DEVELOPMENTS

Legal Protection Against the UN-Security Council Between European and International Law: A Kafkaesque Situation?

Report on the fall conference of the graduate program "Multi-level constitutionalism (*Verfassung jenseits des Staates*)" in Berlin, 8 December 2006

By Isabelle Ley[*]

A. Introduction

Constitutionalism beyond the state concerns itself with the relation among various legal levels and the position of the individual in a multilevel legal system. The question how human rights are protected against international organizations who increasingly take on executive powers cannot be thoroughly answered without confronting a fundamental debate in international law theory: the constitutionalism-fragmentation debate. The European Court of First Instance as well as the European Court of Justice (ECJ) had to deal recently and are still dealing with this complex in a number of cases.

These judgments seem predestined for consideration at the introductory conference of the newly founded *Graduiertenkolleg* (PhD program) "Multilevel constitutionalism – European Experiences and Global Perspectives."[1] The inter-disciplinary program at the law faculty of Berlin's Humboldt University is composed of 20 scholars of four disciplines (law, political science, history and philosophy) from seven nations (Chile, China, Colombia, Germany, Portugal, the Ukraine, The Netherlands) who investigate questions related to the title theme in their doctoral dissertations. The title refers to the "Constitutionalism debate"—a name which sums up at least two different approaches to the subject:[2] an

[*] IsabelleLey@aol.com, Stipendiary of the graduate program "Multi-level constitutionalism" at the Humboldt University, Berlin; http://www.grakov-berlin.de.

[1] Information on this program is available at: http://www.grakov-berlin.de.

[2] Kadelbach / Kleinlein even speak of three debates, Stefan Kadelbach / Thomas Kleinlein, *Überstaatliches Verfassungsrecht*, 44 ARCHIV DES VÖLKERRECHTS 235, 236 (2006). Von Bogdandy emphasizes that this debate comes in as many variants as there are scholars: von Bogdandy,

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interpretive-analytical one and a normative-programmatic one. Of course, many statements oscillate between interpretations of the status quo and normative conceptions of an anticipated international order. Both react to the widely-stated dissolution of the congruency between territoriality and sovereign power and to a widespread legalization of international and transnational global activity through international institutions.

The first approach, which is decidedly European and particularly popular in Germany, interprets present international law to the effect that a constitutionalization of the international legal system is taking place. It observes that generally binding and hierarchical rules are emerging and gaining importance. This development opposes the classical paradigm that the legitimacy of international law results exclusively from state-consent. The emerging hierarchy is perceived in institutions such as *Ius Cogens*, obligations *erga omnes* or even in the entire United Nations Charter as constitutional document of the international community.[3]

The second line of discussion revolves around normative concepts for the further development of the international order. On this level, the debate is not only being led by international lawyers, it is simultaneously found in related disciplines such as political philosophy and international relations—a fact that implies that solutions might not necessarily and solely be legal ones. These constitutional concepts generally share a notion of strengthening international law by building a proper legal layer above national law, comparable to a federal order that catches up with and frames transnational societal developments. International law in this concept strengthens its legitimacy and becomes more consolidated and permanent. It is less dependent on consent while it proliferates general-binding rules with the capacity to guide and limit state action. There is a strong impetus to put the individual forward, to derive legitimacy more directly from the public and protect its rights through international regimes and courts. Representatives of a "constitutionalist world order" are, for example, Jürgen Habermas[4] (as a

Constitutionalism in International Law: Comment on a proposal from Germany, 47 HARVARD INTERNATIONAL LAW JOURNAL, 223 (2006).

[3] Brun-Otto Bryde, *Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts*, 42 Der Staat 61 (2003); Bardo Fassbender, *The UN charter as Constitution of the international community*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 529 (1998); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 291 (2006); Christian Tomuschat, *Die internationale Gemeinschaft*, 33 ARCHIV DES VÖLKERRECHTS 1 (1995); Erika de Wet, *The International Constitutional Order*, 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 51 (2006).

