

THE MYTH OF INTERNATIONAL RULE OF LAW: IN CONTEXT TO THE KADI DECISION

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Introduction

Kadi decisions of the Court of First Instance (CFI)¹ and the European Court of Justice (ECJ)² followed the two theories of relationship of municipal law and international law i.e., Monist and Dualist theory. The CFI placed Community law in a firm hierarchy of international law norms at the apex of which stands the United Nations (UN) Charter. The ECJ, determined that the EU is a self-contained order, whose highest constitutional norms determine irrevocably the outer limits of its competence.³ The ECJ's conclusions and reasoning raise fundamental questions concerning regime conflict and fragmentation in international law. Since the effectiveness of sanctions imposed by the Security Council depends to a large extent on their implementation in domestic law, the judicial review of such implementing measures at the national or regional level may deprive those sanctions of what the ECJ might otherwise term their 'effet utile'.⁴

This paper seeks to examine the relationship between European Union law and international law in light of *Kadi* decision of ECJ and CFI relating to economic sanctions against individuals.

Case Background

This began in aftermath of the attacks on the American Embassy in Africa in 1998, the UN Security Council adopted a series of decisions

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¹ Judgments of the General Court of 21 September 2005 in Case T-306/01 Yusuf and Al Barakaat International Foundation v. Council and Commission, and Case T-315/01 Kadi v. Council and Commission.

² Judgment of the Court of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P. Kadi and Al Barakaat International Foundation/Council and Commission.

³ Takis Tridimas & Jose A. Gutierrez-Fons, *EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?* (Scholarly Works, Paper No. 31, 2009), available at http://elibrary.law.psu.edu/fac_works/31 (last visited Aug. 24, 2014).

⁴ Aurel Sari, *The Relationship between Community Law and International Law after Kadi: Did the ECJ Slam the Door on Effective Multilateralism?*, available at <http://ssrn.com/abstract=1635759> (last visited Aug. 24, 2014).

directed against Al-Qaeda. On 15 October 1999 the Security Council adopted Resolution 1267 (1999)⁵, in which it, inter alia, condemned the fact that Afghan territory continued to be used for the sheltering and training of terrorists and planning of terrorist acts, reaffirmed its conviction that the suppression of international terrorism was essential for the maintenance of international peace and security and deplored the fact that the Taliban continued to provide safe haven to Osama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from territory held by the Taliban and to use Afghanistan as a base from which to sponsor international terrorist operations. In the second paragraph of the resolution the Security Council demanded that the Taliban should without further delay turn Osama bin Laden over to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be arrested and effectively brought to justice. In order to ensure compliance with that demand, paragraph 4(b) of Resolution 1267 (1999) provides that all the States must, in particular, ‘freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need’. In paragraph 6 of Resolution 1267 (1999), the Security Council decided to establish, in accordance with rule 28 of its provisional rules of procedure, a committee of the Security Council composed of all its members (‘the Sanctions Committee’), responsible in particular for ensuring that the States implement the measures imposed by paragraph 4, designating the funds or other financial resources referred to in paragraph 4 and considering requests for exemptions from the measures imposed by paragraph 4.

Taking the view that action by the Community was necessary in order to implement Resolution 1267 (1999), on 15 November 1999 the Council adopted Common Position 1999/727/CFSP concerning restrictive measures against the Taliban⁶. Article 2 of that Common Position prescribes the freezing of funds and other financial resources

⁵ UN Security Council, Resolution 1267 (1999) Adopted by the Security Council at its 4051st meeting on 15 October 1999, 15 October 1999, S/RES/1267 (1999), available at <http://www.unhcr.org/refworld/docid/3b00f2298.html> (last visited Aug. 24, 2014).

⁶ OJ 1999 L 294 at 1.

held abroad by the Taliban under the conditions set out in Security Council Resolution 1267 (1999)⁷. On 14 February 2000, on the basis of Articles 60 EC and 301 EC, the Council adopted Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan.⁸

On 19 December 2000 the Security Council adopted Resolution 1333 (2000)⁹, demanding, *inter alia*, that the Taliban should comply with Resolution 1267 (1999)¹⁰, and, in particular, that they should cease to provide sanctuary and training for international terrorists and their organizations and turn Osama bin Laden over to appropriate authorities to be brought to justice. The Security Council decided, in particular, to strengthen the flight ban and freezing of funds imposed under Resolution 1267 (1999).

