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CONFLICT BETWEEN BINDING U.N.S.C. RESOLUTIONS AND E.U. LAW?

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ABSTRACT: This article discusses the problem of possible conflicts between binding U.N.S.C. resolutions and E.U. Law, especially on the ground of the *Kadi* case. Author presents the problem of United Nations Security Council's decisions and the discussion in the courts as well as in the doctrine, regarding their binding force within international. Smart sanctions are presented, and implications of their implementation within European Union. Based on the ECJ judgment in the *Kadi* case, author discuss the problem of relationship in international law between different set of norms and where within international law U.N.S.C. resolutions should be placed. Also, the question of the clash between resolutions and *ius cogens* norms is discussed.

KEY WORDS: Security Council, Resolution, Kadi, Ius Cogens.

RESUMEN: El artículo trata del problema de posibles conflictos entre las resoluciones del Consejo de Seguridad (ONU) y el derecho de la Union Europea. El autor presenta el problema de las decisiones del Consejo de Seguridad y el debate en los tribunales internacionales y también en la doctrina científica sobre su valor jurídico. Se trata el tema de las sanciones «inteligentes» y también se ocupa este artículo de los problemas con su implementación dentro del derecho de la Unión Europea. El autor habla sobre la relación en el derecho internacional público entre diferentes tipos de normas, según la sentencia del Tribunal de Justicia de la Unión Europea en el caso *Kadi*. También se trata sobre la relación entre las normas jurídicas: *ius cogens* y resoluciones.

PALABRAS CLAVE: Consejo de Seguridad, Resoluciones, Kadi, *Ius cogens*.

The main purpose of the United Nations (UN) is to maintain international peace and security[1]. Therefore the United Nations Security Council (SC) has the power to issue binding resolutions upon the States. The SC can adopt mandatory measures, involving the use of armed forces[2] or economic sanctions[3]. Of course, those sanctions are imposed under Chapter VII of the Charter of the UN. Such powers are vested to the Security Council, under Article 25 of the Charter of the UN[4]. But binding decisions can be rendered not only under Chapter VII of the Charter of the UN, but also the SC is empowered to take such decisions outside Chapter VII. Such interpretation of the Charter of

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[1] Article 1 UN Charter. See generally: Fassbender B., *The United Charter as Constitution of The International Community*, Columbia Journal of Transnational Law, vol. 36, p. 529, 1998.

[2] Article 42 UN Charter.

[3] Article 41 UN Charter.

[4] See generally: Delbruck J., at p. 409-418 in: *The Charter of the United Nations: a Commentary*, (ed.) B. Simma, Oxford University Press, Oxford 1994.

the UN was rendered by the International Court of Justice (ICJ) in its advisory opinion in Namibia case[5]:

"It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter."[6]

"The decisions made by the Security Council in paragraphs 2 and 5 of resolutions 276 (1970), as related to paragraph 3 of resolution 264 (1969) and paragraph 5 of resolution 269 (1969), were adopted in conformity with the purposes and principles of the Charter and in accordance with its Article 24 and 25. The decisions are consequently binding on all States Members of the United Nations which are thus under obligation to accept and carry them out"[7].

It goes without saying that the Security Council Resolutions binds all the Member States, including those who were not represented in the SC in the moment of deciding such decision. As Rosalyn Higgins has expressed her believes, after *Namibia* case, the reading of the Charter, its *travaux* and the limited subsequent practice, testify to the correctness of the conclusion that resolutions validly adopted under Article 24 were binding on the membership as a whole[8]. Also, in accordance with Article 48 of the Charter of the UN[9], UN Members are under a legal duty to implement them. The SC resolutions do not directly bind international organizations (e.g. E.U.), however, "since UN's universal membership guarantees that UN members can exert a commanding influence in (almost) all international organizations, such an indirect approach to other international actors seems to be sufficient"[10]. The legal supremacy of the Member States' obligations under the Charter of the UN was clearly established in the Article 103 of the Charter of the UN[11]. What is more, it has been recognized that those obligations extend to binding Security Council decisions. The ICJ in the *Lockerbie* case stated:

"Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security

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[5] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971.