[4] JÜRGEN HABERMAS, *Die postnationale Konstellation*, in 91 DIE POSTNATIONALE KONSTELLATION – POLITISCHE ESSAYS, (1998); JÜRGEN HABERMAS, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, in 113 DER GESPALTENE WESTEN (2004).

philosopher), David Held[5] (as a political scientist) or Christian Tomuschat (as a lawyer).[6]

The idea of the graduate program is to elaborate structures and implications of these developments. Stipendiaries are therefore doing their research on subjects such as "Who guards the European guardians?,"[7] the "constitutional aspects of the judicial organisation in the Netherlands, France and Germany,"[8] "Supranational jurisprudence as agent of regional integration"[9] or "Political action and new forms of institutionalisation."[10]

In the cases *Yusuf*[11], *Kadi*[12], *Ayadi*[13] and *Hassan*[14], the suitors, persons and legal entities with seats in a European member state ask for legal protection against European Community regulations. The attacked regulations had ordered the freezing of their bank accounts, aiming at their financial incapacity to act. The regulations constituted the transformation of different UN resolutions directed at the UN member states into European law.[15] A so-called Sanctions Committee,

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[5] DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER – FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE, (1995).

[6] Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law*, 281 RECUEIL DES COURS 10 (1999); for a comprehensive résumé see Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARVARD INTERNATIONAL LAW JOURNAL 223 (2006).

[7] Ravi Afonso Pereira.

[8] Elaine Mak.

[9] Osvaldo Alejandro Saldias Collao.

[10] Thorsten Thiel, http://www.grakov-berlin.de (27 February 2007).

[11] Court of First Instance, *Yusuf and Al Barakaat International Foundation v. Council and Commission*, Judgment of 21 September 2005, Case T-306/01 (*Yusuf*).

[12] Court of First Instance, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment of 21 September 2005, Case T-315/01 (*Kadi*).

[13] Court of First Instance, *Hassan v. Council and Commission*, Judgment of 12 July 2006, Case T-49/04 (*Hassan*).

[14] Court of First Instance, *Chafiq Ayadi v. Council*, Judgment of 12 July 2006, Case T-253/02 (*Ayadi*).

[15] SC Res. 1267 of 15 October 1999, no.4 incited to "freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established…," available at: http://www.un.org/Docs/scres/1999/sc99.htm. These measures were expanded by SC

installed by the UN Security Council as a subsidiary organ according to Art. 7 (2), 29 UN Charter composed for this purpose a regularly updated list with the names of persons and entities who supposedly supported Al Quaida financially. The 15 members of the Security Council suggest names for this list. Once on the list, names can only be removed by unanimous decision of the Sanctions Committee. Convicted parties receive no hearing before the execution of the measure and also receive no mechanism of legal protection on UN level.

The cases present a classic situation, namely the justification and limits of human rights infringements within the framework of security measures in a new constellation of global scope. A case, which any law student could solve were it to play on the domestic level, raises highly complicated issues concerning the construction of the relation of international to European law, the obligation of the UN Security Council to human right standards, and the competences for the enactment of these measures and their judicial control. All of these aspects are related to the constitutionalism debate: which level in the multi-level system is competent for decisions, their enactment and their judicial control largely depends on the structure of the postnational legal system as a whole. Classifying case facts according to inner state categories and schemes could prove constructive, revealing as it does issues of temporality, as Ingolf Pernice, speaker of the PhD program and host of the conference of 8 December 2006, asserted in accordance with a statement of Kofi Annan from the same date[16] to apprehend the UN – like every instance vested with interventionist powers – as a potential threat to human rights.

B. Deficits of the Judicial Control of Decisions by the UN Security Council

After Gerd Seidel (Berlin) gave an introductory speech on the case, the first panel delivered contributions on the substantive (Markus Kotzur, Leipzig) and procedural (Heike Krieger, Berlin) deficits of Security Council measures and on reform options for legal protection against those measures (by Bardo Fassbender, Berlin). The positions roughly ranged from the demand for an independent instance of appeal, especially called for by Gerd Seidel and Heike Krieger, to pragmatic considerations motivated by the fact that the world does not cohere at all places to German or European legal standards by Bardo Fassbender and Martin Nettesheim (Tübingen) in the discussion on the other side.

