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UN Sanctions Before the ECJ: the *Kadi* Case

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A. Introduction

In recent times there have been few cases decided by the ECJ (and previously, by the CFI) that have caused as much controversy both in academic writings and in politics as the *Kadi* case.¹ This case has engendered enormous scholarly output and no end is in sight with regard to the flood of publications that continue to evidence new aspects of this case and in association with further developments of the underlying question posed by this case.²

* This study is part of a larger investigation by the author into the interplay between international organizations when adopting individual sanctions. For the exposition of the *Kadi* case, this contribution draws on P Hilpold, 'EU Law and UN Law in Conflict: The *Kadi* Case' (2009) 13 *Max Planck Yearbook of United Nations Law* 141.

¹ For the various documents, see Case T-315/01 *Yassin Abdullah Kadi v Council and Commission*, Court of First Instance, 21 September 2005, [2005] ECR II-3649, (2006) 45 *ILM* 81; Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission*, Court of First Instance, 21 September 2005, [2005] ECR II-3533; opinion of Advocate General Poiares Maduro in Case C-402/05P *Yassin Abdullah Kadi v Council and Commission*, 16 January 2008, see also n 65 below; Joined Cases C-402/05P and C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, European Court of Justice (Grand Chamber), 3 September 2008, [2008] ECR I-6351. See also the already vast scholarly literature on the *Kadi* case in A Reinisch, Introduction (Ch 1), n 8. With regard to the formal designation of this case law it is to be remembered that before the CIF, a further analogous case was considered, the *Yusuf* case, and the findings of the CFI were in both cases practically identical. The respective jurisprudence was widely referred to in literature with both names: *Yusuf* and *Kadi*. As the *Yusuf* case was, however, discontinued the ECJ ruled only on *Kadi* and therefore the underlying problem is now generally identified by this name.

² As has been aptly remarked, this discussion resembles to a certain extent that of the 1970s and the 1980s when several European countries were under threat by home-grown terrorist movements (having, however, international connections). This struggle was connected, on several occasions, with worrying encroachments on human rights. See P Pirrone, 'Attuazione delle risoluzioni del Consiglio di sicurezza contro il terrorismo e tutela giurisdizionale dei diritti fondamentali nell'ordinamento comunitario: la sentenza della Corte di giustizia relativa ai casi *Kadi* e *Al Barakaat*' (2009) 3 *Diritti umani e diritto internazionale* 81, 82.

First, the immediate interests highlighted by this case have attracted much attention. Put simply, we are confronted with a conflict between two primary interests: security and the protection of human rights. It is widely uncontested that terrorism poses an unprecedented challenge to security both in international relations and on the internal level. This was recognized some time ago, but the events of 9/11 have emphasized the perception of immediate threat in a completely new way.

Secondly, the *Kadi* case evidences that another long-lasting trend—the multiplication of international tribunals and *fora* holding the individual responsible for their acts—may lead to conflicts of jurisdiction and a clash between applicable adjudicating standards that are far from being standardized.³

Thirdly, the pronouncements issued in this case so far by the various Community and national courts have provided comfort to adherents of the most varied positions and schools in the areas concerned (relationship between international law and national law, relationship between international law and European law). The most authoritative in this chain of pronouncements comes, of course, from the Grand Chamber of the European Court of Justice (ECJ).⁴ Since the judgment of 3 September 2008 is, at least at first sight, so radical in its overall attitude and so uncompromisingly dualist with regard to its view of the relationship between international law and European law, it necessarily provokes opposition.

Finally, it can be argued that there may be no straightforward, mathematical solution to the many underlying problems on which the outcome depends on the approach and the assumptions taken. In order to avoid a '*dialogue des sourds*' the indeterminacy of the situation has to be taken into account. This can be the starting point for a new value-oriented discussion which should overcome many of these controversies.

For the time being, however, such a solution is not foreseeable and it will be shown that the controversy is very confrontational.

³ On the conflict between tribunals see AM Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191; *eadem*, 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1103. See also N Lavranos, 'On the Need to Regulate Competing Jurisdictions between International Courts and Tribunals', *EUI Working Papers*, Max Weber Programme 2009/14; and S Besson, 'European Legal Pluralism after *Kadi*' (2009) 5 *European Constitutional Law Review* 237; A Reinisch, 'International Courts and Tribunals, Multiple Jurisdiction' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2008); Y Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, Oxford, 2003). On the different standards of review applicable by national courts when examining international acts and on the respective outcome of these different approaches see A Tzanakopoulos in Ch 3 of this volume.

⁴ Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities*, European Court of Justice (Grand Chamber), 3 September 2008, [2008] ECR I-6351.

B. The factual situation—the origin of the problem

The adoption of sanctions by the UN has long been a subject of controversy with regard to the immediate reasons justifying such measures, their content and, in particular, the possible addressees.⁵

For an international legal system conceived mainly as an interstate order it was connatural that sanctions should be directed against governments and, therefore, against countries as a whole. This held true also for the UN. It became clear early on, however, that such an approach could render the relevant measures ineffective if not altogether counter-productive. The ruling elites, which are usually responsible for international law violations attributed to their country, are regularly the last to suffer from international sanctions,⁶ while the situation of large parts of the population worsens further.⁷

The trend to individualize and ‘humanize’ international law⁸ has also found prominent expression in the field of sanctions politics through the introduction of individual, ‘smart’, or ‘targeted’ sanctions.⁹ This step was taken long before individual criminal responsibility was generally established. In fact, the passage from general sanctions to individual sanctions was generated less by an attempt

⁵ See J Combacau, ‘Sanctions’ in *Max Planck Encyclopedia of Public International Law*, Vol IV (Elsevier Science BV, Amsterdam, 2000) 311; M Shervin Majlessi, ‘Use of Economic Sanctions under International Law: A Contemporary Assessment’ (2001) 39 *Canadian Yearbook of International Law* 253.

⁶ It may even be the case that these elites are taking profit from such sanctions, both politically and economically. In fact, sanctions may be portrayed by the government as a foreign intervention requiring unconditional national solidarity. On the other hand, sanctions may create economic windfalls for the ruling elite as they can monopolize large parts of economic transactions and profit from circumventing measures. For recent examples the sanctions against Iraq, North Korea, and Yugoslavia can be cited. It is interesting to note that in former Yugoslavia general sanctions proved to be ineffectual for years, while the situation changed dramatically as soon as the International Criminal Tribunal for the Former Yugoslavia (ICTY) began prosecution against the main culprits, especially Slobodan Milosević.

⁷ See extensively on this issue the so-called *Bossuyt-Report*, M Bossuyt, *The adverse consequences of economic sanctions on the enjoyment of human rights*, UN Doc E/CN.4/Sub.2/2000/33, 21 June 2000, 15 *et seq.* For a recent article suggesting that ‘economic coercion is a counterproductive policy tool that reduces the level of political freedoms in sanctioned countries’ see D Peksen and A Cooper Drury, ‘Economic Sanctions and Political Repression: Assessing the Impact of Coercive Diplomacy on Political Freedoms’ (2009) 10 *Human Rights Review* 393. See also A Reinisch, ‘Developing Human Rights and Humanitarian Accountability of the Security Council for the Imposition of Economic Sanctions’ (2001) 95 *AJIL* 851.

⁸ See Th Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers, Leiden, 2006).

⁹ The request for a general policy change towards ‘smart’ sanctions was explicitly made by Marc Bossuyt (n 7 above). On the subject of ‘smart sanctions’ see, generally, Bolani, ‘Security Council Sanctions on Non-State Entities and Individuals’ (2003) 56 *Revue Hellenique de Droit International* 401; M Brzoska (ed), *Smart Sanctions: The Next Steps. The Debate on Arms Embargoes and Travel Sanctions within the Bonn-Berlin Process* (Nomos Verlagsgesellschaft, Baden-Baden, 2001); V Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (Kluwer Law International, The Hague, 2001); D Cortright and GA Lopez (eds), *Smart Sanctions: Targeting Economic Statecraft* (Rowman & Littlefield Publishers, Lanham, 2002).

to strengthen the retributory element than by the purpose to limit, as far as possible, undesirable side-effects of sanctions. This merits particular attention for two reasons. It is an irony of sorts that this change in the sanctions policy, promoted by a clear intent to strengthen the human rights compatibility of these measures, should engender the prolific human rights arguments discussed below. The very origins of this change in policy should be recalled in a general assessment of targeted sanctions. Starting from the premise that in the international order as it stands, UN sanctions are an indispensable tool for redressing international law violations in general and human rights abuses in particular, it should not be ignored that smart sanctions are associated with far less humanitarian costs than is the case with traditional sanctions. It is remarkable to note that the—far more serious—problems associated with traditional sanctions, while catching the attention especially of the human rights quarter, never reached such prominence as is the case with individual sanctions. It is furthermore interesting to note that the most important faults ascribed to this system—the lack of due process and of a fair hearing—are far more accentuated with traditional sanctions. People hit by these sanctions have no standing at all, and even on a merely technical level of the discussion, it is hardly imaginable to provide for such.

Individual sanctions in a modern sense were first adopted in the case of Haiti, where they targeted the respective military junta.¹⁰ Sanctions in Angola demonstrated that the new orientation was not only a formal one, ie substituting state representatives for the state as addressee of the sanctions. In fact, there the measures were directed against the Angolan rebel group UNITA, which controlled only part of the territory.¹¹ Targeting terrorists that had no power in a specific territory was the next, albeit rather radical step. This step was established with the so-called Taliban sanctions providing for a flight embargo and the freezing of funds and other financial resources.¹² This resolution provided also for the establishment of a Sanctions Committee consisting of all members of the Security Council and administering the sanctions regime. What had been created as an ad hoc measure in response to a new, particularly pernicious threat soon became a standing institution with ever-widening competences *ratione materiae* and *ratione personae*. Through a series of resolutions adopted before and—in particular—in the aftermath of 9/11, the Committee

¹⁰ See UNSC Res 917 (6 May 1994). This resolution was of a mixed nature as it provided partly for traditional, state-centred measures and was partly directed against individuals. For the latter aspects see the following provisions: ‘3. Decides that all States shall without delay prevent the entry into their territories: (a) Of all officers of the Haitian military, including the police, and their immediate families; (b) Of the major participants in the coup d’état of 1991 and in the illegal governments since the coup d’état, and their immediate families; (c) Of those employed by or acting on behalf of the Haitian military, and their immediate families...’

¹¹ See UNSC Res 1127 (28 August 1997). By UNSC Res 1137 (12 November 1997) targeted sanctions (in the form of travel bans) were also adopted against ‘all Iraqi officials and members of the Iraqi armed forces’ who were responsible for non-compliance with previous measures.

¹² UNSC Res 1267 (15 October 1999).

came to be known as the 'Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities'.¹³ This Committee designates individuals and entities associated with Al-Qaida, Usama bin Laden, and/or the Taliban, against which all states must impose asset-freezes, travel bans, and arms embargos. What initially seemed to be an extraordinary measure of limited temporal character and with a very restricted purview of application has outgrown all expectations. The worldwide operation of these terrorist groups is mirrored in a network of anti-terrorist measures of equally global reach and the number of individuals and entities targeted. At the time of writing¹⁴ the 'Consolidated List' contains 142 individuals associated with the Taliban, 258 individuals associated with Al-Qaida, and 111 entities and other groups and undertakings associated with Al-Qaida. Of all the individual sanctions regimes established,¹⁵ the one based on Security Council Resolution 1267 (1999) is the most far-reaching.¹⁶ The growth of this system, which was more accidental than planned, gave rise, over the years, to human rights concerns which became ever more accentuated as the scale and depth of these measures' impact on individual rights became clearer. It cannot be denied that some remarkable steps were taken to improve this system in the sense that the position of the individuals (and entities) was strengthened,¹⁷ but the impression remained that the Sanctions Committee always lagged some steps behind what rule of law considerations required according to the prevailing opinion.

