperation from states that it has received to date").

<sup>34</sup> By virtue of resolution 1373, *supra* note 28, the CTC has no duties to report to the Security Council if a state has violated its obligations according to the resolution itself. Notice that the TC, instead, has this duty (see *supra* note 25). Accordingly, in April 2003 the CTC deliberated not to report any information to the Security Council about the situations of non compliance in which states could be found. On this interesting point see Eric Rosand, *supra* note 33, at 336.

<sup>35</sup> This happens because the resolution no. 1373 (2001) does not contain a definition of terrorism. See *supra* note 33. Moreover, standing this mandate of the CTC, that seems to be merely technical, one should question the qualification of the CTC itself as an "operational subsidiary organ" of the Security Council. For instance, Emmanuel Decaux, Article 29, *supra* note 22, at 985, considers the CTC as a "comité opérationnel", as opposed to other "comités techniques", but then he defines the CTC as "une véritable 'agence' au sein du Conseil de sécurité". See also, on the problem of qualification of subsidiary organs in the U.N. system, Andreas Paulus, Article 29, in BRUNO SIMMA ET AL. (EDS.), 1 *THE CHARTER OF THE UNITED NATIONS. A COMMENTARY* 701 (2d ed., 2002), at 553.

First, one should question the basis for the SC's jurisdiction over the matter. From this standpoint, it is worth recalling the effects of the SC Resolutions based on articles 25<sup>36</sup> and 103<sup>37</sup> of the U.N. Charter. These norms' coordination results in a situation in which member states must carry out the SC decisions — adopted after having ascertained a threat to or breach of peace — which prevail over every other international law norm. Since a state cannot invoke domestic law to refrain from performing a treaty obligation,<sup>38</sup> the SC measures established under Chapter VII have absolute supremacy even in the domestic sphere. Second, SC's power to adopt measures under Chapter VII extends as far as a certain situation represents a “threat to the peace” or a “breach of the peace” according to article 39.<sup>39</sup> Here the SC enjoys “full discretion”.<sup>40</sup> The Charter does not indicate any limitation to SC action. Indeed, international practice shows that the SC has consistently recognised for two decades that terrorism represents a very serious threat to peaceful international relations. The fact that the Council's target can be

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<sup>36</sup> U.N. Charter art. 25 (“[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”).

<sup>37</sup> U.N. Charter art. 103 (“[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”). Cf. Jean-Marc Thouvenin, *Article 103*, in 2 LA CHARTE DES NATIONS UNIES, supra note 22, at 2133, 2135; Alix Toubanc, *L'article 103 et la valeur juridique de la Charte des Nations Unies*, 108 REVUE GÉN. DR. INT. PUBLIC 439 (2004), at 445 f.

<sup>38</sup> See the Vienna Convention on the Law of Treaties, art. 27, supra note 6 (“[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”).

<sup>39</sup> See U.N. Charter art. 39 (“[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”).

<sup>40</sup> See Judge Weeramantry's dissent in *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Lybian Arab Jamahiriya v. United States of America)*, Provisional Measures, 1992 ICJ REP. 176 (April 14, 1992). See again Anthony Aston, supra note 44, who reveals that even with these broad powers the Security Council still uses discretion in a rational way. According to this author, “states represented on the Council take their responsibilities very seriously, whether they are permanent or non-permanent members”, and “there are important checks and balances within the Security Council”. *Id.*, p. 34.

described as a phenomenon, and not a “situation” referred to a certain state;<sup>41</sup> that it uses “its powers under Chapter VII [...] to impose [...] certain obligations, general, uniform and world-wide in scope, whose aim is to fight against a danger of global nature;”<sup>42</sup> and that, finally, its action “[is] not merely directed at a particular terrorist act, but at all (future) acts of terrorism;”<sup>43</sup> does not alter the lawfulness of the mentioned resolutions under article 39.

As discussed before, on the one hand article 103 of the Charter grants to SC decisions supreme priority over any other international obligation; on the other, SC actions appear broadly discretionary. This binding, completely discretionary power reminds the nightmare of the worse tyranny. Therefore some scholars have tried to find some limitations to the SC decision-making. They have examined the Charter and cited articles 24(2),<sup>44</sup> 1(3),<sup>45</sup> 2(2),<sup>46</sup> 55,<sup>47</sup> and 56<sup>48</sup> as significant limitations to SC action. If the SC violates any of these articles, according to the scholars, resolutions should be denied

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<sup>41</sup> Pierre d’Argent et al., *Article 39*, in JEAN-PIERRE COT, ALAIN PELLET (EDS.), 1 *LA CHARTE DES NATIONS UNIES. COMMENTAIRE ARTICLE PAR ARTICLE* (3rd ed., 2005), p. 1163.

<sup>42</sup> Roberto Lavalle, *A Novel, If Awkward, Exercise in International Law-Making: Security Council Resolution 1540 (2004)*, 51 *NETHERLANDS INT’L L. REV.* 411 (2004), at 416, discussing the second legislating episode after the resolution 1373 involving the Security Council, i.e. resolution 1540 of 2004. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

<sup>43</sup> ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* (2004), at p. 172.

<sup>44</sup> Article 24(2) states that all powers granted to the Security Council must be exercised “in accordance with the Purposes and Principles of the United Nations”. U.N. Charter article 24(2).

<sup>45</sup> Charter of the United Nations, article 1(3) (“The purposes of the United Nations are: [...] to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all”).