Res. 1333 of 19 December 2000, No.8, available at: http://www.un.org/Docs/scres/2000/sc2000.htm (3 March 2007).

[16] Kofi Annan, *Speech on International Human Rights Day*, 8 December 2006, at the Time Warner Center, available at: http://www.un.org/News/ossg/sg/stories/statments_full.asp?statID=39 (8 January 2007).

Markus Kotzur argued for an obligation of the UN-Security Council to ethical, legitimacy and common welfare requirements. In his view, a comprehension of public international law focusing on the sovereignty of states is outdated. The UN Charter can by now be attributed constitutional quality with the potential to limit the Security Council's action. According to Kotzur, the Security Council is evolving from a solely punctual police reaction to a world legislator deserving the title "imperfect constitutional organ of the UN". It is therefore important to develop a system of substantive obligations and judicial control for the Security Council.

Heike Krieger's contribution focused on the procedural deficits of the Council activities. Her classification of the incidents not as criminal but as administrative legal measures was followed by the conclusion that the legal position of the person in the international administrative process is so far underdeveloped: Art. 13 European Convention on Human Rights (ECHR) guarantees a right to remedy. Furthermore, the Security Council advised the member states to inform concerned persons about the measures taken against them.[17] In consequence, Krieger emphasized the importance of a control instance. She called for the appointment of an independent body that would be authorized to know the reasons for a listing, to decide authoritatively on its termination and, to address directly concerns by the involved individuals.

She called special attention to the connection between the effectiveness of the Security Council measures and their accordance to human right standards: the fact that about 50 states refuse the implementation of the resolutions for reasons of deficient legal protection demonstrates that matters of protection also impact on the effectiveness of anti-terror measures. Every procedural improvement therefore increases their effectiveness and lowers the risk of the retrospective annulation by regional courts.[18]

At the moment, the only possibility to obtain an abolishment of the freezing of funds consists in asking one's home state for diplomatic assistance. The state has to be convinced that the measures are unjustified and then make an effort to stop them by convincing the other Sanction Committee members to remove the person from the list. The European Court of First Instance considers this right to diplomatic review as functionally equivalent to a judicial body. Next to deficits in objectivity, Krieger criticized this procedure for being practically faulty: *de facto*

[17] SC Res. 1526 of 30 January 2004, p.4, No. 18.

[18] This connection between human rights and the effectiveness of international police measures is also put forward by Saskia Hörmann, *Völkerrecht bricht Rechtsgemeinschaft?* 44 ARCHIV DES VÖLKERRECHTS 267, 324 (2006).

more than 95% of the concerned persons and entities are listed by the U.S. government. The success of the diplomatic path therefore depends on the concession of the U.S. to de-list a person that in turn depends on the political importance of the postulating state and its relation to the U.S. Moreover, such a procedure is not submitted to general rules and therefore highly susceptible to arbitrariness—an aspect which the European Court did not even address.

Bardo Fassbender's talk included political considerations concerning the enforceability of reform proposals of the present procedure. Fassbender compared the intensity of the steps prescribed in the resolutions. They are called "smart sanctions" or "targeted actions" because as opposed to classical military interventions or economic embargos they affect the suspected individual directly and not an entire people. Fassbender reported that the Security Council raised the issue of legal protection but only committed itself to "fair and clear procedures"[19]. According to his estimate, the judgments of the Court of First Instance received great attention in New York and built up a certain pressure of justification for the UN Security Council as well as for the U.S. government. If the ECJ now abolished the measures across Europe in its appeal judgments to come, the international reform debate would be strengthened. Currently, the implementation of an Ombudsman (a Scandinavian proposal) and of a focal point are being discussed in New York.[20] Both bodies would depend on the Sanctions Committee and would be unable to abolish the measures in their own right. The subject of an International Court of Human Rights, however, is not being discussed.[21]

Not a Euro-centric perspective but the right to legal protection against public intrusion presents the strongest reasons for the implementation of an individual control mechanism against UN Security Council activities.[22] The present review

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[19] Affirmed in SC Res. 1730 of 19 December 2006, p. 1, available at: http://daccessdds.un.org/doc/UNDOC/GEN/N06/671/31/PDF/N0667131.pdf?OpenElement (9 January 2007).

