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## **Two Ships in the Night or in the Same Boat Together: How the ECJ Squared the Circle and Foreshadowed Lisbon in its Kadi Judgment**

**Abstract:** *This paper argues that the ECJ in its seminal Kadi judgment made the right decision and foreshadowed numerous reforms in the EU's external action introduced by the Lisbon Treaty. It rightly rejected the approach presented by the Court of First Instance, which ultimately turned out to be a false friend of international law. By largely following the Advocate General's Opinion, the Court maintained the superior human rights standard of the EU legal order. Without, however, jeopardizing the compliance of the Member States with their UN obligations right away, it sent a clear warning signal to the UN Security Council to exhaust the potential for reform of the targeted sanction regime. The Court showed that in the face of such global threats as terrorism as well as the undermining of basic human rights, we are all in the same boat together after all.*

### **Introduction**

The issue of targeted anti-terror sanctions has assumed a prominent place in scholarly and public debate over the past years. The most drastic statements describe assets freezing and travel bans as ‘*a civil death penalty*’,<sup>1</sup>

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<sup>1</sup> Quoting Council of Europe Rapporteur Dick Marty in an interview (‘*zivile Todesstrafe*’), B.Kruse, *Zivile Todesstrafe*, “sueddeutsche.de”, 12.11.2007, <http://www.sueddeutsche.de/politik/dick-marty-bericht-zu-terrorlisten-zivile-todesstrafe-1.344886> (last visited 13.07.2010).

destroying the livelihood and reputation of the people concerned and thus turning them into Agambian *homines sacri*, i.e. outlaws ‘without rights and no avenue to recover their presence in society’.<sup>2</sup> It is further alleged that a permanent state of emergency in the ‘war against terror’ serves as a questionable justification for this.<sup>3</sup> Especially the way these sanctions are imposed and maintained at the United Nations Security Council (UNSC) has kindled this criticism, often spawning analogies to the works of Franz Kafka, where the individual usually finds himself helplessly at the mercy of obscure and inaccessible bureaucratic structures.<sup>4</sup>

At the core of this highly charged debate we find the case concerning Yassin Abdullah Kadi, which culminated in the seminal judgment of the European Court of Justice (ECJ) on 3 September 2008,<sup>5</sup> and which has inspired an immense amount of scholarly work.<sup>6</sup> Here, the highest Court of the European Union (EU) was – ‘in a more dramatic way than ever before’<sup>7</sup> – ‘confronted with the complexities of a world system of governance established at three levels, the United Nations (UN) level, represented primarily by the Security Council, the Community level and lastly the national level’.<sup>8</sup> It is precisely this ‘*Mehrebenenproblematik*’<sup>9</sup> (multi-level problem) which makes

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<sup>2</sup> W. Vlcek, *Acts to Combat the Financing of Terrorism: Common Foreign and Security Policy at the European Court of Justice*, “European Foreign Affairs Review” Vol. 11, No. 4/2006, p. 506, referring to: G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. D. Heller-Roazen, Stanford 1998.

<sup>3</sup> See: J. Klabbers, *Kadi Justice at the Security Council?*, “International Organizations Law Review” Vol. 4, No. 2/2008, p. 303–304, also drawing on the philosophical considerations of G. Agamben, *State of Exception*, trans. K. Attell, Chicago 2005.

<sup>4</sup> See: A. von Arnould, *UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz: Die ‘Soweit-Rechtsprechung’ des Europäischen Gerichts Erster Instanz (UN Sanctions and Fundamental Rights Protection Under Community Law: The ‘as-far-as Jurisprudence’ of the Court of First Instance)*, “Archiv des Völkerrechts” Vol. 44, No. 2/2006, p. 211–212; W. Vlcek, op.cit., p. 507; also I. Ley, *Legal Protection Against the UN-Security Council Between European and International Law: A Kafkaesque Situation?*, “German Law Journal” Vol. 8, No. 3/2007, p. 279–294.

<sup>5</sup> Joined Cases C-402/05 and C-415-05 P Kadi and Al Barakaat v. Council and Commission [2008] ECR I-06351. The cases on *Kadi* and *Al Barakaat* had been joined in the appeals phase. However, for reasons of conciseness, this paper will refer only to the judgments and the Advocate General’s Opinion as pertaining to *Kadi*.

<sup>6</sup> For a useful overview see: S. Poli and M. Tzanou, *The Kadi Rulings: a Survey of the Literature*, “Yearbook of European Law” Vol. 28/2009, p. 533–558.

<sup>7</sup> C. Tomuschat, *European Court of First Instance, judgment of 21 September 2005*, “Common Market Law Review” Vol. 43, No. 2/2006, p. 537.

<sup>8</sup> *Ibidem*.

<sup>9</sup> S. Alber, *Kurzbesprechung der Schlussanträge des Generalanwalts Poiares Maduro vom 16.1.2008 (Case Note on the Opinions of Advocate General Poiares Maduro Delivered on 16 January 2008)*, “Europäische Zeitschrift für Wirtschaftsrecht” Vol. 19, No. 6/2008, p. 165.

this case a unique counterpoint in legal history,<sup>10</sup> i.e. a situation in which several legal orders apply simultaneously and have to be reconciled so as to produce harmony instead of discord.<sup>11</sup> How difficult this task is has become apparent in the two starkly divergent approaches presented to the ECJ in the legal process leading up to its judgment, i.e. the judgment of the Court of First Instance (CFI, after Lisbon called the General Court, GC)<sup>12</sup> stressing the primacy of the UN Charter, and the Opinion of Advocate General (AG) Poiares Maduro,<sup>13</sup> stressing the autonomy of the EU legal order. Therefore, these two approaches represent extremes, each with its respective advantages and disadvantages. It will be argued here that the ECJ's judgment managed to take the best from both. Furthermore, it anticipated many of the important changes to EU's external relations constitutional law introduced 13 months later with the entry into force of the Lisbon Treaty,<sup>14</sup> which has among its principal aims making the EU a more assertive player on the international scene.

The paper will proceed as follows: First, the opposing positions taken in the judgment of the CFI and the AG's Opinion will be compared and critically assessed as to how they conceive of the relationship between the EU and the international legal order. This will be followed by an appraisal of the ECJ judgment and its aftermath, as well as its foreshadowing of certain important changes in the law of the EU's external relations brought about by the Lisbon Treaty.

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<sup>10</sup> The notion of 'counterpunctual law' was coined by Miguel Maduro himself, meaning the harmonious interplay between the legal orders of the EU Member States and the European Union itself; see: M.Poiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action* in: *Sovereignty in Transition*, ed. N.Walker, Oxford 2003, p.501–537. In the present context, however, it will concern the interplay between the international and the European legal orders.

<sup>11</sup> Referring to the metaphor used by V.Kronenberger, *Introduction* in: *The European Union and the International Legal Order: Discord or Harmony?*, ed. V.Kronenberger, the Hague 2001, p. XI-XIV.

<sup>12</sup> Case T-315/01 *Kadi v. Council and Commission* [2005] ECR II-03649.

<sup>13</sup> Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v. Council and Commission*, Opinion of Mr Advocate General Poiares Maduro delivered on 16.01.2008 [2008] ECR I-06351.

<sup>14</sup> References in this paper will be made to the Treaties as amended by the Lisbon Treaty, i.e. to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), as well as to the singular legal entity of the EU. References to the Treaties in force before 1 December 2009 will be to the (post-Nice) old Treaty on European Union (old TEU) and the Treaty Establishing the European Community (TEC), including where necessary reference to the former European Community (EC).

## 1. Between misapplication and isolation: Two approaches to solve *Kadi*

With the ECJ being faced with a unique dilemma on how to deal with the review of acts that are a one-to-one transposition of Security Council resolutions (so-called '*non-autonomous sanctions*'), the solutions proposed by the CFI and the AG to solve the dilemma arrived at two completely opposite conclusions, with their respective lines of reasoning differing considerably. To grasp this divergence, and to determine the preferable solution in dealing with the *Mehrebenenproblematik*, first the judgment of the CFI and subsequently the Advocate General's Opinion will be critically scrutinized as to the implications they have for the relationship between European and international law.