While Security Council Resolution 1267 did not yet address procedural rights of individuals and entities already listed or on the verge of being so, over the years certain guarantees were developed. Thus, states requesting a listing had to furnish, 'to the greatest extent possible', identifying and background information¹⁸

¹³ UNSC Res 1333 (19 December 2000); UNSC Res 1390 (28 January 2002); UNSC Res 1455 (17 January 2003); UNSC Res 1526 (30 January 2004); UNSC Res 1617 (29 July 2005); UNSC Res 1735 (22 December 2006); and UNSC Res 1822 (30 June 2008). ¹⁴ August 2009.

¹⁵ The Sanctions 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 (UNSC Res 1132 (8 October 1997), Al Quaida and the Taliban (UNSC Res 1267 (15 October 1999)), Iraq (UNSC Res 1518 (24 November 2003)), Liberia (UNSC Res 1521 (22 December 2003)), Democratic Republic of Congo (UNSC Res 1533 (12 March 2004)), Cote d'Ivoire (UNSC Res 1572 (15 November 2004)), Sudan (UNSC Res 1591 (29 March 2005)), Lebanon/Syria (UNSC Res 1636 (31 October 2005)), and North Korea (UNSC Res 1718 (14 October 2004)).

¹⁶ See, for more details, I Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 AJIL 275, 295. This regime contains nearly half of all the individuals and entities targeted by the Security Council.

¹⁷ This is acknowledged also by A Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States' (2006) 4 *Journal of International Criminal Justice* 1044, 1068 *et seq.*, who remains, however, very critical with regard to the degree fundamental rights are taken into consideration. ¹⁸ See UNSC Res 1526 (30 January 2004).

while subsequently also a 'statement of case describing the basis of the proposal'.¹⁹ In 2006 the content of the statement of case was further specified.²⁰

The most recent improvements are contained in Security Council Resolution 1822 of 30 June 2008. All these developments are reflected in the 'Guidelines of the Committee for the Conduct of its Work', according to which:²¹

- Member States shall provide a detailed statement of case in support of a proposed listing. This statement shall contain:
 - (1) specific finding demonstrating the association or activities alleged;
 - (2) the nature of the supporting evidence (eg intelligence, law enforcement, judicial, media, admissions by subject, etc); and
 - (3) supporting evidence or documents that can be supplied. States shall identify those parts of the statement of case that may be publicly released.²²
- The Committee shall make accessible on the Committee's website a narrative summary of reasons for listing.²³
- Within one week after a name is added to the Consolidated List, the Permanent Mission of the country where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national shall be notified with the request to inform the listed individual or entity.
- At the Committee a Focal Point is established which receives de-listing requests from listed individuals or entities. These requests are forwarded to the designating state(s) and to the state(s) of nationality and residence for their information and possible comments.²⁴
- The Consolidated List is reviewed periodically.²⁵
- Access to frozen funds or other financial assets or economic resources can be given to cover basic expenses.²⁶

On the whole, these procedural refinements are commendable but there can be no doubt that they do not equal the high standards that apply, in particular,

¹⁹ See UNSC Res 1617 (29 July 2005).

²⁰ See UNSC Res 1735 (22 December 2006). According to this resolution the statement of case should contain 'as much detail as possible on the basis(es) for the listing, including: (i) specific information supporting a determination that the individual or entity meets the criteria above; (ii) the nature of the information and (iii) supporting information or documents that can be provided; State should include details of any connection between the proposed designee and any currently listed individual or entity...'; para 5.

²¹ Security Council Committee Established Pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities, *Guidelines of the Committee for the Conduct of its Work* (9 December 2008); available at http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf (last visited 21 February 2010). See pp 5 *et seq.* of the document.

²² *Ibid* lit (d).

²³ *Ibid* lit (h).

²⁴ *Ibid* lit (j).

²⁵ *Ibid* pp 9 *et seq.*

²⁶ *Ibid* pp 11 *et seq.* Member States notify their intention to grant such an access. The Committee has three working days to make a decision prohibiting such an access.

within the European Union or within the system of the European Convention on Human Rights (ECHR).

The main points of criticism of this system can be summarized as follows:²⁷

— The Sanctions Committee meets and deliberates behind closed doors. According to many, no sufficient transparency is given as to the deliberative process. Publicity is often seen as an important guarantee for the fairness of trials as it offers protection against arbitrary decisions.²⁸

Against this criticism it can be said that national tribunals also deliberate behind closed doors. In any case, even Article 6(1) ECHR contains a list of limitations to the right to a public hearing on various grounds, several of which would apply in the present case: public policy, national security, privacy, and strict necessity in the interests of justice.

The transparency provisions introduced in the last few years (such as the obligation for the designating state to submit a 'statement of case describing the basis of the proposal'²⁹ or the publication of a narrative summary of the reasons for listing, brings some, but, according to many, not sufficient, relief.

- Decisions of the Committee are taken by consensus. This implies that each member of the Committee has de facto a veto power when a request for delisting is presented.
- While in the past the listed individual or entity had no explicit defensive rights, now the respective subjects can address a petition for delisting to the so-called 'Focal Point' instituted at the Secretary of the Sanctions Committee. The respective subject cannot, however, propose a delisting to the Sanctions Committee directly. This task pertains to the country of residence or citizenship, which must consult with the designating country whose decision remains decisive.

This mechanism resembles very strongly that of diplomatic protection. As it is known, diplomatic protection is usually qualified as a discretionary power by the injured subject's home state³⁰ although there have been various attempts to argue for the existence of a specific obligation, at least if 'significant injuries' have occurred.³¹ While these attempts have so far failed as far as diplomatic protection is concerned, it could be argued that the specific form of protection introduced

²⁷ For a detailed exposition see P Hilpold, 'EU Law and UN Law in Conflict: The Kadi case' (2009) 13 *Max Planck Yearbook of United Nations Law* (141).

²⁸ See C Ovey and RCA White, *Jacobs and White—The European Convention on Human Rights* (2006) 185.

²⁹ UNSC Res 1617 (2005).
³⁰ See the *Mavrommatis* and the *Barcelona Traction* case; PCIJ Series A/2 1924, 12 and ICJ Rep 1970, 44, para 78.

³¹ See M Gestri, 'Consiglio di Sicurezza e Sanzioni Mirate: Obblighi degli Stati di Agire in 'Protezione Diplomatica' dei Singoli' in G Venturini and S Bariatti (eds), *Diritti individuali e giustizia internazionale, Liber Amicorum Fausto Pocar* (Giuffrè Editore, Milan, 2009) 353, referring to the respective attempts by Special Rapporteur John R Dugard within the ambit of the International Law Commission (ILC) to elaborate a codification project on this subject.

by the UN sanctions system is to be seen differently, in particular, if protection is sought in Europe.

In fact, for the Court of First Instance (CFI) listed subjects can bring an action for judicial review not only on the basis of domestic law but also directly on the basis of the respective EC sanctions regulation that adopts the relevant Security Council measures in case of a 'wrongful refusal by the competent national authority to submit their cases to the Sanctions Committee for re-examination'.³² The Swiss Federal Tribunal came to a similar conclusion when it opined that the Government was obliged to sustain the de-listing cause of a subject targeted by UN-induced national sanctions. According to the same Tribunal, the Sanctions Committee also had to be informed about the acquittal of the suspect by Swiss penal courts.³³

Even if this situation is qualified as *sui generis*, doubts remain as to whether the assumption is correct.

Once Member States of the European Union implemented these sanctions the related conflict became apparent. In a simplified qualification there are two ways to approach this conflict. On the one hand, there is the monist approach, which puts international law, and in particular UN law, at the top of a hierarchical legal system and aims at reconciling conflicting legal orders according to rules familiar in national systems imbued by Kelsenian thought. The 'lower-ranking', 'weaker', or 'secondary' provision is derogated, superseded, or rendered inapplicable by the 'higher-ranking', 'stronger', or 'primary' provisions. At the end of this process perfect norm accommodation is achieved.

On the other hand, there is the dualist approach, according to which norm accommodation, while also an aim, is not considered an outright necessity. The persistence of norm conflict is implicitly accepted, at least as a temporal problem. The use of the term 'dualism' does not imply that all legal orders at issue are to be attributed equal standing. As will be explained below, the ECJ, when following this approach, left no doubt that it attributed priority to the EU/EC system, at least insofar as the 'very foundations of the Community legal order'³⁴ are affected. This concept, while not totally clear in its contours, is closely associated with human rights protection in the European Union. The ECJ does not accept security considerations, deriving from terrorist threats, as a legitimate ground for derogations to these core constitutional provisions. If this approach inhibits the full implementation of UN law, so be it.

For various reasons, the *Kadi* case is of immense importance. First, it highlights the fact that the terrorist threat has assumed a totally new face and the recent attempts to counter this phenomenon effectively are hard to reconcile with

³² See Case T-315/01 *Kadi*, Court of First Instance, 21 September 2005, [2005] ECR II-3649 para 270. See also Case T-253/02 *Ayadi*, 12 July 2006, [2006] ECR II-2159 para 150.

³³ See *Nada v SECO et al*, Swiss Federal Tribunal, 14 November 2007, BGE 2007 II, 450.

³⁴ See *Kadi and Al Barakat* (n 4 above) para 304.

modern human rights law. In this sense, the *Kadi* case is of an importance that largely transcends the European region.

Secondly, the *Kadi* case evidences a further emancipation of EU law from international law. In this sense *Kadi* follows on from leading judgments beginning with *van Gend en Loos*,³⁵ all attributing characteristics to the EC that are alien to typical international organizations and instead characteristic to states.³⁶ In another sense, this jurisprudence goes beyond the cases mentioned as it is the first to challenge the supremacy of UN law and to attribute priority to EU/EC law. It is an irony of sorts that the justification for this claim is sought in the furtherance of human rights protection, while the basis for worldwide human rights protection was surely established by the UN system and such protection was for many years a 'sore spot' in Community law. The question is now whether *Kadi* can mark the beginning of a new era in which the EU/EC legal order manages to defend its claim for leadership in human rights protection (and maybe beyond, in other political fields) or whether it has to compromise again. As in any struggle the outcome of this controversy will depend to the same extent on the behaviour adopted by the opposite part, in this case the UN.

In the following discussion, the two different perspectives on the *Kadi* case mentioned above and exemplified by the CFI judgment, on the one hand, and the ECJ judgment, on the other, will be illustrated. As is connatural to a hierarchical judiciary system, the position of the court of appeal, the ECJ, had the upper hand. As such, the controversy may have been solved within the EU/EC system, but it is still prevalent in international law. In this ongoing discussion the position taken by the CFI continues to merit attention.