[20] *See Report of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Quaida and the Taliban and associated individuals and entities* of 17 January 2006, S/2006/22, 8; *Fourth Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council Resolutions 1526 (2004) and 1617 (2005) Concerning Al-Quaida and the Taliban and associated Individuals* of 10 March 2006, S/2006/154, 10.

[21] It is also not discussed in Kofi Annan's report on UN reform, see *In larger freedom: towards development, security and human rights for all*, A/59/2005 of 21 March 2005, available at http://www.ohchr.org/english/bodies/hrcouncil/docs/gaA.59.2005_En.pdf (27 February 2007).

[22] Christian Walter argues, in line with a jurisdiction of the European Court of Human Rights concerning power-transfer to private persons, that the European Convention of Human Rights contains the obligation of member states to "export" human rights protection into international organizations they are joining: they are not allowed to absolve themselves of their human right protection standards by transferring interventionist powers to international organizations, Christian Walter, *Grundrechtsschutz*

procedures depend on the motivation of the concerned person's government to stand up for the suspected individual. Its political influence and *in praxi* its relation to the U.S. are decisive for their success, making them an arbitrary instrument which falls behind the level of protection by national courts. These deficits can only be resolved in a satisfying manner, as Seidel emphasized, on the international level. The members of the Sanctions Committee should not assume too quickly that such a body could—for lack of American consent—not be implemented anyway, but remember that the U.S., too, must depend on the co-operation of other states if it wants to use the UN as a tool for its war against terrorism. The alternative would consist of the much more costly and intricate effort of persuading each state individually on a bilateral level to execute the freezing of funds—a step subject to national legal control.

C. The Scope of *Ius Cogens* As A Legal Standard

The second panel consisted of contributions on *Ius Cogens* as a benchmark for international action (Erika de Wet, Amsterdam), *Ius Cogens* as benchmark in the problematic judgments (Georg Nolte, Munich / Berlin) and the scope of *Ius Cogens* in general (Andreas von Arnauld, Hamburg). The speakers revealed their opinions on the judgments in question. De Wet criticized them harshly, mainly because they implicitly present much that is in fact unusual as usual, with little reasoning. She had wished for a bolder and more discerning judgment. She holds a decentral jurisdiction—taking into account a jurisdictional fragmentation—justifiable as long as judicial protection does not exist at the UN-level. In opposition to her views, Georg Nolte and Andreas von Arnauld generally agreed with the judgments, although von Arnauld criticized the situation for the suitor as a little "kafkaesque"[23] because he has no right to know the factual basis for his accusations. Georg Nolte welcomed the devoted reservation of the Court towards international law. The notion that the judgments expressed a novel *Völkerrechtsfreundlichkeit* of the court (friendliness towards international law) repeatedly came up during the conference.

Erika de Wet explicated that *Ius Cogens* was introduced as a principle of international law in Art. 53 of the Vienna Convention on the Law of Treaties (VCLT) which applies only to international conventions and not to administrative action. Furthermore, Art. 53 VCLT did not exist when the UN Charter was adopted.

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gegen Hoheitsakte internationaler Organisationen, 129 ARCHIV DES ÖFFENTLICHEN RECHTS (AÖR) 39, 54 (2004).

[23] *See*, Andreas von Arnauld, *UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz*",44 ARCHIV DES VÖLKERRECHTS 201, 212 (2006); similarly Saskia Hörmann, *supra* note 19, 314.

Nonetheless, she comprehends the obligation of the Security Council of Art. 24 (2) UN Charter to the "purposes and principles" of the United Nations as dynamic reference so that an obligation of the Council to *Ius Cogens* can be affirmed. Such an obligation can, in her opinion, even be counted as customary law by now. This obligation however includes only basic norms such as the prohibition of torture, slavery and genocide. Contrary to the European Court of First Instance, she argued against an expansion of *Ius Cogens* on human right norms – this would only entail a weakening of the status of "simple" international law.

