

# EU Law and UN Law in Conflict: The *Kadi* Case<sup>1</sup>

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## I. Introduction

Of all the cases treated by the European Court system in recent years, the *Kadi* case is surely one of the most contentious. We have here the very particular situation that both the judgment of the CFI (Court of First Instance) and that of the ECJ (European Court of Justice) provoke strong criticism while at the same time they deserve a certain degree of approval. There is no straightforward way to state that one position or the other is unconditionally correct. Only by taking recourse to rather subjective and ideologically loaded concepts can this be achieved. This loses sight of the real dimension of the problems involved and results in an attempt to give general approval to a largely individual standpoint.

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<sup>1</sup> This contribution was mostly prepared during my stay as a *Fernand Braudel* Senior Fellow at the European University Institute in Florence.

There are several reasons why the *Kadi* case has all the ingredients to become a leading case in the EU judicial system without furnishing – in itself – definite hints for the solution of the underlying problems. This case concerns the interplay between UN law and EU law,<sup>2</sup> a field widely unexplored as yet. As the UN is beginning to take notice of the individual not only as a bearer of human rights, but also as a subject to be held directly responsible for his acts, at least in specific areas such as counter-terrorism, the possibility of conflicts with EU law, for which the steadily growing empowerment of the individual is a main trait, is rising simultaneously.

This case puts to test the notion of supremacy, both of International law and of European Community law.<sup>3</sup> The fact that *Kadi* has been hailed as a natural sequel to *Van Gend en Loos*<sup>4</sup> is telling: the relationship between the international order and EU law is compared with that of EU law and the law of Member States and in both cases EU law should be supreme. But there is a difference: supremacy of EU law over the law of Member States is a constitutive element for its autonomy and effectiveness, at the same time leaving intact the integrity of the law of the Member States. Supremacy of EU law over International law is potentially disruptive for the latter order.

The next issue that arises regards the question whether it is possible at all to transpose the concept of supremacy, developed in a comparatively uniform if not monolithic system such as that of the EC to the global scene which is characterised by fragmentation, ideological dissent and cultural clashes. If this should happen at all, should it be in a balanced way (the approach taken by the CFI) or in a radical manner

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<sup>2</sup> In the following the term “EU law” is used as an overarching concept comprising also EC law.

<sup>3</sup> See on this subject A. Nollkaemper, *Rethinking the Supremacy of International Law*, Amsterdam Centre for International Law, Working Papers 2009, available at: <<http://ssrn.com/abstracts=1336946>>.

<sup>4</sup> Case 26/62, 1963 ECR 1. See G. Harpaz, “Judicial Review by the European Court of Justice of ‘Smart Sanctions’ against Terror in the Kadi Dispute”, *European Foreign Affairs Review* 14 (2009), 65 et seq. See on the notion of supremacy of EC law created by the ECJ in the cases *Van Gend en Loos* and, more specifically, *Costa/ENEL*, U. Haltern, *Europarecht – Dogmatik im Kontext*, 2005, 265 et seq. and B. De Witte, “Retour à ‘Costa’ – La primauté du droit communautaire à la lumière du droit international”, *Revue trimestrielle de Droit Européen* 20 (1984), 425 et seq.

(the road chosen by the ECJ)? This whole controversy also sheds new light on the issue of international subjectivity of the individual.<sup>5</sup>

While this whole process is usually seen positively when the perspective of the individual as an actor on the international scene for the defence of his human rights is taken, the attitude changes dramatically if subjectivity accrues to the individual in view of the responsibility he has loaded on himself. As is known, international criminal justice came to life, rather recently, only after an extensive system of procedural guarantees had been created.<sup>6</sup>

If now the UN is creating a second layer of norms of individual international responsibility, albeit in a very limited area, the same problems arise. Can the suspect of terrorist activities be exempted from the broad judicial guarantees created for the domestic area (be they of national or international provenance) as well as for the international one (i.e. before international criminal tribunals)? What would be the legal basis for such an exemption? Is there need, justification and legal leeway for compromise in this field?<sup>7</sup>

Clearly, the conflicts coming to the fore here are conflicts of jurisdiction. *Prima facie*, in a coordinated international system conflicts of this kind should not arise. The picture changes if questions of hierarchy and supremacy come in. In the *Kadi* case, hierarchy enters from many angles. There is, at least according to some, hierarchy between different legal systems: between the UN system and the EU order at the one hand and between general legal orders (such as the UN and the EU) and pure human rights systems such as that of the European Convention on Human Rights on the other. There is, further, hierarchy between various human rights provisions. Some rights are derogable, others are not, and if the concept of *jus cogens* is brought in, a concept which is in itself an expression of norm hierarchy, the picture becomes further complicated.

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<sup>5</sup> See M. Shaw, *International Law*, 2008, 45 et seq.

<sup>6</sup> See M.C. Bassiouni, "The Proscribing Function of International Criminal Law", *Yale Journal of World Public Order* 9 (1983), 163 et seq.; P. Carter, "International Criminal Law and Human Rights", in: F. Butler (ed.), *Human Rights Protection: Methods and Effectiveness*, 2002, 135 et seq.; L. Caflisch, "The Rome Statute and the European Convention on Human Rights", *HRLJ* 23 (2002), 1 et seq.

<sup>7</sup> For an extensive examination of the issue of access to justice in international law see F. Francioni (ed.), *Access to Justice as a Human Right*, 2007.

Hierarchy is also prominent in this case from a different perspective. In fact, intra-institutional hierarchy between the CFI and the ECJ has brought about a final decision in a dispute which is more political in nature than technical-legal. However, the different viewpoints remain in place, as the underlying political question, in which many actors are involved, cannot be decided in a definite way by the EU alone. It is interesting to note that the CFI was prepared to show deference towards Security Council resolutions while the ECJ rejected any hierarchy between the UN system and the EU order, although it did not put the latter first. The first instance judgment was largely annulled by the ECJ, not due to defects in the legal reasoning, but rather on the basis of a completely different view of eminently political questions, which are also of relevance from a European constitutional stance. Hierarchy has, therefore, amplified the perspective on political aspects while allowing at the same time the EC order to preserve consistency.

Finally, this case deserves particular attention because it evidences the Scylla and Charybdis of modern human rights law and policy: on the one side there is a strong pressure for ever more refinement of human rights protection. On the other, the question arises whether we will reach the limits of human rights protection and whether new challenges, such as international terrorism acting through the means and channels of a globalised world, could require, in some areas, a partial reversal of this process.

## II. The Origins of the Problem

At the root of the problem, publicised on a world-wide scale by the *Kadi* case, stands the attempt by the Security Council to fight the challenge of terrorism more effectively and, paradoxically as it may sound, more in line with generally recognised rules of human rights.<sup>8</sup> Both aspirations led to the adoption of so-called targeted sanctions. With regard to the first aim, effectiveness, targeting is nothing else than the adaption of the response to the changing nature of the challenge. In a globalised world where terrorists act as if they were international sub-

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<sup>8</sup> See M. Craven, "Humanitarianism and the quest for smarter sanctions", *EJIL* 13 (2002), 43 et seq.

jects it often<sup>9</sup> no longer makes sense to look for a responsible home country. The ever-growing accessibility of weapons on an international scale, in a seemingly sovereignty-free dimension, and their potentially enormous destructive power add further weight to the effectiveness argument.<sup>10</sup> Effectiveness was, therefore, not considered as a trade-off with regard to human rights protection when recourse to targeted sanctions was taken. Rather the contrary was the case. Targeting should reduce the human costs and render sanctions at the same time more effective. In fact, the undifferentiated application of sanctions against a whole country raises, beyond the effectiveness problems mentioned before, serious human rights concerns.<sup>11</sup> In particular if terrorists enjoy at least some protection by their host state, sanctions often comprise their interests less than those of the rest of the population. Situations can arise where a country is virtually held hostage by a small group of terrorists and the whole country is suffering simply because the government is not willing or able to seize the terrorists. This may be a general problem with sanctions in international law and perhaps it is even more

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<sup>9</sup> The situation is different where terrorists manage to find a conniving government or outrightly to penetrate the government as it was the case with Al Kaida in Taliban governed Afghanistan.

<sup>10</sup> In a certain sense this argument calls to mind the so-called *Bush* doctrine arguing for the existence of a right to pre-emptive self-defence. See P. Hilpold, "Gewaltverbot und Selbstverteidigung – Zwei Eckpfeiler des Völkerrechts auf dem Prüfstand", *JA* 38 (2006), 234 et seq. In both cases it is argued that the evolution of the modern weapons technology redefines automatically the nature of the appropriate (and admissible) defence. The obstacles these two situations meet are, however, quite different. Pre-emptive self-defence finds its natural border in Article 2 para. 4 of the UN Charter and precisely there, where the limited exemption introduced by Article 51 of the Charter no longer applies. Targeted sanctions find their limit, as will be shown extensively in this contribution, in human rights. As far as these human rights are considered to form a cornerstone of a specific constitutional order again conflicts of jurisdiction and sovereignty between UN law and the order of the respective entity can arise.

<sup>11</sup> See A. Shehabaldin, "Economic sanctions against Iraq: human and economic costs", *International Journal of Human Rights* 3 (1999), 1 et seq.; L. Forlati, *Les sanctions économique en droit international*, 2004; A. Borghi, "La législation de l'Union européenne en matière de sanctions internationales et sa compatibilité avec les droits fondamentaux", *Revue trimestrielle des Droits de l'Homme* 19 (2008), 1095 et seq.

pronounced where a corrupt and criminal elite is stubbornly clinging to power.<sup>12</sup>

It comes therefore as no surprise that the concept of targeting was developed in exactly this type of situation, namely against the military junta in Haiti.<sup>13</sup> When officials of the Angolan rebel group UNITA were targeted in 1997<sup>14</sup> the respective measures were directed against members of a group which did not form part of the government but which controlled nonetheless considerable parts of the Angolan territory. With regard to terrorists, however, targeting assumes a new aspect. Terrorists may be hard to hit if they are not located in a specific territory and if they act detached from national borders. At the same time, however, these circumstances render them also extremely vulnerable to specific countermeasures. When Afghanistan became the breeding ground for a new, particularly pernicious form of terrorism towards the end of last century, the Security Council first began targeting terrorists. The catastrophe of September 11, 2001 revealed the previously unknown dimension of the terrorist threat. Therefore, targeting became generalised in the sense that it was no longer restricted to high level officials of the Taliban regime but it applied to all kinds of terrorists, both inside and outside Afghanistan.<sup>15</sup>

Under the institutional perspective the so-called Sanctions Committee, also known as the “Al-Qaida and Taliban Sanctions Committee”, established by para. 6 of SC Resolution 1267 (1999), gained particular relevance.<sup>16</sup> The respective Resolution was designed to hit the Al-Qaida network at its very heart by the imposition, against designated indi-

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<sup>12</sup> This was the dilemma with the invasion of Iraq where – beyond the false accusation that *Saddam Hussein* would support international terrorism or plan the production of weapons of mass destruction – it cannot be denied that the ruling elite perpetrated abhorrent crimes and remained totally unimpressed and untouched by international sanctions. In present days a similar problem is arising with Zimbabwe under *Robert Mugabe*.