[6] *Ibid*., para. 113.

[7] *Ibid*., para. 115.

[8] Higgins R., *The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Artcile 25 of the Charter?* International & Comparative Law Quarterly, vol. 21, p. 270, 1972, at p. 286.

[9] Article 48 of the UN Charter stipulates:
(1) The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all Members of the United Nations or by some of them, as the Security Council may determine.
(2) *Such decisions shall be carried out by the Members of the United Nations directly and though their action in the appropriate international agencies of which they are members.*

[10] Bryde B., in: *The Charter of the United Nations: a Commentary*, (ed.) B. Simma, Oxford University Press, Oxford 1994, see also: Wheatley S., *The Security Council, Democratic Legitimacy and Regime Change in Iraq,* European Journal of International Law, vol. 17, no. 3.

[11] See: Lauwaars R.H., *The Interrelationship between United Nations Law and the Law of other International Organizations,* Michigan Law Review, vol. 82, p. 1604, 1984.

Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including Montreal Convention"[12].

Taking all those theoretical arguments into consideration the power of the Security Council Resolutions taken under Chapter VII in international law seems unquestionable. However, there have been raised serious doubts, in connection with the recent decision of the ECJ[13] in *Kadi* case[14]. Before analyzing this judgment, the new phenomena of so-called UN smart sanction will be briefly presented.

UN smart (or targeted) sanctions, as opposed to general economic sanctions[15] which affect whole population, are narrowly tailored to minimize civilian suffering. Smart sanctions are targeted against responsible politicians or military leaders, using measures such as visa denials or freezing their assets abroad[16]. The smart sanctions, previously aimed only at state officials, were expended to non-state actors and individuals[17]. The SC in its resolution 1267(1999) expanded smart sanctions to Taliban in Afghanistan, and without doubt, Taliban cannot be recognized as state officials or legal government of the country. In 2000, the SC expanded smart sanctions to individuals, namely Usama Bin Laden and others suspected of supporting Al-Qaida or other terrorist groups[18].

The SC Resolution 1267 (1999)[19], adopted on 15 October 1999, under Chapter VII of the Charter of the UN, in order to fight international terrorism, which is essential for the maintenance of international peace and security, has created the sanctions regime. The Security Council has established the Sanctions Committee (also known as "the Al-Qaida and Taliban Sanctions Committee"), responsible in particular for ensuring that States implement the measures imposed by the Security Council resolutions[20], such as e.g.

[12] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, ICJ Rep. 1992, para. 39.

[13] Shortcut 'ECJ' stands for: Court of Justice of the European Union.

[14] Joined cases C-402 & 415/05, *Kadi v. Council*, [herenafter ECJ *Kadi* case].

[15] Such as imposed on Iraq after the Second Gulf War, SC Res. 687, UN Doc. S/RES/687 (April 3, 1991).

[16] See generally about smart sanctions: Howlett A., *Getting "Smart": Crafting Economic Sanctions that Respect All Human Rights*, Fordham Law Review, vol. 73, p. 1199, 2004-2005, see also: Bianchi A., *Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion*, European Journal of International Law, vol. 17, no. 5.

[17] It has to be noticed, that smart sanctions are not free from criticism, see: Cananea G., *Global Security and procedural Due Process of Law Between the United Nations and the European Union: Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council*, Columbia Journal of European Law, vol. 15, 2008-2009, at p. 514 and subs.

[18] S.C. Res. 1730 (2000).

[19] S/RES/1267 (1999), 15 October 1999.

[20] Security Council has adopted further resolutions to modify and strength created sanctions system: S/RES/1333 (2000), S/RES/1390 (2002), S/RES/1455 (2003), S/RES/1526 (2004), S/RES/1617 (2005), S/RES/1735 (2006), S/RES/1822 (2008) and S/RES/1904 (2009).

paragraph 4 of the Resolution 1267. The core sanction is freezing without delay the funds and other financial assets or economic resources of designated individuals and entities (assets freeze)[21]. Other sanctions are: preventing the entry into or transit through States' territories by designated individuals (travel ban) and preventing the direct or indirect supply, sale and transfer from States' territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types, spare parts, and technical advice, assistance, or training related to military activities, to designated individuals and entities (arms embargo).

