II. THE UNITED NATIONS AND CONSTITUTIONAL ORDERS

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Constitutional Democracy Encounters International Law: Terms of Engagement[*]

I. Introduction

There is a tension inherent to the idea of constitutional self-government, as it is understood by many constitutional lawyers, and the claims to authority made by international law. That tension has long been covered up by the fact that international law covered merely a relatively narrowly circumscribed domain of foreign affairs, was solidly grounded in state consent and generally left questions of interpretation and enforcement to states. Much of contemporary international law no longer fits that description. International law has expanded its scope, loosened its link to state consent and strengthened compulsory adjudication and enforcement mechanisms. Not surprisingly, one of the most pressing questions of contemporary constitutional law is how to think about the relationship between the national constitution and international law.

In the first decades of the twentieth century, jurisprudential debates among international lawyers thinking about the relationship between national and international law focused on whether the legal world exhibits a monist or a dualist structure. Under a monist conception of the legal world international and national law constitute one vertically integrated legal order in which International Law is supreme. Dualists insist on the conceptual possibility, historical reality and normative desirability of a non-monist conception of the legal world. Under a dualist (or pluralist) conception of the legal world, different legal systems on the national and international levels interact with one another on the basis of standards internal to each legal system.

The debates between Monists and Dualists have generally subsided. As is often the case with academic debates, the debate did not end with the victory for one side by way of a generally recognized knock down argument. The debate just withered away, as doubts arose about the fruitfulness of the question. After the Second World War a more pragmatic,

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doctrinally focused approach gained ground. Most post-WWII international law textbooks spend a couple of pages providing an historic overview of debates concerning Monism and Dualism, point out that practice is pragmatic and not adequately described by a radical version of either and then move on to engage with specific aspects of domestic practice.

This post-WWII pragmatic style of thinking about the relationship between national and international law is mostly focused on an analysis of constitutional doctrine as it has emerged as a matter of domestic legal practice. But the emphasis on doctrine and practice as opposed to jurisprudential theory should not obfuscate the fact that the approach taken is in an important sense dualist. The relationship between national and international law is generally taught and written about as the *foreign relations law of the state*, as it has been set out *in the constitution* and reflected in constitutional practice. The very idea that the national constitution is decisive for generating the doctrines that structure the relationship between national and international law is dualist. This is true, even where the constitution determines that international law is part of the law of the land.

How the constitution manages the interface between national and international law varies across constitutional jurisdictions. But notwithstanding significant variance across constitutional democracies, the basic structure of post-WWII constitutional doctrines tends to be similar. National constitutions typically assign a status to international law within the domestic hierarchy of norms giving rise to specific *conflict rules*. Typically international law is assigned a lower status than the constitution but is at least on par with ordinary statutes. This means that a statute enacted prior to the entry into force of a duly ratified Treaty, for example, is trumped by the Treaty, but the Treaty in turn is trumped by a provision of constitutional law. Furthermore these doctrines tend to assign a status to international law that depends on its *source*. Treaties are assigned one rule, customary international law is assigned another. Furthermore there are typically judicially developed rules determining whether a Treaty is self-executing or directly effective and can thus be judicially enforced without further implementing legislation. There are also rules of construction typically requiring domestic statutes to be interpreted so as to avoid a conflict with international law if possible.

This way of thinking about managing the relationship between national and international law is still relevant to contemporary scholarship and practice. Yet much innovative contemporary writing on the relationship

between national and international law no longer focuses on these doctrines. With the spread of liberal constitutional democracy after the end of the Cold War and with the spread of constitutional courts and international courts and tribunals, national courts have widely begun to engage international law in new ways that are not captured by traditional doctrinal frameworks. Just as the debates between dualists and monists at some point became unreal in a world where courts were in fact crafting doctrines grounded in national constitutional law to engage international law, today the practice of many national courts seems to have made the doctrines and categories of the post-WWII constitutional doctrinalists seem unreal. And just as the doctrinalists after the Second World War emphasized the normative virtues of pragmatism and realism, the contemporary scholars emphasize their keen focus on what is actually going on and embrace the discursive and deliberative nature of the practice they are describing.

What has been missing in these debates, however, is a well-developed normative framework for thinking about the relationship between national and international law. Even though there are good reasons to have left behind the fruitless debates between Monists and Dualists, there are high costs associated with an anti-theoretical stance. Those who adopt an anti-theoretical attitude are prone to make one of three mistakes. The first is to get lost in the historical intricacies of a particular political tradition of separation of powers in foreign affairs and emphasize a certain statesmanlike pragmatism that is most likely guided by the unstated presuppositions of such a tradition. Context matters, but it will remain unclear what matters and why without an adequate normative framework to guide engagement with it. The second is to get carried away by a cosmopolitan enthusiasm for international law that is perhaps the *déformation professionelle* of the international lawyer. The third is unqualified enthusiasm for non-hierarchical deliberative networks whose activities transgress traditional doctrinal categories, perhaps the prejudice of choice for scholars attuned to postmodern sensibilities. What is generally missing is the reflection on *the commitments of principle that underlie the tradition of democratic constitutionalism and connecting these to the constitutional doctrines that define the terms of engagement between national and international law*. Only after clarifying the relevant normative concerns is it possible to provide an assessment of these practices with a view to guiding their further development.

II. A Constitutionalist Model: Four Principles of Engagement

How then should citizens in liberal constitutional democracies

engage international law? What are the relevant normative concerns? The following presents a framework for thinking about the moral concerns that any set of doctrines governing the interface between national and international law ought to take into account and reflect.

At the heart of the model are four distinct moral concerns, each captured by a distinct principle. These principles are the *formal principle of international legality, the jurisdictional principles of subsidiarity, the procedural principle of adequate participation and accountability, as well as the substantive principle of achieving outcomes that are not violative of fundamental rights and reasonable.*

The principle of international legality establishes a presumption in favour of the authority of international law. The fact that there is a rule of international law governing a specific matter means that citizens have a reason of some weight to do as that rule prescribes. But this presumption is rebutted with regard to norms of international law that violate to a sufficient extent countervailing normative principles relating to jurisdiction, procedure or outcomes. To put it another way: *Citizens should regard themselves as constrained by international law and set up domestic political and legal institutions so as to ensure compliance with international law, to the extent that international law does not violate jurisdictional, procedural and outcome related principles to such an extent, that the presumption in favour of international law's authority is rebutted.* When assessing concerns relating to jurisdiction, procedure and outcome, each of the relevant principles can either support or undermine the moral force of international law in a particular context.

When citizens in constitutional democracies accept the constraints imposed by an international law that is legitimate as assessed under this approach, they are not compromising national constitutional commitments. Instead, such a respect for international law gives expression to and furthers the values that underlie the commitments to liberal constitutional democracy, properly understood.

Given their pivotal role, the content of these principles deserves some further clarification. Such clarification would ideally occur both in the form of a rich set of examples that illustrate the practical usefulness of the framework in concrete contexts and a more fully developed theoretical account of each of these principles. But here a brief further description of each of these principles will have to suffice.

1. Formal Legitimacy: The Principle of International Legality

The first principle is formal and establishes a *prima facie* case for the duty to obey international law. The principle of international legality generally requires that addressees of international law should obey it. International law establishes a prima facie duty to obey it and deserves the respect of citizens in liberal constitutional democracies simply by virtue of it being the law of the international community. International law serves to establish a fair framework of cooperation between actors of international law in an environment where there is deep disagreement about how this should best be achieved. In order for international law to achieve its purpose, those who are addressed by its norms are morally required to generally comply, even when they disagree with the content of a specific rule of international law. There is *a prima facie duty of civility* to comply with even those norms of international law that the majority of national citizens believe to be deficient. Otherwise international law has no chance of achieving its purpose.

A commitment to the principle of international legality says nothing about the proper scope of international law. It certainly provides no grounds for some international lawyer's enthusiasm for expanding the reach of international law to as many domains as possible. Nor does it make a fetish of legality by suggesting that legal forms of dispute resolution are superior to other forms. But it does suggest that once a norm of international law has come into existence, its very existence provides a reason to comply with it. In this sense it establishes a presumption in favour of compliance with international law.

In the European world at the beginning of the century, Max Weber could claim that formal legality could replace charisma or tradition as *the* source of legitimacy. After the Second World War, such a thin notion of legitimacy has been gradually replaced by the considerably richer idea of constitutional legitimacy. To be fully legitimate more is required of a rule than just its legal pedigree. Formal legality matters, but it is not the only thing that matters. More specifically, there is a range of other concerns that provide countervailing considerations and suggest that under certain circumstances the presumption in favour of the legitimacy if international law can be rebutted. These concerns are related to a more substantive commitment to liberal-democratic governance. Concerns about democratic legitimacy should best be understood as concerns about three analytically distinct features of international law. These concerns are related to jurisdiction, procedure and outcomes, respectively. The presumption in

favour of compliance with international law can be overridden, by reasons of sufficient weight relating to jurisdiction, procedure or outcome. Once there are such reasons, citizens in a constitutional democracy ought to think of themselves as free to deviate from the requirements of international law. In these cases, citizens have good reasons to conceive of themselves as free to generate and apply the independent outcomes of the domestic legal and political process.

2. Jurisdictional Legitimacy: The Principle of Subsidiarity

The first of those three concerns is captured by the *principle of jurisdictional legitimacy or subsidiarity.* Subsidiarity is in the process of replacing the unhelpful concept of "sovereignty" as the core idea that serves to demarcate the respective spheres of the national and international. The principle of subsidiarity found its way into contemporary debates through its introduction to European constitutional law in the Treaty of Maastricht. It ought to be conceived as an integral feature of international law as well.

In Europe it was used to guide the *drafting* of the European Constitutional Treaty signed in October 2004. It is a principle that guides the *exercise* of the European Union's power under the Treaty. And it guides the *interpretation* of the European Union's laws. As such, it is a structural principle that applies to all levels of institutional analysis, ranging from the big picture assessment of institutional structure and grant of jurisdiction to the microanalysis of specific decision-making processes and the substance of specific decisions.

At its core the principle of subsidiarity requires any infringements of the autonomy of the local level by means of preemptive norms enacted on the higher level to be justified by good reasons. Any norm of international law requires justification of a special kind.

It is not enough for it to be justified on substantive grounds, say, by plausibly claiming that it embodies good policy. Instead the justification has to make clear what exactly would be lost if the assessment of the relevant policy concerns was left to the lower level. With exceptions relating to the protection of minimal standards of human rights, *only reasons connected to collective action problems*—relating to externalities or strategic standard setting giving rise to "race to the bottom" concerns for example—are good reasons to ratchet up the level on which decisions are made. And even when there are such reasons, *they have to be of sufficient weight to override any disadvantages connected to the preemption of more decentralized rule-*

making. On application, subsidiarity analysis thus requires a two-step test. First, reasons relating to the existence of a collective action problem have to be identified. Second, the weight of these reasons has to be assessed in light of countervailing concerns relating to state autonomy in the specific circumstances. This requires the application of a "proportionality test" or "cost-benefit analysis" that is focused on the advantages and disadvantages of ratcheting up the level of decision-making. This means that, on application this principle, much like the others, requires saturation by arguments that are context sensitive and most likely subject to normative and empirical challenges. Its usefulness does not lie in providing a definitive answer in any specific context. But it structures inquiries in a way that is likely to be sensitive to the relevant empirical and normative concerns.

There are good reasons for the principle of subsidiarity to govern the allocation and exercise of decision-making authority wherever there are different levels of public authorities. These reasons are related to sensibility towards locally variant preferences, possibilities for meaningful participation and accountability and the protection and enhancement of local identities that suggest the principle of subsidiarity ought to be a general principle guiding institutional design in federally structured entities. But the principle has particular weight with regard to the management of the national/international divide. In well-established constitutional democracies instruments for holding accountable national actors are generally highly developed. There is a well-developed public sphere allowing for meaningful collective deliberations, grounded in comparatively strong national identities. All of that is absent on the international level.

The principle of subsidiarity is not a one-way street, however. Subsidiarity related concerns may, in certain contexts, strengthen rather than weaken the comparative legitimacy of international law over national law. If there are good reasons for deciding an issue on the international level, because the concerns addressed are concerns best addressed by a larger community, then the international level enjoys greater jurisdictional legitimacy. The idea of subsidiarity can provide the grounds for strong claims about the *desirability for transnational institutional capacity-building* in order to effectively address collective action problems and secure the provision of global public goods. And even though the principle generally requires contextually rich analysis, there are simple cases. The principle can highlight obvious structural deficiencies of national legislative processes with regard to some areas of regulation.

Imagine that in the year 2010 a UN Security Council Resolution

enacted under Chapter VII of the UN Charter imposes ceilings and established targets for the reduction of carbon dioxide emissions aimed at reducing global warming. Assume that the case for the existence of global warming and the link between global warming and carbon dioxide emissions has been conclusively established. Assume further that the necessary qualified majority in the Security Council was convinced that global warming presented a serious threat to international peace and security and was not appropriately addressed by the outdated Kyoto Protocol or alternative Treaties that were open to signature, without getting the necessary number of ratifications to make them effective. Finally, assume that a robust consensus had developed that Permanent Members of the newly enlarged and more representative UN Security Council were estopped from vetoing a UN Resolution, if four-fifths of the Members approved a measure.

Now imagine a powerful constitutional democracy, such as the United States, has domestic legislation in force that does not comply with the standards established by the Resolution. The domestic legislation establishes national emission limits and structures the market for emission trading, but goes about setting far less ambitious targets and allowing for more emissions then the international rules promulgated by the Security Council allow. Domestic political actors invoke justifications linked to life-style issues and business interests. National cost-benefit analysis, they argue, has suggested that beyond the existing limits it is better for the nation to adapt to climate change rather than incurring further costs preventing it. After due deliberations on the national level a close but stable majority decides to disregard the internationally binding Security Council resolutions and invokes the greater legitimacy of the national political process. Yet, assume that the same kind of cost-benefit analysis undertaken on the global scale has yielded a clear preference for aggressively taking measures to slow down and prevent global warming along the lines suggested by the Security Council Resolution.

In such a case, the structural deficit of the national process is obvious. National processes, if well designed, tend to appropriately reflect values and interests of national constituents. As a general matter, they do not reflect values and interests of outsiders. Since in the case of carbon dioxide emissions there are externalities related to global warming, national legislative processes are hopelessly inadequate to deal with the problem. To illustrate the point: The U.S. produces approximately 25% of the world's carbon dioxide emissions, potentially harmfully affecting the well-being of peoples worldwide. Congress and the EPA currently make decisions with

regard to the adequate levels of emissions. Such a process clearly falls short of even basic procedural fairness, given that only a small minority of global stakeholders is adequately represented in such a process. It may well turn out to be the case that cost-benefit analysis conducted with the national community as the point of reference suggests that it would be preferable to adapt to the consequences of global warming rather than incurring the costs trying to prevent or reduce it. In other jurisdictions, the analysis could be very different. More importantly, cost-benefit analysis conducted with the global community as the point of reference could well yield results that would suggest aggressive reductions as an appropriate political response. The jurisdictional point here is that *the relevant community that serves as the appropriate point of reference for evaluating processes or outcomes is clearly the global community.* When there are externalities of this kind, the legitimacy problem would not lie in the Security Council issuing regulations. Legitimacy concerns in these kinds of cases are more appropriately focused on the absence of effective transnational decision-making procedures and the structurally deficient default alternative of domestic decision-making.

The principle of subsidiarity, then, is Janus-faced. It serves not only to protect state autonomy against undue central intervention. It also provides a framework of analysis that helps to bring into focus the structural underdevelopment of international law and institutions in some policy areas. In these areas, arguments from subsidiarity help strengthen the authority of international institutions engaging in aggressive interpretation of existing legal materials to enable the progressive development of international law in the service of international capacity-building.

3. Procedural Legitimacy: The Principle of Adequate Participation and Accountability

One reason why national law is thought to enjoy comparatively greater legitimacy than anything decided on the international level is the idea that the core depositories of legitimacy are electorally accountable institutions. On the national level, legislative bodies constituted by directly elected representatives make core decisions. There are no such institutions on the international level. Customary international law is generated by an ensemble of actors ranging from democratically legitimate and illegitimate governments, unelected officials of international institutions, judges and arbitrators, scholars and NGOs. Treaties, on the other hand, are legitimate to the extent and exactly because they tend to require national legislative endorsement in some form or another. Some claim that problems arise when

Treaties create institutions in which unelected officials in conjunction with other actors may create new obligations, which, at the time the Treaty was signed, were impossible to foresee. National law is superior because it tends to be parliamentary law, which is law authorized by a directly representative institution.

Many things would need to be said to address this claim. I will confine myself to two core points.

First, even on the national level, parliament as the traditional legislative forum has lost significant ground in the twentieth century in constitutional democracies. Parliament is no longer considered as the exclusive institutional home of legitimate decision-making on the domestic level. On the one hand, this is linked to the emergence of the administrative state. For what generally are believed to be good reasons, the turn to the administrative state in the first half of the twentieth century has involved significant delegation of regulatory authority to administrative institutions of various kinds. Whether in the area of monetary policy, anti-trust policy or environmental policy, many of the core decisions are no longer made by parliament. This is generally justified on diverse grounds ranging from the expertise of decision-makers, the greater possibilities of participation for the various stakeholders involved, and the like. The argument that this is of little significance because legislatures retain the possibility to legislate whenever there is the requisite majority to do so is not irrelevant. But as a matter of institutional practice and of political realism, the effective control over administrative decision-making that exists in virtue of such a possibility is modest. On the other hand, liberal constitutional democracies have developed in the second half of the twentieth century to include constitutional courts with the authority to strike down laws generated by the legislative process on grounds of constitutional principle. And constitutional courts have engaged in such a practice more or less aggressively in many jurisdictions. In many jurisdictions, they enjoy more public support than any other political institution as a result. The reasons generally invoked to justify judicial review of legislative decisions are well-rehearsed. They include the comparative advantage to secure the rights of individuals against inappropriate majoritarian intervention, concerns that are particularly pertinent with regard to groups disadvantaged in the political process as well as other instances in which political failures of various kinds suggest a comparative advantage for judicial review of other actors' decisions. It is important to take note of a bad argument for judicial review. Judicial review is not generally justified because the necessary supermajority for constitutional entrenchment has determined that a specifically circumscribed

right ought to be protected. To the extent that this argument casts constitutional courts as the mouthpiece and mechanical instrument of legislative self-restraint as defined by the constitutional legislature, it is misleading at best. In most jurisdictions, a core task of constitutional courts is to interpret highly abstract constitutional clauses invoking equality, liberty, freedom of speech, property or due process. Courts in many jurisdictions engage in elaborate arguments of principle about why this or that policy concern ought to take precedence over competing concerns in a particular context. To that extent constitutional courts can only be understood as political actors in their own right. If it is desirable for there to be such an actor, it can only be because of widely held beliefs about the comparative advantage of the judicial process over the ordinary political process across the domain that falls within the constitutional jurisdiction of the court.