C. The CFI judgment

As already pointed out, the CFI judgment can be seen as an expression of a traditional position. Confronted with a new challenge, this Court has tried hard to accommodate all parties and interests involved. It essentially deferred to

³⁵ Case 26/62 *van Gend en Loos* [1963] ECR 1. See also Case 6/64 *Costa/Enel*, 15 July 1964, [1964] ECR 585; Case 11/70 *Internationale Handelsgesellschaft*, 17 December 1970, [1970] ECR 1125; Case 35/76 *Simmenthal*, 15 December 1976, [1976] ECR 1871; and, more recently, Case 294/83 *Les Verts*, 23 April 1986, [1986] ECR 1339; Case C-213/89 *Factortame*, 19 June 1990, [1990] ECR I-2433; Joined Cases C-6/90 and C-9/90 *Francoovich*, 19 November 1991, [1991] ECR I-5357; and Case C-285/98 *Kreil*, 11 January 2000, [2000] ECR I-69, to name just a few.

³⁶ It has rightly been said that the whole conflict about targeted sanctions finds its basis, in considerable part, in the fact that the UN is assuming governmental functions for which it is ill-equipped and for which it lacks democratic legitimacy. See A Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 17 *European Journal of International Law* 881. It has to be said, however, that similar considerations are true also for the European Union. The real reason for the conflict here might therefore be found in the fact that two institutions, the UN and the European Union, are competing for (the same) powers that are typical for states.

international law in general and to UN law in particular³⁷ while, at the same time, upholding human rights protection in Europe, at least on a theoretical, formal level. This was achieved again by a distinction being made from international law: UN law should prevail over traditional international law, while *jus cogens* should be binding also on the UN. Human rights provisions contained in EU/EC law should prevail over UN law only insofar as they are expressions of *jus cogens*.

The reasoning of the CFI seems logical for the following reasons:

- The obligations of UN Member States under the UN Charter prevail over every other obligation of domestic law or of international law, among which the CFI lists both the ECHR and the EC Treaty.³⁸ For the CFI the EC Treaty is therefore, in principle, nothing more than an international treaty. In case of conflict between various international obligations UN law has primacy on the basis of Article 103 of the UN Charter, to which the Vienna Convention on the Law of Treaties (VCLT)³⁹ also defers.⁴⁰ The primacy of UN law extends also to Security Council resolutions on the basis of Article 25 of the UN Charter.⁴¹ The Community is bound by the obligations stemming from UN law in two ways:
 - first, Member States are bound by UN law by Article 307 of the EC Treaty, which has made continuing observance of UN obligations necessary even if a conflict with Community law arises;
 - secondly, in addition to this indirect obligation, the CFI identifies a direct one, taking recourse to the institute of substitution developed with regard to the relationship between GATT law and EC law.⁴² In fact, in that context the ECJ has found that the Community assumes rights and obligations of Member States on the international level as soon as it succeeds in their competences in the internal sphere.⁴³
- According to the CFI, the Community was acting under 'circumscribed powers' when giving effect to a trade embargo imposed by a Security Council resolution.⁴⁴ It was not up to the Court, not even indirectly or 'by implication', to hold that the anti-terrorism measures adopted by Security Council

³⁷ See the ironic title of the contribution by D Symon and F Mariatte, 'Le Tribunal de première instance des Communautés: Professeur de droit international?' (2005) 12 *Europe* 6.

³⁸ See the CFI judgment in *Yusuf and Kadi* (n 1 above) para 181.

³⁹ Vienna Convention on the Law of Treaties, adopted 23 May 1969; entered into force 27 January 1980, 1155 UNTS 331.

⁴⁰ See VCLT, Article 30(1).

⁴¹ See the CFI judgment in *Yusuf and Kadi* (n 1 above) para 184.

⁴² *Ibid.*, para 203. See, for more details, P Hilpold, *Die EU im GATT/WTO-System* (IUP/Nomos/Schulthess, Baden-Baden, 2009) 123.

⁴³ See Joined Cases 21/72 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972] ECR 1219 at [18]: 'in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General Agreement, the provisions of that agreement have the effect of binding the Community'.

⁴⁴ See the CFI judgment in *Yusuf and Kadi* (n 1 above) para 203.

resolutions infringe the fundamental rights of individuals, as protected by the Community legal order.⁴⁵

— It is, however, generally recognized that the Security Council does not enjoy limitless powers.⁴⁶

While up to the present no convincing result has been achieved in the various attempts to identify these limits with any precision, broad agreement can be reached on the assumption that the Security Council has to respect peremptory norms, at least insofar as the existence of this concept is accepted.⁴⁷

The CFI follows this typical international law approach, at first sight reconciling all diverging interests and upholding both the supremacy of UN law and the core of the *acquis communautaire* in the field of human rights.⁴⁸ When there is the suspicion of a *jus cogens* violation the Court is even 'empowered to check, indirectly, the lawfulness of the resolutions of the Security Council'.⁴⁹ This seems to be a bold statement, unprecedented in EC jurisprudence. There is only one drawback with this approach: the concept of *jus cogens* is not yet defined in international law, in particular in a sense that would make it a workable instrument in a context like the present one.⁵⁰

⁴⁵ Ibid para 216.

⁴⁶ See S Lamb, 'Legal Limits to United Nations Security Council Powers' in GS Goodwin-Gill and S Talmon (eds), *The Reality of International Law, Essays in Honour of Ian Brownlie* (Oxford University Press, Oxford, 1999) 361; K Zemanek, 'Is the Security Council the Sole Judge of its Own Legality?' in E Yakpo and T Boumedra (eds), *Liber Amicorum Judge Mohammed Bedjaoui* (Kluwer Law International, The Hague, 1999) 629; P Malanczuk, 'Reconsidering the Relationship between the ICJ and the Security Council' in WP Heere (ed), *International Law and The Hague's 750th Anniversary* (TMC Asser Press, The Hague, 1999) 87; J Tercinet, 'Le Pouvoir du Conseil de Sécurité: Le Conseil de Sécurité peut-il Légiférer?' (2004) 37 *Revue Belge de Droit International* 528; E de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, Oxford, 2004); F Voeffray, 'Le Conseil de Sécurité de l'ONU: Gouvernement Mondial, Législateur ou Juge? Quelques Réflexions sur les Dangers de Dérives' in MG Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Castisch* (Martinus Nijhoff Publishers, Leiden, 2007) 1195. *Contra*: GH Oosthuizen, 'Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law' (1999) 12 *Leiden Journal of International Law* 549.

⁴⁷ As it is known, the discussion on the nature and reach of *jus cogens* is still very controversial. See, for example, for a very critical stance, JM Glennon, 'Peremptory nonsense', in St Breitenmoser (ed), *Human Rights, Democracy and the Rule of Law, Liber amicorum Luzius Wildhaber* (Nomos Verlagsgesellschaft, Baden-Baden, 2007) 1265.

⁴⁸ See the CFI judgment in *Yusuf and Kadi* (n 1 above) paras 226 *et seq.* ⁴⁹ Ibid.

⁵⁰ This is true, even though the literature on *jus cogens* is very extensive. See, for example, L Hannikainen, *Peremptory Norms (jus cogens) in International Law: Historical Development, Criteria, Present Status* (Lakimiesliiton Kustannus/Finnish Lawyers' Publishing Company, Helsinki, 1988); G Gaja, 'Jus cogens beyond the Vienna Convention' (1981) 172 *Recueil des Cours* 271; S Kadelbach, *Zwingendes Völkerrecht* (Duncker und Humblot, Berlin, 1992); P Picone, 'La distinzione tra norme internazionali di jus cogens e norme che producono obblighi erga omnes' (2008) 91 *Rivista di Diritto Internazionale* 5; A Bianchi, 'Human rights and the magic of jus cogens' (2008) 19 *European Journal of International Law* 491; Ch Chinkin, 'Jus cogens, Article 103 of the UN Charter and other hierarchical techniques of conflict solution' (2006) 17 *Finnish Yearbook of International Law* 63.

Of course, this defect cannot be repaired by the CFI. This becomes evident when it tries to implement this approach. Determining which human rights form part of *jus cogens* would be equivalent to defining this concept—a task to which the forum of the CFI is clearly not suited. When following this international law approach the CFI was faced with two challenges: excluding certain rights from the purview of the *jus cogens* concept would have exposed the CFI to the criticism of arbitrariness, while an extensive examination of the Security Council sanctions provisions implemented by the EC against its own standards could have led to a declaration of illegitimacy of the contested resolutions, a result the Court obviously wanted to avoid. In fact, it becomes clear from the context that for the CFI a declaration of a *jus cogens* violation was not considered to be a real option but rather a theoretical consideration necessary to defend the propounded approach. These challenges were met by the Court as follows. On the one hand, it carried out a full investigation into the compatibility of the UN sanctions with EU fundamental rights; on the other hand, this investigation was rather indulgent. In conclusion, it can be said that recourse to the concept of *jus cogens* was taken in order to justify a balancing of interests: the interests of the subjects targeted by sanctions, against the interests of security both within the Community and on a worldwide scale. On this basis it was no surprise that in no case could a violation of fundamental rights strong enough to justify the annulment of the contested EC acts be found.

With regard to the freezing of funds of the listed subjects the Court had to examine whether the right to property had been infringed in such a way as to require the annulment of the relevant act. The Court considered that it had not, for the following reasons:

- The deprivation was not arbitrary but pursued an objective of fundamental public interest for the international community.⁵¹
- It was furthermore only of a temporary precautionary nature⁵² and a procedure was available to the persons concerned to present their case at any time to the Security Council.⁵³

With respect to the right to be heard, the CFI confirmed that within the Community a very high standard applied,⁵⁴ but these procedural rights are 'correlated to the exercise of discretion by the authority'.⁵⁵ In the present case, however, the Community possessed no discretion whatsoever when implementing the UN sanctions provisions.⁵⁶

With regard to the sanctions procedure before the Security Council the CFI came to the conclusion that the guidelines adopted 'intended to take account,

⁵¹ See the CFI judgment in *Yusuf and Kadi* (n 1 above) paras 242 and 247.

⁵² Ibid para 248.

⁵³ Ibid para 250.

⁵⁴ Ibid para 255.

⁵⁵ Ibid para 257.

⁵⁶ Ibid para 258.

so far as possible, the fundamental rights of the persons entered in the Sanctions Committee's list, and in particular their right to be heard.⁵⁷

The Court stated that this procedure was not to be measured against the Community standard since the Community had no bearing on its content. Of course, this does not mean that the UN measures are totally exempted from scrutiny but the relevant standard has to be, it seems, a different, less-demanding one. The CFI does not specify what this standard is but rather tries to evidence the particularities of the situation at issue:

- The procedure before the Sanctions Committee has been reformed in such a way that interests of the listed subjects to be heard are respected as far as possible.
- The important role of national authorities to submit their cases to the Sanctions Committee is emphasized.
- The temporary nature of these measures against the background of impelling security interests are underscored.⁵⁸

On the whole, the position adopted by the CFI in this case can be summarized as follows. The relevant UN institutions can take recourse to a balancing of interests which is not possible for the Community. Due to the lack of discretionary powers in the implementation of these measures, this Community standard is, however, not relevant.⁵⁹ On the other hand, no violation of *jus cogens* can be attributed to the UN, in particular in view of the security interests at issue and the fact that some improvements in the sanctions procedure have been achieved.

With regard to the alleged breach of the right to effective judicial review the CFI adheres to the line of reasoning already outlined above: in the presence of a violation of *jus cogens* the Court can annul the relevant provisions. The CFI, at least implicitly, admits that there are deficits in the judicial protection available to the subject but, according to the Court, this does not constitute a violation

⁵⁷ Ibid para 265. ⁵⁸ Ibid para 274.