<sup>13</sup> See S/RES/917 (1994) of 6 May 1994.

<sup>14</sup> See S/RES/1127 (1997) of 28 August 1997.

<sup>15</sup> See J. Almquist, “A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions”, *ICLQ* 57 (2008), 303 et seq. (306).

<sup>16</sup> Committees of such a kind have been instituted before. In fact, the far-reaching sanctions imposed against Iraq after the invasion of Kuwait made it appear necessary to create a body to oversee the implementation of these measures. To this end, by S/RES/661 (1990) of 6 August 1990, a Sanctions Committee, composed of all Security Council Members, was created. See M.N. Shaw, *International Law*, 6th edition, 2008, 1243.

viduals or entities belonging to this network, of a freezing of their assets as well as the imposition of a travel ban and an arms embargo. Of all the individual sanctions regimes established,<sup>17</sup> the one based on SC Resolution 1267 is the most far-reaching and innovative. As has been spelled out in literature,<sup>18</sup> it has the widest scope as it covers nearly half of all the individuals and entities targeted by the Security Council, it is mainly preventive in nature and it is one of the most prominent antiterrorist instruments set in force by the UN.

This sanctions regime has been modified several times over the recent years in order to make it, on the one hand, more effective and on the other to take into account some basic human rights (of substantial and procedural nature) of the targeted subjects. This sanctions regime has been widely criticised as it was considered to be too harsh and therefore unacceptable on several grounds. The Sanctions Committee was not totally insensitive to this criticism but nonetheless the concessions made were not considered to be sufficient by many people. Thus, Advocate General Poiares Maduro, in his Opinion in the *Kadi* case before the ECJ,<sup>19</sup> qualified the consequences of the asset freeze as “potentially devastating.”<sup>20</sup> The asset freezing has been compared to an act of confiscation, the listing procedure as being in violation of the presumption of innocence and of some basic procedural rights such as the right to a fair hearing and judicial review.<sup>21</sup>

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<sup>17</sup> The Sanction Committees with listings procedures which are currently operative can be found on the homepage of the UN Security Council. These are the Committees for Sierra Leone (S/RES/1132 (1997) of 8 October 1997), Al Qaida and the Taliban (S/RES/1267 (1999) of 15 October 1999), Iraq (S/RES/1518 (2003) of 24 November 2003), Liberia (S/RES/1521 (2003) of 22 December 2003), Democratic Republic of the Congo (S/RES/1533 (2004) of 12 March 2004), Cote d’Ivoire (S/RES/1572 (2004) of 15 November 2004), Sudan (S/RES/1591 (2005) of 29 March 2005), Lebanon/Syria (S/RES/1636 (2005) of 31 October 2005) and North Korea (S/RES/1718 (2006) of 14 October 2006).

<sup>18</sup> See for more details, I. Johnstone, “Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit”, *AJIL* 102 (2008), 275 et seq. (295).

<sup>19</sup> See Opinion of 16 January 2008 in the Case C-402/05 P.

<sup>20</sup> *Ibid.*, para. 47.

<sup>21</sup> See, for example, *Nikolaos Lavranos* in several contributions such as UN Sanctions and Judicial Review, *Nord. J. Int’l L.* 76 (2007), 1 et seq. (17); E. Cannizzaro, *Machiavelli, the UN Security Council and the Rule of Law*, Global Law Working Paper 11/20905 and Almquist, see note 15, 309.

The very reason for this criticism lies in the fact that the Sanctions Committee, formally an executive organ with preventive functions, operates in many ways like a Criminal Court without however, providing for similar guarantee. A look at the “Guidelines of the Committee for the Conduct of its Work”<sup>22</sup> reveals the main pitfalls of the sanctioning procedure from a human rights perspective. These deficiencies regard the way the Committee operates and decides: “The Committee will meet in closed sessions, unless it decides otherwise.”<sup>23</sup> Thereby, no transparency as to the way the facts are assessed and legally qualified is given. The deliberative process through which persons and entities are listed and delisted, takes place behind closed doors.

“The Committee shall make decisions by consensus of its Members.”<sup>24</sup>

As is known, the consensus procedure finds broad application for decision making in international organisations due to its sovereignty-friendly nature. As each participating state can impede that a specific decision is taken the interests of all parties involved find maximum protection.<sup>25</sup> As soon as the main interests concerned are no longer those of the participating states but of individuals it becomes questionable whether the consensus procedure is the appropriate one. The consensus procedure finds its best field of operation in the political area. The picture changes when technical questions such as the legal and the factual assessment of a terrorist threat by individuals or entities are to be addressed. Both the listing as well as the delisting procedures reveal the shortcomings of a deliberative process based on consensus. There may be little interest by members of the Sanctions Committee to oppose the proposal for listing of a person or an entity coming from another UN Member State or even a member of the Security Council. On the other hand, delisting based on consensus will meet formidable obstacles. It suffices that one member of the Sanctions Committee adopts a more

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<sup>22</sup> Adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007, and 9 December 2008. These Guidelines now reflect the improvements introduced by S/RES/1822 (2008) of 30 June 2008.

<sup>23</sup> Para. 2 lit. (b).

<sup>24</sup> Para. 3 lit. (a).

<sup>25</sup> As is known, at present, with regard to WTO law, an intense discussion takes place on the role of consensus for decision-making. See only C.D. Ehlermann/ L. Ehring, “Decision-Making in the World Trade Organization”, *JIEL* 8 (2005), 51 et seq.

rigorous approach in the fight against terrorism declaring himself satisfied with less substantiated allegations that delisting attempts will be hard to succeed.

On the other hand, it is to be said that the relevant rules were not applied in a static form over time. They were rather subject of continuous improvements. They represent now an ambiguous mixture of provisions which try hard to make some important concessions to the human rights community but at the same time they also make evident that the whole original approach chosen by Resolution 1267 sets clear limits to such concessions, so as to exclude that full compatibility with some highly evolved human rights regimes, especially the European one, can be achieved. Full compatibility would probably require a radical amendment of Resolution 1267 or even its total abandonment. A good example are the provisions on the “Consolidated List”. By this term it is made reference to the fact that the list is a dynamic one. It has to be adapted continuously by the listing of new subjects and entities and the delisting of others. In the meantime, several precautions for the listing procedure have been introduced, as results of the “Guidelines” of 9 December 2008.

The Consolidated List will be updated regularly and this List will be made promptly available on the website of the Committee. Proposals for new additions are made by Member States which are encouraged “to approach the Stat(e) of residence and/or nationality of the individual or entity concerned to seek additional information.”<sup>26</sup>

“Member States should provide a detailed statement of case in support of the proposed listing that forms the basis of justification for the listing in accordance with the relevant resolutions. The statement of case should provide as much detail as possible on the basis(es) for listing indicated above, including: (1) specific findings demonstrating the association or activities alleged; (2) the nature of the supporting evidence (e.g. intelligence, law enforcement, judicial, media, admissions by subject, etc.) and (3) supporting evidence or documents that can be supplied. States should include details of any connection with a currently listed individual or entity. States shall identify those parts of the statement of case that may be publicly released [...] and those parts that may be released upon request to interested States.”<sup>27</sup>

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<sup>26</sup> See para. 6 (c).

<sup>27</sup> See para. 6 (d).

As can be seen from these excerpts from the “Guidelines” several guarantee mechanisms have been inserted in order to protect the interests of the persons and entities whose listing is under discussion. These guarantees operate at the national level, when a thorough assessment is required, at the interstate level, when the states involved are invited to bilateral consultations and at the UN level when care is taken that detailed information on the case is available. Nonetheless, these guarantees do not match those foreseen before Criminal Courts (both national and international). The qualification of these measures by the Sanctions Committee as “preventive” is of little consolation as it is their objective nature that has to be taken into consideration. As is known also, in national law preventive measures must be accompanied by far-reaching guarantees if they involve personal rights. In any case, in view of the fact that the effects of these measures are potentially very long lasting, we are faced here with preventive measures of a *sui generis* character.

Initially, a listed subject had no individual means at hand to oppose these measures. The respective individual or entity was totally dependent on the home state’s willingness to exercise diplomatic protection. In the meantime, some accommodations have been introduced in this area. A “Focal Point” has been instituted to which petitioners can directly address requests for delisting.<sup>28</sup> These requests are forwarded to the governments of citizenship and residence which are encouraged to consult with the designating government(s). Afterwards they can decide whether to recommend delisting. Alternatively, the petitioner can direct his demand immediately to his state of residence or citizenship.<sup>29</sup>

In the end, the attitude taken by the state of residence or citizenship is of decisive importance. The decision to forward a petition for delisting to the Sanctions Committee is, to a large extent, a political one and may depend, to a considerable measure, on the political relations between the proponent state and the state of residence or citizenship. On the whole, either directly or indirectly, we are faced here with a particular type of diplomatic protection. The specificity results from the fact that the state which is asked to exercise diplomatic protection is under considerable political pressure to make its decision dependant upon a reasoning resembling a judicial process since the rights and interests at issue require that at least some appearance of a criminal proceeding is created. At the same time, on the political side, the question whether or

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<sup>28</sup> See para. 7 on “de-listing”. On the Committee’s website a standard-form for de-listing can be found.

<sup>29</sup> Ibid.

not to grant diplomatic protection depends not only on considerations of internal politics but, to a much larger extent, on international legal and political commitments to fight terrorism more effectively. Therefore, at this stage, highly problematic trade-offs appear. Further, very difficult balancing requirements arise, throughout the whole process of sanction implementation as we will see later on.

