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GREAT ACCOUNTABILITY SHOULD ACCOMPANY GREAT POWER: THE ECJ AND THE U.N. SECURITY COUNCIL IN *KADI I & II*

VANESSA ARSLANIAN*

Abstract: Over a decade ago, the United Nations (UN) Security Council added Yassin Abdullah Kadi's name to a list of hundreds of individuals suspected of associating with Al-Qaida and the Taliban. The Security Council directed UN Member States to freeze the listed individuals' assets and to limit their travel. The Council of the European Union (EC) subsequently passed regulations giving direct effect to the UN sanctions regime. In 2008, the European Court of Justice (ECJ) annulled one such implementing regulation, but assigned responsibility for remedying considerable due process defects inherent in the regime to Community institutions rather than the UN Security Council. Leaving this task to the European Union (EU) presents a logistical impossibility. Instead, the Security Council should create a court to review its own listing decisions and ensure fair procedure. The ECJ should allocate responsibility to the Security Council, while preserving the EU legal order's autonomy. In *Kadi II*, Mr. Kadi's current appeal, the ECJ has the opportunity to indicate that it would accept the authority of a court dedicated to hearing challenges to listing decisions, provided it satisfies the European Court of Human Rights' definition of an independent and impartial tribunal under Article 6 of the European Convention on Human Rights.

INTRODUCTION

In late 2001, the UN Security Council's Al-Qaida Sanctions Committee (Sanctions Committee)¹ added Saudi businessman Yassin Abdul-

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¹ The "Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities" goes by different names. See United Nations, *General Information on the Work of the Committee*, SECURITY COUNCIL COMMITTEE PURSUANT TO RESOLUTIONS 1267 (1999) AND 1989 (2011) CONCERNING AL-QAIDA AND ASSOCIATED INDIVIDUALS AND ENTITIES, <http://www.un.org/sc/committees/1267/information.shtml> (last visited Oct. 15, 2012). The Committee, formerly known as the

lah Kadi's name to the Consolidated List of individuals and groups associated with Al-Qaida and the Taliban.² The Sanctions Committee also

"1267 Al-Qaida Taliban Sanctions Committee," is now the "Al-Qaida Sanctions Committee," with a separate committee in place to implement sanctions for suspected Taliban associates. *See, e.g., Chairmanship of the Al Qaeda & Taliban Sanctions Committees*, PERMANENT MISSION OF GER. TO THE UN N.Y., <http://www.new-york-un.diplo.de/Vertretung/newyorkvn/en/05/al-qaida-and-taliban-sanctions-committees.html> (last visited Oct. 15, 2012). Different authors refer to this committee by different names, including the "1267 Committee," and the "Sanctions Committee." *See, e.g.,* Joined Cases C-402 & 415/05, *Kadi v. Council (Kadi I)*, 2008 E.C.R. I-6351, ¶ 15 (referring to the Committee only as the "Sanctions Committee"); Lorraine Finlay, *Between a Rock and a Hard Place: The Kadi Decision and Judicial Review of Security Council Resolutions*, 18 TUL. J. INT'L & COMP. L. 477, 479 (2010) (referring to the Committee as both the "1267 Committee" and the "1267 Sanctions Committee").

² *See* Press Release, Security Council, Security Council Al-Qaida Sanctions Committee Deletes Entry of Yasin Abdullah Ezzedine Qadi from its List, U.N. Press Release SC/10785 (Oct. 5, 2012), [available at](http://www.un.org/News/Press/docs//2012/sc10785.doc.htm) <http://www.un.org/News/Press/docs//2012/sc10785.doc.htm>; *see also* Finlay, *supra* note 1, at 479–80; Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, 25 BERKELEY J. INT'L L. 203, 206 (2007). *See generally* United Nations, *The List Established and Maintained by the 1267 Committee with Respect to Individuals, Groups, Undertakings and Other Entities Associated with Al-Qaida*, <http://www.un.org/sc/committees/1267/pdf/AQList.pdf> (last updated Oct. 5, 2012) [hereinafter Consolidated List] (listing individuals currently under sanctions for alleged connections to Al-Qaida). Mr. Kadi's case began with this listing, and he now approaches his tenth year of litigation, although the Security Council has removed him from the sanctions list. *See* Case T-85/09, *Kadi v. Comm'n (Kadi II)*, 2010 E.C.R. ____ (not yet published, decided Sept. 30, 2010), ¶ 37, [available at](http://curia.europa.eu/juris/document/document.jsf?text&docid=83733&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1039687) <http://curia.europa.eu/juris/document/document.jsf?text&docid=83733&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1039687>; U.N. Press Release SC/10785, *supra*. Mr. Kadi's case has been decided three times: once in 2005 in the Court of First Instance (CFI)—which has since been renamed the General Court (GC)—then on appeal to the European Court of Justice (ECJ) in 2008, again on remand to the GC in 2010, and has since been appealed. *See Appeal Brought on 13th December 2010 by the European Commission Against the Judgment of the General Court (Seventh Chamber) Delivered on 30th September 2010 in Case T-85/09: Yassin Abdullah Kadi v. European Commission*, 2011 O.J. (C 72) 9, 9 [hereinafter Appeal Brought on 13th December 2010]; Finlay, *supra* note 1, at 483. The European Commission, the Council of the European Union, and the United Kingdom each brought appeals against the General Court's 2010 judgment. *See Appeal Brought on 16 December 2010 by the Council of the European Union Against the Judgment of the General Court (Seventh Chamber) Delivered on 30th September 2010 in Case T-85/09: Yassin Abdullah Kadi v. European Commission*, 2011 O.J. (C 72) 9, 9–10; *Appeal Brought on 16 December 2010 by the United Kingdom of Great Britain and Northern Ireland Against the Judgment of the General Court (Seventh Chamber) Delivered on 30th September 2010 in Case T-85/09: Yassin Abdullah Kadi v. European Commission*, 2011 O.J. (C 72) 10, 10–11. The ECJ hears appeals from the GC. *See* Court of Justice of the Eur. Union, *General Court: Presentation: Jurisdiction*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7033/#compet (last visited Oct. 15, 2012). These three cases have since been joined. Case C-584/10, Order of the President of the Court (unpublished, entered Feb. 9, 2011), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=81825&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=5648528>. Several more EU countries have intervened in the lawsuit than did in *Kadi I*, including the Czech Republic, Austria, Denmark, Luxembourg, Hungary, the Slovak Republic, Bulgaria, Italy, and Finland, all supporting the position of the Council, the Commission, or both. *See Kadi I*, 2008 E.C.R. I-6351, ¶¶ 113–115; Joined

