

# Two Ships in the Night or in the Same Boat Together? Why the European Court of Justice Made the Right Choice in the Kadi Case

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# Two Ships in the Night or in the Same Boat Together? Why the European Court of Justice Made the Right Choice in the Kadi Case

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## About the Author

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## Abstract

This paper investigates the approaches to the recent *Kadi* case taken by both the Court of First Instance and the Advocate General and asks whether the European Court of Justice made the right choice with regard to the case's implications for the relationship between European and international law. It argues that the Court's judgement of 3 September 2008 in *Kadi* is to be welcomed, also from an international perspective. It rightly rejected the approach presented by the Court of First Instance, which, albeit stressing the importance of the UN Charter, ultimately turned out to be a 'false friend' of international law. By largely following the Advocate General's Opinion, the Court maintained the integrity and the superior human rights standard of the EU legal order. Without jeopardizing the compliance of the Member States with their UN Charter obligations right away, it sent a clear warning signal to the United Nations Security Council to exhaust its potential for reform of the targeted sanction regime to the fullest. The Court showed that in an interdependent world of multilevel governance, the different components cannot 'pass by each other like ships in the night'. In the face of threats like global terrorism like the threat of terrorism as well as undue curtailing of human rights, we are all in the same boat together after all.

## Introduction: The *Kadi* Case, a Counterpoint of Legal Orders

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> destroying the livelihood and reputation of the persons 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 (as well as the Al Barakaat Foundation), which has been ruled upon by the European Court of Justice (ECJ) on 3 September 2008.<sup>5</sup> Here, the highest Court of the European Union (EU) was – “in a more dramatic way than ever before”<sup>6</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>7</sup> As will be argued, it is precisely this “Mehrebenenproblematik”<sup>8</sup> (multilevel governance problem) which

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<sup>1</sup> As it has been called by Council of Europe Rapporteur Dick Marty in an interview, B. Kruse, ‘Zivile Todesstrafe’, *sueddeutsche.de*, 12 November 2007, retrieved 23 August 2008, <[www.sueddeutsche.de/ausland/artikel/753/142440/](http://www.sueddeutsche.de/ausland/artikel/753/142440/)>.

<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. Daniel Heller-Roazen, Stanford, Stanford University Press, 1998.

<sup>3</sup> See J. Klabbers, ‘Kadi Justice at the Security Council?’, *International Organizations Law Review*, Vol. 4, No. 2, 2008, pp. 303-304, also drawing on the philosophical considerations of G. Agamben, *State of Exception*, trans. Kevin Attell, Chicago, Chicago University Press, 2005.

<sup>4</sup> See A. von Arnould, ‘UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz: Die “Soweit-Rechtsprechung” des Europäischen Gerichts Erster Instanz’, *Archiv des Völkerrechts*, Vol. 44, No. 2, 2006, pp. 211-212; 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, pp. 279-294.

<sup>5</sup> ECJ, *Kadi and Al Barakat v Council and Commission*, judgement of 3 September 2008, Joined Cases C-402/05 and C-415-05 P (not yet reported). 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 judgements and the Advocate General’s Opinion as pertaining to *Kadi*.

<sup>6</sup> C. Tomuschat, ‘“Case Law”: European Court of First Instance, Judgment of 21 September 2005’, *Common Market Law Review*, Vol. 43, No. 2, 2006, p. 537.

<sup>7</sup> *Ibid.*

<sup>8</sup> S. Alber, ‘Kurzbesprechung der Schlussanträge des Generalanwalts Póiaros Maduro vom 16.1.2008’, *Europäische Zeitschrift für Wirtschaftsrecht*, Vol. 19, No. 6, 2008, p. 165.

makes this case a unique counterpoint in legal history,<sup>9</sup> that is, a situation in which several legal orders apply simultaneously and have to be reconciled so as to produce harmony instead of discord.<sup>10</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 judgement: the judgement of the Court of First Instance (CFI)<sup>11</sup> stressing the primacy of the UN Charter and the Opinion of Advocate General (AG) Poiares Maduro<sup>12</sup> stressing the autonomy of the European Community (EC) legal order, revealing a controversy which at times strongly harks back to "the literary debate during the past century on monism and dualism".<sup>13</sup> But the question now is: "[In] today's time of multifaceted international interdependence",<sup>14</sup> which approach is to be preferred, and did the ECJ choose the right one?

Hence, in shifting the focus from certain aspects such as international security and human rights to the 'big picture' of this very "Mehrebenenproblematik", this paper will concentrate on the merits of these two distinct understandings of the relationship between the European and the international sphere (especially the United Nations). It will be argued that the ECJ made the right decision in largely following the Advocate General in its judgement, for both doctrinal and practical reasons. To this end, the paper will be structured in the following way: First, the opposing positions taken in the judgement of the CFI and the AG's Opinion will be compared and critically assessed as to how they conceive of the relationship between the two legal orders including the advantages and disadvantages of their respective reasoning. This will be followed by an appraisal of the ECJ judgement and its legal aftermath as well as the short and long-term ramifications that are likely to follow on the international level, before drawing a conclusion.

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<sup>9</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 L.M. Poiares Maduro, 'Der Kontrapunkt im Dienst eines europäischen Verfassungspluralismus', *Europarecht*, No. 1, 2007, pp. 19-23; and L.M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition*, Oxford, Hart Publishing, 2003, pp. 501-537. In the present context, however, it will concern the interplay between the international and the European legal orders.