As already mentioned, the main improvements have been brought about by SC Resolution 1822 of 30 June 2008. It is apparent that the Security Council tried thereby to react to the strong criticism levelled against this regime and to make it more palatable to the human rights community. By 30 June 2010 a one-time review of all names that were inscribed on the Consolidated List as of 30 June 2008 will have been carried out.<sup>30</sup> Afterwards it will be ensured that all names on the list are reviewed at least on a three-year basis.<sup>31</sup>

The philosophy standing behind these and the other modifications brought about by Resolution 1822 is given best expression by para. 28 of that document, where the Sanctions Committee is encouraged “to continue to ensure that fair and clear procedures exist for placing individuals and entities on the Consolidated List and for removing them as well as for granting humanitarian exemptions”. Furthermore this resolution “directs the Committee to keep its guidelines under active review in support of these objectives.” However, neither the ECJ nor the human rights community were impressed by these concessions. On the other hand, it could be argued that these modifications also showed, that the Sanctions Committee itself was not absolutely sure of its case.

### III. The *Kadi* Case in Brief

The *Kadi* case is currently surely one of the most discussed in international (and European) law literature in general and the factual elements of this case do not therefore need to be rehearsed here in any detail.<sup>32</sup> It may be worth recalling some elements, however, for a the better under-

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<sup>30</sup> See para. 9 (a).

<sup>31</sup> See para. 9 (b).

<sup>32</sup> It is to be remembered that before the CFI a further analogous case was considered, the *Yusuf* case and the findings of the CFI were in both cases practically identical. As the *Yusuf* case was discontinued the ECJ ruled only on *Kadi* and therefore the underlying legal problem is now prominently identified by this latter name.

standing of the following. From 19 October 2001 Mr. *Kadi*, a wealthy Saudi Arabian citizen with substantial economic interests in the European Union, found himself on the list of the Sanctions Committee. On 27 May 2002 this measure was transposed into the Community Order by the usual two-tier approach: first the Council, acting within the 2nd Pillar, adopted Common Position 2002/402/CFSP. By Commission Regulation 881/2002 of the same day and acting on the basis of articles 60, 301 and 308 ECT, the EU sanctions regime, mirroring the relevant Security Council provisions, was extended to Mr. *Kadi*.<sup>33</sup> What this meant for Mr. *Kadi* becomes clear from a look at article 2 of Regulation No. 467/2001, to which the list with the terror suspects is added as an annex:

“All funds and other financial resources belonging to any natural or legal person, entity or body designated by the [...] Sanctions Committee and listed in Annex I shall be frozen.

No funds or other financial resources shall be made available, directly or indirectly, to or for the benefit of, persons, entities or bodies designated by the Taliban Sanctions Committee and listed in Annex I. Paragraphs 1 and 2 shall not apply to funds and financial resources for which the Taliban Sanctions Committee has granted an exemption. Such exemptions shall be obtained through the competent authorities of the Member States listed in Annex II.”

Again in response to respective modifications of the sanctions regime at the UN level,<sup>34</sup> the European Union eased its sanctions by Regulation 561/2003<sup>35</sup> in the sense that the competent authorities of the Member States were enabled to exempt, upon request, those funds or economic resources from the sanctions regime that are deemed to be necessary to cover basic expenses (for example for foodstuff, mortgage and medicines), professional fees and extraordinary expenses.

By application lodged on 18 December 2001, Mr. *Kadi* brought an action for annulment against Regulation 2062/2001 and 467/2001, in as far as they related to him, before the CFI. The grounds for annulment, on which the claim was based, referred essentially to the alleged viola-

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<sup>33</sup> See Commission Regulation (EC) No. 2062/2001 of 19 October 2001 amending Regulation No. 467/2001 (OJ 2001 L 277, 25). According to article 10(1) of Regulation 467/2001 the Commission can amend or supplement Annex I on the basis of determinations made by either the Security Council or the Sanctions Committee.

<sup>34</sup> See S/RES/1455 (2003) of 17 January 2003.

<sup>35</sup> See also Common Position 2003/140/CFSP.

tion of fundamental rights. Subsequently, the applicant also claimed lack of competence to adopt Regulation Nos 467/2001 and 2062/2001 on the basis of articles 60 and 301 ECT. When Regulation 467/2001 was repealed and replaced by Council Regulation No. 881/2002 (extending the sanction again on Mr. *Kadi*) reference was made, as legal basis, also to article 308 ECT. As a consequence, Mr. *Kadi* withdrew the new ground for annulment but the Court nevertheless decided to consider this question on its own motion.<sup>36</sup> On 10 December 2001 a similar claim was brought forward by *Ahmed Ali Yusuf* and the *Al Barakaat* International Foundation, both also mentioned on the Consolidated List.<sup>37</sup> They also contested the lack of an adequate legal basis for the adoption of Regulation No. 467/2001. The CFI dismissed all pleas in law or argument.

Mr. *Kadi*, Mr. *Yusuf* and *Al Barakaat* appealed the respective sentences. Mr. *Yusuf*, however, having been struck from the list, abandoned the appeal and following this, the two remaining cases were joined. The appeal procedure considered, therefore, the Joined Cases C-402/05 P (*Kadi*) and C-415/05 P (*Al Barakaat*). For reasons of simplicity, reference shall here mostly be made to the name of Mr. *Kadi*.

As already mentioned, the judgment by the CFI met with harsh criticism, especially from the human rights quarter. The Opinion by Advocate General Poiares Maduro proposed in these cases a radical *revirement* to the Court. In the end, the ECJ followed the Advocate General in most points.

On the whole, the judgments by the CFI and the ECJ as well as the opinion by the Advocate General represent highly interesting (and for many parts also highly complex) documents on pivotal legal and political issues at the intersection between international law and EU law. At the same time they try to define the reciprocal relationship between these two orders and – in the final analysis – the very foundations of these orders themselves. At a time when much soul-searching is undertaken both among international and European lawyers about status and perspectives of their field, the documents mentioned try to sum up the discussion and to adopt clear positions. No present or future discussion in this area can ignore these standpoints. Particular attention should be paid to the human rights aspect which forms the material substance of

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<sup>36</sup> See the CFI judgment of 21 September 2005 in *Kadi*, Case T-315/01, 2005, ECR II-3649, para. 60 et seq.

<sup>37</sup> Case T-306/01, *Yusuf* and *Al Barakaat* International Foundation v. Council and Commission, 2005, ECR II-3533.

the conflict between the orders involved. As will be shown, no easy solution can be found for this controversy and radical standpoints in this context are, most probably, counterproductive even though they may sound attractive from a political point of view. Most interestingly, the picture changes somewhat, if a dynamic perspective is taken.

The *Kadi* case contains numerous elements for further discussion. If one adopts a systematic approach, two main areas can be distinguished. There is the issue of competence of the EC to adopt the contested regulation and there is the broad area of controversy regarding the status to be attributed to UN Security Council Resolutions in the EU, in particular if questions of conflict with the *acquis communautaire* in the field of human rights arise. Both areas are of enormous doctrinal relevance. For sake of space, only the second one can be examined in detail here. A few words shall be dedicated, however, also to the first subject.

#### IV. EC Competence to Adopt Targeted Sanctions

Regulation No. 881/2002 imposing the contested sanctions against Mr. *Kadi* was based on articles 60, 301 and 308 ECT. As is known, for a long time the imposition of sanctions by the EC has raised the competence question. Originally, in an instrumental perspective, article 133 (at that time article 113) ECT had been generally used as a competence basis.<sup>38</sup> This approach led to much criticism.<sup>39</sup> In fact, it goes without saying that political sanctions, pre-determined between the Member States within the Common Political Cooperation (and therefore on the International Law level) have no immediate economic goal and therefore it was considered to be doubtful whether the EC was competent in this respect. To remedy this competence problem, with the Maastricht treaty, which brought political cooperation under the roof of the European Union, a *passerelle* was created between the political determina-

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<sup>38</sup> See E.U. Petersmann, "Internationale Wirtschaftssanktionen als Problem des Völkerrechts und des Europarechts", *Zeitschrift für Vergleichende Rechtswissenschaft* 80 (1981), 1 et seq. and C.D. Ehlermann, "Communautés européennes et sanctions internationales – une réponse à J. Verhoeven", *RBDI* 18 (1984), 96 et seq. (109).

<sup>39</sup> See only T. Bruha, "Handelsembargo gegen Argentinien durch EWG-Verordnung?", *Deutsche Verwaltungsrechtliche Blätter* 1982, 674 et seq. (677). On this controversy see also J.H.J. Bourgeois, "Commentary to Art. 113 ECT", in: H. Groeben/J. Thiesing/C.D. Ehlermann (eds), *Kommentar zum EU-/EG-Vertrag*, 3rd edition 1999, 802 et seq.

tions on the Union level and the EC where the sanctions had to be materially adopted with apposite measures. Now, a clear competence for the adoption of politically motivated sanctions by the EC, following a corresponding Common Foreign and Security Policy Resolution, had been created. On the basis of article 60 ECT urgent measures on the movement of capital and on payments as regards third countries can be taken. Article 301 ECT reflects political instrumental necessities of the early 90s. In fact, sanctions are directed “to interrupt or to reduce, in part or completely, economic relations with one or more third countries.” At that time, targeted or individual sanctions were not yet an issue and terrorist threats were not globalised. States were the only perpetrators of international wrongs and each individual act was attributed, in its final consequence, to governments. Now that the nature of the threat had radically changed, could the EC react nonetheless with the traditional instruments on the basis of competence provisions created by the Maastricht treaty?

Both the CFI and the ECJ answered in the affirmative to this question although their reasoning was cautious and formalistic, not to say unconvincing and somewhat contorted. Reading the respective passages one gets the impression that neither the CFI nor the ECJ were truly convinced that a genuine EC competence was given in this case but nonetheless they were prepared to go to great lengths to affirm such a competence as this was the precondition to treat the issue of conflict between Security Council Resolutions and EU fundamental rights.

Both the CFI and the ECJ were of the opinion that for the adoption of targeted sanctions by the EC it was necessary to have recourse not only to articles 60 and 301 ECT but also to article 308. The path to reach this conclusion was different, however. The CFI referred to the consistency argument as set out in article 3 TEU. If the articles 60 and 301 ECT provide for the adoption of sanctions but prove to be insufficient to attain the objectives of the Common Foreign and Security Policy recourse to the additional legal basis of article 308 ECT is justified.<sup>40</sup> This argument did not satisfy the ECJ for which the bridge created by articles 60 and 301 did not extend to article 308 ECT which concerns the realisation of objectives of the EC treaty and not of the EU treaty.<sup>41</sup> This would run counter to the wording of article 308, violating the con-

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<sup>40</sup> Ibid., para. 127 and 128.

