

Kadi v. Council: Putting the United Nations in Its Place

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I. OVERVIEW

Even before the September 11, 2001, attacks on the World Trade Center in New York, Osama bin Laden and the Taliban in Afghanistan were on the international community’s radar.¹ The United Nations Security Council adopted Resolution 1267 in late 1999, demanding the then-ruling Government of Afghanistan immediately deliver bin Laden either to a jurisdiction in which he was already under indictment or to another competent jurisdiction that would bring him to justice.² The Security Council, in order to encourage Talibani compliance, required that all U.N. Member States freeze the financial resources of the Taliban and the resources of those funding the Taliban.³ To do this, the United Nations maintained a list of individuals and entities determined either to be holding Taliban finances or otherwise financially supporting the Taliban.⁴ Plaintiffs Yassin Abdullah Kadi and the Al Barakaat Foundation, both entities with accounts in European Union Member States, were placed on this list.⁵ The Security Council created an appeals process for individuals to challenge their placement on the list.⁶ The Council of the European Union adopted regulations and common positions, effectively requiring compliance by all of its Member States with the U.N. Security Council resolution.⁷ In accordance with these

1. See S.C. Res. 1267, pmb., U.N. Doc. S/RES/1267 (Oct. 15, 1999).

2. *Id.* ¶ 2.

3. *Id.* ¶ 4(b).

4. See S.C. Res. 1333, ¶¶ 8, 12, U.N. Doc. S/RES/1333 (Dec. 19, 2000).

5. Joined Cases C-402 & 415/05, *Kadi v. Council*, paras. 31-33 (Ct. J. Eur. Communities Sept. 3, 2008), <http://curia.europa.eu/en/transitpage.htm> (follow “Case-law:” hyperlink; follow “Search form” hyperlink; search “Case number C-415/05”).

6. *Id.* paras. 324-325.

7. See Council Regulation 467/2001, art. 2, 2001 O.J. (L67) 1 (EC) (giving effect to U.N. Security Council Resolution 1267); see also Council Regulation 881/2002, art. 2, 2002 O.J. (L 139) 1 (EC) (extending, inter alia, the freezing of financial resources).

regulations, the plaintiffs' accounts were frozen.⁸ The plaintiffs brought suit against the Council of the European Union, alleging that it did not have authority to adopt the regulations in question; and, even if the Council did have authority, the regulations in question infringed on the plaintiffs' fundamental rights to defense (essentially, the right to due process) and property.⁹

The Court of First Instance held that it had only limited jurisdiction over the claim.¹⁰ It first held that because a resolution of the U.N. Security Council was binding on its signatories (including the Member States of the European Union by virtue of chapter VII of the U.N. Charter) the court did not have jurisdiction to hear challenges based on Community law.¹¹ The court based this reasoning on the principle that the signatories to the U.N. Charter had delegated binding authority to the Security Council in the sphere of international safety and security.¹² Thus, the lower court reasoned that the European Union, through its Member States, vested power to take certain international measures within the scope of chapter VII in the Security Council. Therefore, the lower court gave up the ability to review any measures, binding or nonbinding, taken within the scope of chapter VII.¹³ For this reason, the lower court declined to review whether plaintiffs' placement on the list of persons and entities subject to asset freezing constituted a breach of their fundamental rights as recognized by the Community.¹⁴ However, the Court of First Instance did hold that it was within its power to undertake a review of the Security Council resolution for violations of *jus cogens* norms of international law.¹⁵ In reviewing the applicability of *jus cogens* norms to the resolution in question, the lower court found that because the resolution was undertaken within the scope of the Security Council, it was not, per se, a violation of *jus cogens*.¹⁶ On review, the Court of Justice of the European Communities *held*: (1) the European Union was within its power to enact legislation enabling U.N. Security Council regulations; (2) the U.N. Charter takes primacy over secondary acts of EU law, but not over the primary law on which the European Community was founded; (3) the Courts of First Instance have both the power and the

8. *Kadi*, C-402 & 415/05, paras. 49-50.

9. *Id.*

10. *Id.* para. 86.

11. *Id.*

12. *See id.* paras. 74-76.

13. *See id.*

14. *Id.* para. 103.

15. *Id.* para. 105.