Georg Nolte objected to this estimate: *Ius Cogens* should not be understood as emergency solution but rather be developed systematically, in an inductive as well as a deductive way. His most controversial remarks concerned his view that human rights can be restricted in a state of emergency. Nolte presupposed that not only the US but all countries represented in the Security Council are in a permanent state of emergency since September 11, 2001. This assumption was criticized as offering a *carte blanche* for human rights intrusions of all sorts. In his eyes, this justifies the measures taken so that every state would have been able to take these steps by its own law. The existing procedure guarantees in itself sufficient safeguard against misuse. After all, a body of 15 members, among them two EU members, determines these sanctions unanimously. *Ceteris paribus*, a national court would—for reasons that the underlying facts are kept secret—have to decide in camera, rather than publicly. "But do we trust judges who judge in camera?"

Von Arnauld put forward a construction of meaning and scope of *Ius Cogens*. He stressed that an inductive approach cannot exhaust a principle which claims an objective status. He used the personal dignity of the individual as a normative foundation of *Ius Cogens*. The formula of "inhuman and degrading treatment"[24] would correlate with this concept as well as the prohibitions of genocide, slavery, race discrimination and torture typically mentioned. According to Arnauld, the recognition of the legal personality of the individual as well as protection against arbitrary decisions should be recognized as *Ius Cogens*. The right to effective legal protection and the right to be heard are linked with this notion of legal subjectivity. Practically speaking, most of these elements are already guaranteed by the European Convention on Human Rights.

In the discussion, attention was drawn to the fact that in some parts of the world human rights of the second and third generation, *i.e.* civil, social and cultural rights, enjoy a much higher status than in the West. A conception based on Western methodological individualism would therefore risk being one-sided, even

[24] Expression from the Universal Declaration of Human Rights of 10 December 1948, Art. 5.

hegemonic. This argument is not unknown. Koskenniemi for instance deconstructed the concept of a global legal community as a "hegemonic technique."[25]

The controversies and uncertainties that were revealed, reaching from the foundation and the scope to the application of *Ius Cogens*, show how daring the construction of the European Court of First Instance was. *Ius Cogens* proves to be a highly controversial legal principle in all its respects. Its use and expansion to palpable human rights would at least have required thorough explanation by the Court.

D. The impact of UN Security Council resolutions on the European legal system

The third panel concerned may be legally speaking the most interesting of the problems raised by the judgments, the relation of UN to European law. The discussion focused mainly on two complexes: The relationship between the European and international legal systems and, related to this, the question of whether the *Solange*-jurisdiction[26] of the German *Bundesverfassungsgericht* (the Federal Constitutional Court) should be applied to that relationship.

Wolff Heintschel von Heinegg (Frankfurt Oder) focused his contribution on the obligation of the European Community to international law. The Court gave the impression that it was distancing itself from its traditional pro-European attitude in favor of a rather "international" approach. The analogous implementation of European fundamental rights in an even-if approach ("Even if European fundamental rights were the benchmark for the Council measures, the concerned rights were not violated"[27]) does not strengthen European law; on the contrary, it evokes ambiguities about its scope. The Court assumed that the European Community was indirectly bound to UN law – by mediation of the direct obligation of the member states.[28] It should instead have taken a definite and clear-cut position regarding the relationship between European and international law. If a priority of

[25] Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS, NO. 197, 202 (2004); Kleinlein / Kadelbach also argued that the peace-keeping function of the indifference of classical international law with its principle of equality of all states might be lost within the process of constitutionalization, *see supra* note 3, 248.

[26] 2 BvL 52/71, BVerfGE 37, 271 (*Solange I*); 2 BvR 197/83, BVerfGE 73, 339 (*Solange II*).

[27] *Yusuf* (note 12), para. 226, 283.