On 26 February 2001 the Council adopted Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP.¹¹ On 6 March 2001, on the basis of Articles 60 EC and 301 EC, the Council adopted Regulation (EC) No. 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation No 337/2000.¹² Annex I to Regulation No 467/2001 contains the list of persons, entities and bodies affected by the freezing of funds imposed by Article 2. Under Article 10(1) of Regulation No 467/2001, the Commission was empowered to amend or supplement Annex I on the basis of determinations made by either the Security Council or the Sanctions Committee. On 8 March 2001 the Sanctions Committee published a first consolidated list of the entities which and the persons who must be subjected to the freezing of funds pursuant to

⁷ UN Security Council, Resolution 1267 (1999) adopted by the Security Council at its 4051st meeting on 15 October 1999, 15 October 1999, S/RES/1267 (1999), available at <http://www.unhcr.org/refworld/docid/3b00f2298.html> (last visited Aug. 24, 2014).

⁸ OJ 2000 L 43 at 1.

⁹ UN Security Council, Resolution 1333 (2000)/adopted by the Security Council at its 4251st meeting, on Dec. 19, 2000, Dec. 19, 2000, S/RES/1333(2000), available at <http://www.unhcr.org/refworld/docid/3b00f51e14.html> (last visited Aug. 24, 2014).

¹⁰ UN Security Council, Resolution 1267 (1999) adopted by the Security Council at its 4051st meeting on 15 October 1999, 15 October 1999, S/RES/1267 (1999), available at <http://www.unhcr.org/refworld/docid/3b00f2298.html> (last visited Aug. 24, 2014).

¹¹ OJ 2001 L 57 at 1.

¹² OJ 2001 L 67 at 1.

Security Council Resolutions 1267 (1999)¹³ and 1333 (2000)^{14,15}. That list has since been amended and supplemented several times. The Commission has in consequence adopted various regulations pursuant to Article 10 of Regulation No 467/2001, in which it has amended or supplemented Annex I to that regulation.

On 17 October and 9 November 2001 the Sanctions Committee published two new additions to its summary list, including in particular the names of the following entity and person:

- ‘Al-Qadi, Yasin (A.K.A. Kadi, Shaykh Yassin Abdullah; A.K.A. Kahdi, Yasin), Jeddah, Saudi Arabia’, and
- ‘Barakaat International Foundation, Box 4036, Spånga, Stockholm, Sweden; Rinkebytorget 1, 04, Spånga, Sweden’.

By Commission Regulation (EC) No 2062/2001 of 19 October 2001 amending, for the third time, Regulation No 467/2001¹⁶, Mr. Kadi’s name was added, with others, to Annex I. By Commission Regulation (EC) No 2199/2001 of 12 November 2001 amending, for the fourth time, Regulation No 467/2001¹⁷, the name Al Barakaat was added, with others, to Annex I.

On 16 January 2002 the Security Council adopted Resolution 1390 (2002)¹⁸, which lays down the measures to be directed against Osama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities. Paragraphs 1 and 2 of that resolution provide, in essence, for the continuance of the measures freezing funds imposed by paragraphs 4(b) of Resolution 1267 (1999)¹⁹ and 8(c) of Resolution 1333 (2000)²⁰.

¹³ UN Security Council, Resolution 1267 (1999) adopted by the Security Council at its 4051st meeting on 15 October 1999, 15 October 1999, S/RES/1267 (1999), available at <http://www.unhcr.org/refworld/docid/3b00f2298.html> (last visited Aug. 24, 2014).

¹⁴ UN Security Council, Resolution 1333 (2000)/adopted by the Security Council at 4251st meeting, on Dec. 19, 2000, Dec. 19, 2000, S/RES/1333(2000), available at <http://www.unhcr.org/refworld/docid/3b00f51e14.html> (last visited Aug. 24, 2014).

¹⁵ The Committee’s Press Release AFG/131 SC/7028 of 8 March 2001.

¹⁶ OJ 2001 L 277 at 25.

¹⁷ OJ 2001 L 295 at 16.

¹⁸ UN Security Council, Security Council resolution 1390 (2002) on the situation in Afghanistan, 16 January 2002, S/RES/1390 (2002), available at <http://www.unhcr.org/refworld/docid/3c4e83d34.html> (last visited Aug. 24, 2014).