This SC sanctions regime mainly depends on blacklisting of the suspected individuals and firms[22]. The Sanction Committee is publishing Consolidated List[23] of those parties whose funds were to be frozen.

The European Union is not a member of the United Nations and is not under any direct international obligation to give effect to the UN Security Council Resolutions. The justification of the UN SC Resolutions' legal effect in the European legal system can be found in the transfer of competence from its member States to the European Union (and also , before Lisbon Reform Treaty, to European Community)[24], but also indirectly under article 48 (2) of the Charter of the UN. However, even without formally binding obligation, the EU take part in the implementation of the UN sanctions regimes[25].

Within the EU, the SC resolutions regarding smart sanctions (and further measures decided by the Sanctions Committee) are implemented through the EU Council Common Positions[26] (under the former second pillar) and through the Regulations[27] (under the former first pillar)[28]. Extensive discussion about the legal basis for such implementation of the SC resolution within the EU is outside the scope of this Article[29]. It can be assumed that such competence is derived from Article 60 of the EC Treaty (now article 75 of the Treaty on the Functioning of the European Union), and Article 301 of the EC Treaty (now replaced by Article 215 of the Treaty on the Functioning of the European Union). Of course,

[21] Assets freeze e.g. was broaden to cover individuals and entities associated with Usama bin Laden by paragraph 8 (c) of Resolution 1333 (2000).

[22] See: Cameron I., *European Union Anti-Terrorist Blacklisting*, Human Rights Law Review, 2003, Draghici C., *Suspected Terrorists' Rights Between the Fragmentation and Merger of Legal Orders: Reflections in the Margin of the Kadi ECJ Appeal Judgment*, Washington University Global Studies Law Review, vol. 8, p. 627, 2009, at p. 629 and subsequent.

[23] First time published on 8 march 2001.

[24] See Benthlehem D., *The European Union*, in: *National Implementation of United Nations Sanctions,* V. Gowlland-Debbas (eds.), The Hague-Leiden, 2004, pp. 123-166.

[25] But previously SC Resolutions against Rhodesia (from 1965 to 1979) were not implemented by European Economic Community, see Bethlehem, D., *op. cit*. at p. 128.

[26] E.g. E.U. Council adopted Common Position 1999/727/CFSP to implement Resolution 1276 (1999), Common Position 2001/154/CFSP to implement Resolution 1333 (2000), Common Position 2002/402/CFSP to implement Resolution 1390 (2002), and Common Position 2003/140/CESP to implement Resolution 1452 (2002).

[27] E.g. Regulation (EC) No. 337/2000, Regulation (EC) No. 467/2001, Regulation (EC) No. 2062/2001 and subsequent.

[28] For more profound analysis see: Bulterman M., *Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities*, Leiden Journal of International Law, vol. 19, p. 753.

[29] This subject is scrutinized in: Mariani P., *The Implementation of UN Security Council Resolutions Imposing Economic Sanctions in the EU/EC Legal System: Interpillar Issues and Judicial Review* (March 6, 2009). Bocconi Legal Studies Research Paper No. 1354568. Available at SSRN: http://ssrn.com/abstract=1354568.

there was nothing in EU Law, which justified imposed economic restrictions against individuals. But, as it was shown by the practice, article 60 and 301 of the EC Treaty (and also article 308 of the EC Treaty – article 352 of the Treaty on the Functioning of the European Union) were used for such justification. After 1 December 2009, under amendments imposed by Lisbon Reform Treaty, nowadays exist explicit legal basis for the imposition of sanctions against non-state entities. Article 215 (2) of the Treaty on the Functioning of the European Union stipulates:

Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

The CFI has faced the problem of the SC resolutions within the EU legal system in the cases: *Kadi v Council and Commission*[30] and *Yusuf and Al Barakaat International Foundation v Council and Commission*[31]. Subsequently the ECJ has heard two appeals, has rendered its judgment on 3 September 2008[32].