16. *See id.*

duty to hear all challenges to EU legislation for breaches of fundamental rights; (4) the regulation in question did deny plaintiffs their fundamental rights to defense and property; and (5) the effects of the resolutions would remain in force for three months from the date of the ruling to allow the EU Council to redress the defects in the legislation in question.¹⁷ Joined Cases C-402 & 415/05, *Kadi v. Council*, paras. 31-33 (Ct. J. Eur. Communities Sept. 3, 2008), <http://curia.europa.eu/en/transit/page.htm> (follow “Case-law:” hyperlink; follow “Search form” hyperlink; search “Case number C-415/05”).

II. BACKGROUND

Between 1945 and 1955, most Members of the current European Union became signatories to the United Nations Charter.¹⁸ Article 7 of the Charter created the Security Council, whose functions and powers were enumerated in chapter V of the Charter.¹⁹ In order to deal with situations that might threaten international peace, article 41 of the U.N. Charter granted the Security Council the authority to bind Member States to actions it deemed appropriate to give effect to its decisions.²⁰ Resolution 1267 passed with an eye to reining in the Talibani Government that was at the time ruling in Afghanistan.²¹ As justification for the sanctions imposed, the Security Council made note of several issues that were troubling the Council, namely the production of opium, the disparity in treatment of women, and the use of Talibani-controlled territory for the planning and preparation of terrorist attacks.²² The Security Council felt that its aims would be most effectively aided not by military force, but by economic coercion.²³ It is a basic norm of international law that international agreements are binding on their signatories, who must carry out the requirements of the agreement in good faith.²⁴ In compliance with this generally recognized principle, the European Union enacted Regulation 467 (EC) to give effect to the sanctions set out in paragraph 4 of Resolution 1267.²⁵

17. *Id.* paras. 281-282, 307-308, 316, 326, 349, 366, 376; *see id.* paras. 280, 292-298.

18. *See* United Nations Member States, <http://www.un.org/members/list> (last visited Mar. 9, 2009).

19. U.N. Charter art. 7.

20. *See id.* art. 41.

21. S.C. Res. 1267, *supra* note 1, pmb.

22. *Id.*

23. *See id.* ¶ 4(b).

24. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 321 (1987).

25. *See* 2001 O.J. (L 67) 1-2.

The European Court of Human Rights previously dealt with the issue of enactment of a Security Council resolution by the European Union.²⁶ In *Bosphorus v. Ireland*, the Court faced a situation similar to that addressed here by the Court of Justice of the European Communities. The Security Council had issued a resolution condemning the former Federal Republic of Yugoslavia and imposing sanctions on that country.²⁷ Similarly to the noted case, the European Union had implemented enabling legislation to give effect to the resolution in its Member States.²⁸ There, an airplane owned by the plaintiff, a Yugoslavia corporation, was seized within ten days of landing in the Republic of Ireland.²⁹ The plaintiff filed suit, alleging that, *inter alia*, its property rights had been violated by the seizure.³⁰ The Court of Human Rights held that if the measures taken were proportional to the goal of the regulation, such measures were justified.³¹

In *Commission v. Ireland*, the Court of Justice heard an appeal from a judgment of the Court of First Instance that held that a fisheries management obligation arising under the imposition of the United Nations Convention on the Law of the Sea took precedence over the laws of a Community Member State to the extent that the two conflicted.³² The Court of Justice, on appeal, determined that an international agreement could not impinge on the sovereignty and autonomy of the Community's legal system, setting the stage for the yet-to-be-decided holding in *Bosphorus*.³³ Furthermore, in *Germany v. Council*, the Court of Justice heard a challenge by one Community Member State to an international treaty entered into by the Council of the European Union subsequent to a conflicting statute enacted by the Community.³⁴ There, the Court held that when obligations of Member States under an international treaty conflict with a preexisting law of the Community, the obligations arising under the treaty are null.³⁵ In *Intertanko v. Secretary of State for Transportation*, the Court of Justice recently determined that

26. See *Bosphorus Hava Yollari Turzimve Ticaret Anonim Sirkeh v. Ireland*, App. No. 45036/98, paras. 14-18 (Eur. Ct. H.R. June 30, 2005), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC database" hyperlink; search "Application Number 45036/98").

27. *Id.* para. 14.