added approximately 400 other individuals and entities to that list.³ The Sanctions Committee directed Member States to freeze the assets and limit the travel of those individuals on the list,⁴ and until November 2002, no formal de-listing procedure existed.⁵ More than ten years after being added to the Consolidated List, Mr. Kadi awaits the outcome of the appeal in his case.⁶

In 2008, the European Court of Justice (ECJ) annulled the Council of the European Union (EC) regulation which gave direct effect to the United Nations (UN) sanctions regime as it applied to Mr. Kadi and the Al Barakaat International Foundation.⁷ In so doing, the ECJ asserted its right to review any European Community (Community)⁸ measure for compliance with the fundamental rights guaranteed by the EC Treaty,⁹ regardless of whether that regulation directly transposes a

Cases C-584/10, C-593/10 and C-595/10, Order of the President of the Court (unpublished, entered May 23, 2010), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=111087&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=5651068>.

³ Cora True-Frost, *The Development of Individual Standing in International Security*, 32 CARDOZO L. REV. 1183, 1209 (2011). As of October 3, 2012, 305 individuals and entities were listed. See generally Consolidated List, *supra* note 2 (listing 305 names).

⁴ See S.C. Res. 1390, ¶¶ 1, 2(a)–(b), 7, U.N. Doc. S/RES/1390 (Jan. 28, 2002).

⁵ Hudson, *supra* note 2, at 207–08.

⁶ See *supra* note 2 and accompanying text.

⁷ See *Kadi I*, 2008 E.C.R. I-6351, Holding ¶ 2; see also Council Regulation 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, and Repealing Council Regulation (EC) 467/2001, 2002 O.J. (L 139) 9, 9–10, 13, 15; Finlay, *supra* note 1, at 480 & n.12. Al Barakaat is a Somali-based organization that was added to the Consolidated List in 2001. *Kadi I*, 2008 E.C.R. ¶ 33; Donald G. McNeil, Jr., *How Blocking Assets Erased a Wisp of Prosperity*, N.Y. TIMES, Apr. 13, 2002, at A10. Al Barakaat's case was joined with Mr. Kadi's. See *Kadi I*, 2008 E.C.R. I-6351, ¶ 120.

⁸ Court of Justice of the Eur. Union, *Court of Justice: Presentation: Foreword*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7024/ (last visited Oct. 29, 2012). The ECJ's website explains that what was previously Community law has since become European Union law under the Treaty of Lisbon, which entered into force on December 1, 2009. See *id.* The ECJ notes, however, that it uses the term “Community law” when referencing ECJ case-law before the treaty entered into force. *Id.* For consistency, this Comment will likewise use the term “Community law.”

⁹ KLAUS-DIETER BORCHARDT, THE ABC OF COMMUNITY LAW 8 (5th ed. 1999), available at http://ec.europa.eu/publications/booklets/eu_documentation/02/txt_en.pdf. The EC Treaty refers to the Treaty Establishing the European Economic Community (EEC), and the EU Treaty refers to the Treaty on European Union. *Id.* A consolidated version of the two treaties can be found in the Official Journal of the European Union. See Consolidated Versions of the Treaty on European Union and the Treaty Establishing the European Community, Dec. 29, 2006, 2006 O.J. (C 321) 1. This Comment uses the term “EU legal order” to refer to the total body of founding documents and laws of the European Union.