<sup>46</sup> Charter of the United Nations, article 2(2) (“All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter”). So must do the U.N. organs. See Robert Kolb, *Article 2(2)*, in Bruno Simma, *supra* note 35, at 93.

<sup>47</sup> U.N. Charter article 55(c).

<sup>48</sup> U.N. Charter 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”).

enforcement by domestic judges and declared void, by virtue of a kind of *detournement de pouvoir*.<sup>49</sup>

We cannot agree with this view. First, it is apparent how vague and abstract the cited provisions are.<sup>50</sup> How they could provide a guidance for the evaluation of resolutions' lawfulness is still a mystery. Moreover, "suggestions that the courts of UN members could declare Chapter VII resolutions (partially) invalid [has] no legal basis".<sup>51</sup> Indeed, were a domestic judge to use the weak tools contained in the Charter as a ground for judicial review, the system for maintaining international security would be at least partially struck down at domestic levels, and the international community's efforts in fighting terrorism would be largely wasted. New safe harbors would be easily created for terrorist organizations. No one could sincerely believe that granting individual national judges the power to review SC decisions concerning terrorism would resolve the problem of limiting the SC's powers.

According to some scholars, one potential limitation of the SC action would lie in international human rights norms.<sup>52</sup> However, most of these norms pertain to treaty or

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<sup>49</sup> See Erika De Wet, *The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View*, in ERIKA DE WET, ANDRÉ NOLLKAEMPER (EDS.), *REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 7* (2003), pp. 24-28, who bases this conclusion on articles 25 and 2(5) of the U.N. Charter, both of which refer to measures adopted "in accordance with the present Charter". U.N. Charter art. 25, and 2(5). According to this author, "the obligation to assist the organization in the first part of the sentence [of article 25] only concerns decisions by the Security Council under Chapter VII in as far as they were taken in accordance with the UN Charter. Thus, since article 2(5) obliges states to respect Chapter VII resolutions that were adopted in accordance with the UN Charter, the logical implication is that they are not bound to do so where this is not the case. It then becomes illogical to see how member states can be obliged in terms of article 25 to follow binding resolutions that are not in accordance with the UN Charter". *Id.*, p. 26 f.

<sup>50</sup> For instance, with regards to article 24 of the U.N. Charter, it has been pointed out that "this is a very broad and vague formula. One should read too much in it, or see it in isolation from more specific provisions in the rest of the UN Charter". Anthony Aust, *The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioner's View*, in ERIKA DE WET, ANDRÉ NOLLKAEMPER (EDS.), *REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 31* (2003), at p. 32.

<sup>51</sup> Anthony Aust, *supra* note 44, at p. 38.

<sup>52</sup> However, "most commentators, with very few exceptions, simply assume that the Security Council is obligated to respect human rights or humanitarian law rules when designing economic sanctions, and do

customary law, and would therefore be subject to article 103 prevalence rule.<sup>53</sup> By article 103 “human rights would be officially downgraded to norms which are simply overridden by the need to respond to the security concerns expressed by the Security Council”.<sup>54</sup> On the other hand, certain resolutions truly raise deep human rights concerns. The listing process under Resolution 1267,<sup>55</sup> in particular, suggests “serious accountability issue[s]”<sup>56</sup> with respect to individual freedoms. The SC, well aware of this problem, held, in its Resolution 1456 (2003), that

“[...] states must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular human rights, refugee, and humanitarian law.”<sup>57</sup>

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not analyze the origin, scope, and existence of the obligation in any detail”. August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT’L L. 851 (2001), at 853.

<sup>53</sup> Cf. the response of the U.K. Delegate under the scope of the resolution no. 1373 (2001) in the field of protection of human rights, according to which article 103 of the Charter would let the norms of the resolution to prevail on other international law norms concerning human rights. U.N. Doc. CCPR/C/SR.1963, § 25 (Oct. 23, 2001).

<sup>54</sup> Exactly, “[i]f all national counter-terrorism measures, challenged for non compliance with human rights treaties, could be justified and legitimated through a simple reference to article 103 of the UN Charter, human rights would be officially downgraded to norms which are simply overridden by the need to respond to the security concerns expressed by the Security Council.” Andrew Clapham, *Terrorism, National Measures and International Supervision*, in Andrea Bianchi (ed.), supra note 27, 283, at 295. See also Nicolas Angelet, *International Law Limits to the Security Council*, in VERA GOWLLAND-DEBBAS (ED.), *UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW* 71 (2001).

<sup>55</sup> S.C. Res. 1267, supra note 12.

<sup>56</sup> Report of the High-level Panel on Threats, Challenges and Change, A MORE SECURED WORLD: OUR SHARED RESPONSIBILITY, U.N. Doc. A/59/565 (Dec. 2, 2004), § 152 (“the Security Council must proceed with caution. The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions”).

<sup>57</sup> S.C. Res. 1456, § 6, U.N. Doc. S/RES/1456 (Jan. 20, 2003).

This norm apparently “demands compliance by states with human rights law thus removing any doubt as to the hierarchy of values to be protected”.<sup>58</sup> Yet Resolution 1456 does not have the same binding effect of Resolution 1267. In fact, while in the latter the SC “decides,” *i.e.* binds the states, in the former the SC simply “calls upon” states to take some steps. It is obvious, then, that Resolution 1456 embodies a recommendation addressed to states.<sup>59</sup> Notoriously international recommendations have an “effect of legality” in the sense that to the extent to which states apply the recommended norms, they do not violate conflicting duties deriving from other international norms.<sup>60</sup> This means that states which grant human rights could refuse to apply the SC resolutions. However, little is said about the domestic judge’s power to refuse to enforce the measures against listed individuals: could domestic courts simply disregard the applicant’s name on the blacklist and free his assets since Resolution 1269 breaches the applicant’s right to a judicial review? While the problem mostly hinges on this crucial point, no clear answer is actually provided by Resolution 1456.