It turns out that any robust version of majoritarian parliamentarianism cannot be understood as the ideal underlying contemporary political practice in liberal constitutional democracies. Instead, there is a predominance of a more pragmatic approach. That approach does take seriously concerns relating to checks and balances, accountability, participation, responsiveness, transparency and so on. But over the whole spectrum of political decision-making, constitutional democracies allocate decision-making authority to a wider range of decision-makers than a robust parliamentarianism is willing to acknowledge. This draws attention to two points of significance for assessing the comparative legitimacy of international and national law. First much of international law that is in potential conflict with outcomes of the national political process competes with national rules determined either by administrative agencies or constitutional courts, suggesting that the argument from democracy has less bite at least in such cases. And even if international law does compete with the outcomes of the national parliamentary process, the domestic example suggests that under some circumstances the outcomes of a non-parliamentary procedure may be preferable over the outcome of a parliamentary procedure. Given that the prerequisites for meaningful, electorally accountable institutions on the international level are missing, the absence of electorally accountable institutions on the international level is insufficient to ground claims that the international legal process is deficient procedurally.

On the other hand, *the absence of directly representative institutions on the transnational level and the difficulty of establishing a meaningful electoral process on the global level is one of the reasons why the principle*

of subsidiarity has greater weight when assessing institutional decision-making beyond the state, than within a national community. It is not surprising that in well-established federal systems concerns about jurisdictional issues are typically less pronounced. A well-developed national political process involving strong electorally accountable institutions, a cohesive national identity and a working public sphere on the national level lower the costs of ratcheting up decision-making. In the European Union, on the other hand, European elections don't mean much as the Commission in conjunction with the Council—consisting of Members of the executive branch of Member State governments—remain largely in control of the legislative agenda. Limiting the scope of what the European Union can do is regarded as a core concern. It ought to be at least as much of a concern when it comes to international law.

But even when international law plausibly meets jurisdictional tests, it could still be challenged in terms of procedural legitimacy. The *principle of procedural legitimacy* focuses on the procedural quality of the jurisgenerative process. Electoral accountability may not be the right test to apply, but that does not mean that there are no standards of procedural adequacy. Instead the relevant question is whether procedures are sufficiently transparent and participatory and whether accountability mechanisms exist to ensure that decision-makers are in fact responsive to constituents concerns. The more of these criteria are met, the higher the degree of procedural legitimacy. In many respects mechanism and ideas derived from domestic administrative law may be helpful to give concrete shape to ideas of due process on the transnational level. . . . Yet it is unlikely that the idea of procedural adequacy as it applies to the various transnational institutional processes will translate into a standard template of rules and procedures comparable to, say, the US Administrative Procedure Act. When it comes to assessing procedures as varied as dispute resolution by the WTO's DSB [Dispute Settlement Body], UN Security Council decision-making under Chapter VII or prosecutions under the newly established ICC, a highly contextual analysis that takes seriously the specific function of the various institutions will be necessary.

4. Outcome Legitimacy: Achieving reasonable outcomes

The final concern is related to outcomes. Bad outcomes affect the legitimacy of a decision and tend to undermine the authority of the decision-maker. Yet an outcome related principle has only a very limited role to play for assessing the legitimacy of any law. Principles related to outcomes only play a limited role because disagreements about substantive policy are

exactly the kind of thing that legal decision-making is supposed to resolve authoritatively. It is generally not the task of addressees of norms to re-evaluate decisions already established and legally binding on them. This is why the legitimacy of a legal act can never plausibly be the exclusive function of achieving a just result, as assessed by the addressee. Were it otherwise, anarchy would reign. But that does not preclude the possibility of having international rules that cross a high threshold of injustice or costly inefficiency be ignored by a national community on exactly the grounds that they are deeply unjust or extremely costly and inefficient. What needs to be clear, however, is that any *principle of substantive reasonableness* is applied in an appropriately deferential way that takes into account the depth and scope of reasonable disagreement that is likely to exist in the international community. In particular, where jurisdictional legitimacy weighs in favour of international law and international procedures were adequate, there is a strong presumption that a national community's assessment of the substantive outcome is an inappropriate ground for questioning the legitimacy of international law and denying its moral force.

III. The Constitutionalist Framework Applied: Illustrations

[What] then are the institutional implications of a constitutional model? How would citizens, committed to a constitutionalist approach, structure their domestic institutions with regard to international law? What should the terms of engagement between national and international law be?

Here there are no quick and easy answers. In part this is because each jurisdiction has, as its starting point, its own tradition and institutions addressing foreign affairs which would need to be carefully developed within their own constitutional framework. In part it is because a great deal of additional work would need to be done to analyze how these concerns play out in various areas of international law. On application, there is no one-size-fits-all solution.

The following can do little more than provide some illustrations concerning the kind of practices that courts thinking about the enforcement of international law might engage in. . . .

Is it appropriate for acts by international institutions to be subjected to national constitutional scrutiny? International institutions, from the European Union to the United Nations have an increasingly important role to play in global governance. States have delegated authority to these institutions in order to more effectively address the specific tasks within

their jurisdictions. These institutions make decisions that directly effect people's lives. Increasingly this gives rise to situations in which constitutional or human rights of individuals are in play. When these decisions are enforced domestically, should national courts apply to them the same constitutional rights standards they apply to acts by national public authorities?

Here there are two opposing intuitions in play. The first focuses on the nature of the legal authority under which international institutions operate. International institutions are generally based on Treaties concluded between states. These Treaties are accorded a particular status in domestic law. If these Treaties establish institutions that have the jurisdiction to make decisions in a certain area, these decisions derive their authority from the Treaty and should thus have at most the same status as the Treaty as a matter of domestic law. Since in most jurisdictions Treaties have a status below constitutional law, any decisions enforced domestically must thus be subject to constitutional standards.

The opposing intuition is grounded in functional sensibilities. Constitutions function to organize and constrain domestic public authorities. They do not serve to constrain and guide international institutions. Furthermore international institutions typically function to address certain coordination problems that could not be effectively addressed on the domestic level by individual states. Having states subject decisions by international institutions to domestic constitutional standards undermines the effectiveness of international institutions and is incompatible with their function. So both the function of the domestic constitution and the function of international institutions suggest that domestic constitutional rights should not be applied to decisions by international institutions at all.

In its recent *Bosphorus* decision, [*Bosphorus Hava Yollari Turizm v. Ticaret Anonim Sirketi v. Ireland* (2005)] the European Court of Human Rights had to address just this kind of question, and it did so developing a doctrinal framework that can serve as an example of the application of the framework presented here. To simplify somewhat, the applicant, Bosphorus, was an airline charter company incorporated in Turkey, which had leased two 737-300 aircraft from Yugoslav Airlines. One of these Bosphorus operated planes was impounded by the Irish Government while on the ground in Dublin airport. By impounding the aircraft the Irish government implemented EC Regulation 990/93, which in turn implemented UN Security Council Resolution 820 (1993). UN Security Council Resolution 820 was one of several resolutions establishing sanctions against the Federal

Republic of Yugoslavia in the early 1990s designed to address the armed conflict and human rights violations taking place there. It provided that states should impound, *inter alia*, all aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia. As an innocent third party that operated and controlled the aircraft, Bosphorus claimed that its right to peaceful enjoyment of its possessions under Art. 1 of Protocol No. 1 to the Convention had been violated.

The ECtHR is, of course, not a domestic constitutional court, but itself a court established by a Treaty under international law. But with regard to the issue it was facing it was similarly situated to domestic constitutional courts. Just as the UN Security Council or the European Union—the two international institutions whose decisions have led to the impounding of the aircraft—are not public authorities directly subject to national constitutional control, they are not directly subject to the jurisdiction of the ECtHR either. Just as only national public authorities are generally addressees of domestic constitutions, the ECtHR is addressed to public authorities of signatory states.

The Court began by taking a formal approach: At issue were not the acts of the EU or the UN, but the acts of the Irish government impounding the aircraft. These acts unquestionably amounted to an infringement of the applicant's protected interests under the Convention. The question is whether the government's action was justified. Under the applicable limitations clause, the government's actions were justified if they struck a fair balance between the demands of the general interest in the circumstances and the interests of the company. A government's actions have to fulfill the proportionality requirement. It is at this point that the court addresses the fact that the Irish government was merely complying with its international obligations when it was impounding the aircraft. The Court held that compliance with international law clearly constituted a legitimate interest. The Court recognized "the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organizations." But that did not automatically mean that a state could rely on international law to completely relieve itself from the human rights obligations it had assumed under the ECHR. Instead the Court "reconciled" the competing principles—ensuring the effectiveness of international institutions and the idea of international legality on the one hand and outcome-related concerns (the effective protection of human rights under the ECHR) on the other—by establishing a doctrinal framework that strikes a balance between the competing concerns.

First, the Court held that state action taken in compliance with international legal obligations is generally justified "as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides." If an international institution provides such equivalent protection, this establishes a *general presumption* that a State has not departed from the requirements of the Convention when it merely implements legal obligations arising from membership of such an international institution. If no equivalent human rights protection is provided by that international institution, the ECtHR will subject the state action to the same standard as it would if it were acting on its own grounds, rather than just complying with international law. When a general presumption applies, this presumption can be *rebutted* in the circumstances of the particular case, when the protection of Convention rights was *manifestly deficient*.

Under the circumstances, the Court first established that the international legal basis on which the Irish government effectively relied was the EC Regulation that implemented the UN Security Council Resolution and *not* the UN Security Council Resolution itself, which had no independent status as a matter of domestic Irish law. It then engaged in a close analysis of the substantive and procedural arrangements of the European Community as they relate to the protection of human rights. Given in particular the role of the ECJ as the enforcer of last resort of human rights in the European Community the ECtHR concluded that the European Community was an international institution to which the presumption applied. Since this presumption had not been rebutted in the present case it held that the Irish government had not violated the Convention by impounding the aircraft.

This approach may be generally satisfactory with regard to legislative measures taken by the European Community and reflects sensibilities towards constitutionalist principles. But in an important sense it dodges the issue. In this case the EC itself had merely mechanically legislated to implement a UN Security Council Resolution. And it is very doubtful that the ECtHR would have held that UN Security Council decisions deserve the same kind of presumption of compliance with human rights norms as EC decisions. It is all very well to say that European citizens are adequately protected against acts of the EC generally. But this just raises the issue what adequate protection amounts to, when the substantive decision has been made *not* by EC institutions, but by the UN Security

Council. How should the European Court of Justice go about assessing, for example, whether EC Regulation 990/93, which implemented the UN Security Council Resolution, violated the rights of Bosphorus as guaranteed by the European Community? Should the European Court of Justice, examining the EC Regulation under *the EC's* standards of human rights, accord special deference to the Regulation, because it implemented UN Security Council obligations?

There is no need to make an educated guess about what the ECJ would do. The ECJ had already addressed the issue. Bosphorus had already litigated the issue in the Irish Courts before turning to the ECtHR. The Irish Supreme Court made a preliminary reference to the European Court of Justice under Art. 234 ECT[the Treaty Establishing Body of the European Community], to clarify whether or not EC law in fact required the impounding of the aircraft, or whether such an interpretation of the regulation was in violation of the human rights guaranteed by the European legal order. In assessing whether the regulation was sufficiently respectful of Bosphorus's rights to property and its right to freely pursue a commercial activity, the ECJ ultimately applied a proportionality test. The general purposes pursued by the Community must be proportional under the circumstances to the infringements of Bosphorus's interests.

How then is it relevant that the EC Regulation implemented a UN Security Council Resolution? Within the proportionality test the Court emphasized that the EC Regulation contributed to the implementation at the Community level of the UN Security Council sanctions against the Federal Republic of Yugoslavia. But, unlike the ECtHR, the ECJ did not go on to develop deference rules establishing presumptions of any kind. Instead the fact that the EU Regulation implemented a Security Council decision was taken as *a factor* that gives further weight to the substantive purposes of the Regulation to be taken into account. The principle of international legality was a factor in the overall equation. The purpose to implement a decision by an international institution added further weight to the substantive purpose pursued by the regulation to persuade the Yugoslav government to change its behaviour and help bring about peace and security in the region. But a generous reading of the decision also suggests that beyond formal and substantive considerations jurisdictional considerations were added to the mix: The Court emphasized the fact the concerns addressed by the Security Council concerned international peace and security and putting an end to the state of war. The particular concerns addressed by the UN Security Council went right to the heart of war and peace, an issue appropriately committed to the jurisdiction of an international institution such as the UN. Jurisdictional

concerns, then, give further weight to the fact that the UN had issued a binding decision on the matter. Under these circumstances the principle of international legality has particular weight. The Court concluded that: "As compared with an objective of general interest so fundamental *for the international community* . . . the impounding of the aircraft in question, which is owned by an undertaking based in . . . the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate."

Within the framework used by the ECJ, both the principle of international legality and jurisdictional considerations were factors that the Court relied on in determining whether, all things considered, the EU measures as applied to Bosphorus in the particular case were proportionate. Outcome related concerns did not disappear from the picture. Indeed within proportionality analysis substantive concerns—striking a reasonable balance between competing concerns—framed the whole inquiry and remained the focal point of the analysis. But what counts as an outcome to be accepted as reasonable from the perspective of a regional institution such as the European Union is rightly influenced to some extent by what the international community, addressing concerns of internal peace and security through the United Nations, deems appropriate. Though it may not have made a difference in this particular case, sanctions by the EU enacted under the auspices of the UN Security Council may be held by the ECJ to be proportionate, even when the same sanctions imposed by the EU unilaterally may be held to be disproportionate and thus in violation of rights.

The approaches by the ECtHR and the ECJ both reflect engagement with the kind of moral concerns highlighted above. The ECtHR's more categorical approach is preferable with regard to institutions such as the European Union that have relatively advanced human rights protection mechanisms. With regard to such an institution, a presumption of compliance with human rights seems appropriate, preventing unnecessary duplication of functions and inefficiencies. On the other hand, even when such a presumption does not apply, there are still concerns relating to the principle of international legality in play. Here the kind of approach taken by the ECJ in *Bosphorus* seems to be the right one.

But the case of UN Security Council Resolutions may help bring to light a further complication. It is unlikely that UN Security Council Resolutions would be held by the ECHR as deserving a presumption of compatibility. Procedurally UN Security Council decisions involve only representatives of relatively few and, under current rules, relatively arbitrarily selected states. Their collective decision-making is frequently, to

put it euphemistically, less than transparent.

Council resolutions enacted to combat terrorism in recent years in particular illustrate the severity of the problem. These resolutions typically establish the duty of a state to impose severe sanctions on individuals or institutions believed to be associated with terrorism: Assets are frozen and ordinary business transactions made impossible because an individual or an entity appears on a list. The content of the list is determined in closed proceedings by the Sanctions Committee established under the Resolution. Until very recently this internal procedure did not even require a state who wanted an entity or individual to be on the list to provide reasons. If a state puts forward a name forward to be listed, it would be listed, unless there were specific objections by another state. There is no meaningful participatory process underlying UN Security Council resolutions, and there is no process within the Sanctions Committee that even comes close to providing the kind of administrative and legal procedural safeguards that are rightly insisted upon on the domestic level for taking measures of this kind.

These deficiencies are not remedied by more meaningful assessments during the implementation stage in Europe. The implementation of the Council Resolution by the EC does not involve any procedure or any substantive assessments of whether those listed are listed for a good reason. Implementation is schematic. The fact that a name appears on the list as determined by the UN Security Council is regarded as a sufficient reason to enact and regularly update implementation legislation. As the Sanction Committee of the UN Security Council decides to amend the list of persons to whom the sanction are to apply, the EU amends the implementation Regulation, which is the legal basis for legal enforcement in Member States, accordingly. EU member states have frozen the assets of about 450 people and organizations who feature on this list.

Furthermore there is no administrative type review process and no alternative legal review procedures that provide individuals with minimal, let alone adequate protection against mistakes or abuse by individual states that are represented in the Sanction Committee. The only “remedy” available to individuals and groups who find their assets frozen is to make diplomatic representations to their government that can then make diplomatic representations to the Security Council Sanctions Committee to bring about delisting, if the represented Member States unanimously concur.

Clearly the serious deficiencies that exist on the level of political procedures in this context ought to be incorporated in the ECJ’s framework

for assessing human rights violations by implementation measures concerning UN Security Council Resolutions of this kind. This, at least, would be required by the principle of procedural adequacy within the constitutionalist model developed here. And it could easily be done. For so long as there are serious procedural inadequacies underlying the international decision-making process, any weight assigned to the principle of legality within proportionality analysis should be regarded as neutralized by countervailing procedural concerns.

When applied to cases that have been percolating through the European Court system in recent years, this would no doubt significantly undermine the enforcement of sanctions as required by the UN Security Council Resolutions. Yet the effect of forceful judicial intervention is likely to be salutary. If the Court were to strike down as incompatible with European human rights the significant infringement of individual interests without adequate procedural guarantees, this creates an incentive for European actors to use their political clout to help significantly improve the procedures used by the Sanction Committee to decide whom to list and when to de-list and strengthens their hand in doing so: If these demands are not met, the sanction regime would simply not be fully implementable on the domestic level. States would have to establish independent review mechanisms that fulfill minimal requirements. In this way European courts enforcing European human rights regimes would help preclude the migration of unconstitutional ideas from the international to the regional and national level while providing political actors with the right incentives to use their influence to improve the procedures of global governance.

Yet the European Court of First Instance[*] in *Yusuf and Al-Barakaat International Foundation v. Council and Commission* (2005), the first of many cases that have been filed to have reached the merits stage has shied away from taking such a step. Instead, unlike either the ECJ or the ECtHR, it adopted a straightforward monist approach. It began stating the trite truth that UN Security Council Resolutions were binding under International Law trumping all other international obligations. But it then went on to derive from this starting point that "infringements either of fundamental rights as protected by the Community legal order . . . cannot affect the validity of a

[*] Editor's Note: The Court of First Instance is an independent court attached to the European Court of Justice. Its jurisdiction includes, *inter alia*, direct actions brought by natural or legal persons against Community institutions, actions brought by the Member States against the Commission, and actions brought by the Member States against certain actions of the Council. Appeals can be taken to the European Court of Justice.

Security Council measure or its effect in the territory of the Community." The only standards it could hold these decisions to were principles of *jus cogens*, which the court held were not violated in this case. It can be hoped that on appeal to the ECJ and possible further review by the ECtHR the constitutionalist sensibilities of these Courts will incline them to strike down the EC implementing legislation as incompatible with European human rights guarantees. Taking international law seriously does not require unqualified deference to a seriously flawed global security regime. On the contrary, the threat of subjecting these decisions to meaningful review could help bring about reforms on the UN level. The very prospect of having the decision reviewed by the ECJ has already helped mobilize the discussion of reform efforts at the UN level. If these efforts bear fruit it can be hoped that the ECJ will have reasons not to insist on meaningful independent rights review of individual cases.

III. Conclusions: The Techniques and Distinctions of Graduated Authority

Constitutionalist principles establish a normative framework for assessing and guiding national courts in their attempt to engage international law in a way that does justice both to their respective constitutional commitments and the increasing demands of an international legal system. There are three interesting structural features that characterize any set of doctrines that reflect a commitment to the constitutionalist model.

First, such courts take a significantly more *differentiated* approach than traditional conflict rules suggest. Treaties are not treated alike, even if constitutionally entrenched conflict rules suggest they should be. Instead, doctrines used are sensitive to the specific subject matter of a treaty and the jurisdictional considerations that explains its particular function, as the example of human rights treaties has illustrated. Furthermore, the example of the ECtHR engagement with international institutions illustrated how outcome related considerations are a relevant factor for assessing the authority of its decisions.