Mr Kadi, Yusuf and organization Al Barakaat – the applicants in those cases, were added to Annex I[33] by Commission Regulation (EC) 2199/2001, and Commission Regulation (EC) 881/2002. Annex I contains the list of those affected by the freezing of funds (and it is copy of the UN Sanctions Committee Consolidated List). The applicants brought legal proceeding before the CFI denying any association with terrorists. They argued that the Council was incompetent to adopt the above mentioned regulations, and also that those regulations breached their fundamental rights, namely the right to be heard, the right to respect for property and the right to effective judicial review.

In the analysis of those cases, main question is the relation of the universal UN system vis-à-vis the EU legal system. In the opinion of the author, questions of the breach of the fundamental rights[34] or competence of the Council to adopt such measures are of the second importance and will be just briefly addressed.

The question of the Council's competence concerning the adoption of the contested regulation has been already addressed and, especially in the light of Article 215 (2) of the Treaty on the Functioning of the European Union, is not relevant.

At this stage it is worth noticing briefly other judgments, in which the supremacy of the SC resolutions were discussed. The European Court of

[30] Case T-315/01, *Kadi v Council and Commission* [2005] ECR II-3669.

[31] Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3533.

[32] Joined cases C-402 & 415/05, *Kadi v Council*.

[33] Of course, prior to EU Regulations, the applicants were listed by the Security Council's Sanction Committee in 2001 as an individuals associated with Usama bin Laden and the Al-Qaida organization.

[34] For further discussion regarding breach of the fundamental rights see: Michaelsen Ch., *Kadi Al Barakaat v Concil of the European Union and Commission of the European Communities, The Incompatibility of the United Nations Security Council's 1267 Sanctions Regime with European Due Process Guarantees*, Melbourne Journal of International Law, vol. 10, p. 329, 2009, Cananea G., *Global Security…*, at 521.

Human Rights in *Bosphorus case*[35] faced very similar problem, involving the interpretation of Regulation 990/93 imposing sanctions against the FRY. The Court stated:

"As to context and aims, it should be noted that by Regulation 990/93 the Council gave effect to the decision of the Community and its Member States, meeting within the framework of political cooperation, to have recourse to a Community instrument to implement in the Community certain aspects of the sanctions taken against the Federal Republic of Yugoslavia by the Security Council of the United Nations, which, on the basis of Chapter VII of the Charter of the United Nations, adopted Resolutions 713 (1991), 753 (1992) and 787 (1992) and strengthened those sanctions by Resolution 820 (1993)"[36].

In the following paragraphs in the *Bosphorus case* Court stated:

"Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions.

Moreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators"[37].

In cases Behrami and Saramati before the ECHR[38], main question regarded different issues and cannot be compared with *Kadi* case, however it is worth noticing that the Court decided that it would not scrutinize acts and omissions of a state party to the Convention that are covered by the Security Council resolutions and occur prior to, or in the course of, operations under Chapter VII of the Charter of the UN. Also the House of Lords in the *Al-Jedda* case[39] confirms that the application of the ECHR provisions are restricted by virtue of the operation of Articles 25 and 103 of the Charter of the UN[40]. To be objective, it has to be mentioned that there are examples of the national judgments disregarding primacy of the UN system. It is worth to notice such decisions as: U.S. Supreme Court's decisions in the cases Medellin I[41] and Medellin II[42], and even within E.U. the English High Court decision[43].