The views mentioned above also cite the *jus cogens* as representing the core of norms that SC cannot violate in its decision-making process. As a creature of the Charter, which is an international treaty, SC may not breach what the Charter itself could not breach, *i.e.*, *jus cogens*. But what is *jus cogens*? And why should it bind the SC? We will address this question shortly.

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<sup>58</sup> Andrew Clapham, *supra* note 54, at 296.

<sup>59</sup> Notice that the in the resolution 1456, the Security Council “calls for the following steps to be taken”. S.C. Res. 1456, *supra* note 57, first sentence. This means that the norm of the resolution 1456 cited above should be considered as a recommendation, addressed by the Security Council to member states.

<sup>60</sup> As well known, U.N. organs recommendations produce the so-called “effect of legality”, that means that “a State does not commit a wrongful act when, in order to carry out a recommendation of a UN organ, it acts in a way that is contrary to commitments previously undertaken by agreement or by obligations deriving from customary international law”. BENEDETTO CONFORTI, *THE LAW AND PRACTICE OF THE UNITED NATIONS* (2nd ed., 2000), p. 279. As a result, it seems clear enough that states do not breach their obligations under the Security Council resolutions if they fulfil them in a way that is consistent with the human rights standards provided by international law.

### III. *The regional implementation of U.N. Resolutions*

#### A. *The framework*

Article 48(2) of the U.N. Charter charges member states with executing the SC decisions through the mediation of international organizations of which they are members.<sup>61</sup> Regarding the measures against the Taliban, the EC enacted the EC Regulation 337/2000,<sup>62</sup> afterward abrogated by the Regulation 467/2001.<sup>63</sup> Article 2 of the latter states that

“[a]ll funds and other financial resources belonging to any natural or legal person, entity or body designated by the [...] Sanctions Committee and listed in Annex I shall be frozen.

No funds or other financial resources shall be made available, directly or indirectly, to or for the benefit of, persons, entities or bodies designated by the Taliban Sanctions Committee and listed in Annex I”.<sup>64</sup>

Annex I contained the proscription list maintained by the TC, that the EC Commission, through appropriate regulations,<sup>65</sup> provided from time to time to modify accordingly.<sup>66</sup> Then, following the Security Council Resolution 1390,<sup>67</sup> the EU enacted

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<sup>61</sup> U.N. Charter art. 48(2).

<sup>62</sup> EC Regulation 337/2000 of Feb. 14, 2000, concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L43 of Feb. 16, 2000, p. 1.

<sup>63</sup> EC Regulation 467/2001 of March 6, 2001, prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation no. 337/2000, OJ L67 of March 9, 2001, p. 1.

<sup>64</sup> See EC Regulation 467/2001, art. 2, *supra* note 63.

<sup>65</sup> See EC Regulation 467/2001, art. 10(1), *supra* note 63.

<sup>66</sup> See for instance EC Regulation 2199/2001 of Nov. 12, 2001, amending, for the fourth time, regulation no. 467/2001, OJ 2001 L 295, p. 16.

<sup>67</sup> S.C. Res. 1390, *supra* note 17.

the Regulation 881/2002,<sup>68</sup> which abrogated all of the previous regulations. Subsequent regulations made some exceptions for humanitarian considerations.<sup>69</sup> European measures are thus identical, as to their subjective and objective scope, to the U.N. framework. As such, those Regulations are hierarchically subordinate to the European Community Treaty (ECT).

Article 6 of the EU Treaty states that the EU and the EC respect human rights as protected under the European Convention of Human Rights (ECHR).<sup>70</sup> Formally, the EC<sup>71</sup> is not a party to the ECHR; nevertheless, European institutions ensure this protection in the subject matter jurisdiction of European institutions.<sup>72</sup>

In particular, article 6(1) of the ECHR states that:

“[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.<sup>73</sup>

With this in mind, we see that the regulations adopted by the EC in the fight against terrorist financing clearly clash with the fair trial guarantee provided by article 6 of the ECHR. First, the freezing of assets involves the property rights of individuals and entities. Usually judicial review is ensured even when potential restrictions of property

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<sup>68</sup> EC regulation 881/2002, *supra* note 3.

<sup>69</sup> EC regulation 561/2003, amending, as regards exceptions to the freezing of funds and economic resources, regulation (EC) 881/2002, OJ 2003 L 82, p. 1.

<sup>70</sup> European Convention for the protection of human rights and fundamental freedoms [ECHR], signed in Rome on Nov. 4, 1950, 213 U.N.T.S. 221 (into force since Sept. 3, 1953).

<sup>71</sup> The EU could not be a party to the ECHR because the EU, as commonly concluded by scholars, has no international legal personality for signing a treaty.

<sup>72</sup> See article 6(2) of the Treaty of the European Union.