### 1.1. The Court of First Instance: A false friend of international law?

In its judgment of 21 September 2005, the CFI trod on new ground concerning the relationship between the EU and UN legal orders, as well as international law in general. Its reasoning can be deconstructed in the following way: First, the CFI chose as point of departure the UN Charter, which it considered to have a binding and supreme character over both the Member States and the EC.<sup>15</sup> Consequently, it presented a changed hierarchy of norms in the (then) EC legal order, granting itself a very limited scope of review against what it considers to be *jus cogens*, i.e. peremptory norms of international law.<sup>16</sup> With a threshold this high, the CFI eventually opined that no human rights violations could be detected.<sup>17</sup> In the following, an appreciation of the CFI's reasoning will be made, concluding that the CFI ended up being a '*false friend*' of international law, while sacrificing most of the legal protection offered by the EU legal order. For the purposes of this paper there are three main remarks to be made.

First, by taking the UN Charter as the starting point, and constantly keeping in mind the setup of the UN throughout its argumentation, the CFI's reasoning is aimed at enabling maximum compliance of both the EU and the Member States with the Charter. The CFI applied the relevant provisions, especially the '*synergy of Articles 25 and 103*',<sup>18</sup> on the primacy (in international law) of the UN Charter and binding decisions taken in accordance with it in a very straightforward manner, not diverting from established public in-

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<sup>15</sup> Case T-315/01 *Kadi*, op.cit., par.178–208.

<sup>16</sup> *Ibidem*, par. 209–232.

<sup>17</sup> *Ibidem*, par. 233–292.

<sup>18</sup> W.Reismann, *The Constitutional Crisis of the United Nations*, "American Journal of International Law" Vol. 87, No. 1/1993, p.93.

international law doctrine.<sup>19</sup> This can be seen as consistent with the traditionally international law friendly attitude of the European Courts, recognising ‘that the European Community must respect international law in the exercise of its powers’.<sup>20</sup> It is here that the ‘*Völkerrechtfreundlichkeit*’<sup>21</sup> (‘friendly attitude towards international law’) of the judgment manifests itself most clearly and most uncontroversially. Most importantly, it sets the UN Charter apart from other international agreements, and therefore appreciates its special character as a global *quasi*-constitutional document.<sup>22</sup>

Following up on that, it is to be welcomed that the CFI underscored the wide discretionary power the Security Council wields in the exercise of its mandate. One should not forget that ‘an integral element of the rule of law [is also] not to push judicial review beyond the limitations which restrict its jurisdiction’<sup>23</sup> and that ‘[t]o assess whether a threat to international peace and security exists is indeed essentially a discretionary decision’<sup>24</sup> requiring ‘a considerable margin of appreciation in determining a state of emergency [...] and the measures required to deal with the situation’.<sup>25</sup> These measures, as is evident from the Charter, can even lead to a derogation from the general prohibition to use force in international relations,<sup>26</sup> entailing not only military but also considerable numbers of civilian casualties.<sup>27</sup>

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<sup>19</sup> C. Tomuschat, *European Court of First Instance*, op.cit., p. 541; see also R. Bernhardt, *Art. 103 in: The Charter of the United Nations: A Commentary*, eds. B. Simma et al., 2<sup>nd</sup> edition, Oxford 2002, Vol. 2, p. 1294–1302.

<sup>20</sup> Case C-286/90 Poulsen and Diva Navigation [1992] ECR I-06019, par. 9; see also: Case 104/81 Kupferberg [1982] ECR 03641; and Case 181–73 Haegeman [1974] ECR 00449.

<sup>21</sup> I. Ley, op.cit., p. 285.

<sup>22</sup> On the constitutional quality of the UN Charter see e.g. B. Fassbender, *Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order in: Ruling the World? Constitutionalism, International Law, and Global Governance*, eds. J. Dunhoff and J. Trachtman, Cambridge 2009, p. 133–147; T. Franck, *Is the UN Charter a Constitution?* in: *Verhandeln für den Frieden / Negotiating for Peace: Liber Amicorum Tono Eitel*, eds. Jochen Frowein et al., Berlin 2003, p. 95–106; and P.-M. Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, “Max Planck Yearbook of United Nations Law” Vol. 1/1997, p. 1–33.

<sup>23</sup> C. Tomuschat, *European Court of First Instance*, op.cit., p. 544.

<sup>24</sup> *Ibidem*, p. 545.

<sup>25</sup> M. Karayigit, *The Yusuf and Kadi Judgments: The Scope of the EC Competences in Respect of Restrictive Measures*, “Legal issues of Economic Integration” Vol. 33, No. 4/2006, p. 398.

<sup>26</sup> UN Charter, Art. 2, par. 4; note also legitimate self-defence as the only other exception, Art. 51.

<sup>27</sup> See S. Alber, op.cit., p. 16; and C. Tomuschat, *Die Europäische Union und ihre völkerrechtliche Bindung (The Bindingness of International Law on the European Union)*, “Europäische Grundrechte-Zeitschrift” Vol. 34, No. 1/2007, p. 7.

Secondly, however, the caveat that has to follow immediately after this point is the question whether there is any form of restraint of the Security Council that could be exercised by the European Courts. As it has been formulated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* case, as an organ of an international organisation, ‘[t]he Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution [i.e. the UN Charter] may be.’<sup>28</sup> The Tribunal, itself a creation of the Security Council, consequently ruled that ‘[i]n any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)’.<sup>29</sup> Indeed, according to the UN Charter, the Security Council has to act ‘in accordance with the Purposes and Principles of the United Nations’<sup>30</sup> in carrying out its mandate, which can be expected to ‘include norms that have been subsequently treated as *jus cogens*’.<sup>31</sup> The CFI used this limitation of the Security Council’s discretion to introduce its own *jus cogens* standard for review. Heralded by some as ‘[t]he strongest argument in favour of limitations on the powers of the Security Council’,<sup>32</sup> it is also the most controversial one. To begin with, even though the existence of a body of peremptory norms as such seems less and less disputed in international law and finds a strong basis in Article 53 of the Vienna Convention on the Law of Treaties (VCLT), there is no clear delimitation between the rules that actually constitute *jus cogens* and those that do not.<sup>33</sup> In any case, more or less undisputed appear to be the prohibition of aggression, slavery, genocide, torture, piracy as well as the right to self-defence and the respect for elementary human rights and norms of international humanitarian law.<sup>34</sup> In view of the uncertainty surrounding the sub-

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<sup>28</sup> Case IT-94-1-I Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 28.

<sup>29</sup> *Ibidem*.

<sup>30</sup> UN Charter, Art. 24, par. 2.

<sup>31</sup> *Report of the International Law Commission*, Official Records, Sixty-first Session, Supplement No. 10 (A/61/10), 2006, p. 422.

<sup>32</sup> See: A. Hudson, *Not a Great Asset: The UN Security Council’s Counter-Terrorism Regime: Violating Human Rights*, “Berkeley Journal of International Law” Vol. 25, No. 2/2007, p. 212.

<sup>33</sup> International scholarship is virtually unanimous in agreeing that here is no consolidated agreement on the scope of *jus cogens* yet, see e.g. P. Tavernier, *L’identification des règles fondamentales, un problème résolu? (The Identification of Fundamental Rules, a solved problem?)* in: *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, eds. C. Tomuschat and J.-M. Thouvenin, Leiden 2006, p. 1; P.-M. Dupuy, *Droit international public (Public International Law)*, 7<sup>th</sup> edition, Paris 2004, p. 285; I. Brownlie, *Principles of Public International Law*, 6<sup>th</sup> edition, Oxford 2003, p. 490.

<sup>34</sup> *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskeniemi, A/CN.4/L.682, 13 April 2006, par. 374–376.

ject, the CFI thus trod on thin ice when it boldly embarked on reviewing indirectly UN Security Council resolutions under its very own notion of what this *jus cogens* should be.