[28] A position shared by Markus Kotzur, Eine Bewährungsprobe für die Europäische Grundrechtsgemeinschaft / Zur Entscheidung des EuG in der Rs. Yusuf u.a. gegen Rat, EuGRZ 2005, S. 592, in: Europäische Grundrechte-Zeitschrift (EuGRZ) 19, 24 (2006).

international law follows from Art. 307 TEC, the Court would not be competent for its control (dualistic approach). Even the assumption of a direct obligation of the European Community to international law would not contradict this. This direct obligation to UN acts and law could, in Heintschel von Heinegg's opinion, well be assumed.

Martin Nettesheim explicitly supported this dualistic approach, which argues that only the internal law of a system – in this case European law – is able to determine the status of foreign law, in this case of UN law. Through collision norms it controls the influence and impact of the foreign law on the legal system in question – comparable to a border officer (this is why Paul Kirchhof calls it the "bridge model"[29]). This was, in his perception, the dominating understanding in European law until now, corresponding with Art. 307 TEC. The new judgments encourage consideration of a new understanding, whereby the interrelation of the legal systems is treated as a network, characterized by a mutual opening and mutual control. For such a self-conception, however, the Court lacks competence; only a "world court", installed by UN law, would be competent to review UN law. Strictly dualistic, Nettesheim argues that courts are competent only to control the law of their legal system. When the European Community acts, it must abide by its own human right standards – and the European Courts are then competent to control this conformity. He finds it astonishing that the Court fails to do this. It surrenders the suitors quite carelessly without warning to international law.[30]

Daniel Thym (Berlin), co-ordinator of the graduate program and organizer of the conference, expanded on the inconsistencies of the cases with respect to the relationship between European and international law. In his view, the judgments contradict earlier judgments of the European Court of Justice which expressed the dualistic conviction of the Court: Traditionally, it took European law as a benchmark of European acts that transformed international conventions. In the *Bosphorus* case, the landmark decision in the field, Irish authorities had confiscated a Yugoslavian airplane in execution of an EC Council regulation which in turn

[29] This concept corresponds with the *Maastricht* decision of the German Federal Constitutional Court (BVerfGE 89, 155), decidedly drafted by Paul Kirchhof, who was then judge at the Court. In this conception, the EC does not qualify as a federal state but something less – a "Staatenverbund". The main line of legitimacy of European legal action still follows from the democratically elected national governments, the most important actors on the European level. Constitutionally speaking, the authority of the European Union stems from the national constitutions and the powers they delegated to the European legislative. Therefore, national constitutional law keeps the guard on what enters the national legal system.

[30] More concerned with human rights issues, Saskia Hörmann came to a similar conclusion, *supra* note 18, 267.

transformed a UN Security Council sanction[31]. The ECJ reviewed the accordance of this confiscation with European primary law and human rights – a review of international law did not take place. The crucial difference to the *Yusuf* and *Kadi* cases lies in the small margin of independent appreciation left by the UN resolution: While there was one in *Bosphorus* which led to the preliminary ruling procedure by the ECJ, the present UN resolutions do not leave space for an original decision of the applicant state.[32] That the European Court now – referring to Art. 307 EC – followed a monistic approach with a priority of international law, overstretches Art. 307 TEC. Art. 307 TEC serves solely to render possible the fulfilment of international conventions which date from before the enactment of the European Community Treaty itself, but does not regulate the posteriority of European human rights protection. In the past, an international law-friendly interpretation of European law would have been the consequence in such a case for the ECJ, not the extrusion of European law.

The European Court of First Instance indirectly reviewed the Common Position on which the regulation was based and which forms a part of the Common Foreign and Security Policy (CFSP). So far, however, the European Court lacks competence to review CFSP acts which belong to the second, intergovernmental pillar of the EU. This competence actually would have been founded through the European Constitutional Convention. In the opinion of Markus Kotzur, this confirms a recent tendency: the European Court seems willing to erode the strict distinction between Community and Union, the supranational and the intergovernmental logic of law production and application, thereby expressing a will to "constitutionalize" Europe.[33]

Daniel Thym expects the ECJ not to confirm the judgments in its appeal decision. He argued that the cases posed a tightrope walk for the European Court of First Instance. If it had drawn on EU fundamental rights as benchmarks, as long as equivalent international individual protection does not exist, it would have taken up the *Solange*-jurisdiction of the national court. Hereby, it would have approved of this jurisdiction ex post, a jurisdiction which implicitly doubted the European Court's effectiveness in human rights protection. If it had, on the other hand, solely given priority to international law without indirectly applying European human

[31] Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS* v. Minister for Transport, Energy and Communications and others, 30 July 1996, European Court of Justice.