28. *Id.*

29. *Id.* paras. 19-24.

30. *Id.* paras. 33-35.

31. *Id.* para. 149.

32. Case C-459/03, *Comm'n of the European Communities v. Ireland*, 2006 E.C.R. I-4635, paras. 1-2.

33. *Id.* para. 123.

34. Case C-122/95, *Germany v. Council*, 1998 E.C.R. I-973, paras. 1-3, 21.

35. See *id.* paras. 65-82.

all obligations arising out of membership in the United Nations take primacy over secondary acts of law.³⁶ The case arose out of a conflict between the United Nations Law of the Sea and substantive legislation passed by the European Parliament dealing with penalties for marine pollution in coastal areas.³⁷

In *Parti Ecologiste 'Les Verts' v. Parliament*, the Court of Justice was faced with a situation where a corporation had merged and changed names after initiating an action in the Court of First Instance.³⁸ The Court of First Instance held that, due to the merger, a new organization was formed without sufficient identity interests to continue with the suit.³⁹ On appeal, the Court of Justice held that it would be an injustice to disallow the action to go forward due to the change in name.⁴⁰ Furthermore, although neither party raised the issue on appeal, the Court of Justice held that it is always the province of the courts to determine the reviewability of an EU body's actions.⁴¹ Under such review, the Court determined that because the Community was founded on the rule of law, it is always appropriate to determine the conformity of Community actions with the grant of fundamental rights in the EU Treaty.⁴²

Schmidberger v. Austria concerned the freedom of expression and free movement of capital.⁴³ A group of protesters had planned a demonstration, in accordance with Austrian law, that would have caused a blockage of a major thoroughfare.⁴⁴ The Austrian Government, after reviewing the application for assembly, decided to allow the protest to take place.⁴⁵ The plaintiff, a trucking company, brought suit against the Austrian Government for failure to block the protest, claiming infringement of one of its fundamental freedoms, i.e., free movement of capital.⁴⁶ The Court of Justice determined that when a fundamental

36. Case C-308/06, Int'l Ass'n of Indep. Tanker Owners (Intertanko) v. Sec'y of State for Transp., para. 42 (Ct. J. Eur. Communities June 3, 2008), <http://curia.europa.eu/en/transitpage.htm> (follow "Case-law:" hyperlink; follow "Search form" hyperlink; search "Case number C-308/06"). Primary and secondary acts of Community law are distinguished by the fact that primary acts include the EU treaties, Member State constitutions, and the fundamental rights on which those are based; secondary acts of law, by contrast, are those enacted pursuant to primary acts of law.

37. *See id.* paras. 28-29.

38. Case 294/83, *Parti Ecologiste 'Les Verts' v. Parliament*, 1986 E.C.R. 1339, para. 13.

39. *Id.* para. 14.

40. *See id.* para. 18.

41. *See id.* paras. 20-22.

42. *Id.* para. 23.

43. Case C-112/00, *Schmidberger v. Austria*, 2003 E.C.R. I-5659, para. 25.

44. *Id.* para. 10.

45. *Id.* para. 13.

46. *Id.* para. 16.

freedom guaranteed by the EU Treaty and a fundamental right inherent in the founding of the European Union come into conflict, the fundamental freedom must give way.⁴⁷ In making this determination, the Court relied on the premise that measures taken by the Community in contravention of the fundamental human rights guaranteed by and underpinning the EU Treaty are unacceptable in the European Union.⁴⁸ Thus, the fundamental human rights of free speech and assembly, even though lesser than the fundamental right to life, can only be infringed upon to a limited extent.⁴⁹ In *Unibet v. Justitiekanslern*, the Court settled the question of who was to adjudicate the infringement of rights granted by the Community that were in conflict with the rights granted by the Member State.⁵⁰ This issue arose in the context of a private lottery company advertising for its lottery sales.⁵¹ There, the Government of Sweden brought criminal charges against the plaintiff's advertising partners, alleging breach of certain advertising laws.⁵² The corporation responded by filing suit against the Swedish Government, challenging the statutes under which its partners had been criminally charged.⁵³ The *Högsta domstolen* (Supreme Court of Sweden) determined that there was no applicable law granting standing to sue for redress when a Member State's substantive law conflicts with a higher law of the Community.⁵⁴ The Court of Justice agreed, holding that it was for the Member States to guarantee the fundamental rights granted by the Community when they were in conflict with rights granted (or not granted) by the Member State.⁵⁵

III. THE COURT'S DECISION

In the noted case, the Court of Justice of the European Communities combined the holdings in *Schmidberger, Germany v. Council, Intertanko, Commission v. Ireland*, and *Les Verts*, and expanded upon the holdings of some to positively establish the right to judicial review of all Community acts, regardless of the impetus behind the acts.⁵⁶ The Court then held, by extending the holding in *Anton Durbeck GmbH*

47. *See id.* para. 74.