Second, the kind of doctrinal structures that come into view suggests a more *graduated authority* than the traditional idea of constitutionally established conflict rules suggest. The doctrinal structures that were analyzed in the examples illustrated *a shift from rules of conflict to rules of engagement*. These rules of engagement characteristically take the forms of a duty to engage, the duty to take into account as a consideration of some weight, or presumptions of some sort. The old idea of using international

law as a "canon of construction" points in the right direction, but does not even begin to capture the richness and subtlety of the doctrinal structures in place. The idea of a "discourse between courts" too is a response to this shift. It captures the reasoned form that engagement with international law frequently takes. But it too falls short conceptually. It is not sufficiently sensitive to the graduated claims of authority that various doctrinal frameworks have built into them. The really interesting questions concern the structures of graduated authority built into doctrinal frameworks: who needs to look at what and give what kind of consideration to what is being said and done.

Finally, the practice is jurisprudentially more complex than traditional models suggest. The traditional idea that the management of the interface between national and international law occurs by way of constitutionally entrenched conflict rules that are focused on the sources of international law is deeply committed to positivist legal thinking. It suggests that the national constitution is the source of the applicable conflict rules. Furthermore, these constitutional conflict rules are themselves typically organized around the "sources" of international law: Treaties and customary international law are each assigned a particular status in the domestic legal order. Both ideas are seriously challenged by actual practice that is attuned to constitutionalist thinking. That practice suggests that moral principles relating to international legality, jurisdiction, procedures and outcomes have a much more central role to play in explaining and guiding legal practice. These principles are not alien to liberal constitutional democracy, appropriately conceived. And they are not alien to international law. But their legal force derives not from their canonical statement in a legal document. Their legal force derives from their ability to make sense of legal practice and to develop it further in a way that fulfills its promise of integrity.

Behrami & Behrami v. France
and
Saramati v. France, Germany & Norway
European Court of Human Rights
Application Nos. 71412/01 and 78166/01 [2007]

I. Relevant Background to the Cases

[2] The conflict between Serbian and Kosovar Albanian forces during 1998 and 1999 is well documented. On 30 January 1999, and following a decision of the North Atlantic Council ("NAC") of the North Atlantic Treaty Organisation ("NATO"), NATO announced air strikes on the territory of the then Federal Republic of Yugoslavia ("FRY") should the FRY not comply with the demands of the international community. Negotiations took place between the parties to the conflict in February and March 1999. The resulting proposed peace agreement was signed by the Kosovar Albanian delegation but not by the Serbian delegation. The NAC decided on, and on 23 March 1999 the Secretary General of NATO announced, the beginning of air strikes against the FRY. The air strikes began on 24 March 1999 and ended on 8 June 1999 when the FRY troops agreed to withdraw from Kosovo. On 9 June 1999 "KFOR" [the security presence established by member States and relevant international institutions under UN auspices], the FRY and the Republic of Serbia signed a "Military Technical Agreement" ("MTA") by which they agreed on FRY withdrawal and the presence of an international security force following an appropriate UN Security Council Resolution ("UNSC Resolution").

[3] UNSC Resolution 1244 of 10 June 1999 provided for the establishment of a security presence (KFOR) by "Member States and relevant international institutions," "under UN auspices," with "substantial NATO participation" but under "unified command and control." NATO pre-deployment to the Former Yugoslav Republic of Macedonia allowed deployment of significant forces to Kosovo by 12 June 1999 (in accordance with OPLAN 10413, NATO's operational plan for the UNSC Resolution 1244 mission called "Operation Joint Guardian"). By 20 June FRY withdrawal was complete. KFOR contingents were grouped into four multinational brigades ("MNBs") each of which was responsible for a specific sector of operations with a lead country. They included MNB Northeast (Mitrovica) and MNB Southeast (Prizren), led by France and Germany, respectively. Given the deployment of Russian forces after the arrival of KFOR, a further agreement on 18 June 1999 (between Russia and the United States) allocated various areas and roles to the Russian forces.

[4] UNSC Resolution 1244 also decided on the deployment, under UN auspices, of an interim administration for Kosovo (UNMIK) and requested the Secretary General ("SG"), with the assistance of relevant international organisations, to establish it and to appoint a Special Representative to the SG ("SRSG") to control its implementation. UNMIK was to coordinate closely with KFOR. UNMIK comprised four pillars corresponding to the tasks assigned to it. Each pillar was placed under the authority of the SRSG and was headed by a Deputy SRSG. Pillar I (as it was at the relevant time) concerned humanitarian assistance and was led by UNHCR before it was phased out in June 2000. A new Pillar I (police and justice administration) was established in May 2001 and was led directly by the UN, as was Pillar II (civil administration). Pillar III, concerning democratisation and institution building, was led by the Organisation for Security and Cooperation in Europe ("OSCE") and Pillar IV (reconstruction and economic development) was led by the European Union.

II. The Circumstances of the Behrami *Case*

[5] On 11 March 2000 eight boys were playing in the hills in the municipality of Mitrovica. The group included two of Agim Behrami's sons, Gadaf and Bekim Behrami. At around midday, the group came upon a number of undetonated cluster bomb units ("CBUs") which had been dropped during the bombardment by NATO in 1999 and the children began playing with the CBUs. Believing it was safe, one of the children threw a CBU in the air: it detonated and killed Gadaf Behrami. Bekim Behrami was also seriously injured and taken to hospital in Pristina (where he later had eye surgery and was released on 4 April 2000). Medical reports submitted indicate that he underwent two further eye operations (on 7 April and 22 May 2000) in a hospital in Bern, Switzerland. It is not disputed that Bekim Behrami was disfigured and is now blind.

[6] UNMIK police investigated. They took witness statements from, inter alia, the boys involved in the incident and completed an initial report. Further investigation reports dated 11, 12 and 13 March 2000 indicated, inter alia, that UNMIK police could not access the site without KFOR agreement; reported that a French KFOR officer had accepted that KFOR had been aware of the unexploded CBUs for months but that they were not a high priority; and pointed out that the detonation site had been marked out by KFOR the day after the detonation. The autopsy report confirmed Gadaf Behrami's death from multiple injuries resulting from the CBU explosion. The UNMIK Police report of 18 March 2000 concluded that the incident amounted to "unintentional homicide committed by imprudence."

[7] By letter dated 22 May 2000 the District Public Prosecutor wrote to Agim Behrami to the effect that the evidence was that the CBU detonation was an accident, that criminal charges would not be pursued but that Mr. Behrami had the right to pursue a criminal prosecution within eight days of the date of that letter. On 25 October 2001 Agim Behrami complained to the Kosovo Claims Office ("KCO") that France had not respected UNSC Resolution 1244. The KCO forwarded the complaint to the French Troop Contributing Nation Claims Office ("TCNCO"). By letter of 5 February 2003 TCNCO rejected the complaint, stating, inter alia, that the UNSC Resolution 1244 had required KFOR to supervise mine clearing operations until UNMIK could take over and that such operations had been the responsibility of the UN since 5 July 1999.

III. The Circumstances of the Saramati *Case*

[8] On 24 April 2001 Mr Saramati was arrested by UNMIK police and brought before an investigating judge on suspicion of attempted murder and illegal possession of a weapon. On 25 April 2001 that judge ordered his pre-trial detention and an investigation into those and additional charges. On 23 May 2001 a prosecutor filed an indictment and on 24 May 2001 the District Court ordered his detention to be extended. On 4 June 2001 the Supreme Court allowed Mr Saramati's appeal and he was released.

[9] In early July 2001 UNMIK police informed him by telephone that he had to report to the police station to collect his money and belongings. The station was located in Prizren in the sector assigned to MNB Southeast, of which the lead nation was Germany. On 13 July 2001 he so reported and was arrested by UNMIK police officers by order of the Commander of KFOR ("COMKFOR"), who was a Norwegian officer at the time.

[10] On 14 July 2001 detention was extended by COMKFOR for 30 days.

[11] On 26 July 2001, and in response to a letter from Mr Saramati's representatives taking issue with the legality of his detention, [the] KFOR Legal Adviser advised that KFOR had the authority to detain under the UNSC Resolution 1244 as it was necessary "to maintain a safe and secure environment" and to protect KFOR troops. KFOR had information concerning Mr Saramati's alleged involvement with armed groups operating in the border region between Kosovo and the Former Yugoslav Republic of Macedonia and was satisfied that Mr Saramati

represented a threat to the security of KFOR and to those residing in Kosovo.

[12] On 26 July 2001 the Russian representative in the UNSC referred to "the arrest of Major Saramati, the Commander of a Kosovo Protection Corps Brigade, accused of undertaking activities threatening the international presence in Kosovo."

[13] On 11 August 2001 Mr Saramati's detention was again extended by order of COMKFOR. On 6 September 2001 his case was transferred to the District Court for trial, the indictment retaining charges of, inter alia, attempted murder and the illegal possession of weapons and explosives. By letter dated 20 September 2001, the decision of COMKFOR to prolong his detention was communicated to his representatives.

[14] During each trial hearing from 17 September 2001 to 23 January 2002 Mr Saramati's representatives requested his release and the trial court responded that, although the Supreme Court had so ruled in June 2001, his detention was entirely the responsibility of KFOR.

[15] On 3 October 2001 a French General was appointed to the position of COMKFOR.

[16] On 23 January 2002 Mr Saramati was convicted of attempted murder under Article 30 § 2(6) of the Criminal Code of Kosovo in conjunction with Article 19 of the Criminal Code of the FRY. He was acquitted on certain charges and certain charges were either rejected or dropped. Mr Saramati was transferred by KFOR to the UNMIK detention facilities in Pristina.

[17] On 9 October 2002 the Supreme Court of Kosovo quashed Mr Saramati's conviction and his case was sent for re-trial. His release from detention was ordered. A re-trial has yet to be fixed. . . .

3. Is the Court competent ratione personae*?*

[144] It is . . . the case that the impugned action and inaction are, in principle, attributable to the UN. It is, moreover, clear that the UN has a legal personality separate from that of its member states (The *Reparations* case, ICJ Reports 1949) and that that organisation is not a Contracting Party to the Convention.

[145] In its *Bosphorus* judgment, the Court held that, while a State was not prohibited by the Convention from transferring sovereign power to an international organisation in order to pursue cooperation in certain fields of activity, the State remained responsible under Article 1 of the Convention for all acts and omissions of its organs, regardless of whether they were a consequence of the necessity to comply with international legal obligations, Article 1 making no distinction as to the rule or measure concerned and not excluding any part of a State's "jurisdiction" from scrutiny under the Convention. The Court went on, however, to hold that where such State action was taken in compliance with international legal obligations flowing from its membership of an international organisation and where the relevant organisation protected fundamental rights in a manner which could be considered at least equivalent to that which the Convention provides, a presumption arose that the State had not departed from the requirements of the Convention. Such presumption could be rebutted, if in the circumstances of a particular case, it was considered that the protection of Convention rights was manifestly deficient: in such a case, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.

[146] The question arises in the present case whether the Court is competent *ratione personae* to review the acts of the respondent States carried out on behalf of the UN and, more generally, as to the relationship between the Convention and the UN acting under Chapter VII of its Charter.

[147] The Court first observes that nine of the twelve original signatory parties to the Convention in 1950 had been members of the UN since 1945 (including the two Respondent States), that the great majority of the current Contracting Parties joined the UN before they signed the Convention and that currently all Contracting Parties are members of the UN. Indeed, one of the aims of this Convention (see its preamble) is the collective enforcement of rights in the Universal Declaration of Human Rights of the General Assembly of the UN. More generally, it is further recalled, as noted at paragraph 122 above, that the Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between its Contracting Parties. The Court has therefore had regard to two complementary provisions of the Charter, Articles 25 and 103, as interpreted by the International Court of Justice.

[148] Of even greater significance is the imperative nature of the principle aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfill that aim. In particular, it is evident from the Preamble, Articles 1, 2 and 24 as well as Chapter VII of the Charter that the primary objective of the UN is the maintenance of international peace and security. While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace (see the Preamble to the Convention), the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force.

[149] In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR. Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfillment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim.

[150] The applicants argued that the substantive and procedural protection of fundamental rights provided by KFOR was in any event not "equivalent" to that under the Convention within the meaning of the Court's *Bosphorus* judgment, with the consequence that the presumption of Convention compliance on the part of the respondent States was rebutted.

[151] The Court, however, considers that the circumstances of the present cases are essentially different from those with which the Court was concerned in the *Bosphorus* case. In its judgment in that case, the Court noted that the impugned act (seizure of the applicant's leased aircraft) had been carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers (§ 137 of that judgment). The Court did not therefore consider that any question arose as to its competence, notably *ratione personae*, vis-à-vis the respondent State despite the fact that the source of the impugned seizure was an EC Council Regulation which, in turn, applied a UNSC Resolution. In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. The present cases are therefore clearly distinguishable from the *Bosphorus* case in terms both of the responsibility of the respondent States under Article 1 and of the Court's competence *ratione personae*.

There exists, in any event, a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was there concerned and those in the present cases. As the Court has found above, UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.

[152] In these circumstances, the Court concludes that the applicants' complaints must be declared incompatible *ratione personae* with the provisions of the Convention.

4. Remaining admissibility issues

[153] In light of the above conclusion, the Court considers that it is not necessary to examine the remaining submissions of the parties on the admissibility of the application including on the competence *ratione loci* of the Court to examine complaints against the respondent States about extra-territorial acts or omissions, [and] on whether the applicants had exhausted any effective remedies available to them within the meaning of Article 35 § 1 of the Convention. . . .

For these reasons, the Court decides, unanimously, to strike the *Saramati* application against Germany out of its list of cases.

Declares, by a majority, inadmissible the application of *Behrami and Behrami* and the remainder of the *Saramati* application against France and Norway.

Christos ROZAKIS
President

Michael O'BOYLE
Deputy Registrar

Yassin Abdullah Kadi
v.
Council of the European Union & Commission of the European Communities
The Court of First Instance
Case T-315/01 (2005)

The facts:

United Nations Security Council (UNSC) Resolution 1267 (1999) instituted a sanctions regime against members of the Taliban government in Afghanistan as well as the person of Usama bin Laden, and put in place a Sanctions Committee to oversee the implementation of this regime. In order to comply with this resolution, the European Union (EU) adopted Common Position 1999/727/CFSP of 15 November 1999 and, to effect the freezing of funds required by the Common Position, Regulation (EC) No 337/2000 of 14 February 2000. The UNSC, on 19 December 2000, adopted Resolution 1333 (2000) which constituted an extension *ratione personae* of the sanctions regime and also charged the Sanctions Committee with keeping a list of persons subject to sanctions and also to update this list on the basis of information provided by States and regional organisations. In order to comply with this new resolution, the EU adopted, first, Common Position 2001/154/CFSP of 26 February 2001 and, second, to give positive effect to the Common Position, Regulation (EC) No 467/2001 of 6 March 2001. This Regulation empowers the European Commission to list persons designated by the Sanctions Committee under Resolution 1333/2000 in its Annex I.

On 19 October 2001 the Sanctions Committee included, among others, the applicant on the list of persons subject to the sanctions regime under Resolution 1333/2000. On 19 October 2001 the European Commission, by Commission Regulation (EC) No 2062/2001, added the applicant's name to the list contained in Annex I to Regulation 467/2001.

After the adoption by the UNSC of Resolution 1390 (2002) of 16 January 2002, and the EU's Common Position 2002/402/CFSP implementing it and repealing the prior Common Positions on the matter, the relevant provisions are now contained in Regulation (EC) No 881/2002 of 27 May 2002. The applicant's name now figures on the list contained in Annex I of Regulation 881/2002.

As concerns the possible derogations from and exceptions to the sanctions regime established by UNSC Resolution 1452 (2002) of 20 December 2002, they were given effect in EU law by Common Position 2003/140/CFSP of 27 February 2003 and Regulation (EC) No 561/2003 of 27 March 2003.

The applicant brought an action challenging the legality of Regulations Nos. 2062/2001 and 467/2001, insofar as they relate to him. . . .

3. Concerning the three pleas alleging breach of the applicant's fundamental rights

Arguments of the parties

[138] In the legal part of his arguments, the applicant emphasises as an introductory point that, according to the case-law, fundamental rights recognised and guaranteed by the constitutions of the Member States, especially those enshrined in the ECHR, form an integral part of the Community legal order.

[139] Next, he puts forward in support of his claims three grounds of annulment: the first alleges breach of the right to a fair hearing, the second breach of the fundamental right of respect for property and of the principle of proportionality and the third breach of the right to effective judicial review.

[140] According to the applicant, the Security Council resolutions relied on by the Council and the Commission do not confer on those institutions the power to abrogate those fundamental rights without

justifying that stance before the Court by producing the necessary evidence. As a legal order independent of the United Nations, governed by its own rules of law, the European Union must justify its actions by reference to its own powers and duties vis-à-vis individuals within that order. . . .

[142] He claims, nevertheless, the right to make his views known to the Council and the Commission with a view to obtaining the removal of his name from the list of persons and entities to whom and to which the sanctions apply, in accordance with the general principle of Community law that persons affected by decisions of public authorities must be given the right to make their points of view known. The applicant maintains that respect for the right to a fair hearing, which is a principle of a fundamental nature, must be ensured in all proceedings likely to affect the person concerned and entail adverse consequences for him.

[143] He argues that, in the circumstances of this case, the contested regulation is clearly in breach of those fundamental principles, in that it makes it possible for the Council to freeze the applicant's funds indefinitely without giving him any opportunity to make known his views on the correctness and relevance of the facts and circumstances alleged and on the evidence adduced against him. . . .

[150] According to the applicant, Community institutions cannot abdicate their responsibility to respect his fundamental rights by taking refuge behind decisions adopted by the Security Council, especially since those decisions themselves fail to respect the right to a fair hearing. With regard to a Community regulation, he maintains that he is entitled to judicial review within the Community context. The fact that the Council claims to have no discretion in the matter and that it is required to act on the instructions of the United Nations evidences the very defect which vitiates the regulation at issue. . . .

[152] Finally, the contention that the applicant has been able to bring these proceedings is not a good argument if the Court cannot investigate the merits of the action. In order to satisfy the requirements of effective judicial review the Court ought either to investigate the validity of the evidence produced before it or strike down the regulation in question on the ground that it provides no legal basis for an investigation of that kind.

[153] As their principal argument, the Council and the Commission, referring in particular to Articles 24(1), 25, 41, 48(2) and 103[*] of the Charter of the United Nations, submit, first, that the Community, like the Member States of the United Nations, is bound by international law to give effect, within its spheres of competence, to resolutions of the Security Council, especially those adopted under Chapter VII of the Charter of the United Nations; second, that the powers of the Community institutions in this area are limited and that they have no autonomous discretion in any form; third, that they cannot therefore alter the content of those resolutions or set up mechanisms capable of giving rise to any alteration in their content and, fourth, that any other international agreement or domestic rule of law liable to hinder such implementation must be disregarded.

[154] On that point the Council and the Commission observe that the contested regulation transposes into the Community legal order Security. On that point the Council and the Commission observe that the contested regulation transposes into the Community legal order Security Council resolutions 1267 (1999), 1333 (2000) and 1390 (2002), adopted pursuant to Chapter VII of the Charter of the United Nations, originally against the Taliban of Afghanistan and subsequently in response to terrorist

[*] Editor's Note: Article 24 (1) of the UN Charter provides:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Article 25 provides:

> The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter. Article 41: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 48 provides:

> (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 the 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 through their action in the appropriate international agencies of which they are members.