<sup>10</sup> Referring to the metaphor used by V. Kronenberger, 'Introduction', in V. Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, The Hague, T.M.C. Asser Press, 2001, pp. XI-XIV.

<sup>11</sup> CFI, *Kadi v Council and Commission*, Judgment of 21 September 2005, Case T-315/01, *European Court Reports 2005*, p. II-03649.

<sup>12</sup> Opinion of AG Poiares Maduro, delivered on 16 January 2008, *Kadi v Council and Commission*, Case C-402/05 P, retrieved 1 July 2008, <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005C0402:EN:HTML>.

<sup>13</sup> A. Ott, 'Thirty Years of Case-Law by the European Court of Justice on International Law: A Pragmatic Towards Integration', in Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?*, The Hague, T.M.C. Asser Press, 2001, p. 98.

<sup>14</sup> "[In] [d]er heutigen Zeit mit ihrer vielfältigen internationalen Verflechtung", C. Tomuschat, 'Die Europäische Union und ihre völkerrechtliche Bindung', *Europäische Grundrechte-Zeitschrift*, Vol. 34, No. 1, 2007, p. 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”<sup>15</sup> 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. Indeed, their respective reasonings differ considerably from one another, which is also a clear indication of the complexity of the issue at hand.

To grasp this divergence, and to determine which solution is preferable in dealing with the “Mehrebenenproblematik”, first the judgement 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.

### *The Court of First Instance: A ‘False Friend’ of International Law?*

In its judgement 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 a starting point the UN Charter, which it considered to have a binding and supreme character over both the Member States and the EC.<sup>16</sup> Resulting from this, it presented a changed hierarchy of norms in the 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>17</sup> With a threshold this high, the CFI eventually opined that no human rights violations could be detected.<sup>18</sup> It will be contended that the CFI ended up being a ‘false friend’ of international law, while sacrificing most of the legal protection offered by the EC legal order. For the purposes of this paper – scrutinising the relationship it establishes between the European and international legal order – there are three main remarks to be made.

First, by taking the United Nations 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 EC and the Member States with the Charter. The CFI applied the relevant provisions, especially the “synergy of Articles 25 and 103”,<sup>19</sup> on the primacy of the UN Charter and binding decisions taken in accordance with it in a very straightforward manner, not diverting

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<sup>15</sup> von Arnould, *op.cit.*, p. 201 (“eins zu eins”).

<sup>16</sup> CFI, *Kadi*, *op.cit.*, para. 178-208.

<sup>17</sup> CFI, *Kadi*, *op.cit.*, para. 209-232.

<sup>18</sup> CFI, *Kadi*, *op.cit.*, para. 233-292.

<sup>19</sup> As it has been called by M. Reisman, ‘The Constitutional Crisis of the United Nations’, *American Journal of International Law*, Vol. 87, No. 1, 1993, p. 93.

from established public international law doctrine.<sup>20</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>21</sup> Furthermore, referring to the jurisprudence concerning the EC and its being bound by the GATT, even when the EC was not yet a member, contributed to the soundness of this argument.<sup>22</sup> It is here that the “Völkerrecht-freundlichkeit”<sup>23</sup> (“friendly attitude towards international law”) of the judgement manifests itself most clearly and most uncontroversially. Most important is the fact that it sets the UN Charter apart from other international agreements and therefore appreciates its special character as a global constitutional document.<sup>24</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. As Tomuschat rightly remarks, 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>25</sup> and that “[t]o assess whether a threat to international peace and security exists is indeed essentially a discretionary decision”<sup>26</sup> requiring “a considerable margin of appreciation in determining a state of emergency [...] and the measures required to deal with the situation”.<sup>27</sup> These measures, as is evident from the Charter, can even lead to a derogation from the general prohibition to use

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<sup>20</sup> Tomuschat, ‘Case Law’, *op.cit.*, p. 541; see also R. Bernhardt, ‘Art. 103’, in Bruno Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, 2<sup>nd</sup> edition, Oxford, Oxford University Press, 2002, Vol. 2, pp. 1294-1302.

<sup>21</sup> ECJ, *Poulsen and Diva Navigation*, Judgment of 24 November 1992, Case C-286/90, *European Court Reports 1992*, p. I-06019, para. 9; see also ECJ, *Kupferberg*, Judgment of 26 October 1982, Case 104/81, *European Court Reports 1982*, p. 03641; and ECJ, *Haegeman*, Judgment of 30 April 1974, Case 181-73, *European Court Reports 1974*, p. 00449.

<sup>22</sup> Tomuschat, ‘Case Law’, *op.cit.*, p. 542; for a differing view see 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, pp. 585-587.

<sup>23</sup> Ley, *op.cit.*, p. 285.

<sup>24</sup> On the constitutional quality of the UN Charter see e.g. P.-M. Dupuy, ‘The Constitutional Dimension of the Charter of the United Nations Revisited’, *Max Planck Yearbook of United Nations Law*, Vol. 1, 1997, pp. 1-33; T. Franck, ‘Is the UN Charter a Constitution?’, in Jochen Frowein *et al.* (eds.), *Verhandeln für den Frieden / Negotiating for Peace: Liber Amicorum Tono Eitel*, Berlin, Springer, 2003, pp. 95-106; and S. Kadelbach & T. Kleinlein, ‘Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht’, *Archiv des Völkerrechts*, Vol. 44, No. 3, 2006, pp. 236-266.

<sup>25</sup> Tomuschat, ‘Case Law’, *op.cit.*, p. 544.

<sup>26</sup> *Ibid.*, p. 545.

