

## EDITORIAL: THE UN, THE EU AND *JUS COGENS*

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On 21 September 2005, the European Union's Court of First Instance (CFI) delivered its judgments in the already quite famous *Yusuf and Kadi* cases.<sup>1</sup> In these judgments, the CFI, *inter alia*, took some bold steps in presenting new views regarding its own competence to scrutinise UN Security Council Resolutions. *Yusuf and Kadi* – two Swedish nationals – were both placed on the list adopted by Resolution 1333 (2000) and subsequently on an EU list annexed to Regulation (EC) No 467/2001.<sup>2</sup> Under Article 10(1) of that Regulation, the European Commission is empowered to amend or supplement the annexed list on the basis of determinations made by either the Security Council or the Sanctions Committee established pursuant to Resolution 1267 (1999). Hence, there is a clear link between the two lists, although the European Union remains free to add individuals or entities to its own list.

In the case they brought before the CFI, *Yusuf and Kadi* presented several arguments on the basis of which they claimed that the Regulation should be annulled. For the purpose of this Editorial, the most relevant argument is as follows:

[T]he contested regulation infringes their fundamental rights, in particular their right to the use of their property and the right to a fair hearing, as guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), inasmuch as that regulation 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. With more particular regard to the alleged breach of the right to a fair hearing, the applicants stress that

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<sup>1</sup> CFI Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*; CFI Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, 21 September 2005; see <<http://curia.eu.int/>>.

<sup>2</sup> Official Journal L 67 (2001), at 1.

they were not told why the sanctions were imposed on them, that the evidence and facts relied on against them were not communicated to them and that they had no opportunity to explain themselves. The only reason for their names being entered in the EU list is the fact that they were entered in the list drawn up by the Sanctions Committee on the basis of information provided by the States and international or regional organizations. Neither the Council nor the Commission examined the reasons for which that committee included the applicants in that list. The source of the information received by that committee is especially obscure and the reasons why certain individuals have been included in the list, without first being heard, are not mentioned.<sup>3</sup>

The reaction of the Court of First Instance touches upon the relationship between the United Nations and the European Community in quite a novel manner. *If* confirmed by the Court of Justice in the currently pending appeals cases, this view may have serious consequences for the relationship between international organizations and the question whether they are bound by peremptory norms of international law. The first part of the Court's train of thought can easily be accepted: irrespective of the fact that the Community is not a member of the United Nations and, hence, not directly bound by the UN Charter, it is 'indirectly' bound by UN law as in its constituting treaty it has taken over some of its Member States' international competences. In the words of the CFI:

... the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it... . It therefore appears that, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community ... .<sup>4</sup>

Even the second step will be acceptable to most of us: when the European Community (or in fact the whole European Union) is bound by the Security Council Resolutions, it becomes difficult for the CFI to annul the Regulation when the only thing it does is implement binding superior law. Indeed:

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<sup>3</sup> Paras. 190-191 of the Yusuf Judgment (references to other cases were left out in the quotation).

<sup>4</sup> *Ibid.*, paras. 243 and 253.

It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.<sup>5</sup>

Leaving aside the consequences for individuals in terms of their legal protection – which indeed forms the core of the frustration displayed in many a comment on these judgments – it is especially in cases like these that Article 103 of the UN Charter reveals its relevance.

The words 'in principle', however, may provide a reason to start raising one's eyebrows. Linguistically one could argue that the Court purports to point to a *principle* precluding a role for itself in the judicial review of Security Council resolutions. In fact, the subsequent sentence seems to support this view as the Court provides that it has 'no authority to call in question, *not even indirectly*' the lawfulness of SC resolutions. However, a few lines later the principle proves to be less hard than presented as the Court chooses not to have its own competences be blocked completely by it. Upon its own initiative it decides that it is 'empowered to check, *indirectly*, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.'<sup>6</sup> And, in fact, this is exactly what it does. In assessing whether the freezing of funds provided for by the contested regulation, and, indirectly, by the resolutions of the Security Council, infringes the applicants' fundamental rights, the Court considers that such is not the case, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*. It is only an arbitrary deprivation of the right to property that might, in any case, be regarded as contrary to *jus cogens*. Irrespective of the fact that the Court leaves some room in relation to the content of *jus cogens* ('in so far as respect for the right to property must be regarded as forming part of the mandatory rules of general international law'), it shows no hesitation to judge the lawfulness of the relevant Security Council resolutions. In similar

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<sup>5</sup> *Ibid.*, para. 276.