[32] *See* on this point von Arnauld, *UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz*, 44 ARCHIV DES VÖLKERRECHTS, 201, 202 (2006).

[33] Markus Kotzur, *supra* note 28, 21.

rights standards, it would have provoked critique by the European Court of Human Rights.

Actually, the Court of First Instance already gave a subsequent judgment which can be interpreted as a change in its jurisdiction. In its decision of 12 December 2006,[34] four days after the conference, it decided a parallel case in which the Sanctions Committee had allowed the member states to choose the persons whose funds were to be frozen. The member states do this in the framework of the CSFP to ensure a coherent execution throughout Europe.[35] It reviewed the measures exhaustively and directly in respect to their accordance with European human rights without drawing on international law or *Ius Cogens*. Does this mean that the Court tends again to follow the traditional dualism-based ECJ jurisdiction? Just like the *Bosphorus* case, this case differs from *Yusuf* and *Kadi* insofar as there was a margin of appreciation for the transforming instance left. Therefore, one could argue in opposition to Daniel Thym, that the case law of the Courts is actually quite consistent. In practice, the more relevant question might be: is it justified that the level of human rights protection depends on whether a person is listed by a state within the framework of the UN Sanctions Committee or independently by a state, on the initiative of the Sanctions Committee? First of all, it is unclear why a decision which was incited and designed by the UN is considered a European decision only because the individualization lies in the hands of European authorities. Secondly, one would expect the same level of protection against those UN-incited measures regardless of where the "target" is located, especially since the suspected entities usually act on an international level anyhow.

E. European and National Legal Protection

The last panel treated the complexity of individual protection between home state, EU and the Human Rights Convention. Eckart Klein (Potsdam) asked whether the European Community was actually competent to review the freezing of individual funds. The Court had argued that Art. 103 UN Charter, Art. 307 TEC and Art. 10 TEC (which formulates the principle of loyalty) contain an obligation of the European Community to the European member states to fulfil their international obligations in the area of Community competences (*i.e.* the economic sector which the sanctions were part of). It drew the conclusion that the obligation of the member states to respect UN law was also indirectly an obligation of the Community. Since the EC is hereby fulfilling member states' obligations, it

[34] Court of First Instance, *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union*, Judgment of 12 December 2006, Case T-228/02.

[35] SC Res. 1373 of 28 September 2001, European Common Position 2001/930/CFSP and 2001/931/CFSP.

considered itself incompetent to review Community human rights.[36] In Klein's opinion, the European Court's competence to review the measures initiated by the Security Council cannot be derived from this indirect obligation of the Court to Security Council resolutions.

One has to agree with this conclusion. A Court gains the competence to review legal acts only by being authorized to do so by the higher level law of its legal system (in the nation state the constitution, in the European Community the primary law, in international law the UN Charter). The UN law lacks such an authorization for individual acts. Therefore, it can only review the due transformation of the resolutions through regulations and the enactment of these EC regulations. The European Court, however, does not have the right to review EC regulations which literally implement a UN resolution. [37]

Christian Walter (Münster) pointed out that the relation of legal systems is typically arranged and clarified through rules of collision or priority, in the case of UN law and other international agreements by Art. 103 of the UN Charter which declares the priority of Charter obligations. But does Art. 103 allow the interpretation of the Charter, or the purposes and principles of the Charter, to rule out human rights obligations stemming from the Treaty of the European Union or the ECHR? According to Walter, Art. 103 should be restricted to those norms that meet the "inter-state paradigm", regulating exclusively interstate relationships.