Nevertheless, the result might have been more acceptable if the assessment had been done thoroughly and in accordance with the VCLT, i.e. determining for each right whether it is ‘*accepted and recognized by the international community of States as a whole*’<sup>35</sup> as being of a peremptory character. The CFI, however, did nothing of this kind. Instead, it simply referred to the advisory opinion of the International Court of Justice (ICJ) on the legality of nuclear weapons,<sup>36</sup> which does not mention *jus cogens* at all, but instead deals with the customary law status of certain core parts of international humanitarian law.<sup>37</sup>

From this flawed starting point, the CFI proceeded to the different human rights breaches alleged by the applicant. Concerning the right to property, instead of relying on the International Covenants on Human Rights, the CFI only referred to the Universal Declaration of Human Rights, which can also be described as an ‘*abortive*’<sup>38</sup> approach. More importantly, however, despite its claim only to review the challenged acts by a standard of whatever it understands to be *jus cogens* the CFI went ‘*much further in its examination than would correspond to the premises which it adopted as guidance*’.<sup>39</sup> Concerning the applicant’s other two claims ‘*the Court does not even make an attempt to show that [these] right[s] have the nature of jus cogens*’,<sup>40</sup> but simply reverts to ECJ<sup>41</sup> and European Court of Human Rights (ECtHR) case law.<sup>42</sup>

Under such circumstances, one could question whether the CFI acting as a friend of international law is indeed beneficial to international law. In any case, one has to agree with van den Herik that the CFI’s reasoning ‘*adds to the argument that national and regional courts are in fact not the proper place for the review of Security Council measures*’.<sup>43</sup> Given the imprecise boundaries of *jus cogens*, such an argument is prone to abuse by other (less independent) courts among UN members to find a justification to escape fulfil-

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<sup>35</sup> VCLT, Art. 53.

<sup>36</sup> Case T-315/01 Kadi, op.cit., par. 231.

<sup>37</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, par. 79.

<sup>38</sup> C. Tomuschat, *European Court of First Instance*, op.cit., p. 547.

<sup>39</sup> *Ibidem*, p. 548.

<sup>40</sup> *Ibidem*, p. 549.

<sup>41</sup> Case T-315/01 Kadi, op.cit., par. 255.

<sup>42</sup> *Ibidem*, par. 287.

<sup>43</sup> L. van den Herik, *The Security Council’s Targeted Sanctions Regimes: In Need of Better Protection of the Individual*, “Leiden Journal of International Law” Vol. 20, No. 4/2007, p. 801 (emphasis in the original).

ment of their obligation in the collective effort to combat international terrorism and thus could create loopholes and safe havens for terrorists.<sup>44</sup> Furthermore, if various domestic and regional courts started applying their very own *jus cogens*, this would lead to the proliferation of notions of what constitutes the absolute core of international law, leading to the fragmentation of international law.

Thirdly, notwithstanding its questionable application of *jus cogens*, the fiercest criticism has to be directed at the actual result of the judgment, namely that the applicant's claims were dismissed altogether, therefore refusing him legal protection against the sanctions which obviously had grave consequences for his life.<sup>45</sup> From this perspective, it has to be conceded that the CFI's seemingly friendly attitude towards international law came at a very high price, namely sacrificing the protection of human rights as guaranteed by the EU legal order, from which the applicants in e.g. in the *Organisation des Modjahedines du peuple d'Iran (OMPI)*<sup>46</sup> cases had fully benefited due to a less direct link between the Community measures and Security Council resolutions (so-called '*non-autonomous sanctions*', where UN members enjoy a certain margin of appreciation in terms of implementation).

In sum, contrasting this sacrifice with a closer look at what has actually been won, namely a questionable and '*adventurous*'<sup>47</sup> application of international law leading to a quasi-'*submission*'<sup>48</sup> of the EU legal order to a *de facto* unaccountable Security Council, evidently begs the question: Is this really worth it? In any case, against such a backdrop, the temptation to choose

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<sup>44</sup> See: C. Möllers, *Der EuG konstitutionalisiert die Vereinten Nationen: Anmerkung zu den Urteilen des EuG vom 21.09.2005, Rs. T-315/01 und T-315/01 (The CFI Constitutionalizes the United Nations: Note on the CFI Judgments of 21 September 2005)*, "Europarecht" Vol. 41, No. 3/2006, p. 428.

<sup>45</sup> See: C. Eckes, *Judicial Review of European Anti-Terrorism Measures – The Yusuf and Kadi Judgments of the Court of First Instance*, "European Law Journal" Vol. 14, No. 1/2008, p. 92. Due process deficiencies at the UN level had also spawned a number of high-level reports, see I. Cameron, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, Report commissioned by the Council of Europe, 06.02.2006.; B. Fassbender, *Targeted Sanctions and Due Process*, Study commissioned by the United Nations Office of Legal Affairs, 20.03.2006; and T. Bierstecker and S. Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30.03.2006.

<sup>46</sup> Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council* [2006] ECR II-04665.

<sup>47</sup> J. D'Aspremont and F. Dopagne, *Kadi: The ECJ's Reminder of the Elementary Divide between Legal Orders*, "International Organization Law Review" Vol. 5, No. 2/2008, p. 378.

<sup>48</sup> 'Unterordnung', K. Schmalenbach, *Normentheorie vs. Terrorismus: Der Vorrang des UN-Rechts vor EU-Recht (Norm Theory vs. Terrorism: The Primacy of UN Law over EU Law)*, "Juristenzeitung" Vol. 61, No. 7/2006, p. 352.

another solution that pays less attention to obligations under international law and doing more to protect the internal values of the EU becomes considerable.

## 1.2. Advocate General Poiares Maduro: Outsourcing the problem?

This temptation to seek a more fundamental rights-friendly solution seems also to have motivated AG Poiares Maduro's reasoning in the Opinion he delivered on 16 January 2008 concerning Mr Kadi's appeal. In contrast to the CFI, the Advocate General chose as his argumentative starting point the (then) EC legal order, stressing its autonomy.<sup>49</sup> This led to an argumentation based on the superior protection of the individual in the EC legal order.<sup>50</sup> This in turn resulted in the detection of several breaches of fundamental rights by the EC acts implementing the sanctions, which should accordingly be annulled.<sup>51</sup> In the following appraisal, it will be pointed out that while the Opinion is consistent in itself, it theoretically risks leading to the isolation of the EC legal order and ultimately to an outsourcing of the problem.

The way international law has been treated by AG Poiares Maduro in the *Kadi* case differs fundamentally from the CFI's approach, with the most obvious difference being that the AG spends far fewer words on it. His argument remains, most of the time, firmly within the realms of EU law. However, also this silence on the matter is quite revealing of the way he conceives of the relationship between international and European law. Three main observations are to be made in this respect.

First, as has been pointed out, the fundament of AG Poiares Maduro's argument is the autonomy of the EC legal order. He kept stressing throughout that it was even a so-called '*municipal legal order*'.<sup>52</sup> Thus, even though '*[t]his does not mean, however, that the Community's legal order and the international legal order pass by each other like ships in the night*',<sup>53</sup> in his view, the Court's duty '*first and foremost, is to preserve the constitutional framework of the [EC] Treaty*'.<sup>54</sup>

This can be seen as the latest of several steps in EU jurisprudence of severing the Union legal order from the international one from which it originated. The formulation of '*a new legal order of international law*'<sup>55</sup> in *van*

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<sup>49</sup> Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, Opinion of AG Poiares Maduro, op.cit., par. 21–24.

<sup>50</sup> *Ibidem*, par. 25–40.

<sup>51</sup> *Ibidem*, par. 41–55.

<sup>52</sup> *Ibidem*, par. 21, 22, 23, 37 and 39.

<sup>53</sup> *Ibidem*, par. 22.

<sup>54</sup> *Ibidem*, par. 24.

<sup>55</sup> Case 26/62 *van Gend en Loos* [1962] ECR (English special edition) 00001, par. 9.