48. *Id.* para. 73.

49. *See id.* para. 79.

50. Case C-432/05, *Unibet Ltd. v. Justitiekanslern*, 2007 E.C.R. I-2271, paras. 38-39.

51. *Id.* para. 17.

52. *Id.*

53. *See id.* para. 18.

54. *See id.* para. 4.

55. *Id.* paras. 38-39.

56. *See* Joined Cases C-402 & 415/05, *Kadi v. Council*, para. 285 (Ct. J. Eur. Communities Sept. 3, 2008), <http://curia.europa.eu/en/transitpage.htm> (follow "Case-law:" hyperlink; follow "Search form" hyperlink; search "Case number C-415/05").

v. Commission, that the Community is bound, when enabling the enforcement of a Security Council resolution, to take into account basic standards of human rights as guaranteed by the EU Treaty.⁵⁷ Turning then to the issue of judicial review of Community acts, the Court of Justice expanded the holding of *Les Verts* to say that EU Member States cannot escape review of their actions in light of the EC Treaty guarantees of fundamental rights.⁵⁸ Previously, the holding of *Les Verts* had been limited to the proposition that the Court of Justice could review whether actions of the Community comported with the guarantee of fundamental rights inherent in the EU Treaty and other founding documents.⁵⁹ In the noted holding, the Court, narrowly distinguishing its recent holding in *Unibet* that it is for the courts of the Member States to ensure judicial review of fundamental rights, created a mandate that it is imperative on all courts of the European Union to require judicial review of all Community measures challenged before them.⁶⁰ The Court tempered that somewhat by affirming that the Community must give due deference to resolutions of the Security Council because it is the international body to which global peace and security have been primarily entrusted.⁶¹ However, the Court noted, the United Nations left to the discretion of its Member States the choice among several possible “models for transposition of those resolutions.”⁶² The Court then took the unusual step of reviewing the plaintiffs’ claims instead of remanding.⁶³ In doing so, the Court determined that because the right exists to be notified of the grounds for Community action, and because the plaintiffs had not been given an opportunity to know the reasons for their inclusion on the sanctions list, the process of seizure of assets under Resolution 467 was deficient.⁶⁴

The Court first addressed the plaintiffs’ argument that the European Union was not authorized to enact the enabling regulation, as it was directed at individuals when only action against nations was authorized

57. *Id.* para. 279; see Case C-430/00 P Anton Durbeck GmbH v. Comm’n, 2001 E.C.R. I-8547, para. 17 (holding that while a novel claim is not allowed to be pled on appeal to the Court of Justice, claims that merely *clarify* the original position argued before the Court of First Instance are allowed on appeal).

58. *Kadi*, Joined Cases C-402 & 415/05, para. 281.

59. See Case 294/83, Parti Ecologiste ‘Les Verts’ v. Parliament, 1986 E.C.R. 1339, paras. 23-25.

60. *Kadi*, Joined Cases C-402 & 415/05, para. 326.

61. See *id.* paras. 292-294.

62. *Id.* para. 298.

63. *Id.* para. 332.