Article (103) provides:

> 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.

activity linked to the attacks of 11 September 2001 in New York City and Washington DC (both in the United States of America). More specifically, after the applicant's name was added on 17 October 2001 to the list drawn up by the Sanctions Committee, Regulation No 2062/2001 amended the list of persons whose funds were frozen because of their links to the Taliban, Usama bin Laden or the Al-Qaeda network so as to include his name, in accordance with Article 10 of Regulation No 467/2001.

[155] The intention of the institutions was thus to give effect to the obligations imposed on the Member States of the Community by Article 25 of the Charter of the United Nations by means of the automatic transposition into the Community legal order of the lists of individuals or entities drawn up by the Security Council or by the Sanctions Committee in accordance with the applicable procedures.

[156] In this connection, the Council and the Commission maintain that, as members of the United Nations, the Member States of the Community have agreed to carry out without reservation the decisions taken in their name by the Security Council, in the higher interest of the maintenance of international peace and security (see Articles 24(1) and 25 of the Charter of the United Nations). The obligations imposed on a Member of the United Nations under Chapter VII of the Charter of the United Nations prevail over every other international obligation to which the member might be subject. In that way Article 103 of the Charter makes it possible to disregard any other provision of international law, whether customary or laid down by convention, in order to apply the resolutions of the Security Council, thus creating an "effect of legality."

[157] Nor, according to the institutions, can national law stand in the way of implementing measures adopted pursuant to the Charter of the United Nations. If a Member of the United Nations were able to alter the contents of Security Council resolutions the uniformity of their application, essential to their effectiveness, could not be maintained. . . .

[159] The Council puts that proposition in general terms, arguing that when the Community acts to discharge obligations imposed on its Member States as a result of their belonging to the United Nations, either because they have transferred to it the necessary powers or because they consider it politically opportune, the Community must be regarded for all practical purposes as being in the same position as the members of the United Nations, having regard to Article 48(2) of the Charter of the United Nations.

[160] According to the Council and Commission, it was not open to the Community, without infringing its international obligations and those of its Member States, to exclude particular individuals from the list drawn up by the Sanctions Committee or to serve prior notice on them or otherwise to provide for a review process at the end of which some individuals might have been removed from the list. In the Council's submission, that would have been contrary to the duty to cooperate in good faith owed by the Member States and the Community, imposed by Article 10 EC.

[161] The Council adds that, even if the contested regulation were to be regarded as violating the applicant's fundamental rights, the circumstances in which it was adopted preclude any unlawful conduct on its part, having regard to Article 48(2) of the Charter of the United Nations. According to that institution, when the Community takes measures for purposes reflecting the desire of its Member States to perform their obligations under the Charter of the United Nations, it necessarily enjoys the protection conferred by the Charter and, in particular, the "effect of legality." The Council submits that that effect applies with regard to fundamental rights which may, as provided for by the appropriate international legal instruments, be temporarily suspended in time of emergency.

[162] In any event, the Council is of the opinion that in this case the Court's jurisdiction must be limited to considering whether the institutions committed a manifest error in implementing the obligations laid down by Security Council Resolution 1390 (2002). Beyond that limit, any claim of jurisdiction, which would be tantamount to indirect and selective judicial review of the mandatory measures decided upon by the Security Council in carrying out its function of maintaining international peace and security, would cause serious disruption to the international relations of the Community and its Member States, would be open to challenge in the light of Article 10 EC and would be liable to undermine one of the foundations of the international order of States established after 1945. The Council submits that such measures may not be challenged at national or regional level, but only before the Security Council itself.

[163] The Commission too submits that any decision to remove or alter the list as adopted by the Security Council might seriously disrupt the international relations of the Community and its Member States. Such a situation would lead the Community into breach of its general obligation to observe international law and the Member States into breach of their

specific obligations under the Charter of the United Nations. It could also affect the uniformity of application of Security Council decisions, which is essential to ensure their effectiveness. The Commission further notes that the principle of comity of nations obliges the Community to implement those measures inasmuch as they are designed to protect all States against terrorist attacks.

[164] That, according to the Commission, precludes any examination by the Court of the consistency of the contested regulations with the rights claimed by the applicant. Even if—quod non—those rights have been infringed, the Community would still be obliged to implement the Security Council resolutions and, if it should fail to act, the Member States would be under the obligation to do so. . . .

[174] In this connection the Council submits that where the Community acts without exercising any discretion, on the basis of a decision adopted by the body on which the international community has conferred sweeping powers for the sake of preserving international peace and security, full judicial review would run the risk of undermining the United Nations system as established in 1945, might seriously damage the international relations of the Community and its Member States and would fall foul of the Community's duty to observe international law. . . .

Findings of the Court

Preliminary observations

[176] The Court can properly rule on the pleas alleging breach of the applicant's fundamental rights only in so far as they fall within the scope of its judicial review and as they are capable, if proved, of leading to annulment of the contested regulation. . . .

[181] From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty. . . .

[183] As regards, second, the relationship between the Charter of the United Nations and international treaty law, that rule of primacy is expressly laid down in Article 103 of the Charter which provides that, "[i]n

the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." In accordance with Article 30 of the Vienna Convention on the Law of Treaties, and contrary to the rules usually applicable to successive treaties, that rule holds good in respect of Treaties made earlier as well as later than the Charter of the United Nations. According to the International Court of Justice, all regional, bilateral, and even multilateral, arrangements that the parties may have made must be made always subject to the provisions of Article 103 of the Charter of the United Nations.

[184] That primacy extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the United Nations, under which the Members of the United Nations agree to accept and carry out the decisions of the Security Council. According to the International Court of Justice, 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.

[185] With more particular regard to the relations between the obligations of the Member States of the Community by virtue of the Charter of the United Nations and their obligations under Community law, it may be added that, in accordance with the first paragraph of Article 307 EC, "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty."

[189] [R]esolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations are thus binding on all the Member States of the Community which must therefore, in that capacity, take all measures necessary to ensure that those resolutions are put into effect.

[190] It also follows from the foregoing that, pursuant both to the rules of general international law and to the specific provisions of the Treaty, Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations. . . .

[193] Nevertheless, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it. . . .

[195] By concluding a treaty between them the Member States could not transfer to the Community more powers than they possessed or withdraw from their obligations to third countries under that Charter.

[196] On the contrary, their desire to fulfill their obligations under that Charter follows from the very provisions of the Treaty establishing the European Economic Community and is made clear in particular by Article 224 and the first paragraph of Article 234. . . .

[198] It is also to be observed that, in so far as the powers necessary for the performance of the Member States' obligations under the Charter of the United Nations have been transferred to the Community, the Member States have undertaken, pursuant to public international law, to ensure that the Community itself should exercise those powers to that end. . . .

[203] It therefore appears that, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community. . . . .

[204] Following that reasoning, it must be held, first, that the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations. . . .

[207] It must therefore be held that the arguments put forward by the institutions, as summarised in paragraph 153 above, are valid, subject to this reservation that it is not under general international law, as those parties would have it, but by virtue of the EC Treaty itself, that the Community was required to give effect to the Security Council resolutions concerned, within the sphere of its powers.

[208] On the other hand, the applicant's arguments based on the view that the Community legal order is a legal order independent of the United Nations, governed by its own rules of law, must be rejected.

Concerning the scope of the review of legality that the Court must carry out

[209] As a preliminary point, it is to be borne in mind that the European Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether their acts are in conformity with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.

[210] As the Court has repeatedly held, "judicial control . . . reflects a general principle of law which underlies the constitutional traditions common to the Member States . . . and which is also laid down in Articles 6 and 13 of the [ECHR]."

[211] In the case in point, that principle finds expression in the right, conferred on the applicant by the fourth paragraph of Article 230 EC, to submit the lawfulness of the contested regulation to the Court of First Instance, provided that the act is of direct and individual concern to him, and to rely in support of his action on any plea alleging lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application, or misuse of powers.

[212] The question that arises in this instance is, however, whether there exist any structural limits, imposed by general international law or by the EC Treaty itself, on the judicial review which it falls to the Court of First Instance to carry out with regard to that regulation. . . .

[214] In that situation, as the institutions have rightly claimed, they acted under circumscribed powers, with the result that they had no autonomous discretion. In particular, they could neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration.

[215] Any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions. In that hypothetical situation, in fact, the origin of the illegality alleged by the applicant would have to be sought, not in the

adoption of the contested regulation but in the resolutions of the Security Council which imposed the sanctions.

[216] In particular, if the Court were to annul the contested regulation, as the applicant claims it should, although that regulation seems to be imposed by international law, on the ground that that act infringes his fundamental rights which are protected by the Community legal order, such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicant asks the Court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order.

[217] The institutions and the United Kingdom ask the Court as a matter of principle to decline all jurisdiction to undertake such indirect review of the lawfulness of those resolutions which, as rules of international law binding on the Member States of the Community, are mandatory for the Court as they are for all the Community institutions. Those parties are of the view, essentially, 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.

[218] It must be recognised that such a limitation of jurisdiction is necessary as a corollary to the principles identified above, in the Court's examination of the relationship between the international legal order under the United Nations and the Community legal order.

[219] As has already been explained, the resolutions of the Security Council at issue were adopted under Chapter VII of the Charter of the United Nations. In these circumstances, determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts, subject only to the inherent right of individual or collective self-defence mentioned in Article 51 of the Charter.

[220] Where, acting pursuant to Chapter VII of the Charter of the United Nations, the Security Council, through its Sanctions Committee, decides that the funds of certain individuals or entities must be frozen, its

decision is binding on the members of the United Nations, in accordance with Article 48 of the Charter.

[221] In light of the considerations set out in paragraphs 193 to 204 above, the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of such a decision according to the standard of protection of fundamental rights as recognised by the Community legal order, cannot be justified either on the basis of international law or on the basis of Community law.

[222] First, such jurisdiction would be incompatible with the undertakings of the Member States under the Charter of the United Nations, especially Articles 25, 48 and 103 thereof, and also with Article 27 of the Vienna Convention on the Law of Treaties.

[223] Second, such jurisdiction would be contrary to provisions both of the EC Treaty, especially Articles 5 EC, 10 EC, 297 EC and the first paragraph of Article 307 EC, and of the Treaty on European Union, in particular Article 5 EU, in accordance with which the Community judicature is to exercise its powers on the conditions and for the purposes provided for by the provisions of the EC Treaty and the Treaty on European Union. It would, what is more, be incompatible with the principle that the Community's powers and, therefore, those of the Court of First Instance, must be exercised in compliance with international law.

[224] It has to be added that, with particular regard to Article 307 EC and to Article 103 of the Charter of the United Nations, reference to infringements either of fundamental rights as protected by the Community legal order or of the principles of that legal order cannot affect the validity of a Security Council measure or its effect in the territory of the Community.

[225] 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.

[226] None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with

regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.

[227] In this connection, it must be noted that the Vienna Convention on the Law of Treaties, which consolidates the customary international law and Article 5 of which provides that it is to apply "to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organization," provides in Article 53 for a treaty to be void if it conflicts with a peremptory norm of general international law (*jus cogens*), defined as "a norm accepted and recognised 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." Similarly, Article 64 of the Vienna Convention provides that: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

[228] Furthermore, the Charter of the United Nations itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of the human person. In the preamble to the Charter, the peoples of the United Nations declared themselves determined to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person." In addition, it is apparent from Chapter I of the Charter, headed "Purposes and Principles," that one of the purposes of the United Nations is to encourage respect for human rights and for fundamental freedoms.

[229] Those principles are binding on the Members of the United Nations as well as on its bodies. Thus, under Article 24(2) of the Charter of the United Nations, the Security Council, in discharging its duties under its primary responsibility for the maintenance of international peace and security, is to act "in accordance with the Purposes and Principles of the United Nations." The Security Council's powers of sanction in the exercise of that responsibility must therefore be wielded in compliance with international law, particularly with the purposes and principles of the United Nations.

[230] International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may

be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.

[231] The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, highly exceptionally, extend to determining whether the superior rules of international law falling within the ambit of *jus cogens* have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute "intransgressible principles of international customary law."

[232] It is in the light of those considerations that the pleas alleging breach of the applicants' fundamental rights must be examined. . . .

Concerning the alleged breach of the right to respect for property and of the principle of proportionality

[234] The applicant alleges a breach of his right to respect for property, as guaranteed by Article 1 of the First Additional Protocol to the ECHR, and also a breach of the principle of proportionality as a general principle of Community law. . . .

[238] The Court considers that such is not the case, measured by the standard of universal protection of the fundamental rights of the human person covered by *jus cogens*. . . .

[242] Thus, in so far as respect for the right to property must be regarded as forming part of the mandatory rules of general international law, it is only an arbitrary deprivation of that right that might, in any case, be regarded as contrary to *jus cogens*.

[243] Here, however, it is clear that the applicant has not been arbitrarily deprived of that right.

[244] In fact, in the first place, the freezing of his funds constitutes an aspect of the sanctions decided by the Security Council against Usama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities.

[245] In that regard, it is appropriate to stress the importance of the campaign against international terrorism and the legitimacy of the protection of the United Nations against the actions of terrorist organisations. . . .

[247] It is in the light of those circumstances that the objective pursued by the sanctions assumes considerable importance, which is, in particular, under Resolution 1373 (2001) of the Security Council of 28 September 2001, referred to by the third recital in the preamble to the contested regulation, to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts. The measures in question pursue therefore an objective of fundamental public interest for the international community.

[248] In the second place, freezing of funds is a temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof.

[249] In the third place, the resolutions of the Security Council at issue provide for a means of reviewing, after certain periods, the overall system of.

[250] In the fourth place, as will be explained below, the legislation at issue settles a procedure enabling the persons concerned to present their case at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence. . . .

[252] It follows from the foregoing that the applicant's arguments alleging breach of the right to respect for property and of the general principle of proportionality must be rejected.

The alleged breach of the right to be heard

[255] [W]ith regard, first, to the applicant's alleged right to be heard by the Council in connection with the adoption of the contested regulation, it must be borne in mind that, according to settled case-law, observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings at issue. That principle requires that any person on whom a

penalty may be imposed must be placed in a position in which he can effectively make known his views on the evidence on the basis of which the sanction is imposed.

[256] The Council and the Commission were, however, right in observing that this case-law was developed in areas such as competition law, anti-dumping action and State aid, but also disciplinary law and the reduction of financial assistance, in which the Community institutions enjoy extensive powers of investigation and inquiry and wide discretion.

[257] As a matter of fact, respect for the procedural rights guaranteed by the Community legal order, especially the right of the person concerned to make his point of view known, is correlated to the exercise of discretion by the authority which is the author of the act at issue.

[258] In this instance, as is apparent from the preliminary observations above on the relationship between the international legal order under the United Nations and the Community legal order, the Community institutions were required to transpose into the Community legal order resolutions of the Security Council and decisions of the Sanctions Committee that in no way authorised them, at the time of actual implementation, to provide for any Community mechanism whatsoever for the examination or re-examination of individual situations, since both the substance of the measures in question and the mechanisms for re-examination fell wholly within the purview of the Security Council and its Sanctions Committee. As a result, the Community institutions had no power of investigation, no opportunity to check the matters taken to be facts by the Security Council and the Sanctions Committee, no discretion with regard to those matters and no discretion either as to whether it was appropriate to adopt sanctions vis-à-vis the applicants. The principle of Community law relating to the right to be heard cannot apply in such circumstances, where to hear the person concerned could not in any case lead the institution to review its position.

[259] It follows that the Council was not obliged to hear the applicant on the subject of his inclusion in the list of persons and entities affected by the sanctions, in the context of the adoption and implementation of the contested regulation.

[260] The applicant’s arguments based on the alleged infringement of his right to be heard by the Council in connection with the adoption of the contested regulation must therefore be rejected.

[261] As regards, second, the applicant's alleged right to be heard by the Sanctions Committee in connection with his inclusion in the list of persons whose funds must be frozen pursuant to the Security Council's resolutions at issue, it is clear that no such right is provided for by the resolutions in question.

[262] Nevertheless, although the resolutions of the Security Council concerned and the subsequent regulations that put them into effect in the Community do not provide for any right of audience for individual persons, they set up a mechanism for the re-examination of individual cases, by providing that the persons concerned may address a request to the Sanctions Committee, through their national authorities, in order either to be removed from the list of persons affected by the sanctions or to obtain exemption from the freezing of funds. . . .

[267] Admittedly, the procedure described above confers no right directly on the persons concerned themselves to be heard by the Sanctions Committee, the only authority competent to give a decision, on a State's petition, on the re-examination of their case. Those persons are thus dependent, essentially, on the diplomatic protection afforded by the States to their nationals.

[268] Such a restriction of the right to be heard, directly and in person, by the competent authority is not, however, to be deemed improper in the light of the mandatory prescriptions of the public international order. On the contrary, with regard to the challenge to the validity of decisions ordering the freezing of funds belonging to individuals or entities suspected of contributing to the financing of international terrorism, adopted by the Security Council through its Sanctions Committee under Chapter VII of the Charter of the United Nations on the basis of information communicated by the States and regional organisations, it is normal that the right of the persons involved to be heard should be adapted to an administrative procedure on several levels, in which the national authorities referred to in Annex II of the contested regulation play an indispensable part. . . .

[273] In any case, the fact remains that any opportunity for the applicant effectively to make known his views on the correctness and relevance of the facts in consideration of which his funds have been frozen and on the evidence adduced against him appears to be definitively excluded. Those facts and that evidence, once classified as confidential or secret by the State which made the Sanctions Committee aware of them, are not, obviously, communicated to him, any more than they are to the

Member States of the United Nations to which the Security Council's resolutions are addressed.

[274] None the less, in circumstances such as those of this case, in which what is at issue is a temporary precautionary measure restricting the availability of the applicant's property, the Court of First Instance considers that observance of the fundamental rights of the person concerned does not require the facts and evidence adduced against him to be communicated to him, once the Security Council or its Sanctions Committee is of the view that that there are grounds concerning the international community's security that militate against it.

[275] It follows that the applicant's arguments alleging breach of his right to be heard by the Sanctions Committee in connection with his inclusion in the list of persons whose funds must be frozen pursuant to the resolutions of the Security Council in question must be rejected.

[276] It follows that the applicant's arguments alleging breach of the right to be heard must be rejected.

Concerning the alleged breach of the right to effective judicial review

[283] [I]t 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 legal order.

[284] Nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or, subject to the limited extent defined in paragraph 282 above, to check indirectly the appropriateness and proportionality of those measures. It would be impossible to carry out such a check without trespassing on the Security Council's prerogatives under Chapter VII of the Charter of the United Nations in relation to determining, first, whether there exists a threat to international peace and security and, second, the appropriate measures for confronting or settling such a threat. Moreover, the question whether an individual or organisation poses a threat to international peace and security, like the question of what measures must be adopted vis-à-vis the persons concerned in order to frustrate that threat, entails a political assessment and value judgments which in principle fall within the exclusive competence of

the authority to which the international community has entrusted primary responsibility for the maintenance of international peace and security.

[285] It must thus be concluded that, to the extent set out in paragraph 284 above, there is no judicial remedy available to the applicant, the Security Council not having thought it advisable to establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions taken by the Sanctions Committee.

[286] However, it is also to be acknowledged that any such lacuna in the judicial protection available to the applicant is not in itself contrary to *jus cogens*.