<sup>27</sup> M. Karayigit, ‘The *Yusuf* and *Kadi* Judgements: The Scope of the EC Competences in Respect of Restrictive Measures’, *Legal issues of Economic Integration*, Vol. 33, No. 4, 2006, p. 398.



force in international relations,<sup>28</sup> entailing not only military but also considerable numbers of civilian casualties.<sup>29</sup>

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:

“[T]he Security Council plays a pivotal role and exercises a very wide discretion under [Article 39 of the UN Charter]. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. [...] In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).”<sup>30</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>31</sup> in carrying out its mandate, which can be expected to “include norms that have been subsequently treated as *jus cogens*.”<sup>32</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>33</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 actually constituting *jus cogens* and those that do

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<sup>28</sup> UN Charter, Art. 2, para. 4; legitimate self-defence being the only other exception, Art. 51.

<sup>29</sup> Note that e.g. the UN-mandated Gulf War of 1990/91 involved over 2,200 Iraqi civilian casualties and almost 6,000 wounded, L. Freedman & E. Karsh, *The Gulf Conflict: Diplomacy and War in the New World Order, 1990-1991*, Princeton, Princeton University Press, 1993, pp. 324-329; in a similar vein Alber, *op.cit.*, p. 16; and Tomuschat, ‘Die EU und ihre völkerrechtliche Bindung’, *op.cit.*, p. 7.

<sup>30</sup> ICTY, *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case IT-94-1-I, para. 28; see also ICJ, *Namibia (South West Africa)*, Advisory Opinion of 21 June 1971, *ICJ Reports 1971*, p. 16., para. 115.

<sup>31</sup> UN Charter, Art. 24, para. 2.

<sup>32</sup> UN General Assembly, *Report of the International Law Commission*, Official Records, Sixty-first Session, Supplement No. 10 (A/61/10), 2006, p. 422.

<sup>33</sup> 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.

not.<sup>34</sup> In any case, more or less undisputed appear to be the prohibition of aggression, slavery, genocide, piracy as well as the respect for elementary human rights and norms of international humanitarian law.<sup>35</sup> In view of the uncertainty surrounding the subject, 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>36</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>37</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>38</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 referred only to the Universal Declaration of Human Rights, which can also be described as an "abortive"<sup>39</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>40</sup> by dwelling e.g. on the temporary nature of the

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<sup>34</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.-M. Dupuy, *Droit international public*, 7<sup>th</sup> edition, Paris, Dalloz, 2004, p. 285; P. Tavernier, 'L'identification des règles fondamentales, un problème résolu?', in Christian Tomuschat & Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Leiden, Martinus Nijhoff, 2006, p. 1; M. Bossuyt & J. Wouters, *Grondlijnen van internationaal recht*, Antwerp, Intersentia, 2005, p. 93; I. Brownlie, *Principles of Public International Law*, 6<sup>th</sup> edition, Oxford, Oxford University Press, 2003, p. 490; H. von Heinegg, 'Die völkerrechtlichen Verträge als Hauptquelle des Völkerrechts', in Knut Ipsen *et al.* (eds.), *Völkerrecht*, 5<sup>th</sup> edition, Munich, C.H. Beck, 2004, p. 186; and M. Shaw, *International Law*, 5<sup>th</sup> edition, Cambridge, Cambridge University Press, 2003, p. 115-116; also (albeit less sceptical) J. Frowein, 'Jus Cogens', in Rudolf Bernhardt & P. Macalister-Smith (eds.), *Encyclopedia of Public International Law*, Amsterdam, Elsevier, 1997, Vol. 3, pp. 65-69.

<sup>35</sup> von Heinegg, *op.cit.*, p. 193; see in detail UN General Assembly, *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 Koskenniemi, A/CN.4/L.682, 13 April 2006, paras. 374-376.

<sup>36</sup> VCLT, Art. 53.

<sup>37</sup> CFI, *Kadi*, *op.cit.*, para. 231.

<sup>38</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports 1996*, p. 226, para. 79.

<sup>39</sup> Tomuschat, 'Case Law', *op.cit.*, p. 547.

<sup>40</sup> *Ibid.*, p. 548.

sanctions,<sup>41</sup> or the review mechanism at the UN level.<sup>42</sup> It gets even worse, when concerning the remaining two claims that “the Court does not even make an attempt to show that [these] right[s] have the nature of *jus cogens*”,<sup>43</sup> but simply reverts to ECJ<sup>44</sup> and European Court of Human Rights (ECtHR) jurisprudence.<sup>45</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>46</sup> In a worst-case scenario, the CFI approach has the potential of “undermining the system of collective security”,<sup>47</sup> since it gives the judiciary the power of “ordering the state to act contrary to the [UNSC] sanctions committee’s lists”.<sup>48</sup> Moreover, the imprecise boundaries of *jus cogens* might be abused by other (less independent) courts among UN members to find a justification to escape fulfilment of their obligation in the collective effort to combat international terrorism and thus create loopholes and safe havens for terrorists.<sup>49</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, which would raise the spectre of fragmentation of international law.

Thirdly, notwithstanding its questionable application of *jus cogens*, the fiercest criticism, which has also spawned several high-level reports,<sup>50</sup> had been on the actual result of the judgement, namely that the applicant’s claims were dismissed altogether, therefore refusing him legal protection against the sanctions which

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<sup>41</sup> CFI, *Kadi*, *op.cit.*, para. 248.

<sup>42</sup> *Ibid.*, paras. 249-250.

<sup>43</sup> Tomuschat, ‘Case Law’, *op.cit.*, p. 549.