*Gend en Loos* still gave the impression that it formed part of public international law. But only shortly thereafter, the judgment in *Costa v ENEL* established a trend more towards something resembling a domestic legal order by stressing that '[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply'.<sup>56</sup> Eventually, the ECJ started referring to the EC Treaty as the '*basic constitutional charter*'<sup>57</sup> of the Community legal order. Also European law scholars concluded that in spite of its origins in public international law, EC law had emancipated into an autonomous legal order,<sup>58</sup> a quality the ECJ was '*particularly insistent on defending*'.<sup>59</sup> With regard to the effects of international law therein, it has been observed that this stance strongly resonates the German bridge metaphor attributed to justice Paul Kirchhof, whereby '*judges operating within the putatively closed entity have the function of guards deciding whether or not a legal act from a foreign power may pass*',<sup>60</sup> with the guard '*exclusively apply[ing] his own standards*'.<sup>61</sup>

However, one cannot help to develop some degree of suspicion vis-à-vis this over-emphasising of the EC's legal autonomy. Even though not the focus of the discussion here, the difficult task the Council, Commission, CFI and AG encountered in finding some '*Magic Mixture*'<sup>62</sup> of articles as a legal basis for (then) EC competence to implement targeted sanctions is telling: At one point always elements form the intergovernmental Common Foreign and Security Policy (CFSP) pillar came into play.<sup>63</sup> The circumstance that '*even when acting within the scope of the CFSP, the Member States must respect EC law*'<sup>64</sup> does not offer much consolation, seeing that the CFSP is excluded from the

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<sup>56</sup> Case 6/64 *Costa v ENEL* [1964] ECR (English special edition) 00614, par. 8.

<sup>57</sup> Case 294/83 *Les Verts v Parliament* [1986] ECR 01339, par. 23.

<sup>58</sup> See e.g. M. Herdegen, *Europarecht (European Law)*, 6<sup>th</sup> edition, Munich 2004, p. 68.

<sup>59</sup> P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials*, 4<sup>th</sup> edition, Oxford 2008, p. 202.

<sup>60</sup> M. Nettesheim, *U.N. Sanctions Against Individuals – A Challenge to the Architecture of European Union Governance*, "Common Market Law Review" Vol. 44, No. 3/2007, p. 580.

<sup>61</sup> *Ibidem*.

<sup>62</sup> Referring to the CFI's judgment, C. Eckes, *Judicial Review...*, op.cit., p. 79; see in detail on the issue M. Cremona, *EC Competence, 'Smart Sanctions' and the Kadi Case*, "Yearbook of European Law" Vol. 28/2009, p. 559–592.

<sup>63</sup> Joined Cases C-402/05 and C-415-05 P *Kadi and Al Barakaat*, op.cit., par. 158–236, especially par. 226; Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, Opinion of AG Poiares Maduro, op.cit., par. 11–15; Case T-315/01 *Kadi*, op.cit., par. 64–135.

<sup>64</sup> P. Craig and G. de Búrca, op.cit., p. 190; based on Case C-124/95 *Centro-Com* [1997] ECR I-00081, par. 25.

ECJ's jurisdiction,<sup>65</sup> and thus evidently did not quite constitute a 'complete system of judicial protection'<sup>66</sup> at that time. Besides that, the fact that any amendment of such a 'constitutional charter' has to be made by unanimous decision of the Member States acting as the *seigneurs des traités* also serves as an indication that this 'legal order [was] still dominated by the spirit of international law'<sup>67</sup> to a certain extent. Lastly, what also fits uneasily with this 'municipal' quality of EC law is the fact that e.g. the German Constitutional Court through its *Solange-II* ruling still reserves the right to review Community acts should the EC cease to exercise a materially equivalent degree of fundamental rights protection.<sup>68</sup> Therefore, the conclusion that the legal effects of review will remain confined to the EC, while the law of treaties and state responsibility will deal with the outside world, might be too black-and-white a depiction for two legal orders with an undeniable grey area still between them.

Secondly, however, introducing the *Solange* jurisprudence of the German Bundesverfassungsgericht in the discussion of the way *Kadi* was approached by AG Poiares Maduro also reveals one of its greatest merits. It is important to note that even though the German Constitutional Court in *Solange-II* did not relinquish its right of review, it decided to refrain from exercising it for as long as the EU legal order maintained a level of protection that it deemed appropriate.<sup>69</sup> Essentially the same argument was used in the judgment of the ECtHR in *Bosphorus*, stating that measures taken to comply with international obligations such as UN sanctions are 'justified 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 which can be considered at least equivalent to that for which the [European Convention on Human Rights (ECHR)] provides'.<sup>70</sup> But accepting an external protection standard requires a 'leap of faith'<sup>71</sup> by the reviewing instance de-

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<sup>65</sup> Art. 46 *juncto* Art. 35 old TEU.

<sup>66</sup> Joined cases C-402/05 P and C-415/05 P *Kadi* and *Al Barakaat*, Opinion of AG Poiares Maduro, *op.cit.*, par.31.

<sup>67</sup> B.de Witte, *Rules of Change in International Law: How Special is the European Community?*, "Netherlands Yearbook of International Law" Vol. 25/1994, p. 331; see also B. Simma and D. Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, "European Journal of International Law" Vol. 17, No. 3/2006, p. 516–519; and J. Allain, *The European Court is an International Court*, "Nordic Journal of International Law" Vol. 68, No. 3/1999, p. 249–274.

<sup>68</sup> Bundesverfassungsgericht (German Constitutional Court), *Solange-II*, 2 BvR 197/83 vom 22.10.1986, BVerfGE 73, p. 387.

<sup>69</sup> See: M. Herdegen, *op.cit.*, p. 208.

<sup>70</sup> Application no. 45036/98 *Bosphorus v. Ireland* (2006) 42 EHRR 1, par. 155.

<sup>71</sup> 'Vertrauensvorschuss', A. von Arnould, *op.cit.*, p. 208.

sisting from the ordinary conduct of its mandate. However, the ECtHR also ruled that ‘any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of [ECHR] rights was manifestly deficient’.<sup>72</sup> AG Poiares Maduro indeed hinted at the possibility of ‘solanging’ the issue by suggesting at the end of his Opinion that if there ‘had been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control’.<sup>73</sup> But there is no denying that with the ICJ not being accessible to individuals<sup>74</sup> (and generally somewhat reluctant when it comes to ‘[s]econd-[g]uessing the Security Council’)<sup>75</sup> and the Security Council itself still only providing ‘a purely political mechanism’<sup>76</sup> for review, there is no judicial remedy whatsoever available at the UN level. Therefore, there is a point in saying that the UN does not (yet) deserve such a leap of faith.<sup>77</sup> Thus, when construing it as a clear-cut ‘choice between a fully developed legal system for the protection of individual rights, [and] an embryonic system ill-equipped to deal with instances of direct individual grievances’,<sup>78</sup> AG Poiares Maduro undoubtedly made the right choice. For him the *Kadi* case is in no way more special than for instance *OMPI*. From a purely EU law point of view, this choice prevents external interference from corroding a more deeply integrated legal system. From a human rights point of view, it shifts the balance from international security concerns to the protection of the individual. Even though the AG does not claim to review the UNSC resolutions as such, at least adversely affected individuals can seek remedies at the regional/domestic level against the implementing measures.

This unequivocal choice by the Advocate General in favour of the EU’s legal autonomy and its more sophisticated human rights protection also leads to the third observation. Instead of simplifying the problem,<sup>79</sup> it is argued here that it instead defers the problem to another level, by letting public international law deal with the ulterior ‘repercussions’<sup>80</sup> of the AG’s argumentation.

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<sup>72</sup> Application no. 45036/98 *Bosphorus v Ireland*, op.cit., par. 156.

<sup>73</sup> Joined cases C-402/05 P and C-415/05 P *Kadi* and *Al Barakaat*, Opinion of AG Poiares Maduro, op.cit., par. 54.

<sup>74</sup> Statute of the ICJ, Art. 34.

<sup>75</sup> K. Roberts, *Second-Guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review*, “Pace International Law Review”, Vol. 7, No. 2/1995, p. 281–327.

<sup>76</sup> I. Cameron, op.cit., p. 6.

<sup>77</sup> A. von Arnould, op.cit., p. 208–209; see also M. Nettesheim, op.cit., p. 592.

<sup>78</sup> C. Tomuschat, *European Court of First Instance*, op.cit., p. 544.

<sup>79</sup> S. Alber, op.cit., p. 166.

<sup>80</sup> Joined cases C-402/05 P and C-415/05 P *Kadi* and *Al Barakaat*, Opinion of AG Poiares Maduro, op.cit., par. 38.