¹⁹ UN Security Council, Resolution 1267 (1999) adopted by the Security Council at its 4051st meeting on 15 October 1999, 15 October 1999, S/RES/1267 (1999), available at <http://www.unhcr.org/refworld/docid/3b00f2298.html> (last visited Aug. 24, 2014).

²⁰ UN Security Council, Resolution 1333 (2000)/adopted by the Security Council at 4251st meeting, on Dec. 19, 2000, Dec. 19, 2000, S/RES/1333(2000), available at

In accordance with paragraph 3 of Resolution 1390 (2002)²¹, those measures were to be reviewed by the Security Council 12 months after their adoption, at the end of which period the Council would either allow those measures to continue or decide to improve them.

On 27 May 2002 the Council adopted Common Position 2002/402/CFSP concerning restrictive measures against Osama bin Laden, members of the Al-Qaeda organization and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746, 1999/727, 2001/154 and 2001/771/CFSP.²² On 27 May 2002 the Council adopted the contested regulation on the basis of Articles 60 EC, 301 EC and 308 EC. Annex I to the contested regulation contains the list of persons, groups and entities affected by the freezing of funds imposed by Article 2 of that regulation. That list includes, *inter alia*, the names of the following entity and persons:

- ‘Al Barakaat International Foundation; Box 4036, Spånga, Stockholm, Sweden; Rinkebytorget1, 04, Spånga, Sweden’, and
- ‘Al-Qadi, Yasin (alias KADI, Shaykh Yassin Abdullah; alias KAHDI, Yasin), Jeddah, Saudi Arabia’.

Mr. Kadi and Al Barakaat both brought actions seeking annulment of Regulation No 467/2001, the former seeking annulment also of Regulation No 2062/2001 and the latter annulment also of Regulation No 2199/2001, in so far as those measures concern them. In support of his claims, Mr. Kadi put forward in his application before the Court of First Instance three grounds of annulment alleging, in essence, breaches of his fundamental rights. The first alleges breach of the right to be heard, the second, breach of the right to respect for property and of the principle of proportionality, and the third, breach of the right to effective judicial review.

Perspective of Court of First Instance

Examining the relationship between the international legal order under the United Nations and the domestic legal orders or the Community legal order, the Court of First Instance ruled that, from the standpoint of international law, the Member States, as Members of the United Nations, are bound to respect the principle of the

²¹ <http://www.unhcr.org/refworld/docid/3b00f51e14.html> (last visited Aug. 24, 2014).

²² UN Security Council, Security Council resolution 1390 (2002) on the situation in Afghanistan, 16 January 2002, S/RES/1390 (2002), available at <http://www.unhcr.org/refworld/docid/3c4e83d34.html> (last visited Aug. 24, 2014).

²² OJ 2002 L 139 at 4.

primacy of their obligations ‘under the Charter’ of the United Nations, enshrined in Article 103 thereof, which means, in particular, that the obligation, laid down in Article 25 of the Charter, to carry out the decisions of the Security Council prevails over any other obligation they may have entered into under an international agreement.²³ According to the Court of First Instance, that obligation of the Member States to respect the principle of the primacy of obligations undertaken by virtue of the Charter of the United Nations is not affected by the EC Treaty, for it is an obligation arising from an agreement concluded before the Treaty, and so falling within the scope of Article 307 EC. What is more, Article 297 EC is intended to ensure that that principle is observed.²⁴

The Court of First Instance concluded that resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations are binding on all the Member States of the Community which must therefore, in that capacity, take all measures necessary to ensure that those resolutions are put into effect and may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of Community law, that raises any impediment to the proper performance of their obligations under that Charter²⁵. However, according to the Court of First Instance, the mandatory nature of those resolutions stemming from an obligation under international law does not bind the Community, for the latter is not, as such, directly bound by the Charter of the United Nations, not being a Member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the member states for the purposes of public international law.²⁶

In terms of rank, the CFI transposes the formal hierarchy of international law norms set by Article 103 UN Charter within EU law. As a result, UN law is granted primacy over all other sources of EU law, including EU primary law. The only exception to the primacy of international law that is granted by the CFI is the case in which

²³ Case T-315/01, Kadi v. Council of the EU and the Commission of the EC, 2005 O.J. (C 281) paragraphs 181 to 184; and Case T-306/01, Yusuf and Al Barakaat Int'l Found. v. Council of the EU and Commission of the EC, 2005 E.C.R. II-3533 paragraphs 231 to 234.

