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Abstract

In response to the increasing rise of terrorist activities throughout the European Union ("EU") and the attacks of September 11, the Council of the European Union ("Council") acted through its powers under the Common Foreign and Security Policy. In addition to other measures, the Council enacted regulations that froze the assets of alleged terrorist individuals and entities. In some cases, the regulations froze assets of alleged terrorists that had been placed on a list published by the U.N. Sanctions Committee, while in another, the assets of individuals were frozen after the European Council itself placed individuals on a list that it had published. Faced with challenges to these regulations, the Court of First Instance ("CFI") has decided a series of cases that address their legality. These decisions are far-reaching, and in some respects provocative and novel. Central to the debate on targeted sanctions and human rights is the right to an effective remedy. In addition to the cases filed with the European Court of Justice ("ECJ"), cases have also been filed in national courts in Europe, North America, Turkey, and Pakistan challenging the legality of targeted sanctions. This Article discusses the human rights aspects of the cases decided by the CFI and critiques the divergent results reached. It should be noted that appeals have been taken to the ECJ.

TARGETED SANCTIONS, HUMAN RIGHTS, AND THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITY

*Elizabeth F. Defeis**

INTRODUCTION

In response to the increasing rise of terrorist activities throughout the European Union ("EU") and the attacks of September 11, the Council of the European Union ("Council") acted through its powers under the Common Foreign and Security Policy. In addition to other measures, the Council enacted regulations that froze the assets of alleged terrorist individuals and entities.[1] In some cases, the regulations froze assets of alleged terrorists that had been placed on a list published by the U.N. Sanctions Committee, while in another, the assets of individuals were frozen after the European Council itself placed individuals on a list that it had published.[2]

Faced with challenges to these regulations, the Court of First Instance ("CFI") has decided a series of cases that address their legality. These decisions are far-reaching, and in some respects provocative and novel. Central to the debate on targeted sanctions and human rights is the right to an effective remedy. In addition to the cases filed with the European Court of Justice ("ECJ"), cases have also been filed in national courts in Europe, North America, Turkey, and Pakistan challenging the legality of targeted sanctions.[3] This Article discusses the human rights as-

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1. *See* Council Regulation No. 467/2001, art. 2(1), O.J. L 67 (2001).

2. *See* Council Regulation No. 2580/2001, O.J. L 344 (2001).

3. *See* THOMAS BIERSTEKER & SUE E. ECKHERT, STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES 6 (Mar. 2006), *available at* http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf. The so-called "terrorist" lists and all cases filed with the CFI and the ECJ involving such lists are regularly monitored at http://www.statewatch.org/terrorlists/terrorlists.html. To date, twenty-one cases have been filed with the CFI and seven with the ECJ. These cases share arguments invoking the violation of fundamental rights including the right to procedural remedies. The majority have been dismissed because the Community is subject to UN Regulations. Three of the cases before the ECJ are pending, the Advocate General has rendered an opinion in two of the cases, one has been dismissed, and one found in favor of

pects of the cases decided by the CFI and critiques the divergent results reached. It should be noted that appeals have been taken to the ECJ.[4]

I.

In September 2005, in *Yusuf v. Council of the European Union* and *Kadi v. Council of the European Union*, the CFI affirmed the supremacy of Security Council Resolutions over obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms, and indeed, over treaty obligations of Member States.[5] The cases involved Ahmed Ali Yusuf, a Swede of Arab origin, and Yassin Abdullah Kadi, a resident of Saudi Arabia, who had both been placed on a list of alleged terrorists by the U.N. Sanctions Committee. Prior to the attacks of 9/11, the Security Council adopted resolutions that required States to freeze all funds and other financial resources controlled directly or indirectly by individuals associated with the Taliban, Osama bin Laden, and the Al-Qaeda network.[6] Pursuant to these resolutions, the U.N. Sanctions Committee published a list of alleged terrorists, which included petitioners Yusuf and Kadi.[7] These regulations were put into effect within the European Community ("Community") by Council regula-

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the applicant and was returned to the CFI. *See* http://www.statewatch.org/terrorlists/terrorlists.html.