<sup>73</sup> ECHR art. 6(1). The ECHR stated that “[t]he effect of Article 6(1) is, *inter alia*, to place the ‘tribunal’ under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision”. *Kraska v. Switzerland*, (1994) 18 E.H.R.R. 188 (decided on April 19, 1993), § 30.



rights are justifiable on the grounds of general interests or public security protection.<sup>74</sup> Indeed, the Committee of Ministers of the Council of Europe, concerned about an imbalanced application of the freezing measures, has submitted to the member states a body of recommendations, the *Guidelines on human rights and the fight against terrorism*.<sup>75</sup> Article XIV of the *Guidelines* recognizes the right of public authorities to freeze the assets of alleged terrorists, but

“the owners of the property have the possibility to challenge the lawfulness of such a decision before a court”.<sup>76</sup>

It is thus uncontested that freezing measures are subject to judicial review.

A second problem arises with regard to the individuals’ ability to challenge the evidence presented by authorities.<sup>77</sup> Even after recognition of the right to challenge the lawfulness of the freezing orders, information could be unavailable to petitioners. Consider, for instance, the listing mechanism: the information presented by states is gathered globally, often through secret agencies, then shared with other states in secret proceedings. “Since a freezing of assets will be brought about without any prior legal proceedings convicting persons of criminal offences, it is particularly important to

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<sup>74</sup> The ECHR clarified that the dispute can involve even a private party against a public authority. Namely, “[f]or Article 6, paragraph (1), to be applicable to a case (‘contestation’) it is not necessary that both parties to the proceedings should be private persons”. *Ringeisen v. Austria*, (1979-80) 1 E.H.R.R. 455 (July 16, 1971), § 94.

<sup>75</sup> HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM, THE COUNCIL OF EUROPE GUIDELINES, Directorate General of Human Rights, Council of Europe (March 2005), available at [http://www.coe.int/T/E/Human\\_rights/guidelines.asp](http://www.coe.int/T/E/Human_rights/guidelines.asp).

<sup>76</sup> Human Rights and The Fight Against Terrorism, *supra* note 75, article XIV (“[t]he use of property of persons or organizations suspected of terrorist activities may be suspended or limited, notably by such measures as freezing orders or seizures, by the relevant authorities”).

<sup>77</sup> See *Ruiz-Mateos v. Spain*, (1993) 16 E.H.R.R. 505 (June 23, 1993), § 63 (“[t]he right to have an adversarial trial means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party”). See also *Rowe et Davis v. United Kingdom*, (2000) 30 E.H.R.R. 1 (decided on February 16, 2000), § 60; *JACOBS & WHITE EUROPEAN CONVENTION ON HUMAN RIGHTS* 156-158 (3rd ed., 2006).

ensure that freezing orders are imposed on the basis of sufficient evidence[, however] it is unclear how one is protected against being included in this list”.<sup>78</sup> Now, the question is: who would check whether this basis actually exists?

Moreover, “there is something distasteful about a process which begins by convicting someone and then proceeds to inquire whether there is a case against them”.<sup>79</sup> The presumption of innocence requires that individuals are entitled to protection from restraining measures unless prosecutors prove they are guilty. Here, the logic is completely inverted: one is suspected to be a terrorist, so his assets are frozen. The measure presupposes an allegation of commission or association with a crime:<sup>80</sup> why would there be no judge available to evaluate the challenges of that allegation?

*B. Which judge for the review?*

The judge charged with the judicial review of the conformity of EC Regulations with respect to the EC Treaties is the European Court of Justice (ECJ) and, in first instance, the Court of First Instance (CFI).<sup>81</sup> It is there that Yusuf, Al Barakaat and others tried to challenge the European Regulations under which their assets have been frozen since 2001.

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<sup>78</sup> August Reinisch, *The Action of the European Union to Combat International Terrorism*, in Andrea Bianchi (ed.), *supra* note 27, at 119, 131.

<sup>79</sup> Lord Archer of Sandwell, in UK TERRORISM ACT: 21 NEW PROSCRIBED ORGANIZATIONS (abstract from the House of Lords debate on March 27, 2001), available at <http://www.statewatch.org/news/2001/oct/01proscribed.htm>.

<sup>80</sup> See S. Peers, *EU Responses to Terrorism*, 52 INT’L & COMP. L.Q. 227 (2003), at 239 (“[w]hile the draconian measures of freezing assets and funding could arguably be justified in the case of a criminal conviction for financing terrorism or (provisionally) where relevant criminal charges have been laid or will be laid imminently, it is obviously a different question where the freezing takes place on the basis of ‘soft’ intelligence information and there is no effective opportunity for a person to defend himself or herself against the allegation”).

<sup>81</sup> Treaty of the European Community, art. 230, *supra* note 5.

B.1. *Yusuf's complaints and defenses*

Petitioners in *Yusuf* sought the annulment of Regulation 881 before the CFI.<sup>82</sup> Their names had been inserted in the attached list, based on the TC's decision. They claimed, among other things, that the Regulation in question violates article 6 of the ECHR. The violation would derive, in the petitioners' view, from the fact that Regulation 881 "imposes on them heavy sanctions, both civil and criminal, although they had not first been heard or given the opportunity to defend themselves, nor had that act been subjected to any judicial review whatsoever".<sup>83</sup> In particular, "they were not told why the sanctions were imposed on them, [and] the evidence and facts relied on against them were not communicated to them and [...] they had no opportunity to explain themselves".<sup>84</sup> Moreover, none of the European institutions involved in the enactment process satisfactorily ascertained the reasons why the applicants were inserted in the blacklist. The listing proceeding was, in other words, "stamped with the seal of secrecy".<sup>85</sup> Finally, they argue that the remedy of annulment, as provided by the ECT, is useless, given that the Court cannot examine the merits of the adopted measures in depth.<sup>86</sup>

The EC Council and Commission argued, to the contrary, that the EC had no choice but to enforce the SC decisions. By this rationale, although the EC is not a party

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<sup>82</sup> Case T-306/01, *supra* note 2, § 42. The petition was filed in 2001 under the Regulation 467/2001, that has been abrogated by the Regulation 881/2002. Since the latter has substituted the former in the same object, the Court consented the parties to move their claims against the new Regulation. See *id.*, §§ 50-55.