Had the ECJ indeed annulled the contested regulation as far as it concerned Mr Kadi, his assets would have been unfrozen and the travel ban lifted. However, he (and others who would have successfully challenged EU measures) would remain on the Security Council's list, with the EU Member States being barred from implementing the sanctions individually.<sup>81</sup> This might not only 'inconvenience the Community and its Member States in their dealings on the international stage',<sup>82</sup> as the AG put it, but would amount to nothing less than forcing 27 UN member states to violate their obligations under the UN Charter. With the Security Council stressing that targeted sanctions represent 'a significant tool in combating terrorist activity'<sup>83</sup> and calling for their 'robust implementation',<sup>84</sup> this could be seen as an indication that non-compliance is not a petty offence.

It may be defensible to argue that it is up to the parties how to live up to their international obligations internally, with failure to comply again being regulated by international law (state responsibility or special rules).<sup>85</sup> However, the Advocate General fails to acknowledge here the special nature of the United Nations in the sector of international security, which cannot be dealt with just like any organisation.<sup>86</sup> In addition, he does not address the lack of room for manoeuvrability in the present case. Be it justified or not, there is no changing the fact that in the *Kadi* case the Union and the Member States do simply not have any leeway when implementing the sanctions from a UN perspective. In this case the EU is indeed just the 'transmission belt'<sup>87</sup> of the Security Council. Hence, unlike international trade under the World Trade Organisation (WTO) framework, there are no alternative solutions conceivable such as 'payment of compensation or suspension of concessions'.<sup>88</sup> In the realm of international security, such options would be plainly absurd.

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<sup>81</sup> See: Case C-124/95 *Centro-Com*, op.cit., par. 25.

<sup>82</sup> Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, Opinion of AG Poiares Maduro, op.cit., par. 39.

<sup>83</sup> UN Security Council Resolution 1822/2008, S/Res/1822 (2008), 30.06.2008, 9<sup>th</sup> perambulatory clause.

<sup>84</sup> *Ibidem*.

<sup>85</sup> A. Schaus, *Article 27 – Droit interne et respect des traités (Article 27 – Internal Law and the Respect for Treaties)* in: *Les Conventions de Vienne sur le Droit des Traités (The Vienna Conventions on the Law of Treaties)*, eds. O. Corten and P. Klein, Brussels 2006, Vol. 2, p. 1132–1137.

<sup>86</sup> S. Alber, op.cit., p. 166.

<sup>87</sup> 'Transmissionsriemen', A. von Arnould, op.cit., p. 203.

<sup>88</sup> Joined cases C-27/00 and C-122/00 *Omega Air* [2002] ECR I-02569, par. 89. These 'alternative' options are already questionable in view of WTO obligations, see M. Herdegen, op.cit., p. 391–392.

Lastly, even though such judicially forced non-compliance would in AG Póiarés Maduro's reasoning not lead to the fragmentation of international law (what is not applied cannot be fragmented), the danger for abuse remains just as with the CFI's application of *jus cogens*. If the AG's approach would be followed by other courts, they would not even have (to pretend) to apply a universal standard. Instead, it would be every UN member state's respective constitutional values that could serve as an excuse for escaping Chapter VII obligations, which could prove to be quite an '*explosive force*' for the UN architecture.<sup>89</sup>

In sum, we have thus seen that also AG Póiarés Maduro's approach, despite its obvious merits, comes at a price. While the CFI was eventually qualified as a false friend of international law, the Advocate General could be described as an honest sceptic of the international legal order. But while he is safeguarding the applicant's fundamental rights and preserving the autonomy of the EU legal order, he sacrifices in principle the commitment of 27 UN members to the UN's system of collective security.

## 2. Squaring the circle: The international ramifications of the ECJ judgment

On 3 September 2008, the ECJ pronounced its anxiously awaited judgment in the case, largely following the AG's Opinion—with some significant differences, however. First, (unsurprisingly) the starting point of the ECJ is also the autonomy of the EC legal order as '*a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions*'.<sup>90</sup> It hereby follows the AG's dualist approach, pointing out that what is being reviewed are EU acts, and not the UN Security Council resolutions as such. However, it is remarkable that while explaining this, the Court makes the effort of emphasising the importance of international law and in particular of Chapter VII of the UN Charter.<sup>91</sup> This does eventually give flesh to the AG's statements that the EU is '*beholden to*'<sup>92</sup> international law and that the two legal orders do indeed not '*pass by each other like ships in the night*'.<sup>93</sup> From this follows, as in the AG's Opinion, that UN Char-

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<sup>89</sup> 'Institutionelle Sprengkraft', A. von Arnould, op.cit., p. 210; similarly C. Tomuschat, *Die EU und ihre völkerrechtliche Bindung*, op.cit., p. 6.

<sup>90</sup> Joined Cases C-402/05 and C-415-05 P Kadi and Al Barakaat, op.cit., par. 281.

<sup>91</sup> Ibidem, par. 286–302.

<sup>92</sup> Joined cases C-402/05 P and C-415/05 P Kadi and Al Barakaat, Opinion of AG Póiarés Maduro, op.cit., par. 21.

<sup>93</sup> Ibidem, par. 22.

ter obligations, despite their overriding importance in the sphere of international law, cannot change the hierarchy of norms within the Union's legal order, with the treaties and the fundamental principles enshrined therein at the top.<sup>94</sup> Again, it is to be noted that the Court nonetheless dwells in its reasoning both on the jurisprudence of the ECtHR, as well as the changes that have been effected at the UN level to improve the targeted sanctions regime, like the requirement to provide information to the listed individual and the possibility to individually petition for re-examination of their case.<sup>95</sup> The ECJ thus shows that stressing the autonomy of its own legal order does not have to entail ignoring whatever is happening outside of it. As a result, it states that under the present circumstances, a full review of the implementation measures against Union law would be called for, and dismisses (probably to the relief of many public international law scholars) the CFI's venture into its own *jus cogens* review. According to this standard of review, it goes on to detect infringements of the right to be heard, the right to effective judicial review and, resulting from these procedural deficiencies, also the right to respect for property.<sup>96</sup> Finally, also at this stage of its reasoning, the ECJ demonstrates awareness of the wider context, e.g. the necessity of a 'surprise effect' of targeted sanctions in order to prevent circumvention,<sup>97</sup> or the need to strike a 'fair balance' between the public interest in effectively combating terrorism on a global scale and the individual interest to have one's property respected.<sup>98</sup>

It is also these considerations that prompt the Court in the final part of its reasoning to depart from the AG's Opinion. The Court recognizes that the immediate annulment of the regulation with respect to the applications 'would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures [...] because in the interval preceding its replacement by a new regulation Mr Kadi and Al Barakaat might take steps seeking to prevent measures freezing funds from being applied to them again'.<sup>99</sup> Furthermore, notwithstand-

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<sup>94</sup> Joined cases C-402/05 P and C-415/05 P Kadi and Al Barakaat, op.cit. par. 281. For an argument that the *Kadi* judgment even elevated the position of fundamental rights within the EU legal order's hierarchy of norms, see N. Isiksel, *Fundamental rights in the EU after Kadi and Al Barakaat*, "European Law Journal" Vol. 16, No. 5/2010, p. 571–577.

<sup>95</sup> *Ibidem*, par. 310–325; see also UN Security Council Resolution 1735/2006, S/Res/1735 (2006), 22 December 2006; and the UNSC Sanction Committee's guidelines, the latest version being: UN 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, adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007, and 9 December 2008.

<sup>96</sup> Joined cases C-402/05 P and C-415/05 P Kadi and Al Barakaat, op.cit., par. 331–372.

<sup>97</sup> *Ibidem*, par. 340.

<sup>98</sup> *Ibidem*, par. 360.