64. *Id.* paras. 336, 349.

under articles 60 EC and 301 EC.⁶⁵ The Court of First Instance relied on *Germany v. Council* to hold that while those articles did in fact authorize only actions against nations and not individuals, measures taken pursuant to the power granted by those articles could nevertheless target individuals in light of the fact that the idea of a nation could reasonably encompass the association of control by individuals.⁶⁶ Here, the Court of Justice specifically overruled the Court of First Instance's holding that the Community was authorized to enact the legislation based in part on articles 60 EC and 301 EC with article 308 EC acting as a bridge.⁶⁷ In rejecting that argument, the Court relied on the wording of article 308 EC, pointing out that it was intended to allow otherwise unenumerated powers *in the area of the common market* and not the areas of international peace and security.⁶⁸

Turning to the ability of the courts of the European Union to review Community regulations enabling U.N. Security Council resolutions, the Court started with the principle espoused in *Les Verts* that because the European Union is based on the rule of law, Member States cannot escape the review by the judiciary of the legality of their acts.⁶⁹ The Court then determined, relying on *Commission v. Ireland*, that international agreements cannot impact the "autonomy of the Community legal system" because the judiciary has sole jurisdiction over such determinations.⁷⁰ The Court of Justice then added the notion that the only acceptable Community actions are those that are compatible with respect for basic human rights, as delineated in the EU Treaty.⁷¹ From this, the Court came to the conclusion that no obligation under an international agreement can prejudice the fundamental principles, i.e., the basic personal rights as espoused in the EU Treaty.⁷² By extension, the reach of the judiciary of the Community extends to those regulations that are meant to give effect to obligations incurred under international agreements and that run afoul of the fundamental rights granted by the EU Treaty.⁷³ The Court of Justice then attempted to temper its holding by reiterating, relying on *Commission v. Council*, that the review of Community regulations intending to give effect to obligations under a

65. *Id.* para. 163.

66. *Id.* para. 195.

67. *Id.* paras. 195-197.

68. *Id.* paras. 199-203.

69. *Id.* para. 281.

70. *Id.* para. 282.

71. *Id.* para. 284.

72. *Id.* para. 285.

73. *Id.* para. 286.

U.N. Security Council resolution should be undertaken seriously and with due respect to the position of the United Nations as the guardian of global peace and security.⁷⁴

However, the Court determined the U.N. Charter allowed signatories some degree of latitude when choosing the method of implementation of its binding resolutions.⁷⁵ In making this determination, the Court relied on the holding of *Intertanko* that U.N. regulations are primary over secondary law of the Community (i.e., regulations adopted pursuant to the EU Treaty) but not over primary law of the Community (the EU Treaty itself, along with its underlying basic principles).⁷⁶ The Court bolstered this line of reasoning with the wording of article 300(6) EC, which restricts the effect of international agreements on Community measures if the Court has determined it to be in conflict with the EU Treaty.⁷⁷ In making this determination, the Court responded to the defendant's contention that as a corollary, the European Court of Human Rights has repeatedly declined jurisdiction in similar cases of enactment of Security Council resolutions.⁷⁸ The Court distinguished those cases by noting that in all of those instances the regulation in question did not originate in the Community (i.e., was directly enforced by the United Nations) or that the actions complained of did not take place within the European Union.⁷⁹ The Court pointed to *Bosphorus*, in which the European Court of Human Rights *did* exert jurisdiction over a case involving the effectuation of a Security Council resolution because the events in question, a seizure of property, took place within a Community Member State.⁸⁰ Furthermore, the Court reasoned the act in question in the noted case was not an act of the United Nations but was, as it had already established, an act of the Community over which it had not only the power but the duty to exert jurisdiction.⁸¹ Finally, with regard to the issue of jurisdiction, the Court addressed the defendant's argument that the Security Council established in its Sanctions Committee an effective tribunal for review of a person's inclusion on the list, thereby guaranteeing fundamental rights and obviating the need for judicial review within the European Union.⁸² The Court of Justice pointed out

74. *Id.* paras. 292-294.

75. *Id.* para. 298.

76. *Id.* paras. 307-308.

77. *Id.* para. 309.

78. *Id.* paras. 310-311.

79. *Id.* para. 312.

80. *Id.* para. 313.

81. *See id.* para. 316.