[287] Here the Court would point out that the right of access to the courts, a principle recognised by both Article 8 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, is not absolute. On the one hand, at a time of public emergency which threatens the life of the nation, measures may be taken derogating from that right, as provided for on certain conditions by Article 4(1) of that Covenant. On the other hand, even where those exceptional circumstances do not obtain, certain restrictions must be held to be inherent in that right, such as the limitations generally recognised by the community of nations to fall within the doctrine of State immunity and of the immunity of international organisations.

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

[291] It follows that the applicant's arguments alleging breach of his right to effective judicial review must be rejected.

[292] None of the applicant's pleas in law or arguments having been successful, the action must be dismissed.

Yassin Abdullah Kadi
v.
Council of the European Union & Commission of the European Communities
European Court of Justice
Case C-402/05 P (2008)

OPINION OF ADVOCATE GENERAL POIARES MADURO

[1] The appellant in the present proceedings has been designated by the Sanctions Committee of the United Nations Security Council as a person suspected of supporting terrorism, whose funds and other financial resources are to be frozen. Before the Court of First Instance, the appellant challenged the lawfulness of the regulation by which the Council has implemented the freezing order in the Community. He argued—unsuccessfully—that the Community lacked competence to adopt that regulation, and, moreover, that the regulation breached a number of his fundamental rights. On what are essentially the same grounds, he now asks the Court of Justice to set aside the judgment of the Court of First Instance. The Council and the Commission disagree with the appellant on both counts. Most importantly, however, they contend that the regulation is necessary for the implementation of binding Security Council resolutions, and, accordingly, that the Community Courts should not assess its conformity with fundamental rights. Essentially they argue that, when the Security Council has spoken, the Court must remain silent. . . .

III. The jurisdiction of the Community Courts to determine whether the contested regulation breaches fundamental rights

[19] The appellant challenges this part of the judgment under appeal with a combination of arguments derived from international law and Community law. In his statement of appeal, he argues, inter alia, that the reasoning of the Court of First Instance in respect of the binding effect and the interpretation of the relevant Security Council resolutions is flawed from the perspective of international law. The appellant claims that neither Article 103 of the UN Charter nor those resolutions could have the effect of precluding the courts from reviewing domestic implementing measures in order to assess their conformity with fundamental rights. In his rejoinder and at the hearing, the appellant refined his arguments and tailored them to fit more closely with Community law and the case law of this Court. The appellant maintains that, so long as the United Nations do not provide a mechanism of independent judicial review that guarantees compliance with

fundamental rights of decisions taken by the Security Council and the Sanctions Committee, the Community Courts should review measures adopted by the Community institutions with a view to implementing those decisions for their conformity with fundamental rights as recognised in the Community legal order. The appellant cites the ruling of this Court in *Bosphorus* as a precedent. . . .

[21] This brings us to the question of how the relationship between the international legal order and the Community legal order must be described. The logical starting point of our discussion should, of course, be the landmark ruling in *Van Gend en Loos*, in which the Court affirmed the autonomy of the Community legal order. The Court held that the Treaty is not merely an agreement between States, but an agreement between the *peoples* of Europe. It considered that the Treaty had established a "new legal order," beholden to, but distinct from the existing legal order of public international law. In other words, the Treaty has created a municipal legal order of trans-national dimensions, of which it forms the "basic constitutional charter."

[22] This does not mean, however, that the Community's municipal legal order and the international legal order pass by each other like ships in the night. On the contrary, the Community has traditionally played an active and constructive part on the international stage. The application and interpretation of Community law is accordingly guided by the presumption that the Community wants to honour its international commitments. The Community Courts therefore carefully examine the obligations by which the Community is bound on the international stage and take judicial notice of those obligations.

[23] Yet, in the final analysis, the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law. The case law provides a number of examples. There are cases in which the Court has barred an international agreement from having effect within the Community legal order on the ground that the agreement was concluded on the wrong legal basis. The Court did so, recently, in *Parliament v. Council and Commission*. The Court's approach is easy to understand once one realises that it would have "fundamental institutional implications for the Community and for the Member States" if an agreement that was adopted without a proper legal basis—or according to the wrong decision-making procedure—were to produce effects within the Community legal order. A similar concern

underpins cases in which the Court has held that, when entering into commitments on the international stage, Member States and Community institutions are under a duty of loyal cooperation. If an international agreement is concluded in breach of that duty, it can be denied effect in the Community legal order. Even more apposite, in the context of the present case, is the fact that the Court has verified, on occasion, whether acts adopted by the Community for the purpose of giving municipal effect to international commitments were in compliance with general principles of Community law. For instance, in *Germany v. Council* the Court annulled the Council decision concerning the conclusion of the WTO Agreement to the extent that it approved the Framework Agreement on Bananas. The Court considered that provisions of that Framework Agreement infringed a general principle of Community law: the principle of non-discrimination.

[24] All these cases have in common that, although the Court takes great care to respect the obligations that are incumbent on the Community by virtue of international law, it seeks, first and foremost, to preserve the constitutional framework created by the Treaty. Thus, it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.

[25] It follows that the present appeal turns fundamentally on the following question: is there any basis in the Treaty for holding that the contested regulation is exempt from the constitutional constraints normally imposed by Community law, since it implements a sanctions regime imposed by Security Council resolutions? Or, to put it differently: does the Community legal order accord supra-constitutional status to measures that are necessary for the implementation of resolutions adopted by the Security Council? . . .

[28] In any event, even if one were to accept the suggestion that the Court sidestepped the problem of its jurisdiction in *Bosphorus*, the fact remains that the Council, the Commission and the United Kingdom fail to identify any basis in the Treaty from which it could logically follow that measures taken for the implementation of Security Council resolutions have

supra-constitutional status and are hence accorded immunity from judicial review.

[29] The United Kingdom suggests that such immunity from review can be derived from Article 307 EC. The first paragraph of that article provides: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty." In the view of the United Kingdom, that provision, read in conjunction with Article 10 EC, would impose on the Community an obligation not to impair Member State compliance with Security Council resolutions. In consequence, the Court should abstain from judicial review of the contested regulation. I shall state at the outset that I am not convinced by that argument, but it is nevertheless worth looking into the matter in some detail, particularly since Article 307 EC figured prominently in the reasoning of the Court of First Instance.

[30] At first sight, it may not be entirely clear how Member States would be prevented from fulfilling their obligations under the United Nations Charter if the Court were to annul the contested regulation. Indeed, in the absence of a Community measure, it would in principle be open to the Member States to take their own implementing measures, since they are allowed, under the Treaty, to adopt measures which, though affecting the functioning of the common market, may be necessary for the maintenance of international peace and security. None the less, the powers retained by the Member States in the field of security policy must be exercised in a manner consistent with Community law. In the light of the Court's ruling in *ERT*, it may be assumed that, to the extent that their actions come within the scope of Community law, Member States are subject to the same Community rules for the protection of fundamental rights as the Community institutions themselves. On that assumption, if the Court were to annul the contested regulation on the ground that it infringed Community rules for the protection of fundamental rights, then, by implication, Member States could not possibly adopt the same measures without—in so far as those measures came within the scope of Community law—acting in breach of fundamental rights as protected by the Court. Thus, the argument based on Article 307 EC is of indirect relevance only.

[31] The crucial problem with the argument raised by the United Kingdom, however, is that it presents Article 307 EC as the source of a

possible derogation from Article 6(1) EU, according to which "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law." I see no basis for such an interpretation of Article 307 EC. Moreover, it would be irreconcilable with Article 49 EU, which renders accession to the Union conditional on respect for the principles set out in Article 6(1) EU. Furthermore, it would potentially enable national authorities to use the Community to circumvent fundamental rights which are guaranteed in their national legal orders even in respect of acts implementing international obligations. This would plainly run counter to firmly established case law of this Court, according to which the Community guarantees a complete system of judicial protection in which fundamental rights are safeguarded in consonance with the constitutional traditions of the Member States. As the Court stated in *Les Verts*, "the European Community is a community based on the rule of law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty." More straightforwardly, in *Schmidberger*, the Court reaffirmed that "measures which are incompatible with the observance of human rights . . . are not acceptable in the Community." In short, the United Kingdom's reading of Article 307 EC would break away from the very principles on which the Union is founded, while there is nothing in the Treaty to suggest that Article 307 EC has a special status—let alone a special status of that magnitude—in the constitutional framework of the Community.

[32] Besides, the obligations under Article 307 EC and the related duty of loyal cooperation flow in both directions: they apply to the Community as well as to the Member States. The second paragraph of Article 307 EC provides that "the Member State or States concerned shall take all appropriate steps to eliminate . . . incompatibilities" between their prior treaty obligations and their obligations under Community law. To this end, Member States shall "assist each other . . . and shall, where appropriate adopt a common attitude." That duty requires Member States to exercise their powers and responsibilities in an international organisation such as the United Nations in a manner that is compatible with the conditions set by the primary rules and the general principles of Community law. As Members of the United Nations, the Member States, and particularly—in the context of the present case—those belonging to the Security Council, have to act in such a way as to prevent, as far as possible, the adoption of decisions by organs of the United Nations that are liable to enter into conflict with the core principles of the Community legal order. The Member States

themselves, therefore, carry a responsibility to minimise the risk of conflicts between the Community legal order and international law.

[33] If Article 307 EC cannot render the contested regulation exempt from judicial review, are there perhaps any other rules of Community law that can? The Council, the Commission and the United Kingdom argue that, as a matter of general principle, it is not for the Court to cast doubt on Community measures that implement resolutions which the Security Council has considered necessary for the maintenance of international peace and security. In this connection, the Commission evokes the notion of "political questions." In brief, one could say that the Commission, the Council and the United Kingdom contend that the specific subject-matter at issue in the present case does not lend itself to judicial review. They claim that the European Court of Human Rights takes a similar position.

[34] The implication that the present case concerns a "political question," in respect of which even the most humble degree of judicial interference would be inappropriate, is, in my view, untenable. The claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights. This does not detract from the importance of the interest in maintaining international peace and security; it simply means that it remains the duty of the courts to assess the lawfulness of measures that may conflict with other interests that are equally of great importance and with the protection of which the courts are entrusted. As Justice Murphy rightly stated in his dissenting opinion in the *Korematsu* case of the United States Supreme Court:

> Like other claims conflicting with the asserted constitutional rights of the individual, [that] claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. What are the allowable limits of [discretion], and whether or not they have been overstepped in a particular case, are judicial questions.

[35] Certainly, extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions. However, that should not induce us to say that "there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods." Nor does it mean, as the United Kingdom submits, that judicial review in those cases should be only "of the most marginal

kind." On the contrary, when the risks to public security are believed to be extraordinarily high, the pressure is particularly strong to take measures that disregard individual rights, especially in respect of individuals who have little or no access to the political process. Therefore, in those instances, the courts should fulfil their duty to uphold the rule of law with increased vigilance. Thus, the same circumstances that may justify exceptional restrictions on fundamental rights also require the courts to ascertain carefully whether those restrictions go beyond what is necessary. As I shall discuss below, the Court must verify whether the claim that extraordinarily high security risks exist is substantiated and it must ensure that the measures adopted strike a proper balance between the nature of the security risk and the extent to which these measures encroach upon the fundamental rights of individuals.

[36] According to the Council, the Commission and the United Kingdom, the European Court of Human Rights relinquishes its powers of review when a contested measure is necessary in order to implement a Security Council resolution. Yet, I seriously doubt that the European Court of Human Rights limits its own jurisdiction in that way.[42] Moreover, even if

[42] The European Court of Human Rights has held that "the Contracting States may not, in the name of the struggle against . . . terrorism, adopt whatever measures they deem appropriate" (*Klass & Others*). Moreover, in its judgment in *Bosphorus Airways*, the same Court discussed the issue of its jurisdiction at length, without even hinting at the possibility that it might not be able to exercise review because the impugned measures implemented a resolution of the Security Council. Therefore, the judgment in *Bosphorus Airways* seems to bolster the argument in favour of judicial review. Still, according to the Council, the Commission and the United Kingdom, it would follow from the admissibility decision in *Behrami* that measures that are necessary for the implementation of Security Council resolutions automatically fall outside the ambit of the Convention (*Behrami & Behrami v. France* and *Saramati v. France, Germany & Norway*). However, that seems to be an overly expansive reading of the Court's decision. The *Behrami* case concerned an alleged infringement of fundamental rights by a security force deployed in Kosovo which operated under the auspices of the United Nations. The respondent States had contributed troops to this security force. Yet, the European Court of Human Rights declined jurisdiction *ratione personae* mainly because the ultimate authority and control over the security mission remained with the Security Council and, therefore, the impugned actions and inactions were attributable to the United Nations and not to the respondent States. Indeed, in this respect the Court carefully distinguished the case from *Bosphorus Airways*. Thus, the position of the European Court of Human Rights seems to be that, where, pursuant to the rules of public international law, the impugned acts are attributable to the United Nations, the court has no jurisdiction *ratione personae*, since the United Nations are not a contracting party to the Convention. By contrast, when the authorities of a contracting State have taken procedural steps to implement a Security Council resolution in the domestic legal order, the measures thus taken are attributable to that State and therefore amenable to judicial review under the Convention.

it were to do so, I do not think that that would be of consequence in the present case.

[37] It is certainly correct to say that, in ensuring the observance of fundamental rights within the Community, the Court of Justice draws inspiration from the case law of the European Court of Human Rights. None the less, there remain important differences between the two courts. The task of the European Court of Human Rights is to ensure the observance of the commitments entered into by the Contracting States under the Convention. Although the purpose of the Convention is the maintenance and further realisation of human rights and fundamental freedoms of the individual, it is designed to operate primarily as an interstate agreement which creates obligations between the Contracting Parties at the international level. This is illustrated by the Convention's intergovernmental enforcement mechanism. The EC Treaty, by contrast, has founded an autonomous legal order, within which States as well as individuals have immediate rights and obligations. The duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community. The European Court of Human Rights and the Court of Justice are therefore unique as regards their jurisdiction *ratione personae* and as regards the relationship of their legal system with public international law. Thus, the Council, the Commission and the United Kingdom attempt to draw a parallel precisely where the analogy between the two Courts ends.

[38] The Council asserted at the hearing that, by exercising its judicial task in respect of acts of Community institutions which have their source in Security Council resolutions, the Court would exceed its proper function and "speak on behalf of the international community." However, that assertion clearly goes too far. Of course, if the Court were to find that the contested resolution cannot be applied in the Community legal order, this is likely to have certain repercussions on the international stage. It should be noted, however, that these repercussions need not necessarily be negative. They are the immediate consequence of the fact that, as the system governing the functioning of the United Nations now stands, the only option available to individuals who wish to have access to an independent tribunal in order to obtain adequate protection of their fundamental rights is to challenge domestic implementing measures before a domestic court. Indeed, the possibility of a successful challenge cannot be entirely unexpected on the Security Council's part, given that it was expressly contemplated by the Analytical Support and Sanctions Monitoring Team of the Sanctions Committee.

[39] Moreover, the legal effects of a ruling by this Court remain confined to the municipal legal order of the Community. To the extent that such a ruling would prevent the Community and its Member States from implementing Security Council resolutions, the legal consequences within the international legal order remain to be determined by the rules of public international law. While it is true that the restrictions which the general principles of Community law impose on the actions of the institutions may inconvenience the Community and its Member States in their dealings on the international stage, the application of these principles by the Court of Justice is without prejudice to the application of international rules on State responsibility or to the rule enunciated in Article 103 of the UN Charter. The Council's contention that, by reviewing the contested regulation, the Court would assume jurisdiction beyond the perimeters of the Community legal order is therefore misconceived.

[40] I accordingly conclude that the Court of First Instance erred in law in holding that it had no jurisdiction to review the contested regulation in the light of fundamental rights that are part of the general principles of Community law. In consequence, the Court should consider the appellant's second plea well founded and set aside the judgment under appeal.

IV. The alleged breaches of fundamental rights

[42] The appellant alleges several breaches of his fundamental rights and, on those grounds, seeks the annulment of the contested regulation in so far as it concerns him. The respondents—in particular the Commission and the United Kingdom—argue that, to the extent that the contested regulation may interfere with the appellant's fundamental rights, this is justified for reasons relating to the suppression of international terrorism. In this connection, they also argue that the Court should not apply normal standards of review, but instead should—in the light of the international security interests at stake—apply less stringent criteria for the protection of fundamental rights.

[43] I disagree with the respondents. They advocate a type of judicial review that at heart is very similar to the approach taken by the Court of First Instance under the heading of *jus cogens*. In a sense, their argument is yet another expression of the belief that the present case concerns a "political question" and that the Court, unlike the political institutions, is not in a position to deal adequately with such questions. The reason would be that the matters at issue are of international significance and any intervention of the Court might upset globally-coordinated efforts

to combat terrorism. The argument is also closely connected with the view that courts are ill equipped to determine which measures are appropriate to prevent international terrorism. The Security Council, in contrast, presumably has the expertise to make that determination. For these reasons, the respondents conclude that the Court should treat assessments made by the Security Council with the utmost deference and, if it does anything at all, should exercise a minimal review in respect of Community acts based on those assessments.

[44] It is true that courts ought not to be institutionally blind. Thus, the Court should be mindful of the international context in which it operates and conscious of its limitations. It should be aware of the impact its rulings may have outside the confines of the Community. In an increasingly interdependent world, different legal orders will have to endeavour to accommodate each other's jurisdictional claims. As a result, the Court cannot always assert a monopoly on determining how certain fundamental interests ought to be reconciled. It must, where possible, recognise the authority of institutions, such as the Security Council, that are established under a different legal order than its own and that are sometimes better placed to weigh those fundamental interests. However, the Court cannot, in deference to the views of those institutions, turn its back on the fundamental values that lie at the basis of the Community legal order and which it has the duty to protect. Respect for other institutions is meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them. Consequently, in situations where the Community's fundamental values are in the balance, the Court may be required to reassess, and possibly annul, measures adopted by the Community institutions, even when those measures reflect the wishes of the Security Council.

[45] The fact that the measures at issue are intended to suppress international terrorism should not inhibit the Court from fulfilling its duty to preserve the rule of law. In doing so, rather than trespassing into the domain of politics, the Court is reaffirming the limits that the law imposes on certain political decisions. This is never an easy task, and, indeed, it is a great challenge for a court to apply wisdom in matters relating to the threat of terrorism. Yet, the same holds true for the political institutions. Especially in matters of public security, the political process is liable to become overly responsive to immediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few. This is precisely when courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of

tomorrow. Their responsibility is to guarantee that what may be politically expedient at a particular moment also complies with the rule of law without which, in the long run, no democratic society can truly prosper. In the words of Aharon Barak, the former President on the Supreme Court of Israel:

> It is when the cannons roar that we especially need the laws. . . . Every struggle of the state—against terrorism or any other enemy—is conducted according to rules and law. There is always law which the state must comply with. There are no "black holes." . . . The reason at the foundation of this approach is not only the pragmatic consequence of the political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law's war against those who rise up against it.

[46] There is no reason, therefore, for the Court to depart, in the present case, from its usual interpretation of the fundamental rights that have been invoked by the appellant. The only novel question is whether the concrete needs raised by the prevention of international terrorism justify restrictions on the fundamental rights of the appellant that would otherwise not be acceptable. This does not entail a different conception of those fundamental rights and the applicable standard of review. It simply means that the weight to be given to the different interests which are always to be balanced in the application of the fundamental rights at issue may be different as a consequence of the specific needs arising from the prevention of international terrorism. But this is to be assessed in a normal exercise of judicial review by this Court. The present circumstances may result in a different balance being struck among the values involved in the protection of fundamental rights but the standard of protection afforded by them ought not to change.