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[35] *Bosphorus Hava Yallan Turizm & Tikaret Anonym Sirketi v. Ireland*, 42 ECHR (2005).
[36] *Ibid*., para 13.
[37] *Ibid*., para. 22-23. see also cases: Case C-124/95, *R v. HM Treasury and Bank of England, ex parte Centro-Com Srl* [1997] 1 CMLR 555, Case C-177/95, *Ebony Maritime SA v. Prefetto Della Provincia di Brindisi* [1997] 2 CMLR 24.
[38] *Agim Behrami & Bekir Behrami v. France; Ruzhdi Saramati v. France, Germany & Norway*, Joined App. Nos. 71412/01 & 78166/01.
[39] *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, [2007] UKHL 58.
[40] For brief analysis see: Orakhelashvili A., *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, American Journal of International Law, vol. 102, p. 337 (2008).
[41] *Medellin v. Drekte*, 544 U.S. 660 (2005), when the US Supreme Court declined the binding effect of the ICJ judgment over national courts (the ICJ held that the United States had violated the individually enforceable rights guaranteed by Vienna Convention on Consular Relations and must reconsider the convictions).
[42] *Medellin v. Texas*, 128 S.Ct. 1346 (2008), when US Supreme Court ignored the President's determination that state courts must give effect to ICJ judgment (*Avena* case). US Supreme Court held that the signed Protocol of the Vienna Convention did not make the treaty self-

Coming back to the *Kadi* case before the CFI, the Court has stated that it had no jurisdiction because the contested regulation is based on the Security Council Resolution binding all member States:

"Examining first the relationship between the international legal order under the United Nations and the domestic legal orders or the Community legal order, the Court of First Instance ruled that, from the standpoint of international law, the Member States, as Members of the United Nations, are bound to respect the principle of the primacy of their obligations 'under the Charter' of the United Nations, enshrined in Article 103 thereof, which means, in particular, that the obligation, laid down in Article 25 of the Charter, to carry out the decisions of the Security Council prevails over any other obligation they may have entered into under an international agreement (Kadi, para. 181 to 184, Yusuf and Al Barakaat, para. 231 to 234)"[44].

Also the CFI stated that EU Member States are obliged to comply with the SC resolutions, and in the case of a clash between such norm and norms of the EC legal system (with no regard to distinction which, primary or secondary law), the provisions of Community law must be left unapplied[45]. 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"[46].

The ECJ concluded that it is not for the Court to review indirectly whether the Security Council's resolutions in question are themselves compatible with fundamental rights as protected by the community order nor to verify that there has been no error of assessment of the facts and evidence relied on by the SC in support of the measures it has taken[47]. Notwithstanding this conclusion, the CFI stated that it is empowered to check indirectly the lawfulness of the SC resolutions with regard to *ius cogens* norms because, as the CFI stated, there exists in international law one limit to the principle that the SC resolutions have binding effect. Such a limitation is the operation of *ius cogens* norm, and resolutions must observe the 'fundamental peremptory provisions of *ius cogens'*. Therefore, a resolution which violates such a norm is not binding[48].

executing and, therefore, the treaty is not binding upon state courts until it is enacted into law by Congress.

[43] *A,K,M,Q & G v. H.M. Tresury*, [2008] EWHC (Admin.) 869 [49]. "Orders in Council, made purportedly to give effect to United Nations resolutions freezing the assets of terrorist organizations and their adherents, were to be quashed since, among other faults, they had been improperly made outside the parliamentary process and were bad as creating criminal law of insufficient certainty", see The Times, 5th May 2008.

[44] Cited from ECJ *Kadi* case, para 74.

[45] CFI *Kadi* case, para. 189 and 190, CFI *Yusuf and Al Barakaat*, para. 239 and 240.

[46] CFI *Kadi* case, para. 225.

[47] CFI *Kadi* case, para. 283 and 284.

[48] CFI *Kadi* case, para 230.

But, the CFI concluded that in the current dispute, no infringement of *ius cogens* norms could be found[49].

The ECJ in its judgment mainly disagree with the CFI rulings. On the one hand, the ECJ confirms primacy of the SC resolutions stating that:

"[…] it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with jus cogens"[50].

But afterward, the ECJ somehow has managed to interpret its own jurisprudence in the way, which allows it to state that:

"[…] it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations"[51].