⁵⁹ This Community standard becomes relevant, however, if the listing is carried out directly by the European Union under its autonomous responsibility. As a consequence, the EC Council decision by which the *Organisation des Modjahedines du peuple d'Iran* was listed, was annulled by the CFI because the right to a fair hearing, the right to an effective judicial remedy, and the obligation to state reasons was found violated: see Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council*, 12 December 2006, [2006] ECR II-4665.

See also, more recently, Case T-327/03 *Stichting Al-Aqsa* [2007] ECR II-79; Case T-47/03 *Sison* [2007] ECR II-73, where the CFI distinguished these cases from *Yusuf and Kadi*. The CFI pointed out, in fact, that the Security Council Resolution relevant in these cases (UNSC Res 1373 (28 September 2001)) did not specify individually the persons, groups, and entities who or which are to be subject to the sanctions. Nor did the Security Council determine the procedure by which the sanctions were to be applied. As the Community exercised discretionary powers in these cases it was bound to observe the rights of defences of the parties concerned. See *Sison* (above) paras 149 *et seq.*

of *jus cogens*.⁶⁰ In fact:

- the applicant has been able to bring an action for annulment before the CFI under Article 230 of the EC Treaty⁶¹ (even though the examination is limited, more or less, to formal aspects and to the question whether *jus cogens* has been violated);⁶²
- international instruments accept derogations to the right to effective judicial review in time of emergency;⁶³
- the relevant measures are temporary in nature, there is a mechanism of re-examination within the Sanctions Committee and there is an 'essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council'.⁶⁴

On a whole, it can be said that the CFI was not willing to put in doubt the superiority of UN law even though the Court voiced some unease about the result. It also is clear that this method of promoting the fight against terrorism would not have been possible if the Community had some discretionary power in this area. At the same time, however, it is also perceptible that the CFI is sympathetic to the need to give top priority to security issues. Deference to the UN system is a legal necessity but there is a hint that the Court was relieved that it did not itself have to undertake the delicate balancing exercise between the competing interests.

D. The position taken by Advocate General Poiares Maduro

In the appeal procedure Advocate General Poiares Maduro adopted a totally different position—and was supported by many legal commentators.⁶⁵

The Advocate General adopts a strictly dualist position. International law and Community law are 'two different planets of the same universe of law'⁶⁶ and the Community judiciary has to take into consideration only Community law. For the Advocate General the fact that the content of the EC sanctions regulations has

⁶⁰ See the CFI judgment in *Yusuf and Kadi* (n 1 above) paras 285 *et seq.*

⁶¹ Ibid para 278. ⁶² Ibid paras 279 and 282.

⁶³ Ibid para 287, referring, *inter alia*, to Article 8 of the Universal Declaration of Human Rights (UDHR) 1948, GA Res 217 (III), UN GAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71 and Article 14 of the ICCPR.

⁶⁴ Ibid para 289. For an author broadly adhering to this view see the case-note on the *Yusuf and Kadi* judgment by Ch Tomuschat (2006) 43 *Common Market Law Review* 537.

⁶⁵ Opinion of Advocate General Poiares Maduro, 16 January 2008 (Case C-402/05P) and 23 January 2008 (Case C-415/05P), Joined Cases C-402/05P and C-415/05P [2008] ECR I-6351. See, among the most pronounced critics of the CFI judgment, B Conforti, 'Decisioni del Consiglio di sicurezza e diritti fondamentali in una bizzarra sentenza del Tribunale comunitario di primo grado' (2006) 10 *Diritto dell'Unione Europea* 333 and N Lavranos, 'UN Sanctions and Judicial Review' (2007) 76 *Nordic Journal of International Law* 1.

⁶⁶ See N Lavranos, 'Judicial Review of UN Sanctions by the European Court of Justice' (2009) 78 *Nordic Journal of International Law* 343, 349.

been fully dictated by the UN and that the EC consequently has no discretionary power when implementing it is irrelevant. The Advocate General only considers the obligations flowing from EC law and in this context he requires complete respect for the high standard of fundamental rights protection achieved within the EC. It was obvious from the outset that the contested regulation would not meet these high criteria.

The Advocate General is not unaware of the fact that EC Member States are bound by UN law and that the Community has to defend its reputation as a friend of international law,⁶⁷ an attitude which, on a whole, is very useful in allowing the Community to assert itself at the international level. The Advocate General also pays tribute to this specific role of the Community, but in substance these declarations are no more than lip service. See, for example, the following statements by the Advocate General:

... the Community has traditionally played an active and constructive part on the international stage. The application and interpretation of Community law is accordingly guided by the presumption that the Community wants to honour its international commitments. The Community Courts therefore carefully examine the obligations by which the Community is bound on the international stage and take judicial notice of those obligations.⁶⁸

... the Court takes great care to respect the obligations that are incumbent on the Community by virtue of international law...⁶⁹

The decisive remark, best expressing the overall attitude by the Advocate General in this case, is, however, the following:

[I]n the final analysis, the Community Courts determine the effect of international obligations within the Community legal order by reference to conditions set by Community law.⁷⁰

Article 6(1) of the EU Treaty, according to which 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law', is attributed so much importance that not even Article 307 EC, which safeguards pre-accession obligations such as those flowing from UN law, allows any derogation. To do otherwise would be 'to break away from the very principles on which the Union is founded'.⁷¹ Póitres Maduro cites the *Schmidberger* case⁷² and the importance attributed therein to the protection of human rights.⁷³ Without doubt, this is a new reading of Article 307 EC and the central, 'constitutional' role of human rights within the European Union. The Advocate General repeatedly points out that he does not want to speak for the international community and that it is not up to the Community to second-guess the lawfulness of UN acts. At least implicitly, however, the Advocate General

⁶⁷ See, however, n 155 below, referring to the *Mox-Plant* case.

⁶⁸ Opinion of Advocate General Póitres Maduro (n 65 above) para 22.

⁷⁰ *Ibid* para 23.

⁷¹ *Ibid* para 31.

⁷² Case C-112/00 *Schmidberger* [2003] ECR I-5659.

⁷³ *Ibid* para 73: 'measures which are incompatible with the observance of human rights... are not acceptable in the Community'.

⁶⁹ *Ibid* para 24.

expresses a vision of EU/EC law that contains a claim for universal application. In fact, he warns strongly against all-too-easy compromises in the name of security interest;⁷⁴ the rule of law must always be preserved.⁷⁵ Statements like these clearly reach beyond the Community order. For the immediate term the Advocate General is prepared to accept a conflict between the Community order and the international legal order, although he attempts to downplay the dimension of these consequences when he speaks of 'certain repercussion on the international stage'⁷⁶ and of possible 'inconvenience' for the Community and its Member States in their dealings on the international stage.⁷⁷ He uses the correct term for such consequences when he speaks of 'international responsibility'.⁷⁸ This should not, however, deter the ECJ from going the way proposed by the Advocate General. First, in the strongly dualist view of Advocate General Póitres Maduro, such a conflict does not have any immediate consequences within the Community. Furthermore, the Advocate General hints also at the possibility that an annulment of the relevant acts has already been taken into account by the UN.⁷⁹

Behind such a viewpoint there is a vision that the Community is more advanced in human rights protection than the UN and that the Community approach to find the right balance between security interests and human rights protection is the preferable one.

It may be the case that this viewpoint, which has largely been taken up by the ECJ, will fortify the identity of the EU/EC as a stronghold of human rights protection. It should be noted, however, that this identity-building process occurs at the expense of UN authority, which is essentially based on its role as an institution for the promotion of human rights. The question could be asked whether the proclaimed interest to promote high human rights standards is really best served by questioning the role of the UN in this field and thereby undermining the authority of an institution that has laid the foundations of modern human rights protection.

E. The judgment of the ECJ

In the material part of its judgment⁸⁰ the ECJ largely follows the opinion of Advocate General Póitres Maduro. Some differences occur with regard to the legal reasoning and terminology applied. It is not to be expected, however, that these differences will have long-term implications in future jurisprudence.

With regard to the qualification of the relationship between EC law and UN law the attitude taken by the ECJ is, like that of the Advocate General, strictly dualist, although the ECJ tries to present its position in a more prudent way that might also appear conciliatory to internationalists.

⁷⁴ Opinion of Advocate General Póitres Maduro (n 65 above) para 34.

⁷⁵ *Ibid* para 45.

⁷⁶ *Ibid* para 38.

⁷⁷ *Ibid* para 39.

⁷⁸ *Ibid* para 39.

⁷⁹ *Ibid* para 38.

⁸⁰ Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat* (n 4 above).

First, the Court is at pains to emphasize that the Community is bound by international law and that it is not ready to denounce its traditional international law-friendly approach.⁸¹ On the basis of the respective references one would have expected an attempt to reconcile the perspectives both of international law and of Community law. However, in conclusion the ECJ requires full respect for EU fundamental rights protection. On the one hand, the ECJ opines that UN law does not have to be transposed in a strict, predetermined way. There is rather a certain leeway at the disposal of the Member States:

It must... be noted that the Charter of the United States does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.⁸²

In reality, in view of the very detailed sanctions resolutions and decisions of the Security Council and the Sanctions Committee it is not possible to see where the area of discretion by the Member States, or the Community, should lie. It certainly cannot be argued that the relevant UN law, as it stands at present, permits the Community to make the implementation of sanctions decisions dependent on the respect of EU fundamental rights.

However, the ECJ builds a second line of defence, which is exclusively grounded in EU/EC law:

- Article 307 EC does not 'permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights'.⁸³
- UN law cannot prevail over EC primary law, in particular over the general principles of which fundamental rights form a part.⁸⁴

⁸¹ Ibid para 291 ('the European Community must respect international law in the exercise of its powers'); para 291 ('the powers of the Community provided for by Articles 177 EC to 181 EC in the sphere of cooperation and development must be exercised in observance of the undertakings given in the context of the United Nations and other international agreements'); para 293 ('observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community gives effect, by means of the adoption of Community measures taken on the basis of Articles 60 EC and 301 EC, to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations'); para 294 ('it is necessary for the Community to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them'), to mention only a few of these references.

⁸² Ibid para 298.

⁸³ Ibid para 304.

⁸⁴ Ibid para 308.

Both affirmations merit closer examination. It is not clear what the ECJ means by 'the very foundations of the Community legal order'. From the formulation used it appears that this concept is not co-extensive with that of fundamental rights, the latter constituting only a sub-category of this broader concept, albeit probably a very important one. Attempts have been made in literature to give substance to it.⁸⁵

It is, however, doubtful whether it was appropriate for the ECJ to introduce such a new concept and it is still not clear what its legal basis should be. In its final analysis, the purpose of this endeavour can only be an attempt to justify a hierarchical vision of the relationship between EU/EC law and international law. According to this perspective, Community law does not automatically take precedence over international law but Community law is in itself hierarchical, and this in two senses:

- According to Article 300(7) EC, international agreements are binding on the institutions of the Community and on Member States.⁸⁶ They have primacy over acts of secondary law, but not over primary law.⁸⁷ In particular, primacy is excluded over general principles of which fundamental rights form part. No mention is made in the judgment of Article 103 of the UN Charter.⁸⁸
- The very foundations of the Community legal order are absolutely non-derogable. This category, unknown at present in EC law, escapes any traditional qualification. Formally, it should be part of primary law but it is characterized, first, by its content. It is formed within the cornerstones of the EU constitution ('Baugesetze der Verfassung') and reflects the essence of what this legal order stands for and of what legitimizes its quest for particularity. Even if UN law should be treated differently from 'ordinary' international law, no norm should overcome the barrier of the 'very foundations of the Community legal order'. This is no small thing, as becomes evident, in particular in the field of the universal fight against terrorism. It goes without saying that only a universal consensus can lead to truly effective norms in this area. The EU/EC, however, reserves its

⁸⁵ See N Lavranos, 'Revisiting Article 307 EC: The untouchable core of fundamental European constitutional law values and principles' in F Fontanelli, G Martinico and P Carozza (eds), *Shaping the Rule of Law through Dialogue* (Europa Law Publishing, Groningen, 2009) 119.