[47] The problem facing the appellant is that all of his financial interests within the Community have been frozen for several years, without limit of time and in conditions where there appear to be no adequate means for him to challenge the assertion that he is guilty of wrongdoing. He has invoked the right to property, the right to be heard, and the right to effective judicial review. In the context of this case, these rights are closely

connected. Clearly, the indefinite freezing of someone's assets constitutes a far-reaching interference with the peaceful enjoyment of property. The consequences for the person concerned are potentially devastating, even where arrangements are made for basic needs and expenses. Of course, this explains why the measure has such a strong coercive effect and why "smart sanctions" of this type might be considered a suitable or even necessary means to prevent terrorist acts. However, it also underscores the need for procedural safeguards which require the authorities to justify such measures and demonstrate their proportionality, not merely in the abstract, but in the concrete circumstances of the given case. The Commission rightly points out that the prevention of international terrorism may justify restrictions on the right to property. However, that does not *ipso facto* relieve the authorities of the requirement to demonstrate that those restrictions are justified in respect of the person concerned. Procedural safeguards are necessary precisely to ensure that that is indeed the case. In the absence of those safeguards, the freezing of someone's assets for an indefinite period of time infringes the right to property. . . .

[49] Both the right to be heard and the right to effective judicial review constitute fundamental rights that form part of the general principles of Community law. According to settled case-law, "observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question. . . . That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views." As to the right to effective judicial review, the Court has held: "The European Community is . . . a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. . . . Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States."

[50] The respondents argue, however, that in so far as there have been restrictions on the right to be heard and the right to effective judicial review, these restrictions are justified. They maintain that any effort on the part of the Community or its Member States to provide administrative or judicial procedures for challenging the lawfulness of the sanctions imposed

by the contested regulation would contravene the underlying Security Council resolutions and therefore jeopardise the fight against international terrorism. In consonance with that view, they have not made any submissions that would enable this Court to exercise review in respect of the specific situation of the appellant.

[51] I shall not dwell too much upon the alleged breach of the right to be heard. Suffice it to say that, although certain restrictions on that right may be envisaged for public security reasons, in the present case the Community institutions have not afforded any opportunity to the appellant to make known his views on whether the sanctions against him are justified and whether they should be kept in force. The existence of a de-listing procedure at the level of the United Nations offers no consolation in that regard. That procedure allows petitioners to submit a request to the Sanctions Committee or to their government for removal from the list. Yet, the processing of that request is purely a matter of intergovernmental consultation. There is no obligation on the Sanctions Committee actually to take the views of the petitioner into account. Moreover, the de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioner in the list. In fact, access to such information is denied regardless of any substantiated claim as to the need to protect its confidentiality. One of the crucial reasons for which the right to be heard must be respected is to enable the parties concerned to defend their rights effectively, particularly in legal proceedings which might be brought after the administrative control procedure has come to a close. In that sense, respect for the right to be heard is directly relevant to ensuring the right to effective judicial review. Procedural safeguards at the administrative level can never remove the need for subsequent judicial review. Yet, the absence of such administrative safeguards has significant adverse affects on the appellant's right to effective judicial protection.

[52] The right to effective judicial protection holds a prominent place in the firmament of fundamental rights. While certain limitations on that right might be permitted if there are other compelling interests, it is unacceptable in a democratic society to impair the very essence of that right. As the European Court of Human Rights held in *Klass and Others*, "the rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure."

[53] The appellant has been listed for several years in Annex I to the contested regulation and still the Community institutions refuse to grant him an opportunity to dispute the grounds for his continued inclusion on the list. They have, in effect, levelled extremely serious allegations against him and have, on that basis, subjected him to severe sanctions. Yet, they entirely reject the notion of an independent tribunal assessing the fairness of these allegations and the reasonableness of these sanctions. As a result of this denial, there is a real possibility that the sanctions taken against the appellant within the Community may be disproportionate or even misdirected, and might nevertheless remain in place indefinitely. The Court has no way of knowing whether that is the case in reality, but the mere existence of that possibility is anathema in a society that respects the rule of law.

[54] Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists. As the Commission and the Council themselves have stressed in their pleadings, the decision whether or not to remove a person from the United Nations sanctions list remains within the full discretion of the Sanctions Committee—a diplomatic organ. In those circumstances, it must be held that the right to judicial review by an independent tribunal has not been secured at the level of the United Nations. As a consequence, the Community institutions cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions in question within the Community legal order.

[55] It follows that the appellant's claim that the contested regulation infringes the right to be heard, the right to judicial review, and the right to property is well founded. The Court should annul the contested regulation in so far as it concerns the appellant.[*]

[*] Editor's Note: The judgment of the Grand Chamber of the European Court of Justice is pending.

A, K, M, Q & G v. H.M. Treasury
High Court of England and Wales
[2008] EWHC (Admin) 869

Before MR JUSTICE COLLINS

[1] All five applicants have been subjected to freezing orders over their assets in accordance with the Terrorism (United Nations Measures) Order 2006 (2006 No.2657) (the TO). In G's case, there is also an order against him by virtue of the Al-Qaida and Taliban (United Nations Measures) Order 2006 (2006 No. 2952) (the AQO). . . .

[3] Both Orders were made under powers conferred by § 1 of the United Nations Act 1946. . . .

[5] I come now to the resolutions of the Security Council which have led to the Orders. The TO is based on two Resolutions. The first is 1373/2001. . . .

Resolution 1452/2002 applies to the regime which has led to the AQO and not directly to that which has resulted in the TO. However, advice has been given that a similar regime should apply. . . .

[6] The AQO relies on a number of resolutions. The starting point is 1267/1999 [and] Resolution 1333/2000. . . .

[7] Resolution 1390/2002 decides that States must freeze the assets of those on the list maintained by the Committee, and ensure that such persons or entities cannot have made available to them any funds, financial assets or economic resources. Resolution 1452/2002 applies to these provisions. The need to freeze the assets of those on the list was confirmed in Resolution 1526/2004. . . .

[9] Article 4 of the TO confers power on the Treasury to designate persons. A designated person is one who is identified in Council Decision 2006/379/EC as provided for in Article 2.3 of Regulation (EC) No. 2580/2001 or one identified in a direction made under Article 4 (Article 3). . . .

[13] The relevant EU regulation is in fact (EC) No. 881/2002. This requires the freezing of assets of those designated by the UN Sanctions

Committee and listed in Annex 1 to the Regulations. Commission regulation (EC) No.14/2007 added G to the list in Annex 1. . . .

[16] It is convenient to deal first with the arguments which are specific to the AQO. Mr Rabinder Singh, Q.C., contended that there must be implied with the Order a right to access the court at least by way of judicial review. He further submitted that, since fundamental rights were being affected, that review must include a means of challenging the factual basis upon which the freezing order was made against G. This would require the court to have power to set aside the order notwithstanding that G was on the Sanctions Committee list if on consideration of the facts it took the view that he ought not to have been listed because he was not involved in any terrorist activity. This was all the more important because there was no means whereby G could mount an effective challenge to his listing since he did not know nor was there any procedure whereby he could be informed of what material had led the Committee to list him. It is known that he was listed following information given against him by the government. Thus, without the support of the government, his chances of achieving delisting are infinitesimal. . . .

[18] It is I think obvious that this procedure does not begin to achieve fairness for the person who is listed. Governments may have their own reasons to want to ensure that he remains on the list and there is no procedure which enables him to know the case he has to meet so that he can make meaningful representations. Nevertheless, that is what the Security Council has approved and the Resolution, which Member States are obliged to put into effect, requires the freezing of the assets of those listed. Article 103 of the Charter makes clear that the obligations under the Charter take precedence over any other international agreements. Thus human rights under the ECHR cannot prevail over the obligations set out in the Resolutions.

[19] Mr Singh has relied on the constitutional right of access to the court, a right which cannot be taken away save by express words in a statute. An Order in Council following the exercise of the Royal Prerogative is itself amenable to judicial review. Accordingly, submits Mr Singh, albeit no right of challenge is contained in the Order, there must be such a right. He has taken me to a number of authorities in which this principle is enshrined. They include *Raymond v. Honey* [1983] . . . and *R v. Lord Chancellor ex p Witham* [1998]. I do not need to refer to them in any detail since Mr Crow has not challenged the proposition that the Order does not

preclude a right to come to the court. He submits that, having regard to the clear words of the Resolutions, EC Regulation 881 and § 1 of the 1946 Act, the court cannot grant any relief which involves the setting aside of the freezing order, so long as G remains on the list maintained by the Sanctions Committee. . . .

[26] The attack on the AQO does not avail G unless he can show that he must have a right to challenge the freezing order under the EC Regulation. This question has been considered by the Court of First Instance (CFI) in *Kadi v. Council* of the EU (2005) ECR 11-3353. This was an attack on Regulation 881/2002 by Mr Kadi who was on the Sanctions Committee's list and who was placed on the list maintained in the EC Regulation. Thus his funds in the Community were frozen. The CFI decided that, having regard to the primacy of the UN Charter, the EC was bound to adopt all measures to enable the Member States to fulfil their obligations under the Charter. There was no power to undertake what would amount to an indirect review of the lawfulness of the UN Resolution unless the Security Council had failed to observe the fundamental peremptory provisions of jus cogens. . . .

[30] Not surprisingly, an appeal has been lodged to the ECJ against this decision. The opinion of Advocate General Maduro was delivered on 8 January 2008: the judgment of the Court is awaited. His conclusion is that the Court should allow the appeal and annul Regulation 881/2002 because it infringes the right to be heard, the right to judicial review and the right to property. He stated that it was for the Community courts to determine the effect of international obligations within the Community legal order by reference to the conditions set by Community law (Paragraph 23). . . .

[32] Since the right to be heard and the right to effective judicial review constituted fundamental rights forming part of the general principles of Community law and those rights, particularly that to effective judicial review, were removed because of the lack of any genuine and effective mechanism to challenge listing, the applicants' claim must succeed. Mr Singh submits with force that that approach applies equally to domestic law. The requirement that there should be an effective right to be heard has recently been confirmed in the terrorism context by the decision of the House of Lords in *Secretary of State for the Home Department v. MB* [2007]. Thus the acceptance of the Advocate General's views would inevitably lead to the quashing of the AQO.

[33] The decision of the Advocate General is no more than an opinion to which a domestic court is entitled to have regard. But at present the only decision of a court is that of the CFI which, unless reviewed, determines the relevant EC law. In domestic law terms, I have to have regard to the obligation to apply the Resolutions of the Security Council which is absolute and which takes precedence over all other international obligations. The applicants submit that fundamental principles of domestic law are not within Article 103 since they are not "obligations under any other international treaty." These fundamental rights are not conferred only by Article 6 of the ECHR but are rights which have for long existed under Common Law.

[34] In *R (Al-Jeddah) v. Defence Secretary* [2008], the House of Lords considered whether internment of a British Citizen in Iraq pursuant to a Security Council resolution permitting such internment if it was "necessary for imperative reasons of security" overrode the rights conferred by Article 5 of the ECHR. Lord Bingham in Paragraph 33 drew attention to the possibility that the Security Council could adopt resolutions couched in mandatory terms in which case Article 25 of the Charter bound Member States to comply with them. But he accepted that, while maintenance of international peace and security is a fundamental purpose of the UN, so too is the promotion of respect for human rights. Lord Bingham dealt with the means whereby the clash between the power or duty to detain on the express authority of the Security Council and the fundamental human right enshrined in Article 5 of the ECHR can be reconciled. He said this:

> There is in my opinion only one way in which they can be reconciled: by ruling that the U.K. may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by [the relevant resolutions], but must ensure that the detainee's rights under Article 5 are not infringed to any greater extent than is inherent in such detention.

This reasoning is clearly applicable to the inevitable breaches of property rights and infringement of Article 8 rights resulting from the freezing orders.

[35] Lord Carswell stated:

> I would emphasise . . . that that power [viz: to detain] has to be exercised in such a way as to minimise the infringements of the detainees' rights under Article 5(1) . . .

[36] Much as I would like to, I do not think I can go as far as the Advocate General in *Kadi*. These cases concern the means whereby the freezing orders necessarily resulting from the listing under the AQO or the application of Paragraph 1(c) of Resolution 1373/2001 under the TO are put into effect. Article 25 of the Charter obliges the U.K. to freeze the assets of a person listed by the UN Committee and so the shortcomings in the procedure to challenge such listing cannot of themselves constitute a bar to freezing. Thus any right to challenge the factual basis for listing has to recognise that obstacle. Nevertheless, there is in my judgment a real practical benefit that can be afforded to the listed person by the ability of this court to consider the facts and to judge whether the necessary threshold has been met. If on considering all relevant material the court concluded that there was not evidence to justify listing, that conclusion would bind the Government to pursue a de-listing application to the Security Council. It follows that I reject the approach of the Government recorded by the Advocate General in *Kadi* at paragraph 35 that judicial review "should be only of the most marginal kind." Mr Crow in the course of argument accepted—or rather, he was not instructed to oppose—the view I expressed that there should be a power in the court to decide whether the basis for listing existed which would then bind the Government to support de-listing.

[37] However, for reasons which will become clear, this does not save the AQO. Counsel for the applicants have submitted that the means used to apply the obligations imposed by the UN Resolutions is unlawful. Parliament has been bypassed by use of Orders in Council.[*] But in deciding the appropriate way in which the obligations should be applied and in particular in creating the criminal offences set out in the Orders it was

[*] Editor's Note: An Order in Council is a decree of the sovereign, issued on the advice of the Privy Council, which has the force of law, despite not requiring legislative approval. (Orders in Council may, however, be subject to annulment by Parliament). The sovereign has the power to issue Orders in Council either because a certain kind of action is deemed within the Royal Prerogative or, more commonly today, because rule-making authority has been delegated by an Act of Parliament. An Order in Council issued in accordance with such parliamentary delegation is referred to as secondary, or delegated, legislation. Most delegated legislation in the United Kingdom is governed by the Statutory Instruments Act 1946.

necessary that Parliamentary approval should be obtained. Those submissions are in my judgment entirely persuasive.

[38] The obligation to apply the Resolutions necessarily involves consideration of how that can be achieved. Since there is a breach of fundamental rights, the application must involve the least possible interference with such rights. Parliament can of course decide what measures are needed and can go as far as it considers necessary to achieve the avoidance of funds being made available for terrorist purposes. The purpose of the UN Resolution is to ensure so far as possible that funds are not made available to assist terrorism by placing constraints on the ability of those who are involved in terrorist activities or who support such activities to provide funds for them.

[39] Section 1 of the 1946 Act enables an Order in Council to be used rather than legislation to be put through Parliament only where it appears to Her Majesty that it is 'necessary and expedient' for enabling the measure to be effectively applied to do so. Thus it is in my judgment necessary, if Parliament is not to be involved, that the Order in Council goes no further than to apply what the Resolution requires. Paragraph 1(c) of Resolution 1373/2001 requires the freezing of 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." The TO confers power to designate where the Treasury have "reasonable grounds for suspecting that the person is or may be a person who commits etc."

[40] The threshold is thus a very low one. While I can see the force of an argument that reasonable suspicion may suffice (and it is to be noted that both the CFI and the Advocate General use the word) to implement the requirement of Paragraph 1(c) of 1373/2001, it is impossible to see how the test could properly be as low as reasonable suspicion that a person may be a person who commits etc. I do not accept—indeed the applicants do not argue—that it is to be limited to those who are proved by conviction to be committing or attempting to commit acts of terrorism. But it is impossible to see how the test applied in the TO can constitute a necessary means of applying the resolution. Mr Crow submits that it is expedient, which has a wider meaning. In *R (Gillan) v. Commissioner of Metropolitan Police* [2006], the distinction between necessary and expedient was considered in the context of powers of random search conferred by § 44 of the Terrorism Act 2000. Lord Bingham said that Parliament had used the word deliberately recognising that the powers were desirable in the interest of

combating terrorism. But Lord Bingham drew attention to the close regulation of the exercise of the statutory power. There is no such regulation here and I do not accept that the extension to those who are suspected of possible involvement is properly within the scope of what is authorised by § 1 of the 1946 Act.

[41] There is another cogent reason for saying that it is not expedient. It is rightly accepted by Mr Crow that the TO in terms and the AQO through judicial review allows consideration of whether the person affected is on the facts properly within the test to be applied. This means that all material must be available to the court, whether closed or open. I have some experience both as an ex-chairman of SIAC[*] and in considering Control Orders cases of the evidence upon which reliance is placed by the Security Services and so available to the Treasury. This will usually—in my experience invariably—include intercept material. Section 17 of the Regulation of Investigatory Powers Act 2000 (RIPA) excludes such evidence from any legal proceedings. Exceptions to this exclusionary rule are contained in § 18, but they do not extend to applications or judicial review claims against orders made under the TO or the AQO. Thus the court is disabled from considering such material. This means that a fair and just consideration of the question whether the individual applicant is one who should be subjected to an order is likely to be impossible in most cases. Fairness works for the Crown as it does for the applicant. Thus the Treasury will be unable to rely on inculpatory intercept material just as the applicant will be unable to rely on exculpatory intercept material. This cannot be in the interests of justice or indeed of ensuring that the right people are made subject to these orders. Thus it is in my view impossible to say that the use of an Order in Council is expedient unless it can provide an exception to § 17 of RIPA. It cannot nor does it purport to do so.

[42] It is submitted that the orders are unlawful in establishing criminal offences which go far beyond what is reasonably required and offend against the principle of legal certainty. The very wide definition of economic resources makes it impossible for members of the family of the designated person in particular to know whether they are committing an offence or a licence is needed. Article 8(1) of the TO applies to any asset which could in theory be used to obtain funds. The solicitor for the applicants A, K and M was concerned to ascertain on their families' behalf what could and could not be provided without the need for a licence and I

[*] Editor's Note: SIAC is the Special Immigrants Appeals Commission, which hears appeals of Home Office decisions to deport persons on national security grounds.

gather that those in the Treasury who have to deal with those matters have had to consider whether licences should be granted on more than 50 occasions. A specific query arose, and it is a good illustration of the absurdity which can result, in relation to the loan of a car to an applicant to enable him to go to the supermarket to get the family's groceries. After some delay, the Treasury (in my view wrongly) decided that a licence was needed. The car was an economic resource and could be used to obtain or deliver goods or services. This was only resolved by the Treasury after seeking ministerial consideration. Similar concerns have been raised in relation to an Oyster card to enable the applicant to travel and any borrowing of items for any purpose. Since the possible penalty on conviction is severe, the concerns are understandable and the effect on the applicant and his family, whose human rights are also in issue, is serious. . . .

[44] *R v. Jones* [2007], concerned the meaning to be attached to "offence" within the meaning of § 68(2) of the Criminal Justice and Public Order Act 1994 in relation to convictions for acts of civil disobedience by opponents of the Iraq war at military institutions. Lord Bingham said:

> [T]here now exists no power in the courts to create new criminal offences. . . . Statute is now the sole source of new criminal offences.