4. Whether the Council was competent to adopt such regulations is not discussed in this article. For a discussion of the competence issue, see Laurent Pech, *Trying to Have it Both Ways—On the First Judgments of the Court of First Instance Concerning EC Acts Adopted in the Fight against International Terrorism*, 1 IR. HUM. RTS. L. REV. 1, 5-7 (2006).

5. *See* Yusuf v. Council, Case T-306/01, [2005] E.C.R. II-3533, ¶ 231; Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649, ¶ 181.

6. *See* S.C. Res. 1267, ¶ 4(b), U.N. Doc. S/RES/1267 (Oct. 15, 1999). Paragraph 4(b) mandates that States must, "freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the grounds of humanitarian need." *Id.* To ensure this is implemented, Paragraph 6 establishes a Security Council Committee to oversee implementation of the Regulation. *See id.* According to Biersteker & Eckhert, 925 individuals and entities were listed as of early 2006 by the U.N. Sanctions Committee's active listing, and 46 had been delisted. *See* BIERSTEKER & ECKHERT, *supra* note 3, at 6.

7. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 24; *Kadi*, [2005] E.C.R. II-3649, ¶ 23.

tions ordering the freezing of the funds of the individuals involved.[8] The petitioners claimed that the sanctions were in violation of the Treaty of Rome, which provides for disciplinary actions against states, but not individuals.[9] Petitioners also claimed that their fundamental rights, including their right to make use of their property, their right to a fair hearing, and their right to an effective judicial remedy, were violated.[10]

The CFI, in an expansive holding, rejected all of the contentions of the applicants. It noted that Article 11(1) of the Treaty on the European Union provides that the Community should implement a common foreign and security policy to safeguard common values, fundamental interests, and the independence and integrity of the Union, to strengthen the security of the Union in all ways, and to preserve peace and strengthen international security in conformity with the U.N. Charter.[11] The CFI held that the Treaty Establishing the European Community ("EC Treaty") empowers the Council to impose economic and financial sanctions on individuals as well as third countries, when a common position adopted by the European Union under the common foreign and security policy so provides.[12] Although Article 301 of the EC Treaty empowers the Council to impose economic sanctions on "one or more third countries,"[13] the Court noted that in the past the Council had taken restrictive measures against persons who constructively governed a part of a country, and against persons or entities associated with them or who provided financial support to them.[14] This type of "smart" sanction

8. *See* Council Regulation No. 467/2001, art. 2, O.J. L 67 (2001).

9. *See* Consolidated Version of the Treaty Establishing the European Community art. 301, Dec. 24, 2002, O.J. C 325/33, at 161 (2002) [hereinafter EC Treaty]. "Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission." *Id.*

10. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 190; *Kadi*, [2005] E.C.R. II-3649, ¶ 59. The Court noted that through Article 301, together with Articles 60 EC, 301 EC, and 308 EC, the Council was competent to enact the regulation. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 256; *Kadi*, [2005] E.C.R. II-3649, ¶ 135.

11. *See* Consolidated Version of the Treaty on European Union art. 11(1), O.J. C. 325/5, at 15 (2002).

12. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 112; *Kadi*, [2005] E.C.R. II-3649, ¶ 133.

13. *See* EC Treaty, *supra* note 9, art. 301, O.J. C 325/33, at 161 (2002).

14. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 114. In 1998, the Council enacted Regula-

is aimed at individuals, is designed to reduce suffering of civilians, and has been utilized by the Security Council since the 1990's.[15] The Court then ruled that the Council was also competent, under similar conditions, to impose economic and financial sanctions—such as the freezing of funds of individuals—in connection with the fight against international terrorism.[16]

The CFI then turned to the relationship between the U.N. and the European Union. It noted that, although the European Union itself is not a member of the U.N., the Community is bound by the obligations flowing from the U.N. Charter, in the same way as U.N. Member States.[17] First, the Community may not infringe the obligations imposed on its Member States by the U.N. Charter or impede their performance of those obligations.[18] Second, the Community is required to adopt all the provisions necessary to allow its Member States to fulfill those obligations.[19]

The Court then discussed the interplay between rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and possible conflict with Security Council resolutions and the regulations of the EU. The Court noted that, under Section 103 of the U.N. Charter, obligations of the Member States of the United Nations under the Charter prevail over any other obligation, including obligations under the European Convention and under the EC Treaty.[20] The Court stated:

> From the standpoint of international law, the obligations

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tion (EC) No. 1705/98, allowing for restrictive measures against groups who physically controlled part of the Angolan territory. Similarly, the Council enacted Regulation (EC) No. 1294/1999 to both freeze funds and ban investments relating to the Federal Republic of Yugoslavia ("FRY"). *See Kadi*, [2005] E.C.R. II-3649, ¶ 90.

15. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 94. "By so doing, the Community has been able, continues the Council, to keep up with the development of international practice, which has been to adopt 'smart sanctions' aimed at individuals who pose a threat to international security rather than at innocent populations." *Id.*

16. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 112; *Kadi*, [2005] E.C.R. II-3649, ¶ 133.

17. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 242-44; *Kadi*, [2005] E.C.R. II-3649, ¶ 192-93.

18. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 247; *Kadi*, [2005] E.C.R. II-3649, ¶ 197.

19. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 248; *Kadi*, [2005] E.C.R. II-3649, ¶ 198.

20. U.N. Charter art. 103. "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." *Id.*

> 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.[21]

This paramountcy extends to decisions of the Security Council.[22]

The Court observed that the Community regulations were enacted to put into effect, at the Community level, decisions of the Security Council that were enacted under Chapter VII of the Charter.[23] Under the U.N. Charter, it is the Security Council that has primary responsibility for maintaining international peace and security.[24] Any review of the internal lawfulness of the regulation would therefore involve the Court in examining, indirectly, the lawfulness of the decisions of the Security Council. The Court stated:

> 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.[25]

Nevertheless, the CFI did reserve for itself one area of review over Security Council decisions. The Court decided it would examine the contested regulation and, indirectly, the Security Council resolutions, in light of the higher principles of general international law, falling within the scope of *jus cogens*—a peremptory norm of public international law from which neither the Member States nor the bodies of the United Nations

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21. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 231.

22. *See id.*, ¶ 234. This aspect of the CFI's holding has been criticized. *See, e.g.*, PIET EECKHOUT, DOES EUROPE'S CONSTITUTION STOP AT THE WATER'S EDGE?: LAW AND POLICY IN THE EU'S EXTERNAL RELATIONS 23-50 (2005) (discussing his belief that Articles 307 EC and 224 EC do not *require* Member States to give effect to their obligations under the UN Charter, and rather that "Articles 307 EC and 224 EC *permit* the Member States to derogate from Community law obligations . . . .") (emphasis in original).

23. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 239.

24. *See* U.N. Charter art. 39.

25. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 276; *Kadi*, [2005] E.C.R. II-3649, ¶ 225.

may derogate.[26] In a novel interpretation of the *jus cogens* doctrine, the Court seemed to accept without question that rights guaranteed in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights ("ICCPR") constitute *jus cogens* norms.[27] The Court then considered claimed violations of human rights, including deprivation of property, right of personal defense, and right of effective judicial review, in light *jus cogens* norms, and found no violation of *jus cogens*.[28]

II.

Subsequently in *Ayadi v. Council of the European Union* and *Hassan v. Council of the European Union*, the CFI attempted to clarify the rights of individuals whose funds had been frozen.[29] Chafiq Ayadi, a Tunisian national resident in Dublin, and Faraj Hassan, a Libyan national, were placed on the list maintained by the U.N. Sanction Committee of persons associated with the Taliban, Osama bin Laden, and the Al-Qaeda network; and their assets were frozen.[30]

The Court, building on its decisions in *Yusuf* and *Kadi*, held that the Community may freeze such funds in the context of its battle with international terrorism.[31] The Court acknowledged that the measure was drastic, but would not prevent the individuals from leading satisfactory personal, family, and social lives.[32] The Court focused on the procedures for delisting before the Security Council, and found that they did not violate *jus cogens* principles, as they related to a fundamental right to a fair hearing.[33] The Court reviewed the procedures of the U.N. Sanctions

26. *See* 45 AM. JUR. 2D *International Law* § 1 (2007) (defining *jus cogens*).

27. *See infra* notes 56-63 and accompanying text.

28. *See Yusuf*, [2005] E.C.R. II-3533, ¶ 277-346; *Kadi*, [2005] E.C.R. II-3649, ¶ 225-291.