Then the ECJ, following previous decision in *Intertanko v. Secretary of State for Transportation*[52] has determined that the Charter of the UN would have primacy over acts of secondary Community law, however:

"That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part"[53].

„[…] The Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations"[54].

The CFI and the ECJ judgments in *Kadi* cases have raised intriguing questions regarding international law.

Firstly, it seem to be true, following CFI argumentation, that the resolutions of the SC fall outside the ambit of the Court's judicial review. The primacy of the Charter of the UN should not be seriously questioned under international law. The European Union legal system, whatever uniqueness would be granted to it by the ECJ, is based on international agreement. Primacy of the Charter of the UN is ensured in article 103, which states that "in the event of a conflict between the obligations of the Members of the United Nations under the

[49] *Ibid*., para. 242, 243, 251, 286, 288.
[50] ECJ *Kadi* case, para 287.
[51] *Ibid.*, para. 299.
[52] Case C-308/06, *Intertanko and Others* [2008] ECR I-0000, para. 42.
[53] ECJ *Kadi* case, para 308.
[54] *Ibid*., 326.

present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

Also it has to be noticed that the competence to review the SC resolutions has to be derived from the Charter of the UN. As professor Klein rightly observed, "there does not exist any direct judicial remedy neither for a State nor an individual to keep a check on whether the Security Council has violated its human rights obligations whatever, they may be"[55]. Therefore, even the General Assembly of the United Nations (GA) does not seem to be entitled to carry out such a review, even though an advisory opinion of the ICJ, since such power has not been vested to the GA under the Charter of the UN.

The unique possibility to answer such question would arise if the SC itself would request the ICJ to give an advisory opinion. And eventually such question could arise as a prejudicial issue in an inter-State dispute before the ICJ, but this is very doubtful, especially after *Lockerbie* case.

Secondly, the use of the term 'immunity from jurisdiction' in accordance to the SC resolutions in the CFI judgment[56] does not seem to be very precise. In the opinion of the author, primacy of the UN Charter does not mean that the EU legislations, applying the SC resolutions are immune from jurisdiction. Jurisdictional immunity, mostly associated with state immunity, means non-justiciability or jurisdictional bar[57]. In the current dispute, it is worth to highlight the opinion of the United Kingdom[58] that the

"*Court's review ought to be confined, on the one hand, to ascertaining whether the rules on formal and procedural requirements and jurisdiction imposed in this case on the Community institutions were observed and, on the other hand, to ascertaining whether the Community measures at issue were appropriate and proportionate in relation to the resolutions of the Security Council which they put into effect*"[59].

Therefore, the court review is not barred merely on the fact that the EU legislation adopt the SC resolution, but it is severely restricted.

Thirdly, some serious doubts can be raised about the arguments of the Court, regarding the power of the Court to indirectly check the lawfulness of the SC resolutions with regard to *ius cogens* norms. The one unique certainty regarding *ius cogens* norms is that they are highly controversial[60]. The definition of peremptory norms, contained in Article 53 of Vienna Convention on the Law

[55] Klein E., *International Sanctions From a Human Rights Law perspective: Some Observations on the Kadi Judgment of the European Court of Justice*, Intercultural Human Rights Law Review, vol. 4, p. 112, 2009, at 114.
[56] See para., 288.
[57] See Brownlie I., *Principles of Public International Law*, 7th ed. Oxford University Press 2008. p 324 and subsequent.
[58] Expressed in the CFI *Kadi* case, para 217.
[59] *Ibid*.
[60] See e.g.: Caplan L.M., *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, American Journal of International Law, vol. 97, p. 741 2003; Bianchi A., *Human Rights and the Magic of Jus Cogens*, European Journal of International Law, vol. 19, no. 3; Linderfalk U., *The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?* European Journal of International Law, vol. 18, no. 5.

of Treaties[61] applies only to conventional regimes (particularly to the problems of invalidating and terminating conflicting treaties). Scholars are far from being virtually uniform in deciding the catalogue of such norms[62] and the ICJ is more than reluctant to refer to the *ius cogens* norms. It seems that it would be better to preserve coherency of international law and not to introduce the concept of *ius cogens* as a basis for indirect review of the SC Resolutions. However, the introduction of *ius cogens* norms has blurred the proper conclusion of the CFI regarding the UN Charter primacy.