<sup>83</sup> *Id.*, § 190.

<sup>84</sup> *Id.*, § 191.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*, § 195 ("an action for annulment, which concerns only the lawfulness of the contested regulation as such, does not allow of an in-depth examination of the lawfulness of the sanctions in the light of the fundamental rights allegedly infringed. In addition, having regard to the legislative technique used, which consisted of drawing up lists of persons and entities covered by those sanctions, such an in-depth examination would be pointless, since it would be limited to ascertaining whether the names in those lists corresponded to those in the Sanctions Committee's lists").

to the U.N. Charter, it is obliged to act in a way that enables member states to fulfill their obligations under the same Charter.<sup>87</sup> Moreover, the SC had already taken into consideration, during the decision-making process, the tension between the rights of the victims of terrorism and the general individual rights, giving the first precedence.<sup>88</sup> Accordingly, the EC had no authority to evaluate the content of the lists transmitted by the TC: had it questioned the merits of those lists, it would have undermined the entire international security system, as well as the good relations between the states involved. The European Courts should therefore play a role in the review of the EC measures, since “full judicial review would risk undermining the system of the United Nations as established in 1945, might seriously damage the international relations of the Community and its Member States and would conflict with the obligation on the Community to comply with international law”.<sup>89</sup>

As stated above, the CFI rejected the petitions in their entirety.

### B.2. *The judgment*

In its judgment, the CFI preliminarily observes that SC Resolutions prevail over all other international law norms, including the provisions concerning human rights. Of

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<sup>87</sup> *Id.*, § 210 (“[a]lthough the Community itself is not a member of the United Nations, it is required to act, in its spheres of competence, in such a way as to fulfil the obligations imposed on its Member States as a result of their belonging to the United Nations”).

<sup>88</sup> *Id.*, § 217 (“the Council responds that there are grounds for supposing that, under the special powers conferred on it by Chapter VII of the Charter, the Security Council weighed up the fundamental rights of the victims of the sanctions against those of the victims of terrorism, in particular the right of the latter to life”).

<sup>89</sup> *Id.*, § 225 (“according to the Council [...] where the Community acts without exercising any discretionary power, on the basis of a decision taken by the body on which the international community has conferred considerable powers with a view to preserving international peace and security, full judicial review would risk undermining the system of the United Nations as established in 1945, might seriously damage the international relations of the Community and its Member States and would conflict with the obligation on the Community to comply with international law”).

course, the Court's reference is article 103 of the U.N. Charter.<sup>90</sup> Clearly, EC "Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations".<sup>91</sup> In enacting the SC resolutions, the EC institutions have no discretion; as such, they cannot alter the content of the lists and must respect the SC's statements.<sup>92</sup>

In other words, EC has no competence to review the Security Council decisions.<sup>93</sup> Such a review would indeed violate international law, EC law, and EU law, because

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<sup>90</sup> *Id.*, § 231 ("[a]ccording to this norm, "[f]rom the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty").

<sup>91</sup> *Id.*, § 240.

<sup>92</sup> *Id.*, §§ 265-267 ("acted under circumscribed powers, with the result that they had no autonomous discretion. In particular, they could neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration. [...] 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").

<sup>93</sup> *Id.*, §§ 269-270 ("[i]t must be recognised that such a limitation of jurisdiction is necessary as a corollary to the principles identified above, in the Court's examination of the relationship between the international legal order under the United Nations and the Community legal order. [...] As has already been explained, the resolutions of the Security Council at issue were adopted under Chapter VII of the Charter of the United Nations. In these circumstances, determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts"). See also Maria Eugenia Bartoloni, *L'ambito di applicazione ratione personae degli articoli 301 e 60 TCE nelle recenti sentenze Yusuf e Kadi [The scope ratione personae of Articles 301 and 60 of the ECT in the recent judgments concerning Yusuf and Kadi]*, 11 DIR. UN. EUR. 316 (2006), at p. 329.

“reference to infringements either of fundamental rights as protected by the Community legal order or of the principles of that legal order cannot affect the validity of a Security Council measure or its effect in the territory of the Community.”<sup>94</sup>

In the Court’s view, however, the decision reached here does not imply that the EC Courts could not exercise any judicial review of SC resolutions. In particular, as a first step the court considers that it can adjudicate accidentally the issue of whether the SC Resolutions are consistent with the international law norms called of *jus cogens*.<sup>95</sup> United Nations organs, in fact, cannot violate the *jus cogens*.<sup>96</sup> In the Court’s view, fundamental human rights are part of the *jus cogens*. As a second step, the court inquires whether the rights allegedly violated in the applicants’ complaints are part of the *jus cogens* and, further, whether those rights apply in this case.

The Court addresses three different points. First, it deals with the right of not being deprived of property.<sup>97</sup> Under international law, property rights may be disregarded by virtue of considerations related to the fight against terrorism. Here, restrictions are justified by the general interest of the global community in protecting its population

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<sup>94</sup> *Id.*, § 275.

<sup>95</sup> *Id.*, § 277 (“the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*”).