<sup>99</sup> *Ibidem*, par. 373.

ing the infringements against the applicants, the ECJ underlines also that *'it cannot be excluded that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified'*.<sup>100</sup> Therefore, by virtue of Article 231 TEC (now Article 264 TFEU), the Court ruled that the effects of the measures should be maintained for three months, allowing the Union institutions to bring the implementing measures in line with EU law.<sup>101</sup>

In response to the judgment, on 28 November 2008, Commission Regulation 1190/2008 was adopted, stating that *'the Commission has communicated the narrative summaries of reasons provided by the UN Al-Qaida and Taliban Sanctions Committee, to Mr Kadi and to Al Barakaat International Foundation and given them the opportunity to comment on these grounds in order to make their point of view known'*.<sup>102</sup> After having received and considered such comments, the Commission ruled that the listing of Mr Kadi (and Al Barakaat) was justified due to association with Al-Qaida and that he should be (re-)added to the list. The regulation entered into force exactly three months after the ECJ judgment was pronounced. Thereupon, Mr Kadi challenged the new regulation before that General Court, which rendered its judgment on 30 September 2010 following an expedited procedure. The GC followed – even though grudgingly<sup>103</sup> – the guidelines adopted by the ECJ, concluding that it has to *'ensure [...] "in principle the full review" of the lawfulness of the contested regulation in the light of fundamental rights'*.<sup>104</sup> Regarding the Commission's compliance measures mentioned above, and in view of the fact that no actual evidence had been produced thus far before the Court by the institutions justifying Mr Kadi's listing, the GC ruled that *'the applicant's rights of defence have been "observed" only in the most formal and superficial sense'*.<sup>105</sup> Given that the new regulation was also in breach of the applicant's fundamental rights, the GC decided that it, too, had to be annulled so far as it concerns Mr Kadi.<sup>106</sup> However, the annulment will only take effect after a two-month period, or in case of an unsuccessful appeal. That means he still remains on the list.

While from an EU law point of view the ECJ's judgment is undoubtedly

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<sup>100</sup> Ibidem, par. 374.

<sup>101</sup> Ibidem, par. 375–376.

<sup>102</sup> Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101<sup>st</sup> time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban; OJ L 322, 2.12.2008, p. 25–26.

<sup>103</sup> Case T-85/09 Kadi v. Commission, judgment of 30 September 2010, not yet reported, par. 112–122.

<sup>104</sup> Ibidem, par. 126, quoting Joined cases C-402/05 P and C-415/05 P Kadi and Al Barakaat, op.cit., par. 326–327.

<sup>105</sup> Ibidem, par. 171.

<sup>106</sup> Ibidem, par. 195.

to be welcomed, let us now turn to the ramifications it can be expected to produce on the international scene. Two observations are to be made in this respect, one for the short-term and one for the long-term.

Firstly, for the time being, the ECJ's judgment managed to square the circle, or otherwise put, to take the best of two worlds: It adopted the AG's legally stringent reasoning, but by virtue of the temporary continuation of the effects of the measures, it maintains also compliance with international obligations. That means that the EU and its Member States continue to fulfil their obligations under the UN Charter, and thus would have nothing to fear from the UNSC. This continued compliance, combined with the sensitivity the ECJ showed in its reasoning for developments on the international scene, should not be underestimated. Taking this into account, it would seem exaggerated to derive from the judgment the impression that the ECJ, or more generally the EU, 'has adopted a largely instrumentalist and self-serving approach',<sup>107</sup> which would be not so 'different from the US in its hard-headed, pick-and-choose attitude to international obligations'.<sup>108</sup>

As a result, however, Mr Kadi has remained the subject of restrictive measures directed against him. Assuming that he would seek, next to the EU Courts, other legal remedies still open to him, he might either bring the matter before a national judge (in the EU) or the ECtHR. The former, however, is a very unpromising option, as he would first have to find a court willing to judge upon a matter just adjudicated by, and again pending before the EU courts. This would presuppose a downward 'solanging', a possibility at least theoretically present in Germany according to the *Solange-II* judgment. But in view of the unlikelihood of this case (and others) actually making it all the way up to that court, as well as the unlikely willingness of the Bunderversfassungsgericht or other Member State courts to challenge both the ECJ and the UNSC, this does not appear as a viable option.<sup>109</sup>

As for the latter, it is not excluded that the applicant eventually will continue his case against EU Member States before the ECtHR as the 'fourth instance',<sup>110</sup> just as the applicant did in *Bosphorus*. This upward 'solanging' is

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<sup>107</sup> G. de Búrca, *The European Courts and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci*, "European Journal of International Law" Vol. 20/2009, p. 853.

<sup>108</sup> Ibidem, p. 854; see also G. de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, "Harvard International Law Journal" Vol. 51/2010, p. 2–4.

<sup>109</sup> See in this context also the ruling of the United Kingdom House of Lords in *Al-Jedda v. Secretary of State for Defence* [2007] UKHL 58.

<sup>110</sup> N. Lavranos, *Judicial Review of UN Sanctions by the Court of First Instance*, "European Foreign Affairs Review" Vol. 11, No. 4/2006, p. 485; see in detail A. Ciampi, *The potentially competing jurisdiction of the European Court of Human Rights and the European Court of Justice*, "Yearbook of European Law" Vol. 28/2009, p. 601–609.

not entirely unrealistic and unpromising, because the ECtHR explicitly stated in its *Bosphorus* judgment that it would be prepared to step in as soon as human rights protection elsewhere proved to be ‘*manifestly deficient*’.<sup>111</sup> Then again, taking into account the ECtHR’s decision on *Behrami and Saramati*, where that court showed a large degree of deference towards the UN, renders the prospects of success for a challenge more questionable.<sup>112</sup> However, as long as the case is pending before the EU Courts, it is unlikely that the ECtHR would intervene.<sup>113</sup> In fact, in order to prevent so-called upward or downward ‘*solanging*’, what the ECJ is actually doing could be described as temporal ‘*solanging*’, or simply procrastinating the problem.

This in turn brings us to the second observation: What if ultimately the ECJ were to remove Mr Kadi due to procedural defaults? Given the emphasis put by the GC on the lack of evidence as well as the long time Mr Kadi has been subject to restrictive measures,<sup>114</sup> this question has become increasingly pressing. Even though the ECJ makes sure that it does not review UN Security Council Resolutions as such, the concern remains that this could eventually lead to the collective non-compliance of 27 UN members, given the temporary nature of the continuation of the effects of the measures and given that the subsequent measures have again been successfully challenged.

However, the real consequences of annulment and delisting, and thus non-compliance with UN Charter obligations would not be as shocking as they may appear. As AG Poiares Maduro put it, legal challenges against the effects of such resolutions ‘*cannot be entirely unexpected on the Security Council’s part*’.<sup>115</sup> Indeed, already in a report from 2005 the UNSC Sanction Committee’s Monitoring Team acknowledged that unless something was done to improve the sanctions regime, there was ‘*the possibility of one or more potentially negative court decisions that could hamper enforcement efforts*’.<sup>116</sup> Consequently, in its report from 2007, the Monitoring Team had discovered no fewer than 26 cases before domestic courts around the world dealing

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<sup>111</sup> Application no. 45036/98 *Bosphorus v. Ireland*, op.cit., par. 156.

<sup>112</sup> Application no. 71412/01 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, decision on admissibility, 45 EHRR 10, par. 144–152.

<sup>113</sup> Under the Lisbon Treaty, the EU is obliged to become a party to the ECHR and therefore submit itself to ECtHR jurisdiction (Art. 6, par. 2 TEU), which will make some sort of agreement on a common fundamental rights standard inevitable.

<sup>114</sup> Case T-85/09 *Kadi*, op.cit., par. 150 and par. 177.

<sup>115</sup> Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, Opinion of AG Poiares Maduro, op.cit., par. 38.