⁸⁶ *Kadi and Al Barakaat* (n 4 above) para 306.

⁸⁷ Ibid paras 306 *et seq.* See, also in this context, JP Jacqué, 'Primauté du droit international versus protection des droits fondamentaux' (2009) 45 *Revue Trimestrielle de Droit Européen* 161, 170: '[L]a Cour assimile les résolutions du Conseil de sécurité à des accords internationaux classiques. Or la situation est bien différente et l'approche réservée aux accords n'est pas transposable aux résolutions d'une organisation internationale'.

For a recent analysis of the status of (traditional) international agreements within the EC legal order, see the Opinion of Advocate General Kokott in Case C-308/06 *Intertanko*, 20 November 2007, [2008] ECR I-4057 paras 37 *et seq.*

⁸⁸ See Jacqué (n 87 above) 170, who writes '[L]e silence de la Cour à ce sujet est étonnant'.

right to withdraw from this consensus if the modalities of implementation of the relevant norms are in conflict with its own legal order. Should this be interpreted in the sense that the respective European standards have to be applied immediately and unconditionally on a universal level; that international law has to be 'Europeanized'⁸⁹ in this area? Such an approach would not be viable politically. It would lead to enormous conflicts and endanger the substance of the UN system. A way out of this situation, respecting the interests of all parties involved absolutely, has to be found.

F. The implementation of these principles in the *Kadi* case

The ECJ decided not only to quash the decision of the CFI but also to give final judgment in the case.⁹⁰ The legal principles outlined above had therefore to be applied to the circumstances of *Kadi*. In this context, the ECJ came to the conclusion that 'the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected'.⁹¹

It is remarkable to note that the ECJ attributes broad space to security considerations and the need to fight terrorism effectively.⁹² The role in this context of the UN in general and the Security Council in particular is recognized explicitly and forcefully:

With reference to an objective of general interest as fundamental to the international community as the fight by all means, in accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate...⁹³

The Court acknowledges even the necessity to assure a surprise effect and allow for measures with immediate effect.⁹⁴ As already mentioned, the ECJ bemoans, however, the nearly total disrespect of the right to defence. It cannot accept that 'the contested regulation escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and

⁸⁹ See J Wouters, A Nollkaemper, and E de Wet (eds), *The Europeanisation of International Law* (TMC Asser Press, The Hague, 2008).

⁹⁰ *Kadi and Al Barakat* (n 4 above) para 331, referring to Article 61(1) of the Statute of the International Court of Justice.

⁹¹ *Ibid* para 334.

⁹² See, for example, *ibid* para 342.

⁹³ *Ibid* para 363.

⁹⁴ *Ibid* para 340.

terrorism'.⁹⁵ In particular, the Court criticizes the following aspects:

- The Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period after those measures were enacted.⁹⁶
- The appellants were therefore unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature.⁹⁷
- That infringement has not been remedied in the course of these actions.⁹⁸

These points of criticism are serious and justified. Remedies are possible and have in fact already been enacted.⁹⁹ The decisive question is how far these measures should go and what model of access to justice should be followed.

Is it possible to find criteria allowing for a coordination of the various legal orders here in conflict? Is there leeway for the application of the so-called 'Solange'-jurisprudence? Can a definitive rupture between UN law and EU/EC law, with all its most serious consequences, be avoided?

G. The meaning of access to justice

The different procedural rights whose violation has led to the annulment of the contested regulation can be aggregated to a concept that is attracting growing attention in literature: access to justice. This concept has been defined as 'the right of an individual not only to enter a court of law, but to have his or her case heard and adjudicated in accordance with substantive standards of fairness and justice'.¹⁰⁰ In this broad definition, access to justice becomes synonymous with judicial protection¹⁰¹ not only in accordance with procedural criteria but also in correspondence with material criteria for what has to be a fair and just procedure. It is obvious from the outset that no universal consensus exists on what such a concept could contain, in particular with regard to its material elements. Some elements will always vary—both from a temporal perspective as well as a regional one. Particular attention merits the question whether derogations to this right are possible and, if this is the case, to what extent. The importance of this right

⁹⁵ *Ibid* para 343.

⁹⁶ *Ibid* para 348.

⁹⁷ *Ibid* para 349.

⁹⁸ *Ibid* para 350.

⁹⁹ The Court does not mention UNSC Res 1822 (30 June 2008), which was adopted two months before the judgment and which introduced important improvements. It is arguable that the ECJ considered them as insufficient. See, in this sense, Jacqué (note 87 above) 174. However, even more important is the fact that the relevant improvement had no immediate consequences for the case at hand as the factual situation in *Kadi* was the result of the application of the provision previously in force.

¹⁰⁰ See F Francioni, 'The Rights of Access to Justice under Customary International Law' in F Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press, Oxford, 2007) 1, 1.

¹⁰¹ *Ibid* 3.

is emphasized by the fact that practically any international human rights instrument devotes central attention to it.¹⁰² There appears to be consensus about the 'core meaning', while some uncertainty remains at the margins. This latter area has given rise to much controversy in jurisprudence. Ever more attention is given to a substantial understanding of effective access.¹⁰³ The question whether and to what extent derogations to this right are possible, on the other hand, has attracted far less attention. The *Kadi* case evidences the need to pay greater attention to this issue. At first sight the drafters of most international human rights instruments did not feel the need to provide particular protection for this right. In fact, with the exception of the American Convention on Human Rights (ACHR) all relevant documents attach only to the most elementary substantive provision so-called non-derogation clauses.¹⁰⁴ The reason for this may be found in the fact that originally implementation of the relevant documents was not intended to be individual-driven but occur on the basis of an intergovernmental dialogue. Under this perspective, denial of access to justice constituted only a procedural limitation, while the most important substantial obligations still required full respect. It was up to any party of the respective instrument to act on the international level to assure adherence to these provisions.

The fundamental changes in the way international human rights instruments are implemented have given a new significance to the right to access to justice. It becomes more and more apparent that a denial of this right can be tantamount to a complete denial of human rights protection.¹⁰⁵ In the case at hand this problem is particularly accentuated because the fight against terrorism is an issue of international concern. Nearly all states are determined that terrorism is wiped out on a universal scale. In most cases, they will prioritize this aim over the obligation to ensure access to justice for non-nationals (or, if nationals, opponents of

¹⁰² See Article 8 of the UDHR ('Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by constitution or by law'); Article 6(1) of the ECHR ('In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'); Article 25(1) of the American Convention on Human Rights, 22 November 1969, 1144 UNTS 143 ('Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties'); Article 7.1 of the African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217, 21 ILM (1982) 58 ('Every individual shall have the right to have his cause heard. This comprise: (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) The right to be presumed innocent until proved guilty by a competent court or tribunal; (c) The right to defence, including the right to be defended by counsel of his choice; (d) The right to be tried within a reasonable time by an impartial court or tribunal').

¹⁰³ See, for example, with regard to the ECHR, Ovey and White (n 28 above) 181.

¹⁰⁴ See Article 27 of the ACHR on the one hand and Article 15 of the ECHR and Article 4 of the ICCPR, on the other.

¹⁰⁵ This scenario has occurred in particular with regard to Guantanamo.

government) in other countries. The problem that human rights violations are not brought to the attention of the competent organs because the victims are not in the position to do so and that other states remain inactive due to political considerations is not new but represents a structural weakness of human rights protection. It is for this reason that international organizations and treaty bodies, in particular within the ambit of the UN, should assume this task from a free and neutral position. But which international organization should control the UN once the UN itself acts against individuals, thereby putting into question those individuals' fundamental rights?

The necessity to provide protection against the terrorist threat has become of paramount importance for many states, and the fact that the Security Council has taken up this task meets with general approval.¹⁰⁶ It is often forgotten that the UN was under great pressure even before 11 September 2001 to assume a leading role in the fight against global terror.¹⁰⁷ It is not possible, however, to ignore the dangers for human rights protection resulting from this unprecedented fight.¹⁰⁸ It cannot be accepted that the fight against terrorism has as its consequence that 'human rights are trampled under foot'.¹⁰⁹ On the other hand, it must also be taken into account that terrorism is undermining the very foundations of modern civilization and is threatening therefore the international human rights system. A delicate balancing of the interests involved is required.¹¹⁰ As has been pointed out by commentators, exceptional situations fall within the law and therefore do not constitute a 'black hole'.¹¹¹ Even if the threat resulting from terrorism has no

¹⁰⁶ See, for example, the statement in the World Summit Outcome Document, UN Doc A/Res/60/1, 24 October 2005, para 90: 'We encourage the Security Council to consider ways to strengthen its monitoring and enforcement role in counter-terrorism...'. See also E Rosand, 'Den Terrorismus weltweit bekämpfen—Die Rolle der Vereinten Nationen' (2009) 57 *Vereinte Nationen* 99.

¹⁰⁷ See C Gearty, 'Situating International Human Rights Law in an Age of Counter-Terrorism' (2007–2008) 10 *Cambridge Yearbook of European Legal Studies* 167, 179 *et seq.*

¹⁰⁸ See the following statement by UN Special Rapporteur Martin Scheinin, which very well summarizes the results of extensive empirical studies undertaken by this expert: 'It is quite clear that in very many countries the notion of terrorism is being used for political purposes to stigmatize political opponents and this takes many forms; one form is that there are isolated individual acts of terrorism by some groups or some individuals, but the government uses it then to dub broad groupings, broad political movements, broad ethnic groups as terrorists without foundations. That is one form, and the other is when a government is simply trying to get away with the persecution of its opponents by calling them terrorists, even though never there was any single act of terrorism. Those two cases refer to the overly broad use of the notion of terrorism'. See <<http://www.google.com/imgres?imgurl=http://world-citizenship.org/wp-content/upload>> (last visited 27 August 2009). See also K Schmalenbach, 'Bedingt kooperationsbereit: Der Kontrollanspruch des EuGH bei gezielten Sanktionen der Vereinten Nationen' (2009) 64 *JuristenZeitung* 35.

¹⁰⁹ See P Vedel Kessing, 'Terrorism and Human Rights' in S Lagoutte, H-O Sano, and P Scharff (eds), *Human Rights in Turmoil* (Martinus Nijhoff Publishers, Leiden, 2007) 133.

¹¹⁰ See S Day O'Connor, 'Balancing Security, Democracy, and Human Rights in an Age of Terrorism' (2008/2009) 47 *Columbia Journal of Transnational Law* 6.