<sup>96</sup> *Id.*, § 277 (“[*jus cogens* can be] understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible”), and 281 (“[i]nternational law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community”).

<sup>97</sup> Under the ECHR, article 1 of the Protocol no. 1 states that “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”. CAMILO B. SCHUTTE, *THE EUROPEAN FUNDAMENTAL RIGHT OF PROPERTY. ARTICLE 1 OF PROTOCOL NO. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ITS ORIGINS, ITS WORKING AND ITS IMPACT ON NATIONAL LEGAL ORDERS* 20 (2004).

from terrorism.<sup>98</sup> In any case, the right does not appear to be violated by Regulation 881, since the TC Guidelines provide for a mechanism of review on the part of the listed people through the mediation of their resident state.<sup>99</sup>

Second, the Court examines the alleged violation of the right to a fair hearing. The CFI notes, in this regard, that the contested resolutions fail to provide for a right to be heard during the listing proceedings. However, that right's denial can be grounded in both practical and political considerations. From a practical standpoint, a cogent norm imposing the right to a previous hearing does not exist,<sup>100</sup> while politically speaking requiring an advance notification would deprive the measures of their very preventive effects.<sup>101</sup> Moreover, the Court focuses on the TC Guidelines,<sup>102</sup> whose article 7 describes the procedure for reviewing the proscription lists. The Court sees embedded in article 7 the expression of the SC's concerns about the protection of human rights.<sup>103</sup> The procedure outlined there is structured in three phases. First, the listed person files a complaint to his residence or national government; in the petition, she "should provide justification for the de-listing request, offer relevant information and request support for de-listing".<sup>104</sup> Then, the government examines the complaint, contacts the states that

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<sup>98</sup> Case T-306/01, *supra* note 2, § 296 ("[i]n that regard, it is appropriate to stress the importance of the fight against international terrorism and the legitimacy of the protection of the United Nations against the actions of terrorist organisations"), and 298 ("[t]he measures in question pursue therefore an objective of fundamental public interest for the international community").

<sup>99</sup> See *infra* notes 104 ff.

<sup>100</sup> *Id.*, § 307.

<sup>101</sup> *Id.*, § 308. Immediate enforcement of these measures is required as a matter of prevention. For instance, in the United States "[e]ach time a new set of sanctions is ordered an entirely new set of regulatory control is created". Peter L. Fitzgerald, *supra* note 8, p. 966. This delays greatly the preventive effects of the measures themselves and increases the risk of further terrorist attacks in the future.

<sup>102</sup> See TC Guidelines, *supra* note 21.

<sup>103</sup> See Case T-306/01, *supra* note 2, § 312. At § 313, the CFI recalls the Resolution 1526 (2004). S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004).

<sup>104</sup> See TC Guidelines, *supra* note 21, par. 7(a).

proposed the inclusion of that person, and consults with them.<sup>105</sup> Third, the Committee deliberates on the request of the petitioned government, with or without support of the designating government(s), “by consensus of its members.”<sup>106</sup> It is true, according to the Court, that “the procedure described above confers no right directly on the persons concerned themselves to be heard by the Sanctions Committee.”<sup>107</sup> However, the Court continues, in the case of dismissal the petitioner could challenge the result before the domestic courts.<sup>108</sup> Even with this option available, the petitioner is not privy to the reasons for being listed. In fact, the related information are secured by diplomatic secrecy, protected also in the Committee deliberation proceedings. In the Court’s view, however, this is not sufficient to prove that the right to a fair hearing has been violated; international security requires this information to stay secret.<sup>109</sup>

Lastly, the Court considers the right to an effective judicial remedy. Here, it notices that, in practice, this right is denied by the SC.<sup>110</sup> However, in the Court’s view this right is not absolute, and includes some exceptions. In brief, this right can be suppressed to protect the general interest of the global community, involving peace and international security. The review procedure depicted in paragraph 7 of the TC

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<sup>105</sup> *Id.*, § 7(b).

<sup>106</sup> *Id.*, § 7(e).

<sup>107</sup> Case T-306/01, *supra* note 2, § 314.

<sup>108</sup> *Id.*, § 317 (“it is open to the persons involved to bring an action for judicial review based on domestic law, indeed even directly on the contested regulation and the relevant resolutions of the Security Council which it puts into effect, against any wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination”).

<sup>109</sup> *Id.*, § 319 f. (“observance of the fundamental rights of the persons concerned does not require the facts and evidence adduced against them to be communicated to them, once the Security Council or its Sanctions Committee is of the view that there are grounds concerning the international community’s security that militate against it”).

<sup>110</sup> *Id.*, § 340 (“[i]t must thus be concluded [...] that there is no judicial remedy available to the applicant, the Security Council not having thought it advisable to establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions taken by the Sanctions Committee”).



*Guidelines* is all that can be reasonably expected, in such a system, to ensure an adequate balance between the right to a judicial remedy and the exigencies inherent in the fight against terrorism.<sup>111</sup>

#### IV. *Critics*

In formulating or assessing criticisms to the *Yusuf* decision, one should keep in mind that, as stated above, the SC enjoys full discretion in initiating an action under Chapter VII, with the exception of the *jus cogens*. This point has been expressly recognized by the *Yusuf* Court.<sup>112</sup> Obviously, this conclusion was not sufficient to rule that the SC violated the petitioners' right, since the Court still had to prove, as an initial premise, that the judicial review of measures affecting property rights was part of the *jus cogens*. Surprisingly, the Court made no such argument. It never ascertained the peremptory character of the right to a judicial review, but only affirmed that some "mandatory provisions concerning the universal protection of human rights"<sup>113</sup> exist, without specifying whether the right to judicial review is among these provisions. Of

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<sup>111</sup> *Id.*, § 345 ("in the absence of an international court having jurisdiction to ascertain whether acts of the Security Council are lawful, the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a procedure involving both the 'petitioned government' and the 'designating government' (see §§ 310 and 311 above), constitute another reasonable method of affording adequate protection of the applicants' fundamental rights as recognised by *jus cogens*").