Lord Hoffmann said this, in the context of incorporating new crimes in international law:

> New domestic offences should in my opinion be debated in Parliament, defined in a statute and come into force on a prescribed date. They should not creep into existence as a result of an international consensus to which only the executive of this country is a party.

[45] I recognise that this dictum relates to offences which international bodies consider should exist. And Mr Crow submits that § 1 of the 1946 Act gives express power to provide for the trial and punishment of persons offending against any Order. But the principle of maximum certainty (as identified by Professor Ashworth in his *Principles of Criminal Law* at p. 24 *et seq*) requires that a citizen must be able to have an adequate indication of the legal rules applicable. That follows from the decision of

the ECtHR in *Sunday Times v U*.K. (1979). On p. 76, Professor Ashworth states:

> [A] person's ability to know of the existence and extent of a rule is fundamental: respect for a citizen as a rational autonomous individual and as a person with social and political duties requires fair warning of the criminal law's provisions and no undue difficulty in ascertaining them.

[46] The purpose of asset freezing is to ensure that funds are not made available for terrorist purposes. Thus any criminal liability which could fall on those who make any assets available to a designated person should depend on whether it was or ought to have been known to the supplier that the asset in question could result in funds being available for terrorist purposes. That at the very least seems to me to be an appropriate limitation on criminal liability. How the requirements of the Sanctions Committee should be put into law is, as it seems to me, having regard to the principles to which I have referred a matter for Parliamentary consideration. Thus I am satisfied that neither Order in Council represents a necessary or expedient means of giving effect to the obligations imposed by the Committee. . . .

[49] The result of this judgment will, I think, be that both the Orders must be quashed. This is not to say that freezing orders cannot be made to comply with the UN resolutions. But in my view it is essential that Parliament considers the way in which what is required should be achieved and it is not proper to do it by relying on § 1 of the 1946 Act. However, I will hear counsel on the appropriate order that I should make.

Medellín v. Texas
Supreme Court of the United States
552 U.S. ___ (2008)

[*Editor's Note: In 2004 the ICJ issued a judgment in* Avena and Other Mexican Nationals ("Avena") *in which it found that the United States had breached its obligations under the Vienna Convention on Consular Relations by failing immediately to inform 51 Mexican nationals of their rights under the Convention and by failing to notify the appropriate Mexican consular officials of the detention of their nationals, thereby depriving Mexico of the right to render assistance to its nationals. In its decision, the ICJ held that the United States must provide "by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals."*

In February 2005, President Bush announced that the United States would comply with the ruling and issued a memorandum requiring that states provide review and reconsideration of the Mexican nationals' sentences. In 2006, the United States Supreme Court handed down a 5-4 decision in Sanchez-Llamas v. Oregon *(2006), holding that violations of the Convention were subject to state procedural default rules which could bar claims not properly raised at trial.*[*] *Citing* Sanchez-Llamas, *as well as its own conclusion that the President's memorandum was unconstitutional, the Texas Supreme Court refused to reconsider the death sentence of José Ernesto Medellín, one of the nationals on whose behalf Mexico had brought the* Avena *case in the ICJ. Medellín had been convicted of rape and murder in the Texas courts. The U.S. Supreme Court agreed to consider whether the ICJ's* Avena *judgment was enforceable as a matter of domestic law,* i.e., *whether the Supremacy Clause required Texas to enforce the law without further legislation from Congress.*[**] *Notably, as the case unfolded, President Bush withdrew the United States from the Optional Protocol requiring governments to accept the jurisdiction of the ICJ in disputes arising under the Convention.*]

[*] *Sanchez-Llamas* did not involve the nationals whose interests were represented at the ICJ.

[**] As this text goes to print, José Ernesto Medellín is scheduled to be executed on Aug. 5, 2008, despite requests from President Bush and the Secretary of State Condoleezza Rice to the Texas Parole Board that his sentence be reviewed so that the United States will not be held in breach of the Convention. On July 16, 2008, the ICJ ordered, by a vote of 7-5, that the United States take all measures necessary to stop the executions. The ICJ sought to ensure that the Mexicans remain alive until the tribunal can resolve, in August, the ongoing dispute over the obligations of the United States government under the Convention.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court. . . .

We granted certiorari to decide two questions. First, is the ICJ's judgment in *Avena* directly enforceable as domestic law in a state court in the United States? Second, does the President's Memorandum independently require the States to provide review and reconsideration of the claims of the 51 Mexican nationals named in *Avena* without regard to state procedural default rules? We conclude that neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions. . . .

Medellín first contends that the ICJ's judgment in *Avena* constitutes a "binding" obligation on the state and federal courts of the United States. He argues that "by virtue of the Supremacy Clause, the treaties requiring compliance with the *Avena* judgment are already the 'Law of the Land' by which all state and federal courts in this country are 'bound.'" Accordingly, Medellín argues, *Avena* is a binding federal rule of decision that pre-empts contrary state limitations on successive habeas petitions.

No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an international law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. The question we confront here is whether the *Avena* judgment has automatic domestic legal effect such that the judgment of its own force applies in state and federal courts.

This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law. . . . In sum, while treaties "may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms. . . .

The label "self-executing" has on occasion been used to convey different meanings. What we mean by "self-executing" is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a "non-self-executing" treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress. Even when treaties are

self-executing in the sense that they create federal law, the background presumption is that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." Accordingly, a number of the Courts of Appeals have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary.

Medellín and his *amici* nonetheless contend that the Optional Protocol, United Nations Charter, and ICJ Statute supply the "relevant obligation" to give the *Avena* judgment binding effect in the domestic courts of the United States. Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* judgment is not automatically binding domestic law. . . .

As a signatory to the Optional Protocol, the United States agreed to submit disputes arising out of the Vienna Convention to the ICJ. The Protocol provides: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Of course, submitting to jurisdiction and agreeing to be bound are two different things. A party could, for example, agree to compulsory nonbinding arbitration. Such an agreement would require the party to appear before the arbitral tribunal without obligating the party to treat the tribunal's decision as binding. . . .

The most natural reading of the Optional Protocol is as a bare grant of jurisdiction. It provides only that "[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice" and "may accordingly be brought before the [ICJ] . . . by any party to the dispute being a Party to the present Protocol." The Protocol says nothing about the effect of an ICJ decision and does not itself commit signatories to comply with an ICJ judgment. The Protocol is similarly silent as to any enforcement mechanism.

The obligation on the part of signatory nations to comply with ICJ judgments derives not from the Optional Protocol, but rather from Article 94 of the United Nations Charter—the provision that specifically addresses the effect of ICJ decisions. Article 94(1) provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party." The Executive Branch contends that the phrase "undertakes to comply" is not "an acknowledgement that an ICJ

decision will have immediate legal effect in the courts of U. N. members," but rather "a commitment on the part of U.N. Members to take future action through their political branches to comply with an ICJ decision."

We agree with this construction of Article 94. The Article is not a directive to domestic courts. It does not provide that the United States "shall" or "must" comply with an ICJ decision, nor indicate that the Senate that ratified the U. N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts. Instead, "[t]he words of Article 94 . . . call upon governments to take certain action." In other words, the U. N. Charter reads like "a compact between independent nations" that "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."

[T]he remainder of Article 94 confirms that the U. N. Charter does not contemplate the automatic enforceability of ICJ decisions in domestic courts. Article 94(2)—the enforcement provision—provides the sole remedy for noncompliance: referral to the United Nations Security Council by an aggrieved state.

The U. N. Charter's provision of an express diplomatic—that is, nonjudicial—remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts. And even this "quintessentially *international* remed[y] is not absolute. First, the Security Council must "dee[m] necessary" the issuance of a recommendation or measure to effectuate the judgment. Second, as the President and Senate were undoubtedly aware in subscribing to the U. N. Charter and Optional Protocol, the United States retained the unqualified right to exercise its veto of any Security Council resolution.

This was the understanding of the Executive Branch when the President agreed to the U. N. Charter and the declaration accepting general compulsory ICJ jurisdiction. Whether or not the United States "undertakes" to comply with a treaty says nothing about what laws it may enact. The United States is always "at liberty to make . . . such laws as [it] think[s] proper." Indeed, a later-in-time federal statute supersedes inconsistent treaty provisions. Rather, the "undertakes to comply" language confirms that further action to give effect to an ICJ judgment was contemplated, contrary to the dissent's position that such judgments constitute directly enforceable federal law, without more. . . .

If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause. Mexico or the ICJ would have no need to proceed to the Security Council to enforce the judgment in this case. Noncompliance with an ICJ judgment through exercise of the Security Council veto—always regarded as an option by the Executive and ratifying Senate during and after consideration of the U. N. Charter, Optional Protocol, and ICJ Statute—would no longer be a viable alternative. There would be nothing to veto. In light of the U. N. Charter's remedial scheme, there is no reason to believe that the President and Senate signed up for such a result.

In sum, Medellín's view that ICJ decisions are automatically enforceable as domestic law is fatally undermined by the enforcement structure established by Article 94. His construction would eliminate the option of noncompliance contemplated by Article 94(2), undermining the ability of the political branches to determine whether and how to comply with an ICJ judgment. Those sensitive foreign policy decisions would instead be transferred to state and federal courts charged with applying an ICJ judgment directly as domestic law. And those courts would not be empowered to decide whether to comply with the judgment—again, always regarded as an option by the political branches—any more than courts may consider whether to comply with any other species of domestic law. This result would be particularly anomalous in light of the principle that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments."

The ICJ Statute, incorporated into the U. N. Charter, provides further evidence that the ICJ's judgment in *Avena* does not automatically constitute federal law judicially enforceable in United States courts. To begin with, the ICJ's "principal purpose" is said to be to "arbitrate particular disputes between national governments." Accordingly, the ICJ can hear disputes only between nations, not individuals. More important, Article 59 of the statute provides that "[t]he decision of the [ICJ] has no binding force except between the parties and in respect oft hat particular case." . . .

It is, moreover, well settled that the United States' interpretation of a treaty "is entitled to great weight." The Executive Branch has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law.

The pertinent international agreements, therefore, do not provide for implementation of ICJ judgments through direct enforcement in domestic courts, and "where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own." In interpreting our treaty obligations, we also consider the views of the ICJ itself, "giv[ing] respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret [the treaty]." It is not clear whether that principle would apply when the question is the binding force of ICJ judgments themselves, rather than the substantive scope of a treaty the ICJ must interpret in resolving disputes. In any event, nothing suggests that the ICJ views its judgments as automatically enforceable in the domestic courts of signatory nations. The *Avena* judgment itself directs the United States to provide review and reconsideration of the affected convictions and sentences "by means of its own choosing." This language, as well as the ICJ's mere suggestion that the "judicial process" is best suited to provide such review, confirm that domestic enforceability in court is not part and parcel of an ICJ judgment. . . .

The dissent faults our analysis because it "looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language)." Given our obligation to interpret treaty provisions to determine whether they are self-executing, we have to confess that we do think it rather important to look to the treaty language to see what it has to say about the issue. That is after all what the Senate looks to in deciding whether to approve the treaty. . . .

As against this time-honored textual approach, the dissent proposes a multifactor, judgment-by-judgment analysis that would "jettiso[n] relative predictability for the open-ended rough-and-tumble of factors." The dissent's novel approach to deciding which (or, more accurately, when) treaties give rise to directly enforceable federal law is arrestingly indeterminate. . . . Determining whether treaties themselves create federal law is sometimes committed to the political branches and sometimes to the judiciary. Of those committed to the judiciary, the courts pick and choose which shall be binding United States law—trumping not only state but other federal law as well—and which shall not. . . . Even then, the same treaty sometimes gives rise to United States law and sometimes does not, again depending on an ad hoc judicial assessment.

Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting

that decision in the political branches, subject to checks and balances. They also recognized that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it. The dissent's understanding of the treaty route, depending on an ad hoc judgment of the judiciary without looking to the treaty language—the very language negotiated by the President and approved by the Senate—cannot readily be ascribed to those same Framers.

The dissent's approach risks the United States' involvement in international agreements. It is hard to believe that the United States would enter into treaties that are sometimes enforceable and sometimes not. Such a treaty would be the equivalent of writing a blank check to the judiciary. Senators could never be quite sure what the treaties on which they were voting meant. Only a judge could say for sure and only at some future date. This uncertainty could hobble the United States' efforts to negotiate and sign international agreements.

In this case, the dissent—for a grab bag of no less than seven reasons—would tell us that this particular ICJ judgment is federal law. That is no sort of guidance. Nor is it any answer to say that the federal courts will diligently police international agreements and enforce the decisions of international tribunals only when they should be enforced. The point of a non-self executing treaty is that it "addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court." To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law. . . .

Our conclusion that *Avena* does not by itself constitute binding federal law is confirmed by the "post ratification understanding" of signatory nations. There are currently 47 nations that are parties to the Optional Protocol and 171 nations that are parties to the Vienna Convention. Yet neither Medellín nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts. . . . [T]he lack of any basis for supposing that any other country would treat ICJ judgments as directly enforceable as a matter of its domestic law strongly suggests that the treaty should not be so viewed in our courts. . . .

Moreover, the consequences of Medellín's argument give pause. An ICJ judgment, the argument goes, is not only binding domestic law but is also unassailable. As a result, neither Texas nor this Court may look behind

a judgment and quarrel with its reasoning or result. . . . Medellín's interpretation would allow ICJ judgments to override otherwise binding state law; there is nothing in his logic that would exempt contrary federal law from the same fate. And there is nothing to prevent the ICJ from ordering state courts to annul criminal convictions and sentences, for any reason deemed sufficient by the ICJ. Indeed, that is precisely the relief Mexico requested.

Even the dissent flinches at reading the relevant treaties to give rise to self-executing ICJ judgments in all cases. It admits that "Congress is unlikely to authorize automatic judicial enforceability of all ICJ judgments, for that could include some politically sensitive judgments and others better suited for enforcement by other branches." Our point precisely. But the lesson to draw from that insight is hardly that the judiciary should decide which judgments are politically sensitive and which are not.

In short, and as we observed in *Sanchez-Llamas*, "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." Given that holding, it is difficult to see how that same structure and purpose can establish, as Medellín argues, that judgments of the ICJ nonetheless were intended to be conclusive on our courts. A judgment is binding only if there is a rule of law that makes it so. And the question whether ICJ judgments can bind domestic courts depends upon the same analysis undertaken in *Sanchez-Llamas* and set forth above. . . .

Our holding does not call into question the ordinary enforcement of foreign judgments or international arbitral agreements. Indeed, we agree with Medellín that, as a general matter, "an agreement to abide by the result" of an international adjudication—or what he really means, an agreement to give the result of such adjudication domestic legal effect—can be a treaty obligation like any other, so long as the agreement is consistent with the Constitution. The point is that the particular treaty obligations on which Medellín relies do not of their own force create domestic law.

The dissent worries that our decision casts doubt on some 70-odd treaties under which the United States has agreed to submit disputes to the ICJ according to "roughly similar" provisions. Again, under our established precedent, some treaties are self-executing and some are not, depending on the treaty. That the judgment of an international tribunal might not automatically become domestic law hardly means the underlying treaty is "useless." [S]uch judgments would still constitute international obligations,

the proper subject of political and diplomatic negotiations. . . . And Congress could elect to give them wholesale effect (rather than the judgment-by-judgment approach hypothesized by the dissent) through implementing legislation, as it regularly has.

Further, that an ICJ judgment may not be automatically enforceable in domestic courts does not mean the particular underlying treaty is not. . . . Contrary to the dissent's suggestion . . . neither our approach nor our cases require that a treaty provide for self-execution in so many talismanic words; that is a caricature of the Court's opinion. Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect. . . .

In sum, while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that preempts state restrictions on the filing of successive habeas petitions. As we noted in *Sanchez-Llamas*, a contrary conclusion would be extraordinary, given that basic rights guaranteed by our own Constitution do not have the effect of displacing state procedural rules. Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by "many of our most fundamental constitutional protections."

JUSTICE STEVENS, concurring in the judgment.

There is a great deal of wisdom in JUSTICE BREYER's dissent. I agree that the text and history of the Supremacy Clause, as well as this Court's treaty-related cases, do not support a presumption against self-execution. . . . In the end, however, I am persuaded that the relevant treaties do not authorize this Court to enforce the judgment of the International Court of Justice (ICJ) in *Case Concerning Avena and Other Mexican Nationals*. . . .

Absent a presumption one way or the other, the best reading of the words "undertakes to comply" is, in my judgment, one that contemplates future action by the political branches. I agree with the dissenters that "Congress is unlikely to authorize automatic judicial enforceability of all ICJ judgments, for that could include some politically sensitive judgments and others better suited for enforcement by other branches." But this concern

counsels in favor of reading any ambiguity in Article 94(1) as leaving the choice of whether to comply with ICJ judgments, and in what manner, "to the political, not the judicial department."

[E]ven though the ICJ's judgment in *Avena* is not "the supreme Law of the Land," no one disputes that it constitutes an international law obligation on the part of the United States. By issuing a memorandum declaring that state courts should give effect to the judgment in *Avena*, the President made a commendable attempt to induce the States to discharge the Nation's obligation. I agree with the Texas judges and the majority of this Court that the President's memorandum is not binding law. Nonetheless, the fact that the President cannot legislate unilaterally does not absolve the United States from its promise to take action necessary to comply with the ICJ's judgment.

Under the express terms of the Supremacy Clause, the United States' obligation to "undertak[e] to comply" with the ICJ's decision falls on each of the States as well as the Federal Government. One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas's duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy. Having already put the Nation in breach of one treaty, it is now up to Texas to prevent the breach of another. . . .

The Court's judgment, which I join, does not foreclose further appropriate action by the State of Texas.

JUSTICE BREYER, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

The Constitution's Supremacy Clause provides that "all Treaties . . . which shall be made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." The Clause means that the "courts" must regard "a treaty . . . as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."

In the *Avena* case the International Court of Justice (ICJ) (interpreting and applying the Vienna Convention on Consular Relations) issued a judgment that requires the United States to reexamine certain

criminal proceedings in the cases of 51 Mexican nationals. The question here is whether the ICJ's *Avena* judgment is enforceable now as a matter of domestic law, *i.e.*, whether it "operates of itself without the aid" of any further legislation.

The United States has signed and ratified a series of treaties obliging it to comply with ICJ judgments in cases in which it has given its consent to the exercise of the ICJ's adjudicatory authority. Specifically, the United States has agreed to submit, in this kind of case, to the ICJ's "compulsory jurisdiction" for purposes of "compulsory settlement." Optional Protocol Concerning the Compulsory Settlement of Disputes. And it agreed that the ICJ's judgments would have "binding force . . . between the parties and in respect of [a] particular case." United Nations Charter, Art. 59. President Bush has determined that domestic courts should enforce this particular ICJ judgment. Memorandum to the Attorney General (Feb. 28, 2005), (hereinafter President's Memorandum). And Congress has done nothing to suggest the contrary. Under these circumstances, I believe the treaty obligations, and hence the judgment, resting as it does upon the consent of the United States to the ICJ's jurisdiction, bind the courts no less than would "an act of the [federal] legislature."