29. *See* Ayadi v. Council, Case T-253/02, [2006] E.C.R. __, ¶ 118-57; Hassan v. Council, Case T-49/04, [2006] E.C.R. __, ¶ 95-129.

30. *See Ayadi*, [2006] E.C.R. __, ¶ 28; *Hassan*, [2006] E.C.R. __, ¶ 30. The Council effectuated Security Council Resolution 1390 through the adoption of Council Regulation No. 881/2002. *See* O.J. L 139/9, at 9-10 (2002). This resolution was adopted after repealing Council Reg. 467/2001 (*supra* note 1).

31. *See Ayadi*, [2006] E.C.R. __, ¶ 116; *Hassan*, [2006] E.C.R. __, ¶ 92.

32. *See Ayadi*, [2006] E.C.R. __, ¶ 126; *Hassan*, [2006] E.C.R. __, ¶ 102.

33. *See Hassan*, [2006] E.C.R. __, ¶ 92. The procedures before the United Nations Sanctions Committee have been widely criticized as lacking due process safeguards and depriving targeted individuals and entities of a meaningful opportunity to be heard.

Committee, which have since been amended, and noted that although individuals could not petition the Security Council directly, they had the right to request review through the government of the country in which they live or of which they are nationals.[34] The Court stressed that the right of an individual to request such a review is guaranteed by the Community legal order, and that, should the national authorities refuse to request such a review, the aggrieved individual should have the ability to request judicial review of such action before a national court.[35]

The *Hassan* case is interesting in that the plaintiff relied on two judgments of the U.S. Court of Appeals for the District of Columbia Circuit, each of which held that freezing the assets of an organization under the Anti-Terrorism and Effective Death Penalty Act of 1996 without a prior hearing infringed the constitutional right of due process.[36] This argument was deemed irrelevant by the CFI, because the U.S. cases cited did not involve measures transposing Security Council Resolutions, but rather

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See, e.g., BIERSTEKER & ECKHERT, *supra* note 3, at 16-18 (discussing various problems with the U.N. Security Council's sanctioning practices, including failure to notify listed individuals and entities, lack of information regarding the basis for listing, complicated procedural requirements for delisting requests, and the overall lack of transparency of committee procedures); *see also* Report of the High-Level Panel on Threats, Challenges, and Change, A More Secure World: Our Shared Responsibility, ¶ 153, U.N. Doc. A/59/565, (Dec. 2, 2004), *available at* http://www.un.org/secureworld/report.pdf.

34. *See Ayadi*, [2006] E.C.R. __, ¶ 149.

35. *See Hassan*, [2006] E.C.R __, ¶ 92; *see also, generally*, IAIN CAMERON, COUNCIL OF EUROPE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, DUE PROCESS AND UNITED NATIONS SECURITY COUNCIL COUNTER-TERRORISM SANCTIONS (2006), *available at* http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/Texts_&_Documents/2006/I.%20Cameron%20Report%2006.pdf (outlining the basic requirements of due process in criminal and civil matters under the European Convention on Human Rights, which forms part of the Community legal order). In the context of sanctions imposed on Yugoslavia, rather than targeted sanctions, the European Court of Human Rights in *Bosphorus Hava Yollari Turizm v. Ireland* ("*Bosphorus Airways*") rejected petitioner's contention that rights under the ECHR had been violated by the EC Regulation mandating the impoundment of the aircraft. The ECJ had previously upheld the sanctions at issue in Bosphorus. *See* Bosphorus Hava Yollari Turizm v. Ireland, Case C-84/95, [1996] E.C.R. I-3953. The European Court of Human Rights found that the provisions adopted by the Community offered protection "equivalent" to those that the Convention provides. The Court stated: "By 'equivalent', "the Court means 'comparable': any requirement that the organisation's protection be 'identical' could run counter to the interest of international co-operation pursued." *Id.* ¶ 155. *See also* BIERSTEKER & ECKHERT, *supra* note 3, at 16-18.

36. *See* People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17 (D.C. Cir. 1999); *see also* National Council of Resistance of Iran v. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001).

involved measures adopted by the United States pursuant to its own sovereign powers.[37]

III.