<sup>112</sup> According to the *jus cogens* doctrine, codified in article 53 of the Vienna Convention on the law of treaties, all treaties contrary to *jus cogens* norms are null and void. Accordingly, states cannot transfer to an international organization powers that they cannot use in a treaty as a consequence of article 53 above. However, the *jus cogens* doctrine has been significantly criticized, as it is based on a controversial and problematic practice. See Michael J. Glennon, *De l'absurdité du droit impératif (jus cogens)*, 90 REV. GÉN. DR. INT. PUBLIC 529 (2006), at 530.

<sup>113</sup> Case T-306/01, *supra* note 2, at § 282. Precisely, the Court stated that:

"the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute 'intransgressible principles of international customary law'"

(quoting *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. 226 [July 8, 1996], § 79).

course, the answer could be nothing but affirmative; otherwise the entirety of the Court's analysis would be contradictory. However, the rationale behind its conclusion remain unknown.<sup>114</sup> The lack of argument on this point is motivated, in our view, by the fact that in actuality, judicial review cannot be asserted to be currently a part of the *jus cogens*.

Why did the Court insist on its power to ascertain whether a violation of *jus cogens* had really occurred, even when it had no basis for affirming that? The answer lies in the section of *Yusuf* in which the Court states that it has no jurisdiction over the Regulations that the EC is obliged to adopt, because of the supremacy of U.N. norms.<sup>115</sup> Despite the lack of jurisdiction, the Court still maintains that it has residual jurisdiction for determining whether the SC violated *jus cogens*.<sup>116</sup> Nevertheless, this power would never go beyond an "indirect check".<sup>117</sup> Thus, the Court refuses to afford a judicial review of EC Regulations, but reserves for itself the judicial review of the SC Resolutions. In our view, this reasoning is not at all persuasive. Article 230 of the ECT vests European Courts with the power of judicial review regarding the actions of European institutions: when the review of European Regulations becomes impossible because the Courts lack jurisdiction, there is no other means to decide upon the SC Resolutions that are the legal basis of those Regulations.

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<sup>114</sup> See Benedetto Conforti, *Decisioni del Consiglio di sicurezza e diritti fondamentali in una bizzarra sentenza del Tribunale comunitario di primo grado [UN Security Council Decisions and fundamental rights according to a "bizarre" judgment of the EC Court of first instance]*, 11 DIR. UN. EUR. 333 (2006), pp. 339-341.

<sup>115</sup> *Id.*, § 254 ("it must be held, first, that the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations"). On the correctness of this solution, see Benedetto Conforti, *supra* note 114, at p. 336.

<sup>116</sup> See *supra* note 95, where the CFI affirms that it "is empowered to check, *indirectly*, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*". Case T-306/01, *supra* note 2, § 277, *emphasis added*.

<sup>117</sup> *Id.* ("the Court is empowered to check, indirectly ...").

Furthermore, one might wonder whether the right to a judicial review had actually been violated by the SC. Here, the Court seems to admit as much, but then replies in the negative because that right, by itself, can be derogated ... due to the resolutions of the Security Council itself (*sic*)!<sup>118</sup> Limitations of the right to a judicial review could be justified by an immunity of the SC resolutions: therefore, the Court says, SC must respect *jus cogens*, but *jus cogens* can be derogated for reasons of international security ... that are in the powers of the Security Council to determine!<sup>119</sup> This reasoning is purely tautological. If the power to derogate ordinary rights is based upon the SC itself, one should ask whether it makes sense to recall the *jus cogens* or whether it would be more correct to assume that SC is free from any constraints.

On this point the Court, in order to confirm the relative nature of the right to an effective judicial remedy, recalls state immunity from jurisdiction. It points out, in particular, that “certain restrictions must be held to be inherent in that right, such as the limitations generally recognised by the community of nations to fall within the doctrine

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<sup>118</sup> See Alessandra Gianelli, *Il rapporto tra diritto internazionale e diritto comunitario secondo il tribunale di primo grado delle Comunità europee [The relationship between international law and communitarian law according to the Court of First Instance of the European Communities]*, 89 RIVISTA DI DIRITTO INTERNAZIONALE 131 (2006), at 138 (“[n]on si comprende qui come un diritto riconosciuto da norme imperative possa contenere in sé il limite delle risoluzioni vincolanti del Consiglio di sicurezza: a meno che ciò non significhi che il Consiglio non è vincolato dalle norme cogenti, così ribaltando il presupposto stesso dell’analisi del Tribunale” “[i]t is not understandable here how a right that is recognized by cogent norms could be limited by itself by binding resolutions of the Security Council: unless this meant that the Council is not bound by *jus cogens*, thus reversing the Court’s assumption”).

<sup>119</sup> See case T-306/01, *supra* note 2, § 343 f.:

“[i]n this instance, the Court considers that the limitation of the applicants’ right of access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States of the United Nations, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, in accordance with the relevant principles of international law (in particular Articles 25 and 103 of the Charter), is inherent in that right as it is guaranteed by *jus cogens*.”