<sup>44</sup> CFI, *Kadi*, *op.cit.*, para. 255.

<sup>45</sup> *Ibid.*, para. 287.

<sup>46</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).

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, p. 799.

<sup>49</sup> See similarly 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’, *Europarecht*, Vol. 41, No. 3, p. 428.

<sup>50</sup> 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, 6 February 2006.; B. Fassbender, *Targeted Sanctions and Due Process*, Study commissioned by the United Nations Office of Legal Affairs, 20 March 2006, retrieved 28 July 2008, <[www.un.org/law/counsel/Fassbender\\_study.pdf](http://www.un.org/law/counsel/Fassbender_study.pdf)>; and UN General Assembly / Security Council, Annex to the letter dated 19 May 2006 from the Permanent Representatives of Germany, Sweden and Switzerland to the United Nations addressed to the President of the General Assembly and the President of the Security Council: Thomas Bierstecker & Sue Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30 March 2006, A/60/887 – S/2006/331 (2006), 14 June 2006.

obviously had grave consequences for his life, in result "leav[ing] the individual without effective legal protection".<sup>51</sup> Without repeating the legitimate criticism expressed in these reports, 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 EC legal order, from which the applicants in e.g. in the *Organisation des Modjahedines du peuple d'Iran (OMPI)*<sup>52</sup> and *Sison*<sup>53</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>54</sup> application of international law leading to a quasi-"submission"<sup>55</sup> of the EC 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 is considerable to look for another solution that is paying less attention to obligations under international law and doing more to protect the values enshrined in the EC's legal order.

#### *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 18 January 2008 concerning Mr Kadi's appeal to the ECJ. In contrast to the CFI, the Advocate General chose as his argumentative starting point the EC legal order, stressing its autonomy.<sup>56</sup> This led to an argumentation based on the superior protection of the individual in the EC legal order,<sup>57</sup> and 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>58</sup> In the following critical 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.

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<sup>51</sup> 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.

<sup>52</sup> CFI, *Organisation des Modjahedines du peuple d'Iran v Council*, Judgment of 12 December 2006, Case T-228/02, *European Court Reports 2006*, p. II-04665.

<sup>53</sup> CFI, *Sison v Council*, Judgment of 11 July 2007, T-47/03 (not yet reported).

<sup>54</sup> J. D'Aspremont & 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>55</sup> See K. Schmalenbach, 'Normentheorie vs. Terrorismus: Der Vorrang des UN-Rechts vor EU-Recht', *Juristenzeitung*, Vol. 61, No. 7, 2006, p. 352 ("Unterordnung").

<sup>56</sup> Opinion of AG Poiares Maduro, *Kadi*, *op.cit.*, paras. 21-24.

<sup>57</sup> *Ibid.*, paras. 25-40.

<sup>58</sup> *Ibid.*, paras. 41-55.

As appears from the previous elaborations, the way international law has been treated by AG Poiares Maduro in the *Kadi* case differs fundamentally from the way it was treated by the CFI, with the most obvious difference being that the Advocate General spends far fewer words on it than the CFI. On the contrary, his judgement remains, most of the time, firmly within the realms of EC law. However, also this silence on the matter is quite revealing in 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 basis 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>59</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>60</sup> in his view, the Court's duty "first and foremost, is to preserve the constitutional framework of the [EC] Treaty".<sup>61</sup>

This can be seen as the latest of several steps in EC jurisprudence of severing the EC legal order from the international one from which it originated. The formulation of "a new legal order of *international law*"<sup>62</sup> in *van Gend en Loos* still gave the impression that it formed part of public international law as a sort of *lex specialis*<sup>63</sup> or self-contained regime.<sup>64</sup> But only shortly thereafter, the judgement 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>65</sup> Eventually, the ECJ started referring to the EC Treaty as the "basic constitutional charter"<sup>66</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>67</sup> a quality the ECJ was "particularly

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<sup>59</sup> *Ibid.*, paras, 21, 22, 23, 37 and 39.

<sup>60</sup> *Ibid.*, para. 22.

<sup>61</sup> *Ibid.*, para. 24.

<sup>62</sup> ECJ, *van Gend en Loos*, Judgment of 5 February 1963, Case 26/62, *European Court Reports 1962* (English special edition), p. 00001, para. 9 (emphasis added).

<sup>63</sup> See UN General Assembly Resolution 56/83, Annex: International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts', A/Res/56/83 (2001), 12 December 2001, Art. 55.

<sup>64</sup> Such as e.g. the rules on diplomatic relations, as stressed in ICJ, *Tehran Hostages*, Judgment of 24 May 1980, *ICJ Reports 1980*, p. 3, para. 86.

<sup>65</sup> ECJ, *Costa v ENEL*, Judgment of 15 July 1964, Case 6/64, *European Court Reports* (English special edition), p. 00614, para. 8.

<sup>66</sup> e.g. ECJ, *Les Verts*, Judgment of 23 April 1986, Case 294/83, *European Court Reports 1986*, p. 01339, para. 23.