<sup>41</sup> See the ECJ judgment in Joined Cases C-402/05 P and C-415/05 P, *Kadi* and *Al Barakaat* of 3 September 2008, para. 197 et seq.

stitutional architecture of the pillars structure and be in contrast with the principle of conferred powers.

Nonetheless, the ECJ found the reference to article 308 to be justified, as “Articles 60 EC and 301 EC are the expression of an implicit underlying objective, namely, that of making it possible to adopt [CFSP] measures through the efficient use of a Community instrument.”<sup>42</sup> On this basis, the limited ambit *ratione materiae* of those provisions could be extended by having recourse to article 308 ECT.<sup>43</sup> CFI and ECJ diverged, consequently, in their opinion on the effects of article 308 ECT. For the CFI this provision was able to cross the bridge between TEU and ECT created with articles 301 and 60 ECT. The ECJ, on the other hand, denied that article 308 could operate on the interpillar level. The “implicit underlying objective” was already part of EC law. Recourse to article 308 was only taken to enlarge the instrumental tool. In a strict formalistic reading on the competence question, the ECJ judgment seems to be more convincing than the CFI judgment. In fact, it is doubtful whether the consistency argument can justify recourse to article 308 ECT in order to import EU goals in the EC law system. Only if it is assumed that the respective objectives are already part of the EC law order can article 308 be used to adopt measures not foreseen in EC law but necessary to attain these objectives.<sup>44</sup>

On the whole, this discussion appears to be over-formalistic and risks losing sight of reality. The ECJ admits, at least indirectly, the weakness of the whole approach when it adds, in para. 235 of the judgment, a final consideration on the importance of referring to article 308 from the viewpoint of democratic policy as thereby the European Parliament was enabled to take part in the decision-making process. Such considerations can hardly be attributed legal relevance.

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<sup>42</sup> Ibid., para. 226.

<sup>43</sup> Ibid., para. 216.

<sup>44</sup> As is known, for article 308 ECT to apply, a further condition must be given, namely that the respective measure relates to the operation of the common market. Do targeted sanctions taken by the Member States possibly affect the common market in a negative way? This is hard to anticipate but the answer in the affirmative by the ECJ in para. 230 of the judgment seems to be, on a whole, correct, when it states that the multiplication of national measures could have a particular effect on trade between Member States, especially with regard to the movement of capital and payments. Different national measures could furthermore create distortions of competition. The respective danger described by the ECJ seems to be not only hypothetical but real.

A more pragmatic and by far more convincing approach was taken in this field by Advocate General Poiares Maduro. Even though the ECJ has pursued a different approach, his reasoning merits some consideration for its soundness. According to him, there is no need to base the contested regulation on article 308 ECT as article 301 represents a sufficient basis for the adoption of targeted sanctions:

“By affecting economic relations with entities within a given country, the sanctions necessarily affect the overall state of economic relations between the Community and that country. Economic relations with individuals and groups from within a third country are part of economic relations with that country: targeting the former necessarily affects the latter. To exclude economic relations with individuals or groups from the ambit of ‘economic relations with ... third countries’ would be to ignore a basic reality of international economic life: that the governments of most countries do not function as gatekeepers for the economic relations and activities of each specific entity within their borders.”<sup>45</sup>

This is probably the most appropriate viewpoint. To say that reference to “third countries” in article 301 excludes individual sanctions from the purview of this norm is hardly justified. In fact, it is obvious that this sanctions regime is closely related to that of the United Nations on the basis of Chapter VII. If this latter regime develops further on the instrumental level there is no reason to interpret the former in a static way. This holds true in particular if one considers that the reference to “third countries” points out that these measures take place on the external, international level as opposed to the internal, Communitarian one – nothing more and nothing less.

As soon as the Treaty of Lisbon enters into force, this question will definitely be solved in the sense proposed by Advocate General Maduro: according to article 215 para. 2 of the Treaty on the Functioning of the European Union the Council will be enabled to adopt restrictive measures also against individuals. On the other hand, the new article 352 (which replaces article 308 TEC) excludes that this provision can serve as a basis for attaining objectives pertaining to the CFSP. In the field of targeted sanctions there will be no more need to do so.

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<sup>45</sup> See the Opinion by Advocate General Poiares Maduro, C-402/05 P, 16 January 2008, para. 13.

## V. The Clash between UN Sanctions and EU Fundamental Rights

### 1. General Introduction

The fight against terrorism has put human rights protection under strain in many countries. While in the immediate aftermath of 9/11 nearly any reaction to this threat seemed to be justified, in the meantime national and international institutions responsible for upholding the rule of law have, to a considerable extent, regained control of the situation.<sup>46</sup> Nonetheless, the particularity of the terrorist threat and its immediate impact on public security and fundamental rights cannot be denied. Each legal order which has to provide, at the same time, for security and for the respect of human rights, has to undertake some balancing based on a complex reasoning. The need to protect national security may justify some limitations of fundamental rights. At the same time, however, these limitations may not go beyond what is strictly necessary to achieve this goal and it must also be assured that non-derogable rights are not jeopardised.<sup>47</sup> There can be no doubt that the need for such a balancing is, as such, universal while the specific way the balancing has to take place has to be determined by each legal order autonomously. But what if various legal orders collide and the compromises found in the different systems diverge? Here the aspect of hierarchy comes in although without being able to provide a solution. In fact, as will be shown, the formal superiority of UN law is contrasted in this case by a claim of substantial and moral superiority of EU fundamental rights. Conflict can be solved in this area only if the opposing rights are structured vertically but the way this shall happen depends on value judgments that can hardly be second-guessed by objective criteria. Most astonishing at all, in a dynamic perspective, it is not even clear whether the security-preference or the human rights-preference really

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<sup>46</sup> See “The Supreme Court and the War on Terrorism”, *ASIL* 101 (2007), 339 et seq.; “Counter-Terrorism Strategies, Human Rights and International Law: Meeting the Challenges”, *NILR* 54 (2007), 571 et seq.; Lady Justice Arden, “Human Rights and Terrorism”, in: S. Breitenmoser et al. (eds), *Human Rights, Democracy and the Rule of Law, Liber amicorum Luzius Wildhaber*, 2007, 21 et seq.; O. Fiss, “The War Against Terrorism and the Rule of Law”, in: *ibid.*, 1239 et seq. In the US, as is known, a watershed decision was *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

<sup>47</sup> See Justice Arden, see note 46, 38.

are best suited to attain the purported goal, as both goals are strongly interrelated. In the end, doubts arise whether it is really the conflict between the two mentioned goals that has given rise to this controversy between the two international institutions or rather a power struggle between them.

## 2. The Binding Effect of Security Council Resolutions

One of the most fundamental issues of this whole controversy was the question of the ultimate basis and the very extent of the Community Courts' jurisdiction on the sanctions provisions. The main elements of this problem are the following. There can be no doubt that the contested sanctions provisions find their ultimate source in Security Council resolutions, at least at the factual level. From a legal point of view this raised the question what were the effects of these resolutions on the EU/EC legal order as neither the EU nor the EC are members of the United Nations. On the other hand, all EU members are UN members and they are surely bound by Security Council resolutions. According to Article 25 of the UN Charter, "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." While it is uncontested that not all pronouncements of the Security Council are binding on Members States,<sup>48</sup> the wording of the respective Security Council Resolution leaves no doubt as to the fact that such effects are here intended and

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<sup>48</sup> See J. Delbrück, "Commentary to Art. 25 of the UN Charter", in: B. Simma (ed.), *The Charter of United Nations*, Vol. I, 2002, 452 et seq., para. 4 and E. Suy/ N. Angelet, "Commentary to Art. 25 of the UN Charter", in: J.P. Cot/ A. Pellet, *La Charte des Nations Unies*, 2005, 909 et seq. (912 et seq.). See also the following passage in the ICJ's 1971 Namibia Advisory Opinion: "The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council", (ICJ Reports 1971, 16 et seq. (53)). See on the interpretation of Security Council Resolutions in general M.C. Wood, "The Interpretation of Security Council Resolutions", *Max Planck UNYB* 2 (1998), 73 et seq.

given.<sup>49</sup> As already mentioned, the EU (or, respectively, the EC) are not members of the United Nations. Why then, should this entity be bound by Security Council Resolutions?

The CFI gave a dogmatically convincing explanation as to why this should be the case. The Court re-discovered the old theory of substitution successfully employed in *International Fruit*<sup>50</sup> to explain why the Community should be bound by the GATT, even though it had never become a member. In fact, by concluding the EEC treaty Member States could not transfer to this institution more power than they possessed or withdraw from their obligations to third countries under that Charter.<sup>51</sup> As the Member States have passed competences they have held formerly themselves to the Community, the corresponding obligations should equally be assumed by the Community.<sup>52</sup> This was an interesting attempt to attribute broader significance to a theory that up to that moment was used to apply only in the very specific GATT framework. Seen abstractly, the concept of substitution could be extremely useful to solve the ever more common problems where the Community enters, at least *de facto*, into contractual positions (or even positions of membership) with their members. Shortly after the CFI judgment, however, the ECJ has pointed out in the *Intertanko* case that for the concept of substitution to apply very strict conditions have to be fulfilled.<sup>53</sup> In particular, it is required that the Community has assumed all the competences previously exercised by the Member States.<sup>54</sup>

In the following, neither the Advocate General nor the ECJ referred to this concept. Seemingly, there was no need to do so as they chose a strictly dualistic approach. In reality, however, this question remained unresolved. If the Member States no longer exercise their competences fully in this field, the Community has to accept the respective responsi-

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<sup>49</sup> See only S/RES/1822 (2008) of 30 June 2008, where it is stated that the Security Council, “[a]cting under Chapter VII of the Charter of the United Nations, [...] [d]ecides that all States shall take the measures as previously imposed by paragraph 4(b) of resolution 1267 (1999), paragraph 8(c) of resolution 1333 (2000), and paragraphs 1 and 2 of resolution 1390 (2002) [...]”.

<sup>50</sup> Joined Cases 21/72 to 24/72, ECR 1972, 1219, para. 11.

<sup>51</sup> Judgement of the CFI in Case T-315/01, *Kadi*, 21 September 2005, 195.

<sup>52</sup> See, in this regard, P. Hilpold, *Die EU im GATT/WTO-System*, 3rd edition 2009, 112 et seq.