[...] Such a limitation is justified both by the nature of the decisions that the Security Council is led to take under Chapter VII of the Charter of the United Nations and by the legitimate objective pursued. In the circumstances of this case, the applicants’ interest in having a court hear their case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council in accordance with the Charter of the United Nations”.

of State immunity”.<sup>120</sup> This is an evident oversight.<sup>121</sup> First, practice shows that state immunity has relevant exceptions in the case of a gross violation of human rights. Second, once it is affirmed that fundamental human rights are part of *jus cogens* — and therefore that the corresponding obligations are not negotiable, nor waivable by states — it would logically follow that states cannot use immunity as a defense for justifying human rights violations. Finally, it is difficult to understand why the court is giving deference to the immunity principle, which even under a strict normative hierarchy theory could not prevail over *jus cogens*.<sup>122</sup>

The Court, then, seems to be deeply concerned about the fact that the TC provides for a mechanism of judicial review.<sup>123</sup> It confirms that this mechanism, although partial, is sufficient. Assuring that the right to a judicial review is established by *jus cogens* norms, the real question is not whether a true remedy is available, but whether the remedy provided by the SC or the TC corresponds to the standard established under *jus cogens*. The Court cleverly avoided an answer to this fundamental question, like so many others.

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<sup>120</sup> Case T-306/01, *supra* note 2, § 342, emphasis added.

<sup>121</sup> Benedetto Conforti, *supra* note 114, at p. 343.

<sup>122</sup> On the point, see the interesting analysis of Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741 (2003), at 744, discussing the inadequacy of the normative hierarchy approach to explain why immunity should be disregarded when fundamental human rights violations are concerned. From the standpoint of the normative hierarchy theory, human rights – in the case, the ban of torture – would prevail, as norms of *jus cogens*, on the norms concerning the immunity of states. So states sued before domestic courts for human rights violations cannot use the immunity defense. According to Chaplan, the limitation of human rights violation lies in the immunity itself – because of its aims to benefit the community of nations – without any need of calling *jus cogens* or hierarchy conflicts.

<sup>123</sup> *Id.*, § 345.

### V. Conclusions

“Sometimes a court does not work as it should.”<sup>124</sup> This is the case in the decision of the *Yusuf* court. The ruling is so contradictory that, should the ECJ uphold the CFI’s rulings in the appeals proceeding without further clarifications, a dangerous precedent would be set in European law. The ECJ will hopefully need to ascertain whether the right to judicial review is actually a part of the *jus cogens*. At any rate, we believe it is not. However, regardless of this issue, a mechanism of review should be provided, at the very least, for corrections of errors in the lists. But this remedy certainly could not be assessed at the regional level: the SC itself should provide a mechanism for the list’s review.

Here is what we propose: a judicial panel, composed of a certain number of impartial and independent individuals,<sup>125</sup> whose names have been proposed by the Secretary General and elected by the General Assembly. The panel would deal with the review of the TC list. Such an organ would present several advantages. First, it would avoid multistate litigation, which might potentially fuel conflicts between domestic and

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<sup>124</sup> Owen Fiss, *Between Supremacy and Exclusivity*, in RICHARD W. BAUMAN & TSVI KAHANA (EDS.), *THE LEAST EXAMINED BRANCH. THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 452 (2006), at p. 463.

<sup>125</sup> The special prominence of these people has a particular significance from the standpoint of the accuracy of international law’s ascertainment by judges. As in *Yusuf*, the CFI erred in interpreting the *jus cogens* without saying whether the right to a judicial remedy is part of that body of norms. As we noticed in the text, this was a very important point, that deserved attention by the Court. This analysis requires time, resources, strong undertaking and, maybe, particular skills. Often judges prefer to cut the problem and solve the dispute using pure prevailing principles, such as article 103 of the U.N. Charter, because a different solution would otherwise require them to explore unknown fields. This situation is absolutely unfair from the standpoint of the need of justice and, at least, contrary to the prohibition of *non liquet*, that keeps the situation as it is, unchanged forever, and, of course, gives courts a way for escaping their responsibility. See for instance Hersch Lauterpacht, *Some Observations on the Prohibition of ‘Non Lique’ and the Completeness of the Law*, in MARTTI KOSKENNIEMI (ED.), *SOURCES OF INTERNATIONAL LAW* 433 (2000), at 444 (non liquet was used “whenever the necessity of reaching a decision was politically embarrassing and inconvenient”).

supranational courts, or between various supranational courts.<sup>126</sup> Second, the proposed solution would ensure a uniform interpretation of SC resolutions, regardless of the venue. Results that differ from nation to nation could undermine the stability of the prevention regime and frustrate effective action by the SC. Third, the proposed organ would ensure states' good faith by increasing the standard of reliability for the lists presented to the Committees: by consolidating rulings into a single settlement, and creating a range of precedents governing the level of due diligence in the listing proceedings would make efforts to stem terrorism financing more credible and efficient. Finally, the proposal would prevent domestic courts from interfering inappropriately in delicate matters, such as international relations, political or diplomatic issues, foreign policy commitments, or – most dangerously – the legitimacy of the U.N. action against global terrorism.

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<sup>126</sup> For instance, should the problem of granting an actual judicial review of EC and EU laws remain unsettled, a conflict between the ECJ and the ECtHR could arise many coordination problems, that become heavier depending on the risk of unadmissible violations of fundamental human rights in the European concern.