In a subsequent case, the CFI focused on the procedures followed by the Council itself in identifying terrorists and freezing their assets in instances where Security Council Resolutions left this decision to Member States, and came to a different result. In *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union*, an exiled Iranian group was placed on a list of banned terrorist organizations by the European Union, although they had not been specifically placed on the list published by the Sanctions Committee.[38] Resolution 1373 of the U.N., enacted after September 11, 2001, left to Member States the competence to specifically identify persons, groups and entities whose funds would be frozen in accordance with the legal order of the State.[39] That Resolution was implemented in the Community through a regulation of the Council, which ordered the freezing of assets of persons and entities included in a list established and regularly updated by Council decisions.[40] The Organisation des Modjahedines du peuple d'Iran was placed on this list, and the EU froze their assets.[41]

The Court criticized the Council's actions, and distinguished the case from *Yusuf* and *Kadi*. In contrast with the pre-September 11, 2001 resolutions involved in those cases, the Security Council resolution did not identify the persons and entities in question, but instead left that determination to the Member States.[42] Thus, the Court found that the identification of

37. *See Hassan*, [2006] E.C.R. __, ¶ 120.

38. Organisation des Modjahedines du peuple d'Iran v. Council of the European Union, Case T-228/02, [2006] E.C.R. __.

39. *See id.*, ¶ 99-102. Specifically, the Resolution called for all States to, "[f]reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities." S.C. Res. 1373, ¶ 1(c), U.N. Doc. S/RES/1373 (Sep. 28, 2001).

40. *See Organisation des Modjahedines*, [2006] E.C.R. __, ¶ 103 (referring to Council Regulation No. 2580/2001, O.J. L 344 (2001)).

41. *See Organisation des Modjahedines*, [2006] E.C.R. __, ¶ 13.

42. *See id.*, ¶ 101.

such entities was an exercise of the Community's own powers, and that the Council was required to observe fundamental rights guaranteed by the Community legal order.[43] In *Yusuf* and in *Kadi*, on the other hand, the Community institutions were not required to hear the parties concerned because the Community institutions had merely transposed the Security Council resolutions into the Community legal order.[44]

The petitioners in *Organisation des Modjahedines* were not informed of any specific information or evidence pertaining to them, nor were they given a statement of reasons for the action taken by the Council.[45] Under these circumstances, the Court held that fundamental rights and safeguards, including the right to a fair hearing, the obligation to state reasons, and the right to effective judicial protection, were violated.[46] Since this involved the exercise of Community powers rather than simply transferring Security Council decisions, the Community legal order must be observed and the decision of the Council was annulled.[47] The CFI declared, "the Court finds that the contested decision does not contain a sufficient statement of reasons and that it was adopted in the course of a procedure during which the applicant's right to a fair hearing was not observed."[48]

IV.

Taken together, these cases indicate that, although the European Union is a willing and active partner with the U.N. in efforts to combat international terrorism, basic tenets of the Community legal order must be adhered to, particularly if the Community acts in exercise of its own powers. However, rights are not absolute, and will be balanced against requirements of national security and international obligations. If the actions of the European Council are mandated by Security Council decisions, the EU regulations will be examined, not for compliance with obligations under the European Convention on Human Rights or other treaty obligations, but rather for compliance with *jus cogens* norms. Indeed, the Court noted that decisions of the

43. *See id.*, ¶ 102.
44. *See id.*, ¶ 100.
45. *See id.*, ¶¶ 64-65.
46. *See id.*, ¶ 173.
47. *See id.*, ¶ 174.
48. *See id.*, ¶ 173.

Security Council must be enforced, even if they violate treaty obligations such as those occurring under the European Convention of Human Rights.[49]

However, the *jus cogens* analysis is puzzling. A *jus cogens* norm is defined in Article 53 of the Vienna Convention on the Law of Treaties as a peremptory norm of general international law that is accepted and recognized by the international community, from which no derogation is permitted.[50] Acceptance of *jus cogens* as a peremptory norm is a relatively recent development, and the exact content of that norm is the subject of much controversy.[51] Indeed, there is no agreement as to which rules are, in fact, *jus cogens*.[52]

While it is generally accepted that prohibitions on genocide, slavery, and use of force constitute norms of *jus cogens*, not all fundamental rights can be regarded as peremptory norms.[53] The CFI, however, seems to have deemed the obligation to protect human rights a *jus cogens* norm, without specifying what

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49. *See id.*, ¶ 49.