<sup>53</sup> See C-308/06, *Intertanko*, Judgment of 3 June 2008, para. 48.

<sup>54</sup> *Ibid.*, para. 49.

bility and also to ensure, on the basis of article 10 ECT, that the Member States do not incur responsibility.

Article 25 of the Charter is, in this case, closely connected with Article 103, according to which, “[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.”

While the English text of this provision may give rise to some doubts as to the extent UN law prevails, from the French text (“obligations [...] en vertu de la présente Charte”) it results very clearly that not only the Charter itself falls under Article 103 but all (binding) UN law, and therefore also Security Council resolutions.<sup>55</sup>

In any case, and leaving aside also the question of substitution, EU Member States remain directly obliged by SC resolutions on the basis of Article 25 and this obligation assumes prevalence over any other obligation. From the Community perspective, account is taken of this hierarchical relationship between UN law and EU law by article 307 ECT, according to which “[t]he 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.”

The CFI interpreted Article 103 of the Charter in combination with article 307 ECT in the traditional, very far-reaching sense, according to which the European Union is an open, international institution which attempts not only to closely adhere to international law in general and UN law in particular but also to promote respect for this law on a world-wide scale. Accordingly, it came to the conclusion that “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.”<sup>56</sup>

In only one case, according to the CFI, this prevalence does not take place: Security Council resolutions “must observe the fundamental per-

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<sup>55</sup> This is also the prevailing view in literature. See R. Bernhardt, “Commentary to Art. 103 of the UN Charter”, in: Simma, see note 48, 1292 et seq. (para. 9) and J.M. Thouvenin, “Commentary to Art. 103 of the UN Charter”, in: Cot/Pellet, see note 48, 2133 et seq. (2135).

<sup>56</sup> See Case T-315/01, *Kadi*, Judgment of 21 September 2005, para. 224.

empty provisions of *jus cogens*.<sup>57</sup> This statement has been widely criticised but a look at previous literature reveals that this position is in line with prevailing doctrinal pronouncements. In fact, it is generally argued that the powers by the Security Council are not unlimited, even though in practice it will neither be easy to define these limits nor to make sure that they are effectively obeyed.<sup>58</sup>

Advocate General Maduro, however, did not accept the general untouchability of obligations assumed before the entry into the Community. He introduces instead a new limitation to the effects of this provision, not explicitly foreseen in the Treaty. In fact, according to him, obligations for Member States, carried into EU-membership on the basis of article 307 ECT, cannot prevail over obligations resulting from article 6(1) EU.<sup>59</sup> It appears that Maduro wanted this rule to apply unconditionally. There seemed to be no need and no possibility to differentiate between core human rights and derogable rights. He adds the following statement: “Certainly, extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions.”<sup>60</sup> In the Opinion however, no concrete consequences of this statement can be discerned.<sup>61</sup>

The ECJ formulates these limitations to article 307 ECT in an even more restrictive way:

“Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Com-

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<sup>57</sup> Ibid., para. 230.

<sup>58</sup> See Bernhardt, see note 55, who refers to the *erga omnes*-concept (which is, as is known, close to, though not identical with *jus cogens*): “The present author [Rudolf Bernhardt] holds the opinion that in case of manifest *ultra vires* decisions of any organ, such decisions are not binding and cannot prevail in case of conflict with obligations under other agreements”, *ibid.*, para. 23. He continues, however, with the following admission: “But the borderline is difficult to draw”, *ibid.*

<sup>59</sup> See the Opinion by Advocate General Maduro in Case C-402/05 P, *Kadi*, of 16 January 2008, para. 31.

<sup>60</sup> *Ibid.*, para. 35.

<sup>61</sup> Both in the Opinion by the Advocate General as in the judgment by the ECJ we find several acknowledgments of the importance of international law. This does not, however, amount to much more than to lip-service. See A. Gattini, “Joined cases C-402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, judgment of the Grand Chamber of 3 September 2008”, *CML Rev.* 46 (2009), 213 et seq. (226).

munity legal order, one of which is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.”<sup>62</sup>

On this basis pre-accession obligations are trumped not only by fundamental rights obligations but by the whole corpus of the “very foundations of the Community legal order”, a potentially very broad set of norms and in any case a concept far from being clearly defined.<sup>63</sup>

### 3. The Different Approaches to Solve the Problems Portrayed

#### a. The ECJ

In the exposition so far it has already been mentioned that the factual conflict of norms can be solved, in the present case, through different approaches.

Before treating these views in detail it should be made clear that conflict arises primarily if the relationship between the EC law order and international law is explained, at least in principle, in monistic terms. In the past, this has been in fact the prevailing perspective when this relationship was examined.

If a dualistic perspective is adopted, conflict may arise only if the respective legal orders are reciprocally connected whereby the norms of one system enter into the other causing legal incompatibilities. Such a situation may be provoked through article 307 ECT even if the relationship between EU law and international law is interpreted as dualistic. In fact, international law obligations previously assumed by the Member States can cause, as shown above, conflict with EC provisions. This was the approach taken by the ECJ and this seems remarkable for

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<sup>62</sup> See the Judgment in Joined Cases C-402/05 P and C-415/05 P, *Kadi* and *Al Barakaat*, 3 September 2008, para. 303.

<sup>63</sup> This new attitude strongly reduces the status of pre-accession agreements in comparison to the previous jurisprudence. In particular, in *Centro-Com*, the ECJ had admitted that provisions of such agreements can even trump primary law if the respective agreement requires such a derogation from the respective Member State. For N. Lavranos the “very foundations of the Community legal order” constitute, therefore, “supra-constitutional law”. See N. Lavranos, *The impact of the Kadi-judgment on the international obligations of the EC Member States and the EC*, 5 (on file with the author).

two reasons. First of all, the adoption of a dualistic view represents, *per se*, an important change with respect to the attitude taken by the ECJ in the past.<sup>64</sup> It is clear that the ECJ could not officially adhere to a position of radical dualism and therefore it had to admit, at least in principle, that former international law obligations by the Member States could prevail over actual community obligations.<sup>65</sup> The ECJ managed, however, to find a justification for a derogation taking reference, on the one hand, to a formalistic approach. For the ECJ the UN treaty is nothing else than a typical international agreement. This Court does not explain why this agreement should be applicable to the EU (or the EC), for example through the theory of substitution, but in any case this law could operate, according to article 307 ECT, only between primary law and secondary law.<sup>66</sup> Prevalence of UN law over primary EU law is, therefore, in any case excluded.

Furthermore, the ECJ based its reasoning on the concept of the “very foundations of the Community legal order.”<sup>67</sup> The extent of this derogation constitutes the second most remarkable aspect. In fact, on closer inspection, it becomes clear that the ECJ did not want to find derogations of an exceptional character to the effects of UN law within the EU but rather to take recourse to a hegemonistic position whereby the relevant EU standards should not only become underogable but rather extend beyond the closer border of its legal realm. The ECJ did not squarely and exclusively refer to fundamental rights protection when it attempted to justify the EU “Sonderweg”. There would have been the following risk with this approach. As is known, fundamental rights are now defined more and more internationally. No state can claim to be the prevailing source for the development of these rights, and even less, claim any sort of leadership with regard to the implementation of these rights. It would not have been easy to explain why fundamental rights protection in the EU is so different to other parts of the world and why the UN, itself having as one of its main objectives the promotion of human rights, should become a primary threat to human rights protection within the European Union. Reference, on the other hand, to the “principles that form part of the very foundations of the

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<sup>64</sup> Which was, as mentioned above, characterised by a will to follow a “moderate monism”.

<sup>65</sup> See the Judgment in the Joined Cases C-402/05 P and C-415/05 P, *Kadi* and *Al Barakaat*, 3 September 2008, para. 301.

<sup>66</sup> *Ibid.*, para. 307.

<sup>67</sup> *Ibid.*, para. 304.

Community legal order” (“one of which is the protection of fundamental rights”) evidences that the EU legal order is as such of a *sui generis* character that commands international respect. Fundamental rights protection is only an element, albeit surely an important one, of this corpus of norms that the state community must accept or, even more preferably, emulate.

Seemingly dualistic, if thought through to the end, this approach would lead to an awkward result. Although, of course, the ECJ does not become specific about this, the underlying philosophy can be interpreted as a return to monism, albeit a very particular one. It is again a form of a moderate monism, but this time the leading norm is not the international but the European one, at least insofar as fundamental rights are concerned. In this field (and in some others which would still have to be specified), the EU seems to have the ambition to show the way to the international community.<sup>68</sup>

The ECJ has missed the opportunity to reach the same result by an internationalist argumentation. In fact, the human rights principles the ECJ claims to fight for, are not exclusive to the EU but are well founded in the “International Bill of Rights”. The ECJ would have had a good point if it had stated that also the Security Council is bound by these provisions in the exercise of its powers.<sup>69</sup>

It could be the case, however, that the ECJ deliberately avoided this approach for the following reasons:

- Arguing this way the ECJ would have adopted a universalist perspective, syndicating thereby directly upon the behaviour of UN organs. It might have seemed safer to the ECJ not to enter into the area of international law with all its dogmatic uncertainties but to rely simply on the self declared autonomy and specificity of the EU legal order.
- The ECJ might have wanted to assert and further develop the new concept of the “very foundations of the Community legal order”.

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<sup>68</sup> Christian Tomuschat has pointedly reformulated the old German dictum “Am Deutschen Wesen soll die Welt genesen” (which stands for the old imperialistic attitude of the German empire) to “Am Europäischen Wesen soll die Welt genesen”. See C. Tomuschat, “Challenging EU Counter-Terrorism Measures through the Courts”, handout at the workshop organised by Marise Cremona, Francesco Francioni and Sara Poli on 19 December 2008 at the European University Institute (manuscript on file with the author).

<sup>69</sup> See Nollkaemper, see note 3, 25.