¹¹¹ See F Ni Aolain, 'The Individual Right to Access to Justice in Times of Crisis: Emergencies, Armed Conflict, and Terrorism' in F Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press, Oxford, 2007) 59, 61.

historic parallels and is, in particular, not known in the modern history of human rights protection, it has to be countered within this system and not by setting it aside.¹¹² Former UN Secretary General Kofi Annan has given clear expression to this challenge:

Terrorists are accountable to no one. We, on the other hand, must never lose sight of our accountability to citizens all around the world. In our struggle against terrorism, we must never compromise human rights. When we do so, we facilitate achievement of one of the terrorist's objectives. By ceding the moral high ground we provoke tension, hatred and mistrust of Governments among precisely those parts of the population where terrorists find recruits.¹¹³

In the World Summit Outcome Document of 2005 the problem of fundamental rights protection and, in particular, the need to provide access to justice in the listing and de-listing process, is addressed (although in a rather prudent way):

We also call upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.¹¹⁴

The question is, therefore, to what extent derogations from fundamental rights protection should be allowed. In this context, General Comment 29 on states of emergency prepared by the UN Human Rights Committee can be of some help.¹¹⁵ There, the following criteria have been spelled out:

- Derogations are allowed only if and to the extent that a situation arises that constitutes a threat to the life of the nation.¹¹⁶
- Such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measure of derogation resorted to because of the emergency.¹¹⁷
- The provision in Article 4(1) of the ICCPR according to which any measure derogating from a state party's obligation under the Covenant must be limited 'to the extent strictly required by the exigencies of the situation'.¹¹⁸

¹¹² This has also been confirmed in relation to the ECHR, no matter how pervasive terrorist attacks have become (for example in Chechnya). See, for more details, Ni Aolain (n 111 above). See also Francioni (n 98 above) 45.

¹¹³ See 'In Larger Freedom, Towards development, Security and Human Rights for All', Report of the Secretary-General, 21 March 2005, UN Doc A/59/2005, para 94. Kofi Annan pleaded further for the nomination of a special rapporteur who would report to the Commission on Human Rights (now the Council of Human Rights) on the compatibility of counter-terrorism measures with international human rights law. This occurred with the nomination of Professor Martin Scheinin as Special Rapporteur on the promotion and protection of human rights while countering terrorism.

¹¹⁴ UN Doc A/Res/60/1, 24 October 2005, para 109.

¹¹⁵ See Human Rights Committee, General Comment No 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 (31 August 2001).

¹¹⁷ Ibid para 4.

¹¹⁸ Ibid para 5.

With regard to access to justice, which is not mentioned among the non-derogable rights, of particular importance is para 15 of General Comments:

It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15.

Hereby it is made evident that the strength of the procedural rights cannot be defined *in abstracto* but is closely related to the quality of the rights protected in the concrete case. The more important the rights at issue the stronger the protection must be.

The expression 'war on terror' is also reflecting the fact that this controversy is fought out with all means that governments have at their disposal. This implies that core fundamental rights are endangered and that, correspondingly, very far-reaching procedural rights have to be assured.

At the same time, however, a different position could be assumed. It is said that the terrorist threat being fought by the UN against, in particular, the Al-Qaida network, is of a widely different nature than that stemming from traditional insurgency, which has come to be qualified as terrorism by the threatened government. As a consequence, it could be argued that it is not clear to what extent the jurisprudence mentioned above, which refers to widely different challenges, can be applied to a confrontation so unprecedented in nature as that exemplified by the *Kadi* case. In any case, it is inconceivable that the danger spreading from modern international terrorism should have a general derogatory effect with regard to core fundamental rights. The great challenge will be to safeguard the essence of the fundamental rights involved while finding new solutions on an instrumental level that allow for an effective fight against a threat that cannot be countered with traditional weapons.¹¹⁹

¹¹⁹ Using word play, Jan Klabbbers has proposed to examine whether recourse to kadi justice could offer a solution to the problems portrayed here. Max Weber has advocated this concept, which he identified with substantive justice, a socially just, outcome-oriented approach in law finding. In cases such as *Kadi*, kadi justice could constitute an approach to finding the right balance between security interests and fundamental rights protection. In any case, the proposal to introduce kadi justice would be a hard sell in a legal (academic) discussion mainly oriented at finding and applying formal rule of law concepts. See J Klabbbers, 'Kadi Justice at the Security Council?' (2008) 4 *International Organizations Law Review* 293.

H. In search of a solution

The problem is in urgent need of an effective solution if both the international rule of law and international security are to be preserved. To this end, new approaches have to be considered. In this context, it is necessary to examine to what extent the UN sanctions mechanism can be reformed so as to better respect access to justice that corresponds as much as possible to that carved out in the ECHR and the CCPR. In a more general sense it has to be asked to what extent the activity of the Security Council as a whole can be subjected to scrutiny by an independent body.

Legal doctrine suggests that no second-guessing of Security Council decisions is possible since the UN Charter itself was characterized by a 'predominance of the political over the legal approach' and there should therefore be no legal limits in the Security Council fulfilling 'its major task of securing peace and security'.¹²⁰ The prevailing opinion is, however, without doubt, the opposite one. On this subject the ICJ was very explicit at an early point in the history of the UN. In the *Conditions of Admission Case* of 1948 the ICJ made clear that the powers of UN organs are subject to legal limits even if their nature is prevalently political. In fact, 'the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment'.¹²¹ The far-reaching power by the ICJ to examine the legality of acts by other UN organs was confirmed several times subsequently.¹²² It was made evident that the political nature of a question was no

¹²⁰ See H Kelsen, *The Law of the United Nations* (Stevens & Sons Publishers, under the auspices of The London Institute Of World Affairs, London, 1951) 735. See also the dissenting opinion by Judge Schwebel in the Lockerbie judgment, from which it can be inferred that the terms and drafting history of the Charter demonstrate that the Security Council was subject to the rule of law, and at the same time was empowered to derogate from international law if the maintenance of international peace so required ('These provisions [Articles 24 and 25 Charter of the United Nations]—the very heart of the Charter's design for the maintenance of international peace—manifest the plenitude of the powers of the Security Council, which are elaborated by the provisions of Chapters VI, VII, [sic] and VIII of the Charter. They also demonstrate that the Security Council is subject to the rule of law; it shall act in accordance with the Purposes and Principles of the United Nations and its decisions must be adopted in accordance with the Charter. At the same time, as Article 103 imports, it may lawfully decide upon measures which may in the interest of the maintenance or restoration of international peace and security derogate from the rights of a State under international law...'). See *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, dissenting opinion of President Schwebel, 27 February 1998, (1998) ICJ Rep 76.

¹²¹ See *Conditions of Admission of a State to Membership in the United Nations*, advisory opinion, 28 May 1948, (1948) ICJ Rep 57.

¹²² See *Certain Expenses of the United Nations*, Advisory Opinion, 20 July 1962, (1962) ICJ Rep 151; *Legal Consequences of the Continued Presence of South Africa in the Namibia notwithstanding Security Council Resolution 276*, Advisory Opinion, 21 June 1971, (1971) ICJ Rep 16; *Preliminary Objections in the Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom, Libyan Arab Jamahiriya v United States of America)*, 27 February 1998, (1998) ICJ Rep 115; and *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, advisory opinion,

hindrance to its legal assessment under UN law and that Security Council decisions were not immune from legal scrutiny. While these findings met with broad assent in legal literature the central question regarding the way in which control of Security Council resolutions by the ICJ can be instituted is still unresolved. It goes without saying that *de lege lata* there is no possibility of a direct ('appellate') review of Security Council acts in contentious proceedings.¹²³ Such a review can occur only incidentally.¹²⁴ Broader possibilities offer, at first sight, advisory proceedings.¹²⁵ In this context Security Council decisions can be subject to examination both in a 'principal' and in an 'incidental' way.¹²⁶ On the other hand, the practical relevance of this review possibility is strongly limited by the fact that access to this procedure is open primarily to the UN General Assembly and the Security Council.¹²⁷ It is obviously not easy to win over a majority of states in the General Assembly for a request for an advisory opinion, in particular in such contentious issues as the one here. Even more unlikely does it seem *de lege lata* that the Security Council would undertake such a step, ie voluntarily to submit its own actions to an ex-post evaluation by another UN organ. However, academic writers¹²⁸ and other legal specialists have identified room for reforms which should permit problems like the present one to be overcome. Thus, it has been suggested to look at political agreements according to which the General Assembly and the Security Council would espouse pleas for advisory opinions by other institutions.¹²⁹ Furthermore, it was suggested that the Security Council should systematically ask for advisory opinions when confronted with motivated objections concerning targeted sanctions.¹³⁰ But is it realistic that such an agreement can be reached? Why should the Permanent Members of the Security Council adhere to such a proposal? It can be presumed that the Security Council or, respectively, its Permanent Members, are also interested in upholding the rule

9 July 2004, (2004) ICJ Rep 136. See, on all these cases, J Lee, 'The United Nations Security Council and the International Court of Justice: Co-operation, Co-existence, and Co-involvement' (2007) 12 *Asian Yearbook of International Law* 57.

¹²³ See, for a detailed analysis, G Arangio-Ruiz, 'The ICJ Statute, the Charter and Forms of Legality Review of Security Council Resolutions' in LC Vohrah *et al.* (eds), *Man's Inhumanity to Man—Essays in International Law in Honour of Antonio Cassese* (Kluwer Law International, The Hague, 2003) 41.

¹²⁴ For this incidental review neither Article 103 nor Article 25 of the Charter constitute an obstacle. See Arangio-Ruiz (n 123 above) 56.

¹²⁵ Arguing for a more frequent recourse to advisory opinions to interpret international law, see E de Wer, 'Judicial Review of the United Nations Security Council and General Assembly through Advisory Opinions of the International Court of Justice' (2000) 10 *Schweizerische Zeitschrift für internationales und europäisches Recht* 237.

¹²⁶ See Arangio-Ruiz (n 123 above) 61.

¹²⁷ It is true that other organs of the United Nations and specialized agencies may be authorized by the General Assembly to request advisory opinions. This power is, however, limited to legal questions arising within the scope of their activities. See Article 96 lit(b) of the UN Charter.

¹²⁸ See J-M Thouvenin, 'Le Juge International Peut-Il Contrôler la Légalité des Sanctions Adoptées par le Conseil de Sécurité?' (2009) 529 *Revue du Marché Commun et de l'Union Européenne* 373.

¹²⁹ *Ibid.* 379.

¹³⁰ *Ibid.*

of law and in avoiding further conflict. The appearance of legitimacy is essential for the successful continuation of the fight against terrorism, and this appearance has been seriously tarnished by convincing allegations of fundamental rights violations occurring in the ambit of this struggle. The tarnished reputation, so the assumption goes, could be restored by the integration of a neutral, widely respected institution like the International Court of Justice (ICJ) in the sanctions application process.

It is, however, doubtful whether the ICJ can really help in this process as long as the substantial law in this field remains unclear. The involvement of the ICJ may give rise to the appearance of a division of powers typical of national democracies, but any contribution by the ICJ would essentially be of a law-creating nature.

A further proposal is to institute an independent tribunal that should act either as an *ex-ante* controlling instance or as a review tribunal where sanctions decisions are appealed. However, its implementation meets with formidable challenges. Assuming that the Security Council would warm to such an idea (an event that cannot be taken for granted) it still has to be acknowledged that a difficult balancing between security interests and individual fundamental rights will have to be carried out by such an institution. To attribute unrestricted powers in this field to an independent tribunal would again create a legitimacy problem. Another suggestion concerns the institution of an ombudsman or review panel which would not have any competence to adopt binding decisions.¹³¹ It cannot be contested that such a reform could bring about important improvements but, on the other hand, it would not change the fact that the ultimate responsibility lies with the Security Council (or, respectively, with the Sanctions Committee), where there is still no guarantee of access to justice in the stricter sense.¹³² As a consequence, it becomes evident that any meaningful reform attempt would have to operate not only on the institutional level but also on the level of the substantive law. In other words, a balancing of the conflicting interests described above that should lead to a solution supported by broader consent presupposes the determination of substantive criteria on the basis of which individual cases can be decided.