The ECJ judgment in the *Kadi* case has rendered serious doubts in the light of public international law. Neither a domestic law, nor a legal system of regional economic organizations may not be invoked as justification for a State's failure to perform an obligation under the Charter of the UN[63].

In the present case, there are no basis to undermine legal validity of the SC decisions (especially adopted under Chapter VII), and without doubt all UN Member States are bound to carry out those decisions. The States may participate in international organizations, whatever their legal form is, and whatever level of integration between member States within such an organization is (from highly integrated as EU to others e.g. ASEAN or OECD). Also it is up to those organizations (and their member states) to decide how to adopt the SC decisions (or within the framework of international organization or directly by the member States). However, still all the UN member States are bound to comply with the SC decisions and no State can shield itself from such obligations, because of conflict of its obligations with international/regional organizations. In the case of the conflict of State obligations between UN and other international/regional organization, the wording of the Article 103 of the Charter of the UN is more than clear.

It is believed that EC legal order is of the *sui generis* character[64] and "by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply"[65]. Some scholars are presenting far-reaching opinions, which are at least very controversial:

"The ECJ restored [in the Kadi case] the sui generic, closed, self-contained, autonomous and dualistic model of the EC legal order vis-à-vis international law, emphasizing that no international agreement can prejudice the Community's constitutional order and that 'the question of the Court's jurisdiction arises in the context of the internal and autonomous legal order of the Community'. The ECJ reiterated that it is EC law which will determine the manner in which the UN obligations will be incorporated into the EC legal order and it is the EC judicature which will determine the precise force of UN

[61] Vienna Convention on the Law of Treaties, 1969. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

[62] See far reaching deliberations regarding *ius cogens* in: Orakhelashvili A., *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, European Journal of International Law, vol. 16, no. 1.

[63] Article 27 of the VCLT stipulates: "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46".*

[64] See 26/62 *Van Gend en Loos* [1963] ECR 1, stating that EEC Treaty is more than an agreement which merely creates mutual obligations between the Contracting States.

[65] Case 6/64 *Costa v ENEL* [1964] ECR 685.

obligations (or implementing EC measures) within the EC hierarchy of norms, according to the EC Treaty and not merely on the basis of Article 103 of the UN Charter"[66].

Whatever form of the legal system of the EU will be determined, it cannot be excluded from the operation within the framework of international law. The author may not accept the argument, that EU legal system (or former EEC or EC legal system) and the EU itself, has evolved magically from international treaty-based organization (even supranational) into even-treaty-based organization but not yet subordinated by the UN Charter and therefore autonomous. In the author's opinion, autonomy of the EU legal system means its unique relationship with legal systems of the Member States. Such autonomy cannot affect the Charter of the UN and obligations derived from it.

In the light of the ECJ *Kadi* decision, it cannot be precluded that universally applicable UN SC resolutions would be differently applied within EU. This hypothetical situation shows that such attitude undermine the legal and political relevance of Security Council resolutions, and indirectly upset the whole UN mechanism for the maintenance or restoration of international peace and security and it leads to fragmentation of international law[67]. What is more, such reasoning if applied in other international organizations would hamper the universality of UN system.

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[66] Harpaz G., Judicial Review by the European Court of Justice of UN Smart Sanctions Against Terror in the *Kadi* Despute, European Foreign Affairs Review, 2009, at p. 76 and subs. for the reasoning of such EC Law supremacy. See also Nettesheim M., *U.N. Sanctions against Individuals: A Challenge to the Architecture of European Union Governance*, Common Market Law Review 2007.

[67] See Pauwelyn J., *Bridging Fragmentation and Unity: International Law as a Universe of Iter-Connected Islands*, Michigan Journal of International Law, vol. 25, 2003-2004.