This would be, however, tantamount to a deliberate challenge to the international legal order. Should this have been the real motivation behind the ECJ's attitude, this Court would be ill-advised to further pursue this road in view of the disruptive consequences for the international order it entails.<sup>70</sup>

#### b. The Advocate General

Although it is generally held that the ECJ followed the Advocate General's Opinion in this main part, on closer examination it becomes clear that the dogmatic attitude is somewhat different. In fact, the Advocate General follows an approach of radical dualism. The EU legal order and the international legal order are two totally different systems operating at completely diverse levels. Each legal order is self-contained. Any legal question has to be answered exclusively and conclusively on the basis of the respective order. As a consequence, however, the question arises whether the final consequence of this attitude amounts to an outright denial of international law. The possibility of Member States incurring international responsibility for not giving effect to Security Council resolutions is admitted, at least indirectly, but the consequences of such a situation are significantly downplayed. The term "international responsibility" is first avoided. Instead the Advocate General speaks of "certain repercussions" and of "inconvenience": "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."<sup>71</sup> The consequences which the Advocate General draws from this situation appear, however, somewhat surprising: "It should be noted, however, that these repercussions need not necessarily be negative. They are the immediate consequence of the fact

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<sup>70</sup> Marjorie Bealey has forcefully written about a danger of an "application particulière des normes internationales" and of a "morcellement du droit international". See M. Bealey, "Les Arrêts Kadi et Al Barakaat International Foundation, Réaffirmation par la Cour de Justice de l'Autonomie de l'Ordre Juridique Communautaire vis-à-vis du Droit International", *Revue du Marché commun et de l'Union européenne* 524 (2009), 32 et seq. (39). For a different view according to which it is the UN which has "lost sight of human rights", see K. Schmalenbach, "Bedingt kooperationsbereit: der Kontrollanspruch des EuGH bei gezielten Sanktionen der Vereinten Nationen", *Juristenzeitung* 64 (2009), 35 et seq. (41).

<sup>71</sup> See the Opinion by Advocate General Maduro in Case C-402/05 P, *Kadi*, of 16 January 2008, para. 38.

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.” It seems that here the Advocate General has the long term consequence of the EU’s attitude in mind. He is confident that this position will ultimately bring about a change on the international level. In comparison to these higher goals, the immediate consequences for the EU and its Member States can be neglected. These consequences consist anyway in mere “inconvenience”. The fact that disregard for Security Council resolutions will lead to international responsibility of the Community and its Member States is finally acknowledged but this is portrayed as having no immediate relevance for the European Union:

“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 responsibility or to the rule enunciated in Article 103 of the UN Charter.”<sup>72</sup>

The Advocate General is quite consistent in his opinion that the ECJ should assess cases before it only on the basis of EU law whereby the protection of fundamental rights assumes paramount importance. Respect for international law is desirable but from this no legal implications arise. For this reason the Advocate General does not accept the distinction made by the CFI between sanctions adopted as a measure undertaken in order to implement a Security Council resolution and sanctions adopted autonomously.<sup>73</sup> For the CFI the latter were subject to full review, while for the former, the mandatory character of the implementation excluded such a review. The Advocate General, on the contrary, did not bother about international responsibility. If the con-

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<sup>72</sup> Ibid., para. 39.

<sup>73</sup> In the OMPI case (Case T-228/02, Organisation des Modjahedines du peuple d’Iran, 2006, ECR II-4665) the CFI, with the judgment of 12 December 2006, annulled a Council decision implementing Regulation (EC) 2580/2001 on specific restrictive measures adopted autonomously and directed against certain persons and entities with a view to combating terrorism. Absent any “circumscription of powers” by UN measures the right to a fair hearing came to a full bearing.

sequence is the violation of international law this happens in a different world and the impression is created that this is a question of politics and not of law. Such an attitude undermines, however, the prevailing perception of international law as a legal order which may differ from the national legal order under many considerations but not with respect to its qualification as law.<sup>74</sup>

Eventually, such a form of radical dualism may render international law invisible. The national order (or the EU order) does not have to care about international law which is relegated to a minor role, to “soft law” more of a political than a legal character. Ultimately, this position resembles the one taken by Hegel who qualified international law as “external State law”.<sup>75</sup>

In EU terminology, the states (and, at least indirectly, the EU) reassert their role as “masters of the (international) law”. In this the EU neglects the way the rules, which this institution now purports to defend, have come about. Only an extensive limitation of national sovereignty and deference towards international rule creating processes (whether institutionalised or not) have permitted the creation of a broad international human rights system.<sup>76</sup> Has the time now come to delink the separate national fundamental rights formation process from its international sources? True, it may be observed that a general process intended to re-nationalise the human rights discussion which is under way. National fundamental rights institutions and protection mechanisms have become so strong that international rules often lose visibility.<sup>77</sup>

Nonetheless, they still assume not only the role of a “second constitutional entrenchment”<sup>78</sup> for the effective long-term protection of fun-

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<sup>74</sup> See P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 1997, 5 et seq.

<sup>75</sup> See G.W.F. Hegel, *Grundlinien der Philosophie des Rechts*, 1821, 330 et seq.

<sup>76</sup> See R.A. Falk, “A Half Century of Human Rights – Geopolitics and Values”, in: R. Falk et al. (eds), *Human Rights*, Vol. I, 2008, 51 et seq.

<sup>77</sup> In this context the growing number of so-called “National Human Rights Institutions”, in: Europe has to be mentioned. See G. de Beco, “National Human Rights Institutions in Europe”, *Human Rights Law Review* 7 (2007), 331 et seq.

<sup>78</sup> As is known, this term was coined by *Frieder Roessler* when he tried to characterise the function of GATT law with respect to the protection of economic rights guaranteed by national constitutions. For an extensive elaboration on this concept see also E.U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law: Interna-*

damental rights but it is also said that the main driving force for the further development of international human rights is situated on the international law level. It seems to be rather dangerous, at least at this stage of development of fundamental rights protection, to cut through the umbilical cord between the national and the international law development in this field.

### c. The CFI

In comparison to the positions taken by the Advocate General and the ECJ the judgment by the CFI seems far more sophisticated in its attempt to moderate between the parties involved and to pay tribute to their respective interests to the greatest possible extent. As will be shown in the following, the CFI was not insensitive to the needs of the individuals but at the same time this Court tried to stay within the open, international law-friendly tradition which has been characteristic of EU integration since its inception. For the CFI, this meant that the EU had to accept the supremacy of UN law, the binding force of Security Council resolutions and the need to make trade-offs in the field of fundamental rights for the sake of security reasons while at the same time staunchly defending the core of fundamental rights in the EU.

To attain all these goals the CFI had recourse to the concept of *jus cogens*. This was really a courageous undertaking since this concept, attractive and promising as it may be, is far from a consensual definition. While in the past the need for this concept was mainly grounded on natural law considerations<sup>79</sup> the prevailingly positivist perspective on international law has not rendered this concept superfluous, quite the contrary. In an international order whose ultimate basis is found in consensus the acceptance of *jus cogens* allows the structuring of international obligations according to their intrinsic value to the state community. While a mere consensualist approach could play in the hands of its most potent members or induce the members of this community to sacrifice the long-term good for the immediate gain, recourse to the *jus cogens* principle gives structure akin to a constitutional system to the

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*tional and Domestic Foreign Trade and Foreign Trade Policy in the United States, the European Community and Switzerland*, 1991.

<sup>79</sup> See i.a. A. Verdross, "Forbidden Treaties in International Law", *AJIL* 31 (1937), 571 et seq. (572) who looked for the moral foundations of this order: "[...] never can the immoral contents of a treaty really become law no matter how often it may borrow the external form of the law", *ibid.*, 577.

whole order and it is, in particular, suited to empower the individual towards the state.<sup>80</sup> As is known from programmatic principles in national constitutions *jus cogens* is a much too unwieldy and imprecise concept to be easily implemented through the judicial process.<sup>81</sup> This is not necessarily a drawback as the *jus cogens* principle must necessarily remain, to a certain extent, flexible, open and vague in order to accommodate new developments, to avoid being contrasted due to specific technical incompatibilities with national provisions and to remain close to politics as it is there where legislative improvements are decided. By its mere existence this concept can provide an important argumentative tool for the furtherance of basic human rights, for the strengthening of the international peace order and in general for the consolidation of community values that seem to be essential for the establishment of an international rule of law.<sup>82</sup>

In principle, *jus cogens* should also furnish a formidable tool for both extending the powers of the Security Council as far as it seems necessary to comply with the ever-growing demand for security and protection<sup>83</sup> and to de-limit, at the same time, these powers in order to make sure that no abuse or *ultra vires* action takes place. The guaranteed, power-delimiting force of *jus cogens* in front of Security Council

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<sup>80</sup> The literature on *jus cogens* is very extensive. See, i.a., L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, 1988; G. Gaja, "Jus cogens beyond the Vienna Convention", *RdC* 172 (1981), 271 et seq. (283); S. Kadelbach, *Zwingendes Völkerrecht*, 1992 and P. Picone, "La distinzione tra norme internazionali di jus cogens e norme che producono obblighi erga omnes", *Riv. Dir. Int.* XCI (2008), 5 et seq.

<sup>81</sup> The practical implementation of this principle encounters A. Paulus, "Jus Cogens in a Time of Hegemony and Fragmentation – An Attempt at a Re-appraisal", *Nord. J. Int'l L.* 74 (2005), 297 et seq. who refers also to a much-quoted phrase by Ian Brownlie according to which "the vehicle does not often leave the garage", *ibid.*, 330.

<sup>82</sup> See for these community interests B. Simma, "From Bilateralism to Community Interest in International Law", *RdC* 250 (1994), 217 et seq.

<sup>83</sup> See, in this context, the attempts to give life to the new concept of a "responsibility to protect". See, i.a., P. Hilpold, "The Duty to Protect and the Reform of the United Nations – A New Step in the Development of International Law," *Max Planck UNYB* 10 (2006), 35 et seq.; E.C. Luck, "Der verantwortliche Souverän und die Schutzverantwortung", *Vereinte Nationen* 56 (2008), 51 et seq. and C. Focarelli, "La dottrina della 'responsabilità di proteggere' e l'intervento umanitario", *Riv. Dir. Int.* 91 (2008), 317 et seq.

resolutions was clearly highlighted by Judge *ad hoc* Elihu Lauterpacht in the Genocide case/Provisional measures before the ICJ in 1993:

“The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent.”<sup>84</sup>

The respective case does not, however, bode well for the fate of attempts to delimit the Security Council’s power in specific situations. In fact, as is known, Bosnia-Herzegovina did not succeed in its attempt to obtain a lifting of the arms embargo imposed by the Security Council, even though this embargo curtailed to a considerable extent the ability of this entity to protect its people against ongoing acts of genocide.<sup>85</sup> It can hardly be argued that the Security Council was totally insensitive towards the need to protect these people but it came to the conclusion that the limitation of the availability of arms for all sides involved would be the most effective and realistic reaction by the State Community. This attitude can be strongly criticised from a political perspective. It is highly probable – though not absolutely certain – that a different, more interventionist approach by the Security Council (or the ICJ) could have saved many lives and have impeded the deterioration of a situation whose appalling details have been made official by various proceedings before the ICTY and in the Genocide proceeding started by Bosnia against Serbia.<sup>86</sup>

Nonetheless, even if the Security Council (and, to a certain extent, also the ICJ) deserves criticism or even outright condemnation for its attitude it will be difficult to assert that it violated a *jus cogens* rule. In

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<sup>84</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 8 April 1993, ICJ, Provisional Measures, Sep. Op. Lauterpacht, ICJ Reports 1993, 440, para. 100.