82. *Id.* paras. 321-322.

that such review did not allow for those affected to appear in person to assert their rights.⁸³ Furthermore, the Court noted that the final decision of the Sanctions Committee was by consensus and could be vetoed by any single member of the Committee.⁸⁴ Moreover, the Court was bothered by the fact that the Sanctions Committee was required to communicate neither the basis for its decision nor the evidence upon which it was based.⁸⁵

Having come to the conclusion that the courts of the European Union do have jurisdiction to hear challenges to legislation enacted to enable the provisions of a Security Council resolution, it was unnecessary to address the merits of the Court of First Instance's ruling as to review in cases of *jus cogens* violations as such situations were encompassed by the Court of Justice's broader holding of jurisdiction.⁸⁶ The Court rendered a final judgment in the case instead of remanding to the Court of First Instance.⁸⁷ In this section of its decision, the Court first relied on *Unibet* for the notion that "effective judicial protection" is common to all Community Member States and thus is inherent in the formation of the EU Treaty.⁸⁸ It then noted that the Community authority that is exercising the power granted it under the regulation in question must communicate its grounds for inclusion on the list as soon as possible.⁸⁹ Again trying to effect a balanced approach, the Court also noted that it would strip the account-freezing measures of any efficacy if the authority in question were required to notify the subject of its actions before those actions were put into place, because it would simply cause those individuals and entities to move the assets beyond the reach of the Community before anything could be done.⁹⁰ With due regard for this concern, however, the Court still reasoned that the authorities could not escape all review by the courts.⁹¹ Applying these principles to the case at bar, the Court determined that (1) the Community authority never informed the plaintiffs of the evidence against them; (2) the plaintiffs were not given the chance to exercise their respective rights before a competent tribunal, denying them of their right to an effective legal

83. *Id.* para. 324.

84. *Id.* para. 323.

85. *Id.* para. 325.

86. *Id.* para. 329.

87. *Id.* para. 331.

88. *Id.* para. 335.

89. *Id.* para. 336.

90. *Id.* paras. 339-340.

91. *Id.* para. 343.

remedy; and (3) the defendants offered no evidence to the contrary.⁹² Thus, the Court held the rights of the plaintiffs had indeed been infringed upon.⁹³

Finally, the Court addressed whether the deprivation of the plaintiffs' rights could be justified.⁹⁴ For such measures to be justified, the Court determined, relying on *Bosphorus*, that there must be a reasonable proportionality between the aims of the regulation and the means employed.⁹⁵ As in *Bosphorus*, the Court stated that the aims of the Community in effectuating a Security Council resolution were substantial enough to allow the infringement on property rights of even those who were not the reason the resolution was enacted.⁹⁶ Thus, the Court found the measures taken could in principle be justified, but the person targeted must still be given a reasonable opportunity to present his or her case to a competent tribunal.⁹⁷ Because the plaintiffs were not given any opportunity to have their challenges to the seizure regulations heard, the methods used were inherently unjustified and must be struck down.⁹⁸ So that the plaintiffs and others on the seizure list would not have the opportunity to remove all assets beyond the reach of the Community authorities before a new, justifiable regulation could go into effect, the Court extended the effects of the regulations for three months from the date the decision was handed down.⁹⁹

IV. ANALYSIS

In balancing the interests of the property owners and the Community authorities, the Court did well to recognize that the EU has a legitimate interest in prenotification seizures. That is to say, imposing preseizure notice requirements on EU Member States may allow those who have been determined to be a risk to move the assets in question before the appropriate authorities have an opportunity to actually seize the accounts, thereby frustrating the purpose of the U.N. Security Council and the enabling regulations. However, the Court reasoned that such extraordinary preseizure powers required increased postseizure opportunity for the property holders to challenge the seizure. Because the EU regulation in question didn't afford any such challenge

92. *Id.* paras. 346, 349-350.

93. *Id.* paras. 352-353.

94. *Id.* para. 359.

95. *Id.* paras. 360-361.

96. *Id.* para. 361.

97. *Id.* paras. 366, 368.

98. *Id.* paras. 369-372.

99. *Id.* paras. 375-376.

procedures, the Court invalidated it. In a consolation to the European Union, though, it did continue the effect of the regulation for three months so as to allow the EU to implement new measures. In doing so, the Court recognized that considerable harm could be done to the purpose of the regulation and the underlying U.N. Security Council resolution. If the seizures were immediately lifted, the Court noted, most of the assets would disappear beyond the reach of the EU Member States' authority.