<sup>116</sup> Letter dated 14 February 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), second report of the Monitoring Team, S/2005/83, 15.02.2005, par. 58.

with such challenges.<sup>117</sup> Against this backdrop, the ECJ is likely to have had a significant announcement effect. In 2008, the Monitoring Team itself stated that the adoption of the AG's position by the ECJ would create a 'precedent'.<sup>118</sup> According to the report, 'there is a real possibility that the regulation used by the 27 member States of the European Union to implement the sanctions will be held invalid'<sup>119</sup> which could 'trigger similar challenges that could quickly erode enforcement',<sup>120</sup> also in 'other States outside the European Union'.<sup>121</sup> In its 2009 report, the Monitoring Team indeed took note of the 'long awaited decision'<sup>122</sup> of the ECJ, calling it 'arguably the most significant legal development to affect the regime since its inception'.<sup>123</sup> It is also anxiously observing its aftermath, stating that '[w]hen the process of judgment and appeal [concerning Mr Kadi's new challenge] is completed, the resulting decision [...] has the potential to create significant difficulties for all member States of the European Union and may alter the terms of the wider discussion of the fairness of the regime and the need for reform'<sup>124</sup> of the UNSC sanctions regime. Thus, just as the ECJ demonstrated awareness of what is going on *outside* of the EU, the UNSC seems to be following equally closely what is happening *inside* of the EU. In view of this, one could qualify the *Kadi* judgment as an example of what Bronckers calls a 'muted dialogue' between institutions on the international and domestic levels.<sup>125</sup>

In any event, politically speaking, the French and British vetoes in the Council would most likely prevent the EU and its members from facing any sanctions themselves in case of non-compliance with the sanctions regime resulting from an ECJ judgment. Moreover, the ECJ's judgment and any fu-

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<sup>117</sup> Letter dated 15 November 2007 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), seventh report of the Monitoring Team, S/2007/677, 29.11.2007, p. 40–42.

<sup>118</sup> Letter dated 13 May 2008 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), eighth report of the Monitoring Team, S/2008/324, 14.05.2008, par. 40.

<sup>119</sup> *Ibidem*.

<sup>120</sup> *Ibidem*.

<sup>121</sup> *Ibidem*.

<sup>122</sup> Letter dated 11 May 2009 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), ninth report of the Monitoring Team, S/2009/245, 13.05.2009, par. 19.

<sup>123</sup> *Ibidem*.

<sup>124</sup> Letter dated 28 September 2009 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), tenth report of the Monitoring Team, S/2009/502, 02.10.2009, par. 36.

<sup>125</sup> M. Bronckers, *From 'Direct Effect' to 'Muted Dialogue'*, "Journal of International Economic Law" Vol. 11, No.4/2008, p. 885–898.

ture judgments of this kind might be beneficial to the UN in the sense that additional pressure on the Security Council would contribute to the establishment of more transparent and fair procedures. In fact, pressure on the Security Council to improve the targeted sanctions regime has been applied for years now at the highest levels. For instance, already in 2004 the report of the High-level Panel on Threats, Challenges and Change addressed the issue of targeted sanctions and called for '*procedures to review the cases of those claiming to have been incorrectly placed or retained on such lists*'.<sup>126</sup> In 2005, the UN World Summit outcome document urged '*the Security Council, [...] 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*'.<sup>127</sup> One year later the Legal Counsel at the UN Secretariat commissioned an in-depth study on '*Targeted Sanctions and Due Process*'. This study concluded that the sanctions regime should ensure four basic rights of listed persons, viz. the right to be informed about the measures taken against them, the right to be heard before the UNSC or the sanctions committee, the right of legal counsel and representation, and the right to an effective remedy before an independent body,<sup>128</sup> basically matching what the ECJ is demanding from the EU's own institutions. Later the same year, on 22 June 2006, the Security Council organised a special debate on '*Strengthening international law: rule of law and maintenance of international peace and security*', a central topic of which was improving the sanctions regime.<sup>129</sup> In this debate, the Legal Counsel of the UN reiterated the necessity to guarantee the four rights from the Fassbender study,<sup>130</sup> and the Austrian permanent representative to the UN, speaking on behalf of the EU, underscored '*the importance of upholding certain minimum standards to ensure fair and clear procedures when designing and implementing sanctions*'<sup>131</sup> in order to '*preserve the legitimacy and reinforce the efficacy of the United Nations sanctions regimes*'.<sup>132</sup> In a report from 2006, the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism Martin Scheinin pointed out that '*if there is no proper or adequate*

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<sup>126</sup> *A more secure world: Our shared responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, New York 2004, p. 105.

<sup>127</sup> UN General Assembly Resolution 60/1, 2005 World Summit Outcome, A/Res/60/1 (2005), 16.09.2005, par. 109.

<sup>128</sup> B.Fassbender, *Targeted Sanctions and Due Process*, op.cit., p. 8.

<sup>129</sup> UN Security Council, 5474<sup>th</sup> meeting on Thursday 22 June 2006, meeting record, S/PV.5474 (2006), 22.06.2006.

<sup>130</sup> *Ibidem*, p. 5.

<sup>131</sup> *Ibidem*, p. 33.

<sup>132</sup> *Ibidem*.

*international review available, national review procedures — even for international lists — are necessary*'.<sup>133</sup>

These considerations at the international level explain the incremental process of adaptation of the sanctions regime that has been going on in the last years. Hence, it can safely be said that this ECJ judgment will not cause the sudden and unprecedented demise of the international security architecture. Still, it constitutes an important apex in a continuing back-and forth between the Security Council and critical voices regarding targeted sanctions throughout the international community. In fact, also the concerns about other countries imitating the ECJ's assumed defiance of the Security Council can be reinterpreted in a more positive way, as they ultimately contribute to additional constructive pressure on the UN.

In sum, in the long run, the EU and its Member States would have no direct adverse ramifications to fear from a definitive annulment of the measures in question, while saving at the same time their credibility regarding human rights protection. However, there is a real risk that this might spark (more) imitation by other courts outside of the EU. Then again, this would only contribute to increasing the pressure on the Security Council to amend its procedures, which is to be welcomed.

But the question that directly ensues from this is: What could we then realistically expect the Security Council to do in order to provide for improved human rights protection at the UN level? As the listing and de-listing procedure stands, three of the four rights claimed by Fassbender and the UN Legal Counsel are lived up to. However, as the Sanctions Committee's Monitoring Team points out itself, '*one major issue remains: the suggestion that listing decisions by the Committee be subject to review by an independent panel*'.<sup>134</sup> According to the team, the prospect of '*any panel having more than an advisory role*'<sup>135</sup> is unrealistic. Thus, while legally the setting-up of a special tribunal would not be a problem,<sup>136</sup> it seems highly unlikely that the Security Council would establish a tribunal directed against its own actions. Furthermore, quite convincing practical arguments militate against such a permanent body. As Tomuschat argues, it would be quite paradoxical indeed to grant terror suspects around the world who have been subject to

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<sup>133</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/61/267, 16.08.2006, par. 39.

<sup>134</sup> Eighth report of the Monitoring Team, op.cit., par. 41.

<sup>135</sup> Ibidem. See also in detail on the pros and cons of a review body Tenth report of the Monitoring Team, op.cit., par. 41–45.

<sup>136</sup> See e.g. the setting up of the ICTY by virtue of a resolution, UN Security Council Resolution 827/1993, S/Res/827 (1993), 25.05.1993.

a travel ban free flights to New York or The Hague to plead their case before a special tribunal.<sup>137</sup>

Against this backdrop, even though the generally preferable solution is to be sought at the UN level, optimism for radical change should remain limited. In view of the particular complexity of the issue and the jealously guarded prerogatives of the Security Council, the right to judicial review seems to be only approachable in an asymptotical manner, i.e. by striving for something as closely resembling a tribunal as possible without being one. In this context, the suggestion to install ‘panels of wise men (or women)’<sup>138</sup> or the office of ‘an independent Ombudsman’<sup>139</sup> (which was established at the end of 2009)<sup>140</sup> with mere advisory power, but bearing political and public authority, seems to be the most viable option, which at the end of the day remain the most effective, albeit not judicial remedies.<sup>141</sup> As the GC confirmed in its latest *Kadi* judgment, however, the possibility to turn to an Ombudsperson does not solve the problems in terms of judicial review and access to documents in terms of EU law.<sup>142</sup>

Finally, the Security Council could easily rid itself of the problem by simply relying more on (semi-)autonomous sanctions, i.e. by retaining its lists, but leaving it up to each UN member state’s judiciary to review the implementation measures taken by its respective executive branch. As the Sanctions Committee’s Monitoring Teams point out in this regard, ‘[t]he authority of the Council will be far more fundamentally affected if States are unable to implement its decisions without violating their own laws’.<sup>143</sup> Following the ECJ’s lead, national (or supranational) judicial mechanisms would ensure that this would not occur. Should the Security Council find that a state abuses this freedom, or have doubts as to the independence of its judiciary, it could still apply sanctions to either that state or the person concerned. Otherwise put, though the EU human rights standard cannot be transposed to the UN level (yet), another European specialty, the principle of subsidiarity, might prove helpful in this regard.