<sup>67</sup> See e.g. Herdegen, Matthias, *Europarecht*, 6<sup>th</sup> edition, Munich, C. H. Beck, 2004, p. 68.

insistent on defending".<sup>68</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>69</sup> with the guard "exclusively apply[ing] his own standards."<sup>70</sup>

However, one cannot help but 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 that the Council, Commission, CFI and AG encountered in finding some "Magic Mixture"<sup>71</sup> of articles as a legal basis for EC competence to implement targeted sanctions is telling: at one point elements from the *intergovernmental* Common Foreign and Security Policy (CFSP) pillar always came into play.<sup>72</sup> The circumstance that "even when acting within the scope of the CFSP, the Member States must respect EC law"<sup>73</sup> does not offer much consolation, seeing that the CFSP is excluded from the ECJ's jurisdiction,<sup>74</sup> and thus evidently does not quite constitute a "complete system of judicial protection"<sup>75</sup> in this respect. Besides that, the fact that any amendment of the so-called "constitutional charter" has to be made by unanimous decision of the Member States acting as the *seigneurs des traités*<sup>76</sup> also serves as an indication that "the Community legal order is still dominated by the spirit of international law"<sup>77</sup> to a certain extent. In the same vein, certain scholars contend that even though "it is reasonable to conclude that EC law operates as a closed system [...] for most practical purposes",<sup>78</sup> this still does not make it "a self-contained regime since there remain scenarios in which a fallback on state responsibility remains feasible and necessary, and since such a fallback is not precluded by peculiar characteristics of the Community order."<sup>79</sup> Lastly, what also fits uneasily with this 'municipal' quality of EC law is the fact that e.g.

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<sup>68</sup> Craig, Paul & Gráinne de Búrca, *EU Law: Text, Cases and Materials*, 4<sup>th</sup> edition, Oxford, Oxford University Press, 2008, p. 202.

<sup>69</sup> Nettesheim, *op.cit.*, p. 580.

<sup>70</sup> *Ibid.*

<sup>71</sup> Referring to the CFI's judgement, Eckes, *op.cit.*, p. 79.

<sup>72</sup> See Opinion of AG Poiares Maduro, *Kadi*, *op.cit.*, paras. 11-15; CFI, *Kadi*, *op.cit.*, paras. 64-135; note also ECJ, *Kadi and Al Barakaat*, *op.cit.*, paras. 158-236, especially para. 226.

<sup>73</sup> Craig & de Búrca, *op.cit.*, p. 190; based on ECJ, *Centro-Com*, Judgement of 14 January 1994, Case C-124/95, *European Court Reports 1997*, p. I-00081, para. 25.

<sup>74</sup> EU Treaty, Art. 46 *juncto* Art. 35.

<sup>75</sup> Opinion of AG Poiares Maduro, *Kadi*, *op.cit.*, para. 31.

<sup>76</sup> EU Treaty, Art. 48, para. 3.

<sup>77</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 J. Allain, 'The European Court is an International Court', *Nordic Journal of International Law*, Vol. 68, No. 3, 1999, pp. 249-274.

<sup>78</sup> B. Simma & D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law', *European Journal of International Law*, Vol. 17, No. 3, 2006, p. 519.

<sup>79</sup> *Ibid.*; e.g. the "continuous violation of Community law by an EC Member State", p. 517.

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>80</sup> Hence, the autonomy of the ‘municipal’ EC legal order may not be as absolute as AG Poiares Maduro makes it appear. 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 EC legal order maintained a level of protection that it deemed appropriate.<sup>81</sup> Essentially the same argument was used in the ECtHR’s *Bosphorus* ruling, 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>82</sup> But accepting an external protection standard requires a “leap of faith”<sup>83</sup> by the reviewing instance desisting 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. In such cases, the interest of international co-operation would be outweighed by the Convention’s role as a ‘constitutional instrument of European public order’ in the field of human rights”.<sup>84</sup>

AG Poiares Maduro indeed hinted at the possibility of ‘solanging’<sup>85</sup> 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

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<sup>80</sup> *Bundesverfassungsgericht* (German Constitutional Court), *Solange-II*, Decision of 22 October 1986, *Entscheidungen des Bundesverfassungsgerichts*, Vol. 73, 1987, p. 387.

<sup>81</sup> See Herdegen, *op.cit.*, p. 208.

<sup>82</sup> ECtHR, *Bosphorus v Ireland*, Judgement of 30 June 2005, Application no. 45036/98, *European Human Rights Reports*, Vol. 42, 2006, p. 1, para. 155.

<sup>83</sup> von Arnould, *op.cit.*, p. 208 (“Vertrauensvorschluss”).

<sup>84</sup> ECtHR, *Bosphorus v Ireland*, *op.cit.*, para. 156.

<sup>85</sup> This neologism was coined, to the author’s knowledge, by L. Gradoni, ‘Making Sense of the Practice of “Solanging” in International Law’, contribution to a panel discussion at the Hague Joint Conference on Contemporary Issues of International Law, The Hague, 29 June 2007.

for judicial control of implementing measures that apply within the Community legal order.”<sup>86</sup> But there is no denying that with the ICJ not being accessible to individuals<sup>87</sup> (and generally somewhat reluctant when it comes to “[s]econd-[g]uessing the Security Council”)<sup>88</sup> and the Security Council itself still only providing “a purely political mechanism”<sup>89</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>90</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>91</sup> AG Poiares Maduro obviously took the right choice. For him the *Kadi* case is in no way more special than for instance *Sison* or *OMPI*. From a purely EC law point of view, this choice prevents external interference from corroding a more deeply integrated legal system. From an international 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 EC’s legal autonomy and its more sophisticated human rights protection also leads to the third observation. At first glance, his strictly dualistic reasoning might seem to result in a drastic simplification of the problem.<sup>92</sup> However, it is argued here that it instead defers the problem to another level, by letting public international law deal with the ulterior “repercussions”<sup>93</sup> of his argumentation. 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. Other listed persons with standing before the EC Courts could bring challenges as well. However, they would remain on the Security Council’s list, with the EU Member States being barred from implementing the sanctions individually.<sup>94</sup> This might not only “inconvenience the Community and its Member States in their dealings on the international stage”<sup>95</sup>, as the AG put it, but

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<sup>86</sup> Opinion of AG Poiares Maduro, *Kadi*, *op.cit.*, para. 54.