²⁴ Case T-315/01, Kadi v. Council of the EU and the Commission of the EC, 2005 O.J. (C 281) ¶¶ 185 to 188; and Case T-306/01; Yusuf and Al Barakaat Int'l Found. v. Council of the EU and Commission of the EC, 2005 E.C.R. II-3533 ¶¶ 235 to 238.

²⁵ Case T-315/01, Kadi v. Council of the EU and the Commission of the EC, 2005 O.J. (C 281) ¶¶ 189 and 190; and Case T-306/01, Yusuf and Al Barakaat Int'l Found. v. Council of the EU and Commission of the EC, 2005 E.C.R. II-3533 ¶¶ 239 and 240.

²⁶ Case T-315/01, Kadi v. Council of the EU and the Commission of the EC, 2005 O.J. (C 281) ¶ 192; and Case T-306/01, Yusuf and Al Barakaat Int'l Found. v. Council of the EU and Commission of the EC, 2005 E.C.R. II-3533 ¶ 242.

international law norms violate international *jus cogens* norms. Those norms apply to all international law subjects, including the UN, and hence take priority over the formal hierarchy of norms applying within the UN, and accordingly within EU law. If international *jus cogens* norms were to be violated, the CFI would have the competence to review the international legality of international law norms within the EU legal order.²⁷ As there was no violation of *jus cogens* in the case at hand, the CFI rejected the action in annulment. The CFI's reasoning reflects a monist approach according to which valid international law is also immediately valid within EU law.²⁸

Opinion of Attorney General Maduro

On 16 January 2008, Advocate-General Maduro issued his opinion, disagreeing with the CFI both on the outcome and the reasoning. According to Maduro, the EC is not bound by the UN Charter and by UN Security Council resolutions. The CFI's de facto succession argument cannot be made successfully pertaining to the UN. As a matter of fact, Article 307 EC creates duties for member states to make sure they can abide by their EC obligations. Of course, the EC shares many of the UN's aims and ought to make sure its member states can abide by their obligations under UN law.²⁹ In terms of the relationship between European and international law, the opinion adopts a dualist, or, more exactly, a pluralist approach to international law given Maduro's other writings on the subject.³⁰ Even in cases in which the EC is bound by international law, Maduro considers that '[t]he relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under

²⁷ Case T-315/01, *Kadi v. Council of the EU and the Commission of the EC*, 2005 O.J. (C 281) ¶ 226; Samantha Besson (2009), European Legal Pluralist after Kadi, *European Constitutional Law Review*, 5, pp. 237-264, available at http://journals.cambridge.org/abstract_S1574019609002375 (last visited Aug. 24, 2014).

²⁸ Case T-315/01, *Kadi v. Council of the EU and the Commission of the EC*, 2005 O.J. (C 281) paragraphs 224; Samantha Besson (2009), European Legal Pluralist after Kadi, *European Constitutional Law Review*, 5, Pages 237-264, available at http://journals.cambridge.org/abstract_S1574019609002375 (last visited Aug. 24, 2014).

²⁹ Case C-402/05 P *Kadi*, Opinion of AG Maduro, 16 January 2008, ¶¶ 21-4, 30.

³⁰ M. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. Walker (ed.), *Sovereignty in Transition* 501 (Oxford, Hart Publishing 2003); M. Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, *European Journal of Legal Studies* 1 (2007); Samantha Besson (2009), European Legal Pluralist after Kadi, *European Constitutional Law Review*, 5, pp. 237-264, available at http://journals.cambridge.org/abstract_S1574019609002375 (last visited Aug. 24, 2014).

the conditions set by the constitutional principles of the Community'.³¹

Decision of European Court of Justice

The ECJ's reasoning was robustly dualist, emphasizing repeatedly the separateness and autonomy of the EC from other legal systems and from the international legal order more generally, and the priority to be given to the EC's own fundamental rules. The judgment is striking for its treatment of the U.N. Charter, at least insofar as its relationship to EC law was concerned, as no more than any other international treaty. Furthermore, the judgment gives only perfunctory consideration to the traditional idea of the EC's openness to international law. The ECJ denied that its review of the EC Regulation implementing the U.N. Resolution would amount to any kind of review of the Resolution itself, or of the Charter, and suggested that its annulment of the EC instrument implementing the Resolution would not necessarily call into question the primacy of the Resolution in international law.³² Without specifically mentioning the U.N. Charter, the ECJ declared that: "an international agreement cannot affect the allocation of powers fixed by the Treaties or . . . the autonomy of the Community legal system", that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty", and that the EC is an 'internal' and 'autonomous legal system which is not to be prejudiced by an international agreement'.³³