Segi,[38] another parallel case presently pending before the ECJ in which the suitor asks for compensation by the European Union, demonstrates how unclear and poorly prepared European law is for such a claim. A positive title for compensation for acts of the EU in the field of foreign affairs does not exist. Moreover, the EU does not qualify as a legal entity in the area of foreign and security policy so that it can actually not even be addressed in a suit. Apart from these shortcomings, Walter fears that the search for compensation might turn into a substitute for primary legal protection.

Gernot Biehler (Dublin / Hamburg) drew attention to the fact that not even the International Court of Justice (ICJ) in The Hague has the competence to determine

[36] Kadi, Case T-315/01, No. 197, 200, 218.

[37] *See* likewise Christoph Möllers, *Das EuG konstitutionalisiert die Vereinten Nationen*, 3 EUROPARECHT (EuR) 426 (2006) and Mehrdad Payandeh, *Rechtskontrolle des UN-Sicherheitsrats durch staatliche und überstaatliche Gerichte*, 66 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 41, 54 (2006).

[38] Opinion of Advocate General Mengozzi, delivered on 26 October 2006, Case C-354/04 P (*Segi*).

such primary individual protection. At the most, it could give its advisory opinion on the case, but only on demand of the General Assembly or the Security Council, not an individual person in accordance with Art. 65 ICJ Statute and Art. 96 UN Charter. The European Convention on Human Rights and the national fundamental rights systems nevertheless oblige the European Court to review the measures with respect to their accordance to these human right systems. Biehler, therefore, expects a subsequent judgment by the European Court of Human Rights.

In the discussion Georg Nolte proposed a different, preventively functioning solution; the European Union should oblige the two European permanent members of the Security Council, France and Great Britain, to agree only with those steps of the Security Council that meet European legal standards via the EU Common Foreign and Security Policy. This undoubtedly audacious idea was met by mixed reactions. Apart from its questionable realizability (one only has to remember the fundamental tension in European foreign relations on the Iraq war issue), it is reminiscent of the strategy to exploit the EU for the possibility of national penetrating power under disguise of common good motives. Therefore, Nolte drew the more pragmatic conclusion that legal protection should be sought where the measures originate from, the U.S. The U.S. government listed the great majority of private persons and entities hit by the sanctions. Both European and international legal protection will always suffer from the problem that the American intelligence service will not provide access to the necessary information. One should therefore search for legal protection directly before American courts. This back door presents, in a certain way, the synthesis of the tension between systematic and pragmatic arguments for and against legal protection on the international or the European level that was continually voiced at the conference. It does not resolve the lack of protection against Security Council measures. But, contrary to the European answer, it has strong chances to provide the most effective legal protection. In the present situation the solution could indeed lie in the forum shopping of the otherwise legally unprotected.

F. Good Prospects for International Law?

The classification of the judgments as "international law-friendly" has to be read as underlining the increasing importance of the UN's further legal (and political) exploration and development. However, they convey a critique of the insufficient international legal protection. In Europe, the judgments may even have led to a strengthening of the communal identity felt since they offered a possibility to the Community to present itself to the rest of the world as a unitary instance of legal transformation and protection. The Court did decide against applying European human rights and therefore against applying a regional humanitarian regime. But the application of general international law by a regional court also produces a

regionally limited interpretation of *Ius Cogens* which might be seen differently by another regional court, with the consequence of a further fragmentation of international law. Perhaps these aspects make the judgments appear less international law-friendly and less in line with the constitutionalization project than the overall impression at the conference recognized.

The judgments demonstrate that the constitutionalism and fragmentation debates belong together. Constitutionalization as a normative program reacts to an increasing differentiation of international law into functional regimes and a differentiation in scope and interpretation which regionalize the meaning of international law norms. While fragmentation can be seen as part of the consent-based and thus anti-universal logic of classical international law, constitutionalists strive to offer a coherent, unifying solution. Whether this can be achieved, however, without a unified source of legitimacy, a proper *pouvoir constituant*, remains dubious.

Even if a consensus on the final interpretation of the cases was not found at the conference, one thing is certain; not only Europeans are awaiting the appeal judgments of the ECJ. Meanwhile, the stipendiaries are doing their research in a highly controversial field.