<sup>87</sup> Statute of the ICJ, Art. 34; see also Tomuschat, ‘Case Law’, *op.cit.*, p. 538.

<sup>88</sup> In detail 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, pp. 281-327; note that the ICJ ultimately refrained from reviewing UNSC resolutions in ICJ, *Lockerbie*, Request for the indication of provisional measures, Order of 14 April 1992, *ICJ Reports 1992*, p. 3., paras. 43-45.

<sup>89</sup> Cameron, *op.cit.*, p. 6.

<sup>90</sup> von Arnould, *op.cit.*, pp. 208-209; see also Nettesheim, *op.cit.*, p. 592.

<sup>91</sup> Tomuschat, ‘Case Law’, *op.cit.*, p. 544.

<sup>92</sup> Alber, *op.cit.*, p. 166.

<sup>93</sup> Opinion of AG Poiares Maduro, *Kadi*, *op.cit.*, para. 38.

<sup>94</sup> See ECJ, *Centro-Com*, *op.cit.*, para. 25; and ECJ, *Elliniki Radiophonia Tiléorassi (ERT)*, Judgment of 18 June 1991, Case C-260/89, *European Court Reports 1991*, p. I-02925, para. 41.

<sup>95</sup> Opinion of AG Poiares Maduro, *Kadi*, *op.cit.*, para. 39.



would amount to nothing less than forcing 27 UN member states to violate their obligations under Chapter VII of the UN Charter. With the Security Council reiterating “that sanctions are an important tool under the Charter of the United Nations in the maintenance and restoration of international peace and security, and [stressing] in this regard the need for robust implementation of the measures [...] as a significant tool in combating terrorist activity”,<sup>96</sup> this could be seen as an indication that it would not regard non-compliance as a petty offence.

It may be defensible that the dualist approach can be maintained in general, i.e. that in spite of *pacta sunt servanda*,<sup>97</sup> it is up to the parties to decide 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>98</sup> However, the Advocate General fails to recognise here the special nature of the United Nations in the sector of international security, which cannot be dealt with just like any organisation.<sup>99</sup> In addition, he fails to appreciate 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 EC and the Member States do simply not have any leeway when implementing the sanctions. In this case the EC is indeed just the “transmission belt”<sup>100</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>101</sup> In the realm of international security, such options would be plainly absurd.

Lastly, even though such judicially forced non-compliance would in AG Poiares 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 constitution 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>102</sup>

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<sup>96</sup> UN, Security Council Resolution 1822/2008, S/Res/1822 (2008), 30 June 2008, 9<sup>th</sup> perambulatory clause.

<sup>97</sup> VCLT, Art. 26.

<sup>98</sup> A. Schaus, ‘Article 27 – Droit interne et respect des traités’, in Olivier Corten & Pierre Klein (eds.), *Les Conventions de Vienne sur le Droit des Traités*, Brussels, Bruylant, 2006, Vol. 2, pp. 1132-1137.

<sup>99</sup> Alber, *op.cit.*, p. 166.

<sup>100</sup> von Arnould, *op.cit.*, p. 203 (“Transmissionsriemen”).

<sup>101</sup> ECJ, *Omega Air*, Judgement of 12 March 2002, Joined cases C-27/00 and C-122/00, *European Court Reports 2002*, p. I-02569, para. 89. These ‘alternative’ options are already questionable in view of WTO obligations, see Herdegen, *op.cit.*, pp. 391-392.

<sup>102</sup> von Arnould, *op.cit.*, p. 210 (“institutionelle Sprengkraft”); similarly Tomuschat, ‘Die EU und ihre völkerrechtliche Bindung’, *op.cit.*, p. 6.

In sum, we have thus seen that also AG Poiares 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. While he is safeguarding the applicant's fundamental rights and preserving the autonomy of the Community legal order, he sacrifices in principle the commitment of 27 UN members to the UN's system of collective security.

### The International Ramifications of the ECJ Judgement

On 3 September 2008, the ECJ pronounced its judgement 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>103</sup> It hereby follows the AG's dualist approach, pointing out that what is being reviewed are Community 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>104</sup> This does eventually give flesh to the AG's statements that the EC is “beholden to”<sup>105</sup> international law and that the two legal orders do indeed not “pass by each other like ships in the night”.<sup>106</sup> From this follows, as in the AG's Opinion, that UN Charter obligations, despite their overriding importance in the sphere of international law, cannot change the hierarchy of norms within the EC legal order, with the treaties and the fundamental principles enshrined therein at the top.<sup>107</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 individuals and the possibility to individually petition for re-examination of their case.<sup>108</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

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<sup>103</sup> ECJ, *Kadi and Al Barakaat*, *op.cit.*, para. 281 (referring to ECJ, *Les Verts*, *op.cit.*, para. 23).

<sup>104</sup> *Ibid.*, paras. 286-302.

<sup>105</sup> Opinion of AG Poiares Maduro, *Kadi*, *op.cit.*, para. 21.

<sup>106</sup> *Ibid.*, para. 22.

<sup>107</sup> ECJ, *Kadi and Al Barakaat*, *op.cit.*, para. 281.