<sup>85</sup> See on this subject also A.M. Weisburd, “The Emptiness of the Concept of *Jus Cogens*, as Illustrated by the War in Bosnia-Herzegovina”, *Mich. J. Int’l L.* 17 (1995), 1 et seq.

<sup>86</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment of 26 February 2007.

fact, conflicting values had to be taken into consideration and even if one were to rank human rights first the dispute as to how to best attain the protection of these rights will continue with the security aspects always playing a dominant role.

Exactly this problem re-surfaced in the *Kadi* case. The CFI did its best to find its way through the surrounding intricacies and to do justice to all the interests involved. In this perspective, this judgment is far more integrative and balanced than the judgment by the ECJ. Building on the internationalist tradition of the ECJ, the CFI tried to find a compromise between goals and aspirations coming from both inside and outside the EU which are not only evidently conflicting on the legal level but also emotionally loaded in a very pronounced way.

According to the CFI the EU acted under “circumscribed powers”. It was not empowered to second-guess Security Council resolutions and, accordingly, the relating implementation measures. Only where the Security Council had itself violated peremptory norms could the Community institutions disregard the respective obligations. This attitude had far-reaching consequences. It implied, first of all that a solution had been found to the long lasting controversy as to the effects of *jus cogens* violations in the sense that an act affected by such a flaw should be considered as non-existent. For a European Court such as the CFI to come to such a definitive conclusion was a bold step.

It implied, furthermore, and this was the even more problematic aspect, that the CFI actually knew how to define peremptory norms in detail. This was the first time that an international Court had attempted to implement *jus cogens* in such a way, i.e. to implement provisions of such a kind in a technical sense. Peremptory norms were treated in the same way as traditional positive norms. Such an endeavour was necessarily bound to fail. In fact, the CFI might have been able to identify the main areas where *jus cogens* violations could arguably have been an issue. This Court did not know, however, where to stop the investigation. The consequence could only be that the CFI undertook a fully-fledged investigation as to the compatibility of the UN sanctions with the existing fundamental rights standards in the EU. It is obvious that the conclusions reached were the result of a balancing act between security aspects (allowing certain fundamental rights restrictions) and EU fundamental rights protection (requiring the application of protective standards that are comparatively high on an international scale). Recourse to the *jus cogens* principle has become – at least indirectly – a vehicle to perform this balancing act without having to sacrifice one of the fundamental interests involved. This is not, however, the proper func-

tion of the *jus cogens* concept. It is not for this aim that this concept has been called into life and it is rather improbable that other courts outside the EU would have been able to make any use of such an interpretation. Several governments of EU Member States which generally have problems with this concept were most probably extremely relieved when the ECJ totally abandoned this approach and no longer relied on the *jus cogens* principle.<sup>87</sup>

#### 4. Conclusions

In conclusion we must ask ourselves how it could be possible that such wise men exercising different jurisprudential functions in the EU and whose unconditional commitment to human rights protection cannot be contested in the slightest way could come to such different conclusions as to the required standard of protection. As we have seen, the technical concepts used to justify the results reached are not convincing. Neither did the recourse to the *jus cogens* idea provide an acceptable explanation for the stance taken by the CFI, nor did it seem to be coherent with the previous jurisprudence when the ECJ simply refused to take into consideration the impact of international law obligations on the EU legal order.<sup>88</sup> This narrowed perspective by the ECJ is all the more remarkable as the respective obligations are, as has been shown, of a particular stringency on the basis of Articles 25 and 103 of the Charter of the United Nations.

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<sup>87</sup> These states were France, the Netherlands, the United Kingdom which strongly opposed recourse to the principle of *jus cogens* during the proceeding before the ECJ. See the ECJ judgment in *Kadi* und *Al Barakaat*, paras 262-268.

<sup>88</sup> As is known, the ECJ stated in *Racke* peremptorily that the "European Community must respect international law in the exercise of its powers." See Case C-162/96, *Racke*, judgment of 16 June 1998, ECR I-3655, para. 45 (referring to Case C-286/90 *Poulsen* and *Diva Navigation*, 1992, ECR-I-6019, para. 9). As a consequence, the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances were found being binding upon the Community institutions and as forming part of the Community legal order, *ibid.*, para. 46. See on this issue P. Palchetti, "Può il giudice comunitario sindacare la validità internazionale di una risoluzione del Consiglio di sicurezza?", *Riv. Dir. Int.* XCI (2008), 1085 et seq.

It seems that the fundamentally different conclusions reached by the CFI, on the one hand, and the ECJ on the other, were the result of a profoundly different way in which the open conflict between the main interests at issue was approached. While the CFI tried to take a square look at all conflicting interests and to pay tribute also to the security interests formulated at the international level, the ECJ showed itself to be very sensitive towards the strong criticism provoked by the CFI judgment. In order to be able to come to a different conclusion it widely ignored the international level.

This raises the question why such different attitudes were taken. At first sight it appears that the reasons were dogmatic. In reality, recourse to specific dogmatic concepts is only instrumental to achieve different goals. They stand for different views as to the question of which competing interests should be given preference and in which procedural sequence they should be achieved. For a Community Court to adopt a strictly dualist perspective means to deny immediate relevance to the issue of international security as there is no proper competence basis given to consider this aspect. On the other hand, recourse to moderate monism, such as that taken by the CFI, opens the borders of the EU for a balancing of security considerations and human rights protection ambitions that after 9/11 have become common on a world-wide scale but which the EU has, to a certain extent, resisted so far. These are highly political questions to which there is no easy answer.<sup>89</sup>

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<sup>89</sup> See also on this issue the recent contribution by G. de Búrca, "The European Court of Justice and the International Legal Order after *Kadi*", available at: <<http://www.ssm.com/abstract=1321313>>. De Búrca compares the ECJ's approach in *Kadi* with that of the Supreme Court in *Medellín* and argues as follows: "Even as Europe's political institutions assert the EU's distinctive role as a global actor committed to multilateralism under international law, and even as a future amendment to the EU Treaties would enshrine the 'strict' commitment to international law in its foundational texts, the European Court has chosen to use the much-anticipated *Kadi* ruling as the occasion to proclaim the internal and external autonomy and separateness of the EC's legal order from the international domain, and the primacy of its internal constitutional values over the norms of international law." *Ibid.*, 52. For some, this conflict between EU law and UN law reflects also a deeper conflict between the United States and the EU as the new UN sanctions policy can be seen as a "manifestation of the Bush administration's firm approach towards international terrorism", Harpaz, see note 4, 83.

Similar explanations can be found for the highly diverging positions taken by academic writers on this issue. Even the minority of writers who defended the CFI's judgment, at least in its ultimate substance, show no less commitment to the human rights issue than the respective critics but they had a different view on how human rights should be implemented and as to the relevance that should be attributed to the security issue in this context.<sup>90</sup>

The whole controversy is, therefore, less about abstract theoretical concepts than about different ideas on how to define and to achieve the common good whereby the protection of fundamental rights should play, in any case, a pivotal role. The documents discussed above reveal that the broad consensus over the final goals to be achieved in this field are overshadowed by a deep dissent on the specific instruments to be adopted to achieve this end. Should the EU set an example on the international stage and defend steadfastly the human rights idea without any larger concession to demands, coming mainly from outside the EU, to consider competing security interests? The ECJ judgment may be interpreted in this sense. Advocate General Póitares Maduro has even become very explicit about the need to limit the extent of such a balancing.<sup>91</sup>

Or should the EU be, as the CFI opined, more responsive to the idea that terrorism also constitutes a severe threat for human rights protection? A more effective fight against terrorism should, in this perspec-

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<sup>90</sup> See, in particular, C. Tomuschat, "Case law - Court of Justice Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission", *CML Rev.* 43 (2006), 537 et seq. who examined in detail whether the targeted sanctions violated fundamental rights in the European Union. Although also critical towards several parts of the CFI pronouncement he finally shared, in substance, the CFI's view.

<sup>91</sup> See, in particular, para. 35 of his opinion, where he writes, i.a. the following: "[...] 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".

tive, also be a necessary pre-condition for achieving progress in the human rights area.<sup>92</sup>

From a technical standpoint, no definite answer can be given to these questions. In fact, the underlying issues are of an eminent political character and this hints at the necessity to attribute them, first of all, to political organs and not to jurisdictional ones. This was exactly what the CFI aspired at even though this Court did not expressly develop this issue. Prof. Mengozzi, himself a judge in the *Kadi* case before the CFI, has openly admitted, in a later academic writing,<sup>93</sup> that the Court's attitude was mainly motivated by an attempt to pay deference to the political institutions.<sup>94</sup>

The Advocate General and the ECJ were strongly against this position, presenting the conflict as incurring between the aspiration for international law conformity and the necessity to respect the high fundamental rights standards of the EU. According to Advocate General Poiares Maduro the "political question" doctrine cannot "silence the

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<sup>92</sup> It is interesting to note that Secretary-General Kofi Annan in his report *In Larger Freedom* (Doc. A/59/2005 of 21 March 2005) denied the existence of a conflict between these two goals: "It would be a mistake to treat human rights as though there were a trade-off to be made between human rights and such goals as security or development. We only weaken our hand in fighting the horrors of extreme poverty or terrorism if, in our efforts to do so, we deny the very human rights that these scourges take away from citizens". (ibid., para. 140).

<sup>93</sup> See P. Mengozzi, "The European Union balance of powers and the case law related to EC external relations", in: M. Monti et al. (eds), *Economic Law and Justice in Times of Globalization, FS Carl Baudenbacher*, 2007, 207 et seq. (216 et seq.).