Does this mean that no solution to the conflict can be found as long as no such determination can be achieved? It seems improbable that such a consent can be found in the near future. Do we have to stand on the sidelines in view of an ever-growing conflict which could potentially be disruptive for international

¹³¹ See M Gestri, 'Legal remedies against Security Council Targeted Sanctions: De lege lata and de lege ferenda options for enhancing the protection of the individual' (2007) 17 *The Italian Yearbook of International Law* 25, 49.

¹³² Ibid. Marco Gestri also points at a further crucial problem for which no solution is proposed: access to, and review of, confidential intelligence information on which listing proposals are often based. Disclosure of such information could put the life of other people (members of intelligence services, informants) at risk. As will be exposed towards the end of this contribution, by UNSC Res 1904 (2009) of 17 December 2009 an ombudsperson was introduced. See below Section J.

relations? While the extreme stance taken by the ECJ hints at such a possibility there are signs that this will not happen.

At the international level, conflicts between international subjects with overlapping competences over an adequate degree of fundamental rights protection are not new, the most famous being that between the EC and single Member States, in particular Germany. By the so-called 'Solange' jurisprudence a way was found to manage this conflict. First, in 1974 the German Constitutional Court asserted its right to rule on the compatibility of EC acts with fundamental rights and the German Constitution as long as the integration process of the EC does not include a catalogue of fundamental rights corresponding to that of the German Basic Law (*Solange I*).¹³³

In its *Solange II* judgment of 1986¹³⁴ the German Constitutional Court changed perspective: as human rights protection has been strengthened within the EC the ECJ would no longer exercise its jurisdiction for reviewing EC legal acts as long as the ECJ continued to generally and effectively protect fundamental rights against EC measures in manners comparable to the essential safeguards of German constitutional law.

In the so-called Maastricht judgment (*Solange III*) of 1993¹³⁵ the German Constitutional Court reasserted its jurisdiction when it declared that so-called 'ausbrechende Gemeinschaftsakte', ie EC measures exceeding the limited EC competences, could not be legally binding and applicable in Germany.

In *Solange IV* of 2002¹³⁶ the German Constitutional Court was again more prudent when it declined to declare single EC acts to be *ultra vires* due to an alleged restriction of single freedoms of German importers (at issue were the EC import restrictions on bananas). Instead, it stated that German courts would interfere only if the required level of human rights protection in the EC had generally fallen below the minimum level required by the German Constitution.¹³⁷

This jurisprudence demonstrates that the *Solange* principle can be used both to justify deference towards international institutions as well as to de-escalate a conflict which cannot be avoided for the time being. In this latter form of application it contains an invitation to cooperate and aspires at a consensual solution. In the much-debated *Bosphorus* case¹³⁸ the ECtHR had to examine whether the

¹³³ Such a request could be made by German courts after having requested a preliminary ruling from the EC Court. *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)*, Federal Constitutional Court (Second Chamber), 29 May 1974, BVerfGE 37, 291, (1974 II) 14 CMLR 540.

¹³⁴ *Re Application of Wünsche Handelsgesellschaft (Solange II)*, Federal Constitutional Court (Second Chamber), 22 October 1986, BVerfGE 73, 339, (1987 III) 50 CMLR 225.

¹³⁵ BVerfGE 89, 115, 12 October 1993. ¹³⁶ BVerfGE 102, 147, 7 June 2000.

¹³⁷ For this system of the *Solange* jurisprudence see E-U Petersmann, 'Constitutional Theories of International Economic Adjudication and Investor-State Arbitration' in PM Dupuy, F Francioni, and EU Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press, Oxford, 2009) 137.

¹³⁸ *Bosphorus v Ireland*, Application No 45036/98, European Court of Human Rights (Grand Chamber), 18 February 1999, Reports 2005-VI, para 107.

impounding of a Yugoslav aircraft by Irish authorities in application of Council Regulation (EEC) 990/93 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia [1999] OJ L102/14, adopted as an implementation measure for Security Council sanctions, was reconcilable with the ECHR. In adopting this measure, Ireland enjoyed no discretion. Therefore, the ECtHR had to examine whether the transfer of this power was justified. To solve this problem the ECtHR took recourse to the *Solange* principle. It regarded the transfer of sovereign power to an international organization (in the present case by Ireland to the EEC) as justified under the Convention 'as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner that can be considered at least equivalent to that for which the Convention provides'.¹³⁹ After an absolutely formal examination, which was not based on the case at hand, the Court was satisfied that such an equivalence was given as a minimum and therefore no violation of the ECHR could be found.¹⁴⁰

Thereby, a major conflict between Strasbourg and Brussels was avoided. Interestingly, soon after, the ECtHR managed to differentiate its jurisprudence in such a way as to avoid a conflict with UN law when the strict application of the *Bosphorus* jurisprudence could have generated a major international controversy.

In the *Behrami* and *Saramati* cases the ECtHR had to examine who was responsible for human rights violations by UNMIK/KFOR forces in Kosovo.¹⁴¹ As the Kosovo administration is carried out under UN auspices with NATO involvement and with national contingents assuming specific tasks, the Court had first to attribute responsibility. Due to the fact that all these activities were under the 'ultimate control' of the UN it was to this institution that the responsibility was to be attributed. After a somewhat contorted reasoning¹⁴² the Court came to the conclusion that it could not exercise control over UN acts. Interestingly, here the ECtHR did not make recourse to the *Solange* principle. It was clear from the outset that it would not have been possible to state that fundamental rights protection within the UN was equivalent to that of the ECHR.¹⁴³

¹³⁹ Ibid para 155.

¹⁴⁰ See, generally, N Wenzel, 'Bosphorus Case' in R Wolfrum, *Max Planck Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2008).

¹⁴¹ See *Behrami v France*, Application No 71412/01 and *Saramati v France, Germany and Norway*, Application No 78166/01, European Court of Human Rights (Grand Chamber), inadmissibility decision, 31 May 2007, (2007) 46 ILM 743.

¹⁴² See G de Búrca, *The EU, the European Court of Justice and the International Legal Order after Kadi* (2009) 12 *et seq.*, available at <<http://ssrn.com/abstract=1321313>> (last visited 9 November 2009).

¹⁴³ For a critical assessment of these cases see G Hafner, 'The ECHR torn between the United Nations and the States: The *Behrami* and *Saramati* case' in A Fischer-Lescano *et al.* (eds), *Frieden in Freiheit, Festschrift Michael Bothe* (Nomos Verlagsgesellschaft, Baden-Baden, 2008/2008) 103 and A Breitegger, 'Sacrificing the Effectiveness of the European Convention on Human Rights on the

In the *Kadi* case Advocate General Poirares Maduro seemed to make reference to *Solange* when he declared that the existence of a 'genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations... might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order'.¹⁴⁴

This *Solange* approach is characterized by the following specifics:

- It does not express any deference towards the UN system but instead aims at a profound change of this legal order.
- In any case, this invitation for cooperation sets very demanding conditions when it requires the establishment of an independent tribunal to control UN activities and, in particular, those of the Security Council.

Interestingly, the ECJ seemed to ignore totally this aspect of the Advocate General's opinion. As has been discussed above, at least in the first part of the judgment the ECJ irradiated enormous self-confidence to be part of the 'better' human rights order and to be judge of a system which is representative of the 'true rule of law'. On the basis of such a self-perception no offer of future cooperation¹⁴⁵ and even less a promise of a possible deference appeared to be appropriate. As has been hinted at above¹⁴⁶ it is conceivable that with this statement the ECJ had in mind an agenda that went far beyond fundamental rights protection and that it tried instead to promote further the autonomy of the EU/EC as an independent legal order and to proceed along its way to 'Europeanize international law'.¹⁴⁷ It is too early to say whether this attempt will bring about any concrete result. In the end, the European Union cannot disregard the fact that a common solution to the worldwide fight against terrorism has to be found. If the EU/EC tries to distance itself from the UN in this fight any subsequent backlash in this struggle will also be attributed to the European Union and might eventually also be detrimental to its further political ambitions.¹⁴⁸

Altar of the Effective Functioning of Peace Support Operations: A Critique of *Behrami* & *Saramati* and *Al Jeddá*' (2009) 11 *International Community Law Review* 155.

¹⁴⁴ See Case C-402/05P *Kadi*, opinion of Advocate General Poirares Maduro, 16 January 2008 (n 65 above) para 54.

¹⁴⁵ It has been widely deplored that the ECJ justified its approach exclusively from the perspective of EU fundamental rights protection. Had it derived its position from the international human rights system it might have been easier to lay the basis for an international consensus on this subject. See de Búrca (n 139 above) 44 and D Halberstam and E Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, Jean Monnet Working Paper 2/2009, 58 *et seq.*

¹⁴⁶ See also the doubts expressed by B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 *European Journal of International Law* 265, 292.

¹⁴⁷ See Wouters, Nollkaemper, and de Wet (n 89 above). For a perspective, however, according to which international law still matters very much for and within the European Union see B de Witte, 'International Law as a Tool for the European Union' (2009) 5 *European Constitutional Law Review* 265.

¹⁴⁸ As has been stated correctly, the fight against terrorism can be won only jointly. See M Beulay, 'La Mise en Oeuvre des "Smart Sanctions" des Nations Unies par les États Membres

Does this mean that the European Union and the UN are poised to enter into a fierce confrontation alimented partly by diverging conceptions of fundamental rights protection and partly by a power struggle? This may not necessarily be the case if past experience can be taken as a measure. As has been demonstrated above, the UN has already evidenced some willingness to reform and to take into account several points of criticism with regard to the sanctions mechanism.¹⁴⁹ There is surely room for further reform even though the most extensive proposals, as mentioned above, cannot realistically be implemented for the time being.¹⁵⁰

As is apparent from the *Sayadi* case, pronouncements by authoritative institutions are eventually also noted by the UN Sanctions Committee.¹⁵¹

As has been rightly noted, counter-terrorism strategies are associated with a concrete danger of abuse. Authoritarian governments may officially be fighting terrorism but effectively attacking political opponents. The emergency situation created by the terrorist threat may be used as an excuse for denying fundamental rights and democratic liberties. Such an abuse is not, however, carried out by the UN. Therefore, as well as for reasons of efficiency militating in favour of a dominant role of the UN in this field, it can even be argued that a detailed pre-determination of these sanctions with regard to their content and nature is a valuable deterrent against abuse.

et la Communauté Européenne' (2009) 529 *Revue du Marche Commun et de l'Union Européenne* 367. See also A Reinisch, 'European Court of Justice: Yassin Abdullah Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities (September 9, 2008) Introductory Note' (2008) 47 *ILM* 923.

¹⁴⁹ These reforms were strongly influenced by the so-called White Paper report of Brown University's Watson Institute for International Studies, 'Strengthening Targeted Sanctions Through Fair and Clear Procedures', 30 March 2006, available at <http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf> (last visited 24 August 2009).