50. *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. "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." *Id.* In 2006, the International Court of Justice endorsed the concept of *jus cogens*. *See* Armed Activities on the Territory of the Congo (The Democratic Republic of the Congo v. Rwanda), 2006 I.C.J. 126 (Feb. 3).

51. *See* A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475, 1488-1491 (2003) ("[jus cogens] originated in the belief that moral principles impose legal limits on state authority – in effect, applying a natural law approach – [but] was codified [in the Vienna Conference on the Law of Treaties in 1968 and 1969] in a form that grounded limitations on states' freedom solely on acceptance of those limits by states, that is, in a form shaped to satisfy positivist conceptions of the nature of law.").

52. *See* 1 OPPENHEIM'S INTERNATIONAL LAW 7 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); *see also* Weisburd, *supra* note 51, at 1492-1500 (discussing the varying "lists" of peremptory norms submitted by delegates to the Vienna Convention, as well as the differing treatments of the concept of *jus cogens* in the Federal Courts of the United States); Anthony D'Amato, *The Significance and Determination of Customary International Human Rights Law: Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47, 53 (1994) (discussing the fact that even within the customarily accepted *jus cogens* violations of genocide, slavery, torture, and inhuman treatment or punishment, substantial disagreements exist as to what falls within the purview of these practices).

53. *See* IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 488-490 (6th ed. 2003); Weisburd, *supra* note 51, at 1515.

rights are *jus cogens* norms. The CFI did not engage in analysis of customary international law to determine whether the rights in question were in fact accepted and recognized by the international community as peremptory norms, but rather, it seemed to assume that, since the rights were enumerated in the Universal Declaration of Human Rights and the ICCPR, their inclusion in these instruments meant they constituted *jus cogens* norms.[54] This interpretation of *jus cogens* goes far beyond that accepted by international courts that have considered the question, and beyond the commonly accepted definition of *jus cogens* among scholars.[55]

For example, in addressing the petitioners' contention that the contested regulations deprived them of their right to property, the CFI indicated that the alleged violation of their right to not be arbitrarily deprived of property would be examined solely in relation to a potential violation of *jus cogens*.[56] However, it offers no explanation concerning why such a right is a *jus cogens* norm. Although a right to property is included in the Universal Declaration of Human Rights, its omission from the enumeration of rights in the ICCPR is far from inadvertent, and can be

54. *See,* e.g., Organisation des Modjahedines du peuple d'Iran v. Council of the European Union, Case T-228/02, [2006] E.C.R. __, ¶ 135. (The Court did not discuss whether property rights were accepted as peremptory norms).

55. *See generally* Tawhida Ahmed and Israel de Jesús Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EUR. J. INT'L L. 771 (2006). In *Al-Adsani v. UK*, and *Prosecutor v. Furundzija*, torture was held to violate *jus cogens* norms. *See* Al-Adsani v. The United Kingdom, App. No. 35763/97, Eur. Ct. H.R. 761 (2001); Prosecutor v. Furundzija, Case No. IT-95-17/1, Statement of the Trial Chamber at the Judgement Hearing (Dec. 10, 1998). Similarly, the Inter-American Commission on Human Rights found that *jus cogens* covers the right to life in *Victims of the Tugboat '13 de Marzo' v. Cuba*; and the Inter-American Court of Human Rights found the right to equality before the law and non-discrimination in *Advisory Opinion OC-18/03*; and a probation of slavery in *Aloeboetoe v. Suriname*. *See* Victims of the Tugboat "13 De Marzo" vs. Cuba, Inter-Am. C.H.R. Report No.47/96 (1996), *available at* http://www.cidh.oas.org/annualrep/96eng/Cuba11436.htm; Aloeboetoe et al. v. Suriname, Inter-Am. C.H.R., Ser. C No. 15 (1993) *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_15_ing[1].pdf.; Advisory Opinion OC-18/03 of September 17, 2003, Requested by the United Mexican States, Juridical Condition and Rights of the Undocumented Migrants, Inter-Am. C.H.R., Ser. A No. 18 (2003), *available at* http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