<sup>94</sup> This appears to be an interesting admission and it becomes even more interesting when it is associated with Community jurisprudence denying, in principle, direct effect to GATT/WTO law for the same motive. As is known, in their judgments the Community Courts take a different position. They take recourse to the reciprocity argument and the diplomatic character of the GATT/WTO system based on the principle of negotiations for the mutual benefit. In a certain sense, Prof. Mengozzi is vindicating writers like Ernst-Ulrich Petersmann who has been arguing since the beginning of this controversy that denial of direct effect to GATT/WTO law is politically motivated and does not constitute a dogmatic necessity. This writer, however, is firmly convinced that there is no need to refer to a political doctrine in order to deny direct effect of GATT/WTO law as the structure of this law stands in the way of such a proposition. See extensively P. Hilpold, *Die EU im GATT/WTO-System*, 2009.

general principles of Community law and deprive individuals of their fundamental rights.”<sup>95</sup>

Should the “world be saved by the European Union?”<sup>96</sup> Of course, nobody would make such a strong statement except in irony (or to require exactly the contrary). There are authors, however, who substantially point in this direction,<sup>97</sup> when they state that “[f]or once, European ‘value imperialism’ may serve a good cause, which is to push up the overall level of fundamental rights protection in the world.”<sup>98</sup> At the extreme opposite we can find the opinion, that it could be difficult to “differentiate between challenges based on fundamental human rights, as perceived and construed in Western-Europe, and challenges based on, say, the Sharia.”<sup>99</sup>

If we look for a viable solution, for an approach that can expect to meet with a broader international consensus, it can probably be found somewhere in between these two positions. There is little leeway for European value imperialism. Any action by the EU that is suspected as being expression of such an attitude will most probably provoke strong objections.<sup>100</sup> On the other hand, international human rights cannot be compared with the law of Sharia. Differently from the latter provisions, at least the core principles of human rights law can claim international recognition. This is exactly the line the CFI wanted to pursue. Even though the arguments brought forward by this Court were not always convincing, the strong criticism levelled against this judgment was surely excessive and unfair.

On closer examination, however, this conflict is not only one between a broader internationalist and a more restrictive Community position but also, and perhaps even largely, an inter-institutional controversy where the ECJ tried to reaffirm its jurisdiction also upon strictly

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<sup>95</sup> See para. 34 of the Opinion.

<sup>96</sup> This is to paraphrase the dictum by Christian Tomuschat cited in note 68.

<sup>97</sup> See Lavranos, see note 63.

<sup>98</sup> *Ibid.*, 9 et seq.

<sup>99</sup> See Nollkaemper, see note 3, 4.

<sup>100</sup> This can be noticed, for example, in the context of the European development policy where the attempt to impose a policy of conditionality (for example by advocating the principle of good governance) meets with considerable international resistance. See, for example, P. Hilpold, “EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance”, *European Foreign Affairs Review* 7 (2002), 53 et seq.

political decisions by the Council. The “circumscribed competence” the CFI spoke about with regard to the need for the Council to implement in great detail Security Council resolutions was seen to be, in reality, a circumscription of the community courts and the ECJ was not prepared to accept a limitation of its prerogatives so painstakingly acquired over the last decades.<sup>101</sup>

Does this mean that the international perspective has got totally lost and that the European Union is irremediably bound to enter into collision with the international order?

This is not necessarily the case. In fact, both orders are continuing to interact very intensively and it is not impossible that finally the EU position will also prevail on the international level. As is known, the 1267 sanctions regime is under strong pressure.<sup>102</sup> While it is generally recognised that this regime plays an important role in the international fight against terrorism and while it is also known that in many evolved national orders it will never be feasible to grant full due process in this context, according to a very broad conviction in the international community there are some elements, like the protection against arbitrary decisions and the introduction of a review process for allegations that are non-derogable.<sup>103</sup> As already demonstrated above, the 1267 regime has undergone, since its inception, considerable reform and it is obvious that critics of this regime have played an important role in engineering these reforms. The clear stance taken by the EU against any deviation from core fundamental rights standards represents a formidable challenge for this sanctions regime in terms of reputation and legitimacy. Against this background, the real motivations of the ECJ to take the position described lose importance.

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<sup>101</sup> As Marjorie Beulay writes, “la Cour cherche à nouveau à défendre jalousement son monopole juridictionnel, face à un tribunal de première instance trop enclin à soumettre sa compétence au droit international”. See M. Beulay, “Les arrêts Kadi et Al Barakaat International Foundation – Réaffirmation par la Cour de Justice de l’Autonomie de l’Ordre Juridique Communautaire vis-à-vis du Droit International”, *Revue du Marché commun et de l’Union européenne* 524 (2009), 32 et seq.

<sup>102</sup> See I. Johnstone, “Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit”, *AJIL* 102 (2008), 275 et seq. (297).

<sup>103</sup> *Ibid.*, referring also to the strong criticism voiced by the European Council in 2006 against the 1267 mechanism.

While a first reading of the ECJ's judgment (and the Advocate General's Opinion) may give the impression that a pronounced "isolationist" attitude has been taken, it cannot be ignored that the international system is not only characterised by the existence of a "global community of courts"<sup>104</sup> but also by a strong multi-level interaction of political, judicial and administrative organs and institutions, so that an act which seems first to be unilateral may show afterwards that its main function was to prompt a reaction by the other players in order to start an effective discourse. In this sense, the *Kadi* judgment is also in line with the "Solange-principle", developed by the German Constitutional Court with regard to the attempts to further develop fundamental rights protection in the EU. In the *Kadi* case the ECJ was simply of the opinion that the Security Council had gone too far, but this should not mean that this Court could not step back once the procedure before the Sanctions Committee was endowed with sufficient guarantees.<sup>105</sup>

Undoubtedly, if the main purpose of the "Solange-principle" is to preserve, in an interactive system of mutually interdependent entities the respect of both a minimum standard of fundamental rights protection and, at the same time, the judicial autonomy of these entities, this principle has to operate in both directions. In other words: once an effective judicial control system was established at the UN level, the ECJ would no longer exercise its control on implementation measures for UN acts.<sup>106</sup>

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<sup>104</sup> See A.M. Slaughter, "A Global Community of Courts", *Harv. Int'l L. J.* 44 (2003), 191 et seq.

<sup>105</sup> This, at least, transpires from the Advocate General's opinion when he writes at para. 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".

<sup>106</sup> It was argued that too much leniency by the ECJ in the *Kadi* case could have prompted the ECHR, on the basis of the *Bosphorus* judgment, to reassert its jurisdiction on areas for which the competence has been transferred to the EU. On the other hand, in the *Behrami* and *Saramati* cases, the ECHR declined jurisdiction over acts attributable to the UN (via UNMIK and KFOR) even if the respective persons were agents of Member States of the Convention. It is therefore open as to how the ECHR had decided in the *Kadi* case. See T. Giegerich, "The Is and the Ought of International Constitutionalism: How far Have We Come on Habermas's Road to a Well-Considered Constituzionalization of International Law"?, *German*

The immediate reactions to this judgment seemed to reveal, however, entrenched positions. The Security Council, in a meeting of 9 December 2008, was divided on how to react to this new situation.<sup>107</sup> Some state representatives, in particular that of South Africa, were very outspoken on the need to take into consideration the results of the ECJ judgment in the *Kadi* case.<sup>108</sup> For other countries the recent reforms undertaken by Security Council Resolution 1822 of 30 June 2008 were already sufficient.<sup>109</sup>

The EU Commission formally pretended to comply with the ECJ judgment and communicated the narrative summaries of reasons by the Sanctions Committee to Mr. *Kadi* and to *Al Barakaat* International Foundation and gave them the opportunity to comment on these grounds in order to make their point of view known. After examining the comments received the Commission, however, decided that the listing of Mr. *Kadi* and the *Al Barakaat* Foundation was justified and therefore the freezing of their assets was maintained.<sup>110</sup>

In the long term, however, both the EU and the UN will have no other choice than to compromise. It can hardly be denied that the aspirations of both sides are, to a certain extent, justified. Now it is up to the political institutions to find a workable solution.<sup>111</sup> The *Kadi* case

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*Law Journal* 10 (2009), 31 et seq. (55 et seq.). The ECHR will, however, have the occasion to express itself in a similar case, the *Nada* case. *Youssef Nada Ebada*, an Italian businessman of Egyptian origin and working mainly in Switzerland has found himself on the UN sanctions list which was implemented by Switzerland. National investigations in Italy and in Switzerland could not corroborate the allegations of financing of terrorist activities. As Swiss authorities saw no legal possibility to withdraw the sanctions against him since they were imposed by the UN, Mr. *Nada* has now filed a claim before the ECHR.

<sup>107</sup> See Doc. S/PV.6034, 9 December 2008.

<sup>108</sup> *Ibid.*, p. 15: "These challenges should put the Security Council on notice that it cannot proceed as if it were business as usual".

<sup>109</sup> *Ibid.* See also J.M. Thouvenin, "Le Choc du Droit Communautaire et du Droit International, encore l'Arrêt Kadi", *Revue du marché commun et de L'Union européenne* 524 (2009), 30 et seq.

<sup>110</sup> See Commission Regulation (EC) No. 1190/2008, OJ L 322/25 of 2 December 2008.

<sup>111</sup> Perhaps the final compromise will not be very distant from the one found by the CFI which took recourse, as demonstrated, to the political question doctrine, using as a limitation the *jus cogens* principle. The formal concepts

will perhaps be remembered as a starting point for the search of a new equilibrium between the need to fight terrorism more effectively and the parallel need to uphold fundamental rights in this struggle. The *Kadi* case will, however, also be remembered for the many colourful concepts it has given rise to. As the real conflict was, however, of an eminently political nature, these concepts were of little help for the solution of the underlying dispute. Questions such as the practical relevance of *jus cogens* and the effect of Security Council resolutions on national orders (or, respectively, the EU order) are now even more unclear as they were before.<sup>112</sup>

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to be used for the qualification of this compromise will, however, have to be different ones.

<sup>112</sup> The uncertainties surrounding the concept of *jus cogens* have been made evident, i.e., by the allegation by Beulay, see note 101, 38 that the CFI had disregarded the statement made by the ICJ in the Armed Activities case (Democratic Republic of the Kongo v. Rwanda, ICJ 2006, para. 64 et seq.) according to which the *jus cogens* principle was not constitutive of the ICJ's jurisdiction which remained based on consent of the parties. The circumstances in *Kadi* were, however, clearly different since here the CFI had to decide whether this Court regained full jurisdiction on EU implementation measures if the underlying SC resolutions were to be considered as vitiated due to a contrast with peremptory norms.