¹⁵⁰ It has been suggested that the UN could take an example from the United Nations Interim Administration Mission in the Kosovo (UNMIK), which has established a Human Rights Advisory Panel advising the UN Special Representative on human rights complaints. See G Thallinger, 'Sense and Sensibility of the Human Rights Obligations of the United Nations Security Council' (2007) 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1015, 1039.

¹⁵¹ To achieve this end, however, a tortuous path had to be followed. Nabil Sayadi and Patricia Vinck were, respectively, the director and secretary of the Global Relief Foundation (GRF), also known as Fondation Secours Mondial (FSM), a Belgian institution pertaining to an Islamic charitable organization. They were added to the UN Sanctions list on 22 January 2003 and afterwards targeted also by EU and national sanctions with all the personal and economic restrictions ensuing from such a measure. Belgian national courts, however, could find no wrongdoing with regard to this couple's activities. The Human Rights Committee expressed harsh criticism of these measures and found them illegitimate on several grounds (see CCPR/C/94/D/1472/2006; for a commentary see H Keller and A Fischer, 'The UN Anti-terror Sanctions Regime under Pressure' (2009) 9 *Human Rights Law Review* 257). Finally, on 20 July 2009 the Sanctions Committee approved the de-listing of the couple (see UN Press Release SC/9711 of 21 July 2009, available at <<http://www.un.org/News/Press/docs/2009/sc9711.doc.htm>> (last visited 4 November 2009) and *The Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them*, available at <<http://www.un.org/sc/committees/1267/consolist.shtml>> (last visited 4 November 2009).

It is clear that there are still differences between the UN and the EU/EC concerning the correct balancing of interests in the fields of security and fundamental rights, but these differences are only part of the picture represented by the *Kadi* case. With both institutions so committed to both security and fundamental rights, a solution on the correct balancing should have been reached a long time ago. Such a solution could consist of unorthodox elements, which are more result-oriented than rule-oriented and wherein relatively more time could be attributed to the search for equitable solutions.¹⁵² Such proposals are, however, anathema to those lawyers who put a formal rule-of-law-principle first¹⁵³ and who are less interested in outcome than in justice as procedure, or, to be more explicit, in a specific form of procedure which comes to be identified with justice.

At the beginning of this contribution it was said that none of the theoretical positions that come into play can claim in advance to be the only right and correct one. As long as any institution sticks to dogmatic truths no real value-oriented dialogue can be established.¹⁵⁴ Important values are at stake but no institution can pretend to represent them exclusively or represent only those it considers most important. In addition to a balancing of fundamental rights and security interests it is necessary to balance the positions of leading institutions in the international order. The right way to fight for security and fundamental rights has become an epitaph for representing the good and honest in the international order. In this conflict on reputation it does not appear to be easy to make concessions.¹⁵⁵ A short-term confrontation will probably leave no scars in the international order. It might even be conducive to a new order that better accommodates all the interests involved.¹⁵⁶ In this sense, the confrontational

¹⁵² See Klabbers (n 119 above) 302.

¹⁵³ See, in this context, however, the following statement by Lord Bingham, the President of the British Institute of International and Comparative Law, made in an interview on the rule of law: '[F]air hearing doesn't necessarily mean that all the protections of a full-blown criminal trial should be afforded to the individual but it does mean the thing should be fair in the sense that the person knows broadly what the thrust of the case against him or her is and has a reasonable opportunity to answer it. So the difficult question here is to draw the line between a hearing which is fair and a hearing which isn't': see <<http://www.biicl.org/binghaminterview/>> (last visited 30 August 2009).

¹⁵⁴ It has been noted that some participants of this discussion are not really interested in a balancing of the interests involved. Thus, it was said that after the CFI had passed judgment in the *Yusuf and Kadi* cases, 'the criticism expressed in respect of the jurisprudence of the CFI in subjecta materia at times seem motivated more by a sort of expectation of a judgment finally provoking "a rupture" of the current legal picture rather than by an objective evaluation of the *lex lata*': Gestri (n 131 above) 35.

¹⁵⁵ It must be noted that in the last few years the ECJ has adopted an assertive approach with regard to the relationship of EU law with international law. The most important example is probably the *Mox-Plant* case, Case C-459/03 *European Commission v Great Britain and Ireland*, European Court of Justice, 30 May 2006, [2006] ECR I-4635, in which the ECJ advanced the claim for a privileged position in case of conflicts with other international dispute-settlement institutions. See, more generally on the far-reaching powers the ECJ has arrogated to itself, G Roth and P Hilpold (eds) *Der EuGH und die Souveränität der Mitgliedstaaten* (Linde Verlag, Wien, 2008).

¹⁵⁶ See also KS Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights' (2009) 9 *Human Rights Law Review* 288, 305. As Thomas Franck has evidenced, for a system to be effective, it must be

style in which this dispute has been conducted up to the present day may not be detrimental as it has helped to render the various positions transparent, to clearly delineate them, and to sharpen the sensibility of the interests here at play. It should ensure, however, that the gap between the various positions does not become ever wider. Such a pernicious development could take place, in particular, if the dispute about the right compromise between security interests and judicial guarantees becomes enmeshed with a power struggle between the UN and the European Union. It is very dubious whether such a struggle would lead to an outcome beneficial for the European Union. But what is more, a long-term dispute leading to isolationist and fragmented approaches both in human rights protection and with regard to international security could be highly disruptive for the international order.

I. Testing four hypotheses

The four hypotheses that are at the root of the whole research exercise can be tested on the *Kadi* case.

Hypothesis 1: Although the *Kadi* case has renewed the interest in issues of judicial review of acts of international organizations, this question is not new and not limited to targeted sanctions. In fact, national courts are often asked to exercise some degree of judicial review of acts of international organizations, which frequently takes very indirect forms.

The *Kadi* case has made clear that the necessity for national courts to exercise judicial review of acts of international organizations increases dramatically as soon as these organizations are attempting to regulate the behaviour of the individual. Epochs of struggles have led to the creation of a network of protective provisions in the field of human rights that shield the individual against abuses by the state. The danger may arise that this shield could be circumvented by the creation of international organizations that are empowered to impose obligations on individuals. It is true that in the past the acts of international organizations have had repercussions on the legal position of individuals, at least indirectly. The recourse to targeted sanctions by the Security Council constitutes, however, a new step in this specific area. In fact, in the past international organizations addressed the individual directly first to enhance its individual rights position. This holds true for human rights organizations. When individual criminal responsibility was introduced the relevant provisions and instruments were endowed with extensive safeguards in order to protect the human rights position of the individual. It cannot be doubted that such guarantees have not been foreseen, as of yet, in

seen as effective: 'To be seen as effective, its decisions must be arrived at discursively in accordance with what is accepted by the parties as right process': Th Franck, *Fairness in International Law and Institutions* (Oxford University Press, Oxford, 1995) 7.

the adoption of targeted sanctions. On the other hand, it cannot be doubted that these sanctions have been introduced in order to respond to an immediate and very serious challenge to human rights. Therefore, on the whole, some balancing of interests will be required in an overall assessment of whether these measures are compatible with highly evolved legal orders based on the rule of law and on the protection of human rights.

Hypothesis 2: Challenges against acts of international organizations before national courts are possible regardless of whether the forum jurisdiction follows a monist or a dualist tradition of incorporating international law into the domestic order.

In this regard we have to consider that no state openly declares to follow a monist or dualist approach with regard to the incorporation of international law into domestic law. This is an academic distinction used to describe the specific attitude of a constitutional order towards international law. Although the monist/dualist distinction is extremely contested in some academic quarters, it still enjoys high popularity and it is difficult to deny its worth as a theoretical tool. A constitutional order may be more or less open towards the international order or, respectively, more or less flexible when adaptation to international law precepts is required. In the end, no state (and no international organization like the European Community) can ignore international law while the necessity for immediate and unconditional adaptation constitutes the absolute exception. As a consequence, national courts, and of course also the ECJ, have to consider international law. This is even more the case when international law is implemented nationally. Even if courts pretend to adopt a dualistic attitude, any assessment of the legality of such national norms implies a judgment on the international provisions that stand as its basis. If the ECJ did not want to take a position expressly with regard to the legality of international law provisions underlying EU sanctions law it did not act out of deference towards international law, but to the contrary. Although dualist in its formal appearance this attitude gives rise to a self-perception of moral superiority, of pre-eminence, and therefore of hierarchy. Therefore, the ECJ, at least implicitly, went further than the CFI, which wanted to assess UN law only insofar as the violation of peremptory norms was concerned (even though the CFI was not able to convincingly implement this approach due to the indeterminacy of *jus cogens*).

Hypothesis 3: A human rights review of acts of international organizations by national courts based on internationally accepted principles is more adequate than a review based on checking their conformity with purely national legal concepts.

This is probably one of the most important conclusions that may be drawn from the *Kadi* case. At the same time it harbours the key to a future solution to the underlying conflict. To make respect for UN law conditional upon observance of human rights can be compatible with international law only if the relevant human rights provisions are indeed mirroring a universally recognized standard.

Conversely, to pretend that UN law should defer, at least within the jurisdiction of the EU, to conflicting EU human rights provisions could prove to be highly disruptive for the international legal order and, ultimately, for international human rights protection.

Hypothesis 4: Even though requests for judicial review of acts of international organizations and direct lawsuits against international organizations implicating their immunity from suit are fundamentally different matters, there is an important overlap as regards the underlying policy issues of securing the independent functions of international organizations versus guaranteeing legal protection against them.

International organizations operate within specific legal spheres. In order to operate effectively these legal spheres need protection. In this context it is of fundamental importance that their activity is not second-guessed by standards that are not part of their order. This is no licence for *ultra vires* acts, but the competences Member States attribute to these organizations via an auto-limitation of (state) sovereignty need respect. The evolving standards of human rights protection are posing a formidable challenge to the powers and competences of international organizations. This is a field that demands much attention and where no easy solutions are at hand. Reference can be made, however, to hypothesis 3: restrictions imposed on international organizations will meet less resistance if they are based on universally recognized principles of human rights.

Both the human rights community and international organizations should cooperate in order to develop a set of rights, standards, and obligations that can guarantee smooth cooperation between the different segments of international law and thus avoid further fragmentation and conflict. The *Solange* principle is an early attempt in this regard and has helped to overcome some dangerous conflicts between different legal orders. The *Kadi* case has evidenced that further endeavours in this sense are needed.

J. Conclusion

After completion of this contribution, on 17 December 2009, the new Security Council Resolution 1904 (2009) was issued. This resolution is intended to modify the sanctions procedure and to provide more effective procedural guarantees to individuals and entities subject to targeted sanctions. The most salient innovation concerns the introduction of the figure of an ombudsperson who will provide access to justice. This innovation evidences, on the one hand, that international institutions are capable of learning from achievements at the national level in the area of human rights. In fact, the figure of the ombudsperson has contributed much to the improvement of the protection of individual rights, first before national institutions and subsequently before international institutions. At the same time, however, this development confirms the phenomenon described

above: there is a strong resistance to providing judicial guarantees of highly developed legal orders at the international level that comply, in all technical elements, with those foreseen at the national level.

It is doubtful whether the new measures indicated in Security Council Resolution 1904 (2009) will fulfil the expectations of national courts (or courts like the ECJ) that apply such demanding standards. The continuing reference to the fact that 'the measures... are preventative in nature and are not reliant upon criminal standards set out under national law' will hardly convince these courts. A more intense dialogue at international and national level is still needed.