<sup>108</sup> ECJ, *Kadi and Al Barakaat*, *op.cit.*, paras. 310-325; see also UN Security Council Resolution 1735/2006, S/Res/1735 (2006), 22 December 2006; and the UNSC Sanctions 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 and 12 February 2007, retrieved 16 July 2008, <[www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf)>.

states that under the present circumstances, a full review of the implementation measures against EC 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>109</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>110</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>111</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>112</sup> Furthermore, notwithstanding the infringements against the applicants, the ECJ underlined 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>113</sup> Therefore, by virtue of Article 231 of the EC Treaty, the Court ruled that the effects of the measures should be maintained for three months, allowing the EC institutions to bring the implementing measures in line with EC law.<sup>114</sup>

It should be noted that in response to the judgement, 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>115</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 judgement

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<sup>109</sup> ECJ, *Kadi and Al Barakaat*, *op.cit.*, paras. 331-372.

<sup>110</sup> *Ibid.*, para. 340.

<sup>111</sup> *Ibid.*, para. 360.

<sup>112</sup> *Ibid.*, para. 373.

<sup>113</sup> *Ibid.*, para. 374.

<sup>114</sup> *Ibid.*, paras. 375-376.

<sup>115</sup> Commission of the EC, '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', *Official Journal of the European Union*, L 322 , 2 December 2008, pp. 25-26.

was pronounced. On 26 February 2009, Mr Kadi brought an action for annulment of Commission Regulation 1190/2008 before the CFI for essentially the same reasons as the originally contested regulation.<sup>116</sup>

While from an EC law point of view that judgement is undoubtedly to be welcomed,<sup>117</sup> let us now turn to the ramifications it can be expected to produce on the international scene, both in law and practice.<sup>118</sup> Two observations are to be made in this respect, one for the short term and one for the long term.

Firstly, for now, the ECJ's judgement in fact 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, *de facto*, also compliance with international obligations. That means that the EU and its Member States continue to fulfil, for the time being, their obligations under the UN Charter and would have nothing to fear from the UNSC. However, Mr Kadi thus remains, until today, the subject of restrictive measures directed against him. Assuming that he would seek, next to the EC 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 ECJ. This would presuppose a downward 'solonging', a possibility at least alluded to publicly by the President of the German *Bundesverfassungsgericht*.<sup>119</sup> 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 *Bunderverfassungsgericht* to challenge *both* the ECJ and the UNSC, this does not appear as a viable option. As for the latter, official circles agree that the applicant is likely to (eventually) continue his case against EU Member States before the ECtHR as the "fourth instance",<sup>120</sup> just as the applicant did in *Bosphorus*. This upward 'solonging' is more realistic and promising, because the ECtHR explicitly stated in its

<sup>116</sup> CFI, 'Action brought on 26 February 2009 – Kadi v Commission', Case T-85/09, *Official Journal of the European Union*, C 90, 18 April 2009, p. 37.

<sup>117</sup> For an in-depth discussion of the judgement see e.g. T. Tridimas & J. Gutiérrez-Fons, 'EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?', *College of Europe Research Papers in Law*, No. 3, 2008, p. 2 (republished in the *Fordham International Law Journal*); and G. de Búrca, 'The EU, the European Court of Justice and the International Legal Order after Kadi', *Fordham Law Legal Studies Research Paper*, No. 1321313 (to be republished in the *Harvard International Law Journal*).

<sup>118</sup> In the course of August and September 2008, the author conducted several interviews with national diplomats from relevant countries and officials from the EU. As the interviewees requested to remain anonymous, their names will not appear in footnotes or the bibliography.

<sup>119</sup> He did so in an interview in early 2008, see T. Darnstädt, 'Ohne Wenn und Aber: Der Präsident des Bundesverfassungsgerichts Hans-Jürgen Papier, 64, über die Herausforderungen des internationalen Terrorismus, das Folterverbot und die Grenzziehung zwischen Freiheit und Sicherheit', *Der Spiegel*, Vol. 62, No. 3, 14 January 2008, p. 26.

<sup>120</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.

*Bosphorus* judgement that it would be prepared to step in as soon as human rights protection elsewhere proved to be “manifestly deficient”.<sup>121</sup> This would indeed be a delicate scenario since Member States could no longer use the CFI’s argument of the overriding importance of UN Charter obligations, as it has been rebuffed by the ECJ. However, as long as the case is pending before the EC Courts, it is unlikely that the ECtHR would intervene. 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, however, brings us to the second observation: What if the ECJ were to ultimately remove Mr Kadi due to procedural defaults? 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 challenged. Without going into detail, the fact that the Commission had merely a brief exchange of letters with the applicants indeed does raise doubts as to whether the institutions now lived up to appropriate procedural standards.

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>122</sup> Indeed, in a report from 2005 the UNSC Sanctions 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>123</sup> Consequently, in its report from 2007, the Monitoring Team had discovered no fewer than 26 cases before domestic courts around the world dealing with such challenges.<sup>124</sup> Against this backdrop, official circles share the view that a decision of the ECJ in this regard surely will have 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>125</sup> According to the report, “there is a real possibility that the regulation used by the 27 Member

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<sup>121</sup> ECtHR, *Bosphorus v Ireland*, *op.cit.*, para. 156.

<sup>122</sup> Opinion of AG Poiares Maduro, *Kadi*, *op.cit.*, para. 38.

<sup>123</sup> UN Security Council, 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 February 2005, para. 58.

<sup>124</sup> UN Security Council, 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 November 2007, pp. 40-42.