I

To understand the issue before us, the reader must keep in mind three separate ratified United States treaties and one ICJ judgment against the United States. The first treaty, the Vienna Convention, contains two relevant provisions. The first requires the United States and other signatory nations to inform arrested foreign nationals of their separate Convention-given right to contact their nation's consul. The second says that these rights (of an arrested person) "shall be exercised in conformity with the laws and regulations" of the arresting nation, *provided that the "laws and regulations . . . enable full effect to be given to the purposes for which" those "rights . . . are intended."*

The second treaty, the Optional Protocol, concerns the "compulsory settlement" of Vienna Convention disputes. It provides that for parties that elect to subscribe to the Protocol, "[d]isputes arising out of the interpretation or application of the [Vienna] Convention" shall be submitted to the "compulsory jurisdiction of the International Court of Justice." It authorizes any party that has consented to the ICJ's jurisdiction (by signing the Optional Protocol) to bring another such party before that Court.

The third treaty, the United Nations Charter, says that every signatory Nation "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Art. 94(1). In an annex to the Charter, the Statute of the International Court of Justice states that an ICJ judgment has "binding force . . . between the parties and in respect of that particular case." Art. 59. See also Art. 60, *id.*, at 1063 (ICJ "judgment is final and without appeal").

The judgment at issue is the ICJ's judgment in *Avena*, a case that Mexico brought against the United States on behalf of 52 nationals arrested in different States on different criminal charges. Mexico claimed that state authorities within the United States had failed to notify the arrested persons of their Vienna Convention rights and, by applying state procedural law in a manner which did not give full effect to the Vienna Convention rights, had deprived them of an appropriate remedy. The ICJ judgment in *Avena* requires that the United States reexamine "by means of its own choosing" certain aspects of the relevant state criminal proceedings of 51 of these individual Mexican nationals. The President has determined that this should be done.

The critical question here is whether the Supremacy Clause requires Texas to follow, *i.e.*, to enforce, this ICJ judgment. The Court says "no." And it reaches its negative answer by interpreting the labyrinth of treaty provisions as creating a legal obligation that binds the United States internationally, but which, for Supremacy Clause purposes, is not automatically enforceable as domestic law. In the majority's view, the Optional Protocol simply sends the dispute to the ICJ; the ICJ statute says that the ICJ will subsequently reach a judgment; and the U.N. Charter contains no more than a promise to " 'undertak[e] to comply' " with that judgment. Such a promise, the majority says, does not as a domestic law matter (in Chief Justice Marshall's words) "operat[e] of itself without the aid of any legislative provision." Rather, here (and presumably in any other ICJ judgment rendered pursuant to any of the approximately 70 U.S. treaties in force that contain similar provisions for submitting treaty-based disputes to the ICJ for decisions that bind the parties) Congress must enact specific legislation before ICJ judgments entered pursuant to our consent to compulsory ICJ jurisdiction can become domestic law.

In my view, the President has correctly determined that Congress need not enact additional legislation. The majority places too much weight upon treaty language that says little about the matter. The words "undertak[e] to comply," for example, do not tell us whether an ICJ

judgment rendered pursuant to the parties' consent to compulsory ICJ jurisdiction does, or does not, automatically become part of our domestic law. To answer that question we must look instead to our own domestic law, in particular, to the many treaty-related cases interpreting the Supremacy Clause. Those cases, including some written by Justices well aware of the Founders' original intent, lead to the conclusion that the ICJ judgment before us is enforceable as a matter of domestic law without further legislation.

A

Supreme Court case law stretching back more than 200 years helps explain what, for present purposes, the Founders meant when they wrote that "all Treaties . . . shall be the supreme Law of the Land."

[A]ll of these cases make clear that self-executing treaty provisions are not uncommon or peculiar creatures of our domestic law; that they cover a wide range of subjects; that the Supremacy Clause itself answers the self-execution question by applying many, but not all, treaty provisions directly to the States; and that the Clause answers the self-execution question differently than does the law in many other nations. The cases also provide criteria that help determine *which* provisions automatically so apply—a matter to which I now turn.

B

1

The case law provides no simple magic answer to the question whether a particular treaty provision is self-executing. But the case law does make clear that, insofar as today's majority looks for language about "self-execution" in the treaty itself and insofar as it erects "clear statement" presumptions designed to help find an answer, it is misguided.

[T]he many treaty provisions that this Court has found self-executing contain no textual language on the point. Few, if any, of these provisions are clear. Those that displace state law in respect to such quintessential state matters as, say, property, inheritance, or debt repayment, lack the "clea[r] state[ment]" that the Court today apparently requires. This is also true of those cases that deal with state rules roughly comparable to the sort that the majority suggests require special accommodation. These many Supreme Court cases finding treaty provisions to be self-executing

cannot be reconciled with the majority's demand for textual clarity.

Indeed, the majority does not point to a single ratified United States treaty that contains the kind of "clea[r]" or "plai[n]" textual indication for which the majority searches. [T]he issue whether further legislative action is required before a treaty provision takes domestic effect in a signatory nation is often a matter of how that Nation's domestic law regards the provision's legal status. And that domestic status-determining law differs markedly from one nation to another. As Justice Iredell pointed out 200 years ago, Britain, for example, taking the view that the British Crown makes treaties but Parliament makes domestic law, virtually always requires parliamentary legislation. On the other hand, the United States, with its Supremacy Clause, does not take Britain's view. And the law of other nations, the Netherlands for example, directly incorporates many treaties concluded by the executive into its domestic law even without explicit parliamentary approval of the treaty.

The majority correctly notes that the treaties do not explicitly state that the relevant obligations are self-executing. But given the differences among nations, why would drafters write treaty language stating that a provision about, say, alien property inheritance, is self-executing? How could those drafters achieve agreement when one signatory nation follows one tradition and a second follows another? Why would such a difference matter sufficiently for drafters to try to secure language that would prevent, for example, Britain's following treaty ratification with a further law while (perhaps unnecessarily) insisting that the United States apply a treaty provision without further domestic legislation? Above all, what does the absence of specific language about "self-execution" prove? It may reflect the drafters' awareness of national differences. It may reflect the practical fact that drafters, favoring speedy, effective implementation, conclude they should best leave national legal practices alone. It may reflect the fact that achieving international agreement on *this* point is simply a game not worth the candle.

In a word, for present purposes, the absence or presence of language in a treaty about a provision's self-execution proves nothing at all. At best the Court is hunting the snark. At worst it erects legalistic hurdles that can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones.

2

The case law also suggests practical, context-specific criteria that this Court has previously used to help determine whether, for Supremacy Clause purposes, a treaty provision is self-executing. The provision's text matters very much. But that is not because it contains language that explicitly refers to self-execution. For reasons I have already explained, one should not expect *that* kind of textual statement. Drafting history is also relevant. But, again, that is not because it will explicitly address the relevant question. Instead text and history, along with subject matter and related characteristics will help our courts determine whether, as Chief Justice Marshall put it, the treaty provision "addresses itself to the political . . . department[s]" for further action or to "the judicial department" for direct enforcement.

In making this determination, this Court has found the provision's subject matter of particular importance. Does the treaty provision declare peace? Does it promise not to engage in hostilities? If so, it addresses itself to the political branches. Alternatively, does it concern the adjudication of traditional private legal rights such as rights to own property, to conduct a business, or to obtain civil tort recovery? If so, it may well address itself to the Judiciary. Enforcing such rights and setting their boundaries is the bread-and-butter work of the courts.

One might also ask whether the treaty provision confers specific, detailed individual legal rights. Does it set forth definite standards that judges can readily enforce? Other things being equal, where rights are specific and readily enforceable, the treaty provision more likely "addresses" the judiciary.

Alternatively, would direct enforcement require the courts to create a new cause of action? Would such enforcement engender constitutional controversy? Would it create constitutionally undesirable conflict with the other branches? In such circumstances, it is not likely that the provision contemplates direct judicial enforcement.

Such questions, drawn from case law stretching back 200 years, do not create a simple test, let alone a magic formula. But they do help to constitute a practical, context-specific judicial approach, seeking to separate run-of-the-mill judicial matters from other matters, sometimes more politically charged, sometimes more clearly the responsibility of other branches, sometimes lacking those attributes that would permit courts to act on their own without more ado. And such an approach is all that we need to find an answer to the legal question now before us.

C

Applying the approach just described, I would find the relevant treaty provisions self-executing as applied to the ICJ judgment before us (giving that judgment domestic legal effect) for the following reasons, taken together.

First, the language of the relevant treaties strongly supports direct judicial enforceability, at least of judgments of the kind at issue here. The Optional Protocol bears the title "Compulsory Settlement of Disputes," thereby emphasizing the mandatory and binding nature of the procedures it sets forth. The body of the Protocol says specifically that "any party" that has consented to the ICJ's "compulsory jurisdiction" may bring a "dispute" before the court against any other such party. And the Protocol contrasts proceedings of the compulsory kind with an alternative "conciliation procedure," the recommendations of which a party may decide "not" to "accep[t]." Thus, the Optional Protocol's basic objective is not just to provide a forum for *settlement* but to provide a forum for *compulsory* settlement.

Moreover, in accepting Article 94(1) of the Charter, "[e]ach Member . . . undertakes to comply with the decision" of the ICJ "in any case to which it is a party." And the ICJ Statute (part of the U.N. Charter) makes clear that, a decision of the ICJ between parties that have consented to the ICJ's compulsory jurisdiction has "*binding force* . . . between the parties and in respect of that particular case." Enforcement of a court's judgment that has "binding force" involves quintessential judicial activity.

True, neither the Protocol nor the Charter explicitly states that the obligation to comply with an ICJ judgment automatically binds a party *as a matter of domestic law* without further domestic legislation. *But how could the language of those documents do otherwise?* The treaties are multilateral. And, as I have explained, some signatories follow British further-legislation-always-needed principles, others follow United States Supremacy Clause principles, and still others, *e.g.*, the Netherlands, can directly incorporate treaty provisions into their domestic law in particular circumstances. Why, given national differences, would drafters, seeking as strong a legal obligation as is practically attainable, use treaty language that *requires* all signatories to adopt uniform domestic-law treatment in this respect?

The absence of that likely unobtainable language can make no

difference. We are considering the language for purposes of applying the Supremacy Clause. And for that purpose, this Court has found to be self-executing multilateral treaty language that is far less direct or forceful (on the relevant point) than the language set forth in the present treaties. The language here in effect tells signatory nations to make an ICJ compulsory jurisdiction judgment "as binding as you can." Thus, assuming other factors favor self-execution, the language *adds,* rather than *subtracts,* support. . . .

I recognize, as the majority emphasizes, that the U.N. Charter uses the words "undertakes to comply," rather than, say, "shall comply" or "must comply." But what is inadequate about the word "undertak[e]"? A leading contemporary dictionary defined it in terms of "lay[ing] oneself under obligation . . . to perform or to execute." And that definition is just what the equally authoritative Spanish version of the provision (familiar to Mexico) says directly: The words "compromete a cumplir" indicate a present obligation to execute, without any tentativeness of the sort the majority finds in the English word "undertakes."

And even if I agreed with Justice STEVENS that the language is perfectly ambiguous (which I do not), I could not agree that "the best reading . . . is . . . one that contemplates future action by the political branches." The consequence of such a reading is to place the fate of an international promise made by the United States in the hands of a single State. And that is precisely the situation that the Framers sought to prevent by enacting the Supremacy Clause.

I also recognize, as the majority emphasizes, that the U.N. Charter says that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the [ICJ], the other party may have recourse to the Security Council." And when the Senate ratified the charter, it took comfort in the fact that the United States has a veto in the Security Council.

But what has that to do with the matter? To begin with, the Senate would have been contemplating politically significant ICJ decisions, not, *e.g.*, the bread-and-butter commercial and other matters that are the typical subjects of self-executing treaty provisions. And in any event, both the Senate debate and U.N. Charter provision discuss and describe what happens (or does not happen) when a nation decides *not* to carry out an ICJ decision. The debates refer to remedies for a breach of our promise to carry out an ICJ decision. The Senate understood, for example, that Congress (unlike legislatures in other nations that do not permit domestic legislation

to trump treaty obligations) can block through legislation self-executing, as well as non-self-executing, determinations. The debates nowhere refer to the method we use for affirmatively carrying out an ICJ obligation that no political branch has decided to dishonor, still less to a decision that the President (without congressional dissent) seeks to enforce. For that reason, these aspects of the ratification debates are here beside the point.

The upshot is that treaty language says that an ICJ decision is legally binding, but it leaves the implementation of that binding legal obligation to the domestic law of each signatory nation. In this Nation, the Supremacy Clause, as long and consistently interpreted, indicates that ICJ decisions rendered pursuant to provisions for binding adjudication must be domestically legally binding and enforceable in domestic courts *at least sometimes.* And for purposes of this argument, that conclusion is all that I need. The remainder of the discussion will explain why, if ICJ judgments *sometimes* bind domestic courts, then they have that effect here.

Second, the Optional Protocol here applies to a dispute about the meaning of a Vienna Convention provision that is itself self-executing and judicially enforceable. The Convention provision is about an individual's "rights," namely, his right upon being arrested to be informed of his separate right to contact his nation's consul. The provision language is precise. The dispute arises at the intersection of an individual right with ordinary rules of criminal procedure; it consequently concerns the kind of matter with which judges are familiar. The provisions contain judicially enforceable standards. And the judgment itself requires a further hearing of a sort that is typically judicial. This Court has found similar treaty provisions self-executing.

Third, logic suggests that a treaty provision providing for "final" and "binding" judgments that "settl[e]" treaty-based disputes is self-executing insofar as the judgment in question concerns the meaning of an underlying treaty provision that is itself self-executing. Imagine that two parties to a contract agree to binding arbitration about whether a contract provision's word "grain" includes rye. They would expect that, if the arbitrator decides that the word "grain" does include rye, the arbitrator will then simply read the relevant provision as if it said "grain including rye." They would also expect the arbitrator to issue a binding award that embodies whatever relief would be appropriate under that circumstance.

Why treat differently the parties' agreement to binding ICJ determination about, *e.g.*, the proper interpretation of the Vienna

Convention clauses containing the rights here at issue? Why not simply read the relevant Vienna Convention provisions as if (between the parties and in respect to the 51 individuals at issue) they contain words that encapsulate the ICJ's decision? Why would the ICJ judgment not bind in precisely the same way those words would bind if they appeared in the relevant Vienna Convention provisions-just as the ICJ says, for purposes of this case, that they do?

To put the same point differently: What sense would it make (1) to make a self-executing promise and (2) to promise to accept as final an ICJ judgment interpreting that self-executing promise, yet (3) to insist that the judgment itself is not self-executing (*i.e.,* that Congress must enact specific legislation to enforce it)?

I am not aware of any satisfactory answer to these questions. It is no answer to point to the fact that in *Sanchez-Llamas v. Oregon,* (2006), this Court interpreted the relevant Convention provisions differently from the ICJ in *Avena*. This Court's *Sanchez-Llamas* interpretation binds our courts with respect to individuals whose rights were not espoused by a state party in *Avena*. Moreover, as the Court itself recognizes, and as the President recognizes, the question here is the very different question of applying the ICJ's *Avena* judgment to the very parties whose interests Mexico and the United States espoused in the ICJ *Avena* proceeding. It is in respect to these individuals that the United States has promised the ICJ decision will have binding force. . . .

Fourth, the majority's very different approach has seriously negative practical implications. The United States has entered into at least 70 treaties that contain provisions for ICJ dispute settlement similar to the Protocol before us. Many of these treaties contain provisions similar to those this Court has previously found self-executing—provisions that involve, for example, property rights, contract and commercial rights, trademarks, civil liability for personal injury, rights of foreign diplomats, taxation, domestic-court jurisdiction, and so forth. If the Optional Protocol here, taken together with the U.N. Charter and its annexed ICJ Statute, is insufficient to warrant enforcement of the ICJ judgment before us, it is difficult to see how one could reach a different conclusion in any of these other instances. And the consequence is to undermine longstanding efforts in those treaties to create an effective international system for interpreting and applying many, often commercial, self-executing treaty provisions. I thus doubt that the majority is right when it says, "We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments." In respect to

the 70 treaties that currently refer disputes to the ICJ's binding adjudicatory authority, some multilateral, some bilateral, that is just what the majority has done.

Nor can the majority look to congressional legislation for a quick fix. Congress is unlikely to authorize automatic judicial enforceability of *all* ICJ judgments, for that could include some politically sensitive judgments and others better suited for enforcement by other branches: for example, those touching upon military hostilities, naval activity, handling of nuclear material, and so forth. Nor is Congress likely to have the time available, let alone the will, to legislate judgment-by-judgment enforcement of, say, the ICJ's (or other international tribunals') resolution of non-politically-sensitive commercial disputes. And as this Court's prior case law has avoided laying down bright-line rules but instead has adopted a more complex approach, it seems unlikely that Congress will find it easy to develop legislative bright lines that pick out those provisions (addressed to the Judicial Branch) where self-execution seems warranted. But, of course, it is not necessary for Congress to do so-at least not if one believes that this Court's Supremacy Clause cases *already* embody criteria likely to work reasonably well. It is those criteria that I would apply here.

Fifth, other factors, related to the particular judgment here at issue, make that judgment well suited to direct judicial enforcement. The specific issue before the ICJ concerned "'review and reconsideration'" of the "possible prejudice" caused in each of the 51 affected cases by an arresting States failure to provide the defendant with rights guaranteed by the Vienna Convention. This review will call for an understanding of how criminal procedure works, including whether, and how, a notification failure may work prejudice. As the ICJ itself recognized, "it is the judicial process that is suited to this task." Courts frequently work with criminal procedure and related prejudice. Legislatures do not. Judicial standards are readily available for working in this technical area. Legislative standards are not readily available. Judges typically determine such matters, deciding, for example, whether further hearings are necessary, after reviewing a record in an individual case. Congress does not normally legislate in respect to individual cases. Indeed, to repeat what I said above, what kind of special legislation does the majority believe Congress ought to consider?

Sixth, to find the United States' treaty obligations self-executing as applied to the ICJ judgment (and consequently to find that judgment enforceable) does not threaten constitutional conflict with other branches; it does not require us to engage in nonjudicial activity; and it does not require

us to create a new cause of action. The only question before us concerns the application of the ICJ judgment as binding law applicable to the parties in a particular criminal proceeding that Texas law creates independently of the treaty. I repeat that the question before us does not involve the creation of a private right of action (and the majority's reliance on authority regarding such a circumstance is misplaced).

Seventh, neither the President nor Congress has expressed concern about direct judicial enforcement of the ICJ decision. To the contrary, the President favors enforcement of this judgment. Thus, insofar as foreign policy impact, the interrelation of treaty provisions, or any other matter within the President's special treaty, military, and foreign affairs responsibilities might prove relevant, such factors *favor,* rather than militate against, enforcement of the judgment before us.

For these seven reasons, I would find that the United States' treaty obligation to comply with the ICJ judgment in *Avena* is enforceable in court in this case without further congressional action beyond Senate ratification of the relevant treaties. The majority reaches a different conclusion because it looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language). Hunting for what the text cannot contain, it takes a wrong turn. It threatens to deprive individuals, including businesses, property owners, testamentary beneficiaries, consular officials, and others, of the workable dispute resolution procedures that many treaties, including commercially oriented treaties, provide. In a world where commerce, trade, and travel have become ever more international, that is a step in the wrong direction.

Were the Court for a moment to shift the direction of its legal gaze, looking instead to the Supremacy Clause and to the extensive case law interpreting that Clause as applied to treaties, I believe it would reach a better supported, more felicitous conclusion. That approach, well embedded in Court case law, leads to the conclusion that the ICJ judgment before us is judicially enforceable without further legislative action.