The ECJ turns hypothetical and envisages the case in which the EC were bound by a UN Security Council resolution. The articulation between the international and European legal orders in such a case would clearly follow a dualist model (rather than a monist one): it is up to EC law to determine the conditions under which the 'transposition' of international law can take place, and hence the validity of international law as a source of EC law within the EU legal order. This follows a fortiori from the ECJ's considerations about the 'internal and autonomous legal order of the Community' as being distinct from the international legal order and about the ECJ's power to review the compatibility between EC law and the constitutional

³¹ Case C-402/05 P Kadi, Opinion of AG Maduro, 16 January 2008, ¶ 24.

³² Grainne de Burca, *The European Court of Justice and the International Legal Order after Kadi*, 51(1) HARVARD INTERNATIONAL LAW JOURNAL 25 (winter 2010), available at <http://www.harvardilj.org/articles/1-50.pdf> (last visited Aug. 24, 2014).

³³ Grainne de Burca, *The European Court of Justice and the International Legal Order after Kadi*, 51(1) HARVARD INTERNATIONAL LAW JOURNAL 25, 26 (winter 2010), available at <http://www.harvardilj.org/articles/1-50.pdf> (last visited Aug. 24, 2014).

guarantees of EC law, a constitutional power that is unaffected by international law. According to the ECJ, the rank of international law within the European legal order is determined by EC law and in particular by Article 300 paragraphs 6 and 7 EC law, including EU constitutional principles and EU fundamental rights (qua general principles of EU law). It is intermediary and international law norms are subordinated to EU primary.³⁴ The bottom line of the judgment, however, was that the U.N. Charter and Security Council resolutions, just like any other piece of international law, exist on a separate plane and cannot call into question or affect the nature, meaning, or primacy of fundamental principles of EC law. In an interesting legal counterfactual, the ECJ asserted that even if the obligations imposed by the U.N. Charter were to be classified as part of the “hierarchy of norms within the Community legal order”, they would rank higher than legislation but lower than the EC Treaties and lower than the “general principles of EC law” which have been held to include “fundamental rights”.³⁵ Not only did the ECJ’s approach provide a striking example for other states and legal systems that may be inclined to assert their local constitutional norms as a barrier to the enforcement of international law, but more importantly it suggests a significant paradox at the heart of the EU’s relationship with the international legal order, the implications of which have not begun to be addressed.³⁶

Conclusion

Without doubt, *Kadi* is a significant case. However, the challenge it presents to the international legal system is tactical, not strategic. D’Aspremont and Dopagne have spoken of the ECJ’s judgment in *Kadi* as a reminder of the elementary divide between legal orders.³⁷ The ECJ’s judgment leaves us with a number of open questions regarding its effects on the structure of the international legal order. Indeed, the question must be asked whether the primacy of UN

³⁴ Samantha Besson, *European Legal Pluralist after Kadi*, 5 EUROPEAN CONSTITUTIONAL LAW REVIEW 237-264 (2009), available at http://journals.cambridge.org/abstract_S1574019609002375 (last visited Aug. 24, 2014).

³⁵ Grainne de Burca, *The European Court of Justice and the International Legal Order after Kadi*, 51(1) HARVARD INTERNATIONAL LAW JOURNAL 25, 26 (winter 2010), available at <http://www.harvardilj.org/articles/1-50.pdf> (last visited Aug. 24, 2014).

³⁶ Grainne de Burca, *The European Court of Justice and the International Legal Order after Kadi*, 51(1) HARVARD INTERNATIONAL LAW JOURNAL (winter 2010), available at http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ_51-1_deBurca.pdf (last visited Aug. 24, 2014).

³⁷ Jean d’Aspremont & Frédéric Dopagne, *Kadi: The ECJ’s Reminder of the Elementary Divide between Legal Orders* 5 IOLR 371 (2008).