<sup>125</sup> UN Security Council, 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 May 2008, para. 40.

States of the European Union to implement the sanctions will be held invalid"<sup>126</sup> which could "trigger similar challenges that could quickly erode enforcement",<sup>127</sup> also in "other States outside the European Union."<sup>128</sup> Finally, in its latest report, the Monitoring Team took indeed note of the "long awaited decision"<sup>129</sup> of the ECJ, calling it "arguably the most significant legal development to affect the regime since its inception".<sup>130</sup> It also closely followed its aftermath and will anxiously await the outcome of Mr Kadi's new challenge,<sup>131</sup> which could "give rise to new and more difficult issues".<sup>132</sup> Thus, just as the ECJ demonstrated awareness of what is going on *outside* of the EU, the UNSC seems to be equally closely following what is happening *inside* of the EU.

However, politically speaking, as one diplomat pointed out to the author, it should be borne in mind that despite the binding character of Security Council resolutions, put mildly, this would by far not be the first time that UNSC resolutions would fail to be fully complied with. Further, it is obvious that the inefficacy of the system of collective security is already inherent in the setup of the Security Council with the veto right of the five permanent members. Finally, 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 judgement.

Moreover, the ECJ's judgement and any future judgements 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>133</sup> In 2005, the UN World Summit 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>134</sup> One year later,

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<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> UN Security Council, 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 May 2009, para. 19.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*, paras. 20-23.

<sup>132</sup> *Ibid.*, para. 22.

<sup>133</sup> UN, *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, New York, 2004, p. 105.

<sup>134</sup> UN General Assembly Resolution 60/1, '2005 World Summit Outcome', A/Res/60/1 (2005), 16 September 2005, para. 109.

the Legal Counsel at the UN Secretariat commissioned an in-depth study on "Targeted Sanctions and Due Process".<sup>135</sup> 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>136</sup> basically matching what the ECJ is demanding from the EC'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>137</sup> In this debate, the Legal Counsel of the UN reiterated the necessity to guarantee the four rights from the Fassbender study,<sup>138</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>139</sup> in order to "preserve the legitimacy and reinforce the efficacy of the United Nations sanctions regimes".<sup>140</sup>

This also explains the adaptation of the sanctions regime that has been going on in the last years. Hence, it can safely be said that this ECJ judgement will not lead to the sudden and unprecedented demise of the international security architecture. Still, it would constitute 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 also be reinterpreted in a more positive way, as they ultimately contribute to additional 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 currently stands, three of the four rights claimed by Mr Fassbender and the UN Legal

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<sup>135</sup> Fassbender, *op.cit.*

<sup>136</sup> *Ibid.*, p. 8.

<sup>137</sup> UN Security Council, 5474<sup>th</sup> meeting on Thursday 22 June 2006, meeting record, S/PV.5474 (2006), 22 June 2006.

<sup>138</sup> *Ibid.*, p. 5.

<sup>139</sup> *Ibid.*, p. 33.

<sup>140</sup> *Ibid.*

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>141</sup> According to the Team, the prospect of "any panel having more than an advisory role"<sup>142</sup> is unrealistic. This assessment is confirmed by official circles, expecting insurmountable resistance especially from the permanent members of the UNSC. Thus, while legally the setting-up of a special tribunal would not be a problem,<sup>143</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, which have been outlined by Tomuschat.<sup>144</sup> Indeed, it would be quite paradoxical to grant terror suspects around the world who have been subject to a travel ban free flights to New York or the Hague to plead their case before a special tribunal.<sup>145</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, that is 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>146</sup> or "an independent Ombudsman"<sup>147</sup> with mere advisory power, but bearing political and public authority, seems to be the most viable option to provide the most effective, albeit not judicial remedies.<sup>148</sup>

Finally, the Security Council could of course 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. Should the Security Council find that a state abuses this freedom, it could still apply sanctions to either that state or the person concerned. Otherwise put, though the EC human rights standard cannot be transposed to the UN level (yet), another European specialty, the principle of subsidiarity, might prove helpful in this regard.

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<sup>141</sup> UN, eighth report of the Monitoring Team, *op.cit.*, para. 41.

<sup>142</sup> *Ibid.*

<sup>143</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 May 1993.

<sup>144</sup> Tomuschat, 'Die EU und ihre völkerrechtliche Bindung', *op.cit.*, pp. 10-11.

<sup>145</sup> *Ibid.*, p. 11.

<sup>146</sup> Klabbers, *op.cit.*, p. 302.

<sup>147</sup> Hudson, *op.cit.*, p. 226.

<sup>148</sup> Tomuschat, 'Die EU und ihre völkerrechtliche Bindung', *op.cit.*, pp. 11-12.



## **Concluding Remarks: In the Same Boat Together**

In the light of the foregoing, what is the answer to be given to the question posed at the outset? What approach is to be preferred, the AG's where the international and European spheres are depicted as two ships, albeit not passing by each other unnoticed since trying to avoid collision, yet remaining separate vessels sailing at different speed? Or rather the CFI's, 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, globalist 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. Contrariwise, while the AG's argumentation at first glance seems a bit out-of-time, its legal conclusiveness 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, especially when taking into account the international ramifications which are likely to result, both in the short term and in the long term. Ironically, this is so since the reality of the international community and its imperfect international 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 this ECJ ruling creates, amounts to a clear warning signal, still short of a mutiny, reminding the UNSC as the 'oversteering helmsman' of the international community to readjust the course of this common enterprise as far as possible.

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