This is the *Marbury v. Madison* of the European Union, and more. Not only does it effectively establish judicial review of every act of the European Union, it does so in the context of the intersection of international treaty obligations and positive EU law. This is the first time the Court determined that judicial review is a duty incumbent upon the courts any time an action of the Community or one of its bodies is challenged. Previously, the Court had held simply that the Court of Justice has the prerogative to review acts of the Community.¹⁰⁰ Furthermore, the Court just last year held that when fundamental rights have been infringed, it is for the *Community Members*, not the Court of First Instance and the Court of Justice, to “ensure judicial protection.”¹⁰¹ The Court in the noted case takes that onus off the Member States and places it on the courts of the European Community without acknowledging that it has done so. Even more striking, the Court here has essentially determined that the European Union can only comply with the requirements of other supranational agreements and treaties to the extent that they do not conflict with the underlying principles of the European Union's formation.¹⁰² This is somewhat remarkable in and of itself. However, it is even more remarkable that the treaty in question, the U.N. Charter, predated the existence of the European Union by over thirty years. Typically in such situations, the international treaty obligation trumps the national law of its signatories.¹⁰³ This is even truer in situations where the international agreement preceded the national law it conflicts with. In fact, this is the case with the authority relied on by the court to support the primacy of EU Community law over international agreements. Furthermore, in *Germany v. Council*, the law at issue was a secondary law, enacted pursuant to its authority under the primary law of the EU Treaty. In the United States, treaties are the “supreme Law of the

100. Case 294/83, Parti Ecologiste 'Les Verts' v. Parliament, 1986 E.C.R. 1339, para. 23.

101. Case C-432/05, Unibet Ltd. v. Justitiekanslern, paras. 38-39, 2007 E.C.R. I-2271.

102. See *Kadi*, Joined Cases C-402 & 415/05, para. 285.

103. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 321, 331 (1987).

Land,” coexistent with constitutional laws and rules.¹⁰⁴ This ruling, then, is all the more remarkable in that it holds that a *preexisting* international treaty obligation can be abrogated by a later-formed primary law. Presumably, primary law includes constitutional foundations and rules.¹⁰⁵ What, then, would stop a U.N. Member from simply rewriting its constitution to avoid obligations under the U.N. Charter?

The Court was faced with a difficult dilemma. If it upheld the legality of the contested regulation, it would be eviscerating the protection of the basic fundamental rights granted to all citizens of the European Union by virtue of the EU Treaty. However, if it struck down the regulation, it would create an environment in which those persons suspected of funding Osama bin Laden would have an opportunity to move those funds beyond the reach of the European Union. As a compromise, the Court attempted a balanced position. It succeeded except in the area of conflicts between international treaty obligations and national or supranational legislation. In attempting to balance those two competing outcomes, the Court brought about a completely unintended result: it created a precedent that, if followed by other nations, could eviscerate or erode the power of the U.N. Security Council. The Court has in essence made the determination that subsequent treaties can modify the obligations of Member States under the U.N. Charter. That begs the question, does the Charter allow for such modification without ratification by the remaining U.N. members?

V. CONCLUSION

The Court was attempting repeatedly to balance the rights of the plaintiffs with the legitimate goals of the Community. The method it devised does so, at least within the confines of the European Community. However, the Court seemed to stretch at times to find sufficient support for its arguments, at times expanding previous holdings (such as *Les Verts* and *Intertanko*) and at others citing seemingly unrelated holdings (e.g., *Schmidberger*, *Council v. Commission*). The Court narrowly distinguished its holding in *Unibet* so as not to create a conflict between two recent cases. It pulled from seemingly disparate sources to construct enough support for its holding in the noted case. It seems that the Court had no other option in this case, as the holding is wholly novel with respect to the U.N. Charter’s interaction with the later-in-time EU Treaty. However, in doing so the Court may have created a greater problem for

104. U.S. CONST. art. VI, cl. 2.

105. See, e.g., *Kadi*, Joined Cases C-402 & 415/05, para. 282.

itself. The unique context of this situation means that the Court's decision will have ripple effects on the interaction of obligations under prior existing treaties and subsequently developed positive law. True, the Court of Justice limited its holding to that which was necessary, i.e., to what it called "primary" law. This does not obviate two potential problems: first, it sets a dangerous precedent for other Member States by validating, albeit in a limited sense, blatant disregard for U.N. Security Council binding resolutions; and second, it does not sufficiently distinguish between "primary" and "secondary" law, such that in the future the line may easily be blurred, leading to the potential for future disregard of international obligations due to conflict with any law whatsoever and whensoever enacted.

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