56. *Organisation des Modjahedines*, [2006] E.C.R. __, ¶ 132. The CFI concluded, "the Council may only adopt such a decision after having ensured that maintaining the parties concerned in the disputed list remains justified, which implies that it must afford them the opportunity effectively to make known their views on the matter." *Id.*

attributed to an ideological conflict between East and West.[57] The Court, however, assumes that the right not to be arbitrarily deprived of property is a *jus cogens* norm, and then rejects the applicants' arguments because the sanctions imposed were a precautionary measure not affecting the substance of the applicants rights.[58] Moreover, the Court notes that the measures adopted by the U.N. in the context of the fight against international terrorism and the procedures established by the Security Council provide a mechanism for review before the Sanctions Committee.[59]

With respect to a right to a fair hearing, the CFI acknowledged that no "mandatory rule of public international law requires a hearing for the persons concerned in circumstances such as those of this case," but nevertheless described at length the mechanisms available to individuals to challenge decisions of the Sanctions Committee and request a delisting.[60] Finally, with respect to an effective judicial remedy, the CFI rejected the applicants' arguments because, as a matter of law, the Court has provided such a review in the context of the *jus cogens* analysis. Further, although no international court is competent to challenge actions taken by the Sanctions Committee, such a "lacuna" is not itself contrary to *jus cogens*.[61]

Thus, while first declaring that it lacks competence to review Security Council decisions for conformity to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), the Court undertakes a review, based upon *jus cogens* principles, without conducting a thorough analysis of which norms are *jus cogens* and why. While undertaking this review, the Court abandons the Community's human rights regime, but insists on its power to review in light of international peremptory norms. This approach was criticized in a report that

57. *See* LOUIS HENKIN ET AL., HUMAN RIGHTS 323 (1999).

58. *Organisation des Modjahedines*, [2006] E.C.R. __, ¶¶ 133-37.

59. *See id.*, ¶ 100. Procedures before the Sanctions Committee have been harshly criticized. *See supra* note 33.

60. Yusuf v. Council, Case T-306/01, [2005] E.C.R. II-3533, ¶ 307. In the subsequent case, *Ayadi v. Council of the European Union*, the Court focused on the procedures available in the Security Council for review of sanctions and also the obligations of Member States with respect to a fair hearing required by the Community legal order. *See generally* Ayadi v. Council, Case T-253/02, [2006] E.C.R. __, ¶ 118-57.

61. *See* Al Barakaat International Foundation, [2005] E.C.R. II-03533, ¶ 341; Kadi v. Council, Case T-315/01, [2005] E.C.R. II-3649, ¶ 286.

was prepared for the Council of Europe.[62] The report suggests that, although under Article 103 of the U.N. Charter the Member States are required to carry out the decisions of the Security Council, nevertheless, Member States that are party to the ECHR might incur State responsibility for violating the European Convention if a State votes for sanctions in the Security Council or if it implements them in its territory.[63] Faced with increasing criticism from Member States that procedures before the Sanctions Committee violate due process, in December, 2006, the Security Council amended its procedures and established a focal point to receive delisting requests from individuals, groups, and undertakings on the Sanctions Committee lists, as well as from governments.[64]

The decisions of the CFI, if left intact by the ECJ, would have far-reaching implications with respect to obligations under Section 103 of the U.N. Charter, which provides that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[65] Indeed, taken as a whole, the cases seem to indicate that, contrary to strong language in the cases indicating that recommendations of the Security Council fall outside the ambit of general review, the ECJ will be required to review Security Council resolutions in light of fundamental rights. Moreover, if sanctions are imposed pursuant to decisions taken by the European Council, basic tenets of the Community legal order will be applied—including all obligations arising under the treaty obligations, which include procedural due process rights, such as the right to a hearing and judicial review. The ECJ, in adjudicating the appeals to the cases discussed here, faces the daunting task of reconciling Community principles with responsibilities under the international legal order. The ICJ has, for example, declined to review the legality of U.N. Security Council Resolutions.[66] If in practice the ECJ

62. *See* CAMERON, *supra* note 35, at 7.

63. *Id.*

64. *See generally* S.C. Res. 1730 ¶¶ 1-8, U.N. Doc. S/RES/1730 (Dec. 19, 2006).

65. U.N. Charter art. 103.

66. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), 2003 I.C.J. 149 (Sept. 10).

chooses to review Security Council decisions under *jus cogens* standards, and actually finds such decisions violate fundamental rights, a new course in international cooperation will have been charted, one with profound political implications.