### 3. Foreshadowing the Lisbon Treaty

Having concluded that the ECJ found an on the whole very satisfactory solution to the *Kadi* conundrum, let us now take a look at the changes intro-

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<sup>137</sup> C. Tomuschat, *Die EU und ihre völkerrechtliche Bindung*, op.cit., p. 10–11.

<sup>138</sup> J. Klabbers, op.cit., p. 302.

<sup>139</sup> A. Hudson, op.cit., p. 226.

<sup>140</sup> UN Security Council Resolution 1904/2009, S/Res/1904 (2009), 17.12.2009.

<sup>141</sup> C. Tomuschat, *Die EU und ihre völkerrechtliche Bindung*, op.cit., p. 11–12.

<sup>142</sup> Case T-85/09 *Kadi*, op.cit., par. 128.

<sup>143</sup> Tenth report of the Monitoring Team, op.cit., par. 45.

duced by the Treaty of Lisbon, which entered into force on 1 December 2009, and at the extent to which these modifications clarify the issues the Court had to deal with. Even though there have been complaints about there being ‘*too much*’ constitutional law introduced by Lisbon in the area of external relations,<sup>144</sup> it will be submitted here that at least with respect to targeted sanctions and the relationship with the UN, the Lisbon reform contains a number of useful additions.

First of all, the problem concerning lack of competence for adopting sanctions also against entities other than states has been solved. The pillar structure has been formally disbanded and replaced with the single legal entity of the EU,<sup>145</sup> and a new provision has been added explicitly allowing restrictive measures ‘*against natural or legal persons and groups or non-State entities*’.<sup>146</sup> Also, the successor to Article 60 TEC on capital movement restrictions has been reframed for the purpose of ‘*preventing and combating terrorism*’.<sup>147</sup> However, the adoption of sanctions as such remains a disguised ‘*cross-pillar*’ exercise, requiring first a CFSP ‘*decision*’, generally taken by unanimity.<sup>148</sup>

The most striking feature, however, can be found in paragraph 3 of Articles 215 and 75 TFEU respectively, stipulating that restrictive measures adopted under Lisbon ‘*shall include necessary provisions on legal safeguards*’.<sup>149</sup> This would cater to AG Maduro’s reasoning, by turning the right to judicial review from a general principle of EU law to an explicit Treaty provision on which applicants could directly base their claim. In addition, notwithstanding a general exclusion of ECJ jurisdiction in CFSP matters, the Court has been granted competence to assess whether such safeguards are indeed provided for, since there is an exception for ‘*proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty [ex-Article 230 TEC], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union [CFSP]*’.<sup>150</sup>

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<sup>144</sup> B. de Witte, *Too Much Constitutional Law in the European Union’s Foreign Relations in: EU Foreign Relations Law: Constitutional Fundamentals*, eds. M. Cremona and B. de Witte, Oxford 2008, p. 3–15.

<sup>145</sup> Art. 1(3) and 47 TEU.

<sup>146</sup> Art. 215 par. 2 TFEU; also Art. 75, par. 1 TFEU.

<sup>147</sup> Art. 75 par. 1 TFEU.

<sup>148</sup> Art. 31 TEU; see in detail M. Dougan, *The Treaty of Lisbon 2007: Winning Minds not Hearts*, “Common Market Law Review” Vol. 45, No. 3/2008, p. 624–626.

<sup>149</sup> Art. 215 par. 3 TFEU and Art. 75, par. 3 TFEU.

<sup>150</sup> Art. 275 par. 2 TFEU; see also M. Dougan, *op.cit.*, p. 674–675.

It should also be mentioned that the duty of loyal cooperation between Member States at the Security Council has been strengthened. Under the old TEU, only permanent members (i.e. France and the UK) have to ‘ensure the defence of the positions and the interests of the Union’<sup>151</sup> with other EU members just having to ‘concert’.<sup>152</sup> Now all EU members at the UNSC would be obliged to ‘defend the positions and the interests of the Union’.<sup>153</sup> However, the qualification to exercise this duty ‘without prejudice to their responsibilities under the provisions of the United Nations Charter’ remains<sup>154</sup> leaves the door open for well-known justifications about the prerogatives and discretionary powers of the UNSC.

On a more general level, the newly introduced provision on the external objectives of the Union, to be found in Article 3, paragraph 5 TEU, also raises the oft-discussed question of the relationship between international and European law. There it is *inter alia* stated that ‘[i]n its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens’<sup>155</sup> and that ‘[i]t shall contribute to peace, security, [...] the protection of human rights, [...] as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter’.<sup>156</sup> Looking back, this resonates the essential message of the ECJ in *Kadi*. Also in the fight against international terrorism, the Union is committed to contribute to international peace and security, and acknowledges the special role of the UN in that area. However, such a contribution cannot be such as to undermine the EU’s own values, including fundamental rights and a complete system of legal remedies. Yet, the ECJ’s circumspect move not to cast the EU and its Member States offhand into a situation of non-compliance with international obligations is indeed a contribution to ‘strict compliance’, while at the same time it also points out areas where the international legal order is in need of ‘development’, in this case concerning the protection of international human rights.

In sum, the Lisbon Treaty certainly clarifies the situation in the internal legal order of the EU. It can be strongly suspected that these changes were deliberately framed for the purpose of addressing the current targeted sanctions problematic. However, when following an inward looking reasoning such as the AG’s in *Kadi*, the current state of EU law already was quite straightforward (safe the question of legal basis). Concerning the interrelatedness with

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<sup>151</sup> Art. 19 par. 2, 2<sup>nd</sup> indent, old TEU.

<sup>152</sup> *Ibidem*.

<sup>153</sup> Art. 34 par. 2, 2<sup>nd</sup> indent, TEU.

<sup>154</sup> *Ibidem*.

<sup>155</sup> Art. 3 par. 5 TEU.

<sup>156</sup> *Ibidem*.

international law and the UN Charter in particular, Article 3, paragraph 5 TEU sets out the parameters of the Union's commitment as well as the outer limits of its willingness to comply with international obligations.

## Conclusion

In order to conclude, let us return to the point of departure of the analysis. Were any of the extreme approaches proposed to solve *Kadi* to be preferred? That is, either the AG's one where the international and European spheres are depicted as two ships, albeit not passing by each other unnoticed, but trying to avoid collision, yet remaining separate vessels sailing at different speed; or rather the other of the CFI, where the international legal order is conceived of as an all-embracing hulk, with the UNSC at the helm, leaving us hoping that it will safely circumnavigate all the perils on the way.

The latter approach, from a modern, globalised perspective, appears more appealing at first glance. But a closer look at the actual argumentation revealed too many leaks, leaks that ultimately make the seaworthiness of this giant ship questionable, while the hard-won achievement of effective human rights protection is simply thrown overboard. On the contrary, while the AG's argumentation at first glance might seem a bit out-of-time, its legal conclusiveness, or 'waterproofness', at least keeps those on the European ship safe. But then again, what about the other, the struggling ship flying the light-blue flag of the UN?

The right balance was ultimately found by the ECJ, and ultimately accepted by the General Court, especially when taking into account the international ramifications which are likely to result, both in the short term and in the long term. The fact that the ECJ largely foreshadowed constitutional changes in this area introduced by the Lisbon Treaty demonstrates its foresight and underpins this conclusion. In the end, the reality of the international community and its imperfect institutions, in the face of common threats such as international terrorism as well as human rights violations, rather paints the picture of us all sitting in the same boat together after all. However, the legitimate and productive pressure that the ECJ ruling created is tantamount to a clear warning signal, still short of a mutiny, reminding the UNSC as the over-steering helmsman of the international community to readjust the course of this common enterprise as far as possible.