<sup>6</sup> *Ibid.*, para. 277 [emphasis added].

terms, the argumentation is used in relation to the right to be heard. According to the CFI:

[N]o mandatory rule of public international law requires a prior hearing for the persons concerned in circumstances such as those of this case, in which the Security Council, acting under Title VII of the Charter of the United Nations, decides, through its Sanctions Committee, that the funds of certain individuals or entities suspected of contributing to the funding of terrorism must be frozen.<sup>7</sup>

The fact that the Court goes into this subject implies that an alternative reasoning would have been possible. In fact, the conclusion drawn by the Court that there was no violation of *jus cogens* met with serious criticism by observers pointing first and foremost to the importance of a sound system of individual legal protection now that international organizations seem to become more engaged in the daily lives of individual citizens.<sup>8</sup> But what would have happened if the Court had established that the Security Council had, indeed, violated *jus cogens*? Would the relevant resolution be void (cf. Art. 53 of the Vienna Convention)? Would the Court have had no alternative but to annul the relevant Regulation or declare it inapplicable? How would this have related to the obligation of the EU member states to carry out the decisions of the Security Council? Could parts of the Regulation (i.e. the part of the Annex listing Yusuf and Kadi) be set aside? And, if so, could other (regional or national) courts or tribunals do the same? We can rest assured that the members of the Security Council would take their turn in raising their eyebrows, and rightfully so. There is a clear and established hierarchy between UN law and the law of other international organizations. Therefore, in the appeal cases, the European Court of Justice will have no choice but to accept its place in the pecking order.

In the present international legal order, lacking a centralised and fully developed judiciary, it is up to the Security Council to decide on the form of legal protection to be included in this sanctions regime. So far, no court has the power to review Security Council resolutions, or is otherwise competent to 'force' the Council to comply with *jus cogens*.<sup>9</sup> If a case involving (the lack of)

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<sup>7</sup> *Ibid.*, para. 307.

<sup>8</sup> See in general on this topic E. de Wet, 'The International Constitutional Order', 2006 *International and Comparative Law Quarterly* 51-76.

<sup>9</sup> Although it has been argued that in the 1992 Lockerbie Case the International Court of Justice did review a Security Council resolution. See Thomas M. Franck, 'The "Powers

legal protection under the sanctions regime would be brought before the ICJ, it is unlikely, in view of its case-law, that the World Court would exercise full fledged judicial review. At the same time, the ICJ, the principal judicial organ of the UN, is the only judicial organ that potentially has the power to scrutinize Security Council resolutions. Moreover, if it comes to questions of whether or not certain human rights are part of *jus cogens*, the Vienna Convention on the Law of Treaties in Article 66(a) explicitly recognises that the ICJ has a role to play. If a court could play a role in this field at all, it is the ICJ. It is, therefore, unclear on what basis the CFI considered itself competent to ‘check, indirectly, the lawfulness of the resolutions of the Security Council’.

The debate triggered by Yusuf and Kadi, nevertheless, pointed to the shortcomings of an international legal order in which non-state actors are increasingly visible, either as rule-makers or as rule-subjects. While our conclusion on the primacy of the international legal order seems inescapable, the practical consequence that, in cases like these, international organizations enact regulation for which they cannot be held accountable, which may run counter to other foundations of that legal order.<sup>10</sup> Indeed, in the current anti-terrorism cases, there is – as acknowledged by the CFI – ‘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.’<sup>11</sup> And, indeed, in view of the fact that even the decision by national authorities to derogate from the imposed sanction by allowing a coverage of basic expenses (foodstuffs, rent, medicines, taxes and public utility charges) can be blocked by the Sanctions Committee, the conclusion that this does not conflict with *jus cogens* (para. 341) should be open to debate. However, this calls first and foremost for a reform of the procedures in New York, in

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of Appreciation”: Who is the Ultimate Guardian of UN Legality?”, 1992 *Am. J. Int’l L.* 519.

<sup>10</sup> Cf. ECHR Case Waite & Kennedy, in which the European Court of Human Rights held that, even at a national level, courts could have a competence to judge the actions of international organizations, notwithstanding the latter’s immunity from jurisdiction, once these organizations lack a certain standard of legal protection. See *Waite & Kennedy*, Decision of 18 February 1999, [1999] RJD, at 393. See also A. Reinisch and U.A. Weber, ‘In the Shadow of Waite and Kennedy – The Jurisdictional Immunity of International Organizations, the Individual’s Right of Access to Courts and Administrative Tribunals as Alternative Means of Dispute Settlement’, 2004 *International Organizations Law Review* 59 (providing an extensive analysis).

<sup>11</sup> Para. 340.

particular those used by the Sanctions Committee. We can only hope that the expected judgments of the European Court of Justice will be used to highlight the currently existing 'legal protection limbo' with a view to reforming the system, without hijacking it.

In the past year, some suggestions for changes – and indeed not more than that – have been proposed by, *inter alia*, the High-level Panel on Threats, Challenges and Change, and by UN Secretary-General Kofi Annan in his *In larger freedom* report. Similarly, the September 2005 World Summit Outcome, adopted five days before the CFI delivered its Yusuf and Kadi judgments, did not propose to work on a complete overhaul of the sanctions regime, but merely called upon the Security Council, with the support of the Secretary-General, *inter alia*, 'to ensure that sanctions are implemented in an accountable manner' and 'to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exceptions' (paras. 108-09).

The value of the Yusuf and Kadi judgments may be that these judgments put pressure on the need to adapt the sanctions regime. Without any adaptations, regional or national courts increasingly may feel compelled to scrutinise Security Council sanction resolutions. As a result, the unity and coherence of this regime, the effectiveness of UN sanctions and, ultimately, the authority of the Security Council will suffer, and the Council will not be able to perform its functions as required by the Charter. In the face of the reality of these and perhaps future judgments in this field by regional or by national courts, the Security Council will need to make this regime not only smart and targeted, but also develop its own comprehensive system for human rights protection.