Security Council resolution into the Community legal framework.¹⁰ The court therefore indirectly ruled that the UN sanctions regime violated fundamental rights under the Treaty.¹¹ Despite procedural improvements inspired in part by this decision, the General Court struck down the contested EC regulation in 2010.¹² This is the decision the Council and Commission currently appeal.¹³

Part I of this Comment describes the background to the ECJ decision in *Kadi v. Council (Kadi I)* and its aftermath, including the recently-decided *Kadi v. Commission (Kadi II)*. Part II provides a discussion of the dilemma of the 1267 sanctions regime, its evolution since 2001, and the possible interpretive approaches the ECJ may have taken in its review of the contested regulation. Part III argues that the ECJ should employ different reasoning when it decides *Kadi II* on appeal than it used in *Kadi I*. Specifically, this Comment suggests that the ECJ should indicate that it would accept the decision of an independent court or tribunal as defined by the European Court of Human Rights (ECtHR) in the ECtHR's interpretation of Article 6 of the European Convention on Human Rights (ECHR). The ECJ could thereby remain consistent with *Kadi I*'s emphasis on the autonomy of the European Union (EU) legal order while still allocating the primary responsibility for due process¹⁴ concerns to the Sanctions Committee itself, so that it may be more accountable to the individuals its regulations affect.

I. BACKGROUND

Nearly one year before 9/11, the Sanctions Committee altered its pre-existing sanctions regime to include a list—later entitled the “Consolidated List”—of individuals and entities associated with the Taliban,

¹⁰ See *Kadi I*, 2008 E.C.R. I-6351, ¶¶ 285–288.

¹¹ See *id.* ¶¶ 334–335, 342–343. While exhibiting caution not to contravene the Security Council resolution directly, the ECJ noted that Kadi's rights to be heard and to have effective judicial review of his rights were “patently not respected.” See *id.*

¹² See *Kadi II*, 2010 E.C.R. _____, ¶¶ 170, 192–195.

¹³ See Appeal Brought on 13th December 2010, *supra* note 2, at 9–10.

¹⁴ *Kadi I*, 2008 E.C.R. I-6351, ¶ 334. In *Kadi I*, the ECJ held that Mr. Kadi's “right[s] to be heard” and “to effective judicial review” were infringed by the sanctions regime. *Id.* while recognizing due process as a term of art in some national jurisprudence, including the United States', the term will be used throughout this Comment as shorthand for the “right[s] to be heard” and “to effective judicial review.” *Id.* This shorthand accords with other 1267 sanctions regime scholarship. See generally Jared Genser & Kate Barth, *When Due Process Concerns Become Dangers: The Security Council's 1267 Regime and the Need for Reform*, 33 B.C. INT'L & COMP. L. REV. 1 (2010) (articulating due process concerns tied to the 1267 regime).

Al-Qaida, and Usama bin Laden.¹⁵ As the Sanctions Committee revised its procedures in subsequent resolutions, the EC passed common positions and regulations to mirror these changes.¹⁶

Mr. Kadi filed suit at the Court of First Instance (CFI)—which has since been renamed the General Court¹⁷—in late 2001, later amending his complaint to contest the newer Regulation 881/2002 as it applied to him.¹⁸ His complaint argued, *inter alia*, that the sanctions scheme breached his fundamental rights to be heard and to effective judicial review.¹⁹

The CFI rejected his claim after sharply circumscribing the scope of judicial review of EC regulations that give direct effect to Security Council resolutions.²⁰ The CFI stated that Member States' obligations to the UN have primacy over subsequent treaties, even the EC Treaty.²¹ As such, the court disclaimed authority to question the lawfulness of the UN sanctions regime, except to review whether it comported with *jus cogens*.²² Under this narrow scope of review, the court found that in the context of counter-terrorism efforts, the applicant's rights had not been deprived arbitrarily, and thus the penalty, as applied, did not violate *jus cogens*.²³

¹⁵ Finlay, *supra* note 1, at 479; see S.C. Res. 1333, pmbll., ¶ 8(c), U.N. Doc. S/RES/1333 (Dec. 19, 2000).

¹⁶ See *Kadi I*, 2008 E.C.R. I-6351, ¶¶ 40–45.

¹⁷ See Craig Forcese & Kent Roach, *Limping into the Future: The U.N. 1267 Terrorism Listing Process at the Crossroads*, 42 GEO. WASH. INT'L L. REV. 217, 247 (2010).

¹⁸ See *Kadi I*, 2008 E.C.R. I-6351, ¶¶ 2, 39, 46; Case T-315/01, *Kadi v. Council (Kadi CFI Case)*, 2005 E.C.R. II-3649, ¶ 39.

¹⁹ *Kadi I*, 2008 E.C.R. I-6351, ¶ 49.

²⁰ See *Kadi CFI Case*, 2005 E.C.R. II-3649, ¶¶ 217–225.

²¹ See *id.* ¶¶ 193–194, 203–204.

²² *Id.* ¶¶ 225–231. *Jus cogens* is a narrow body of “peremptory norms” of customary international law. VAUGHAN LOWE, INTERNATIONAL LAW 59 (2007). *Jus cogens* is defined in Article 53 of the Vienna Convention on the Law of Treaties as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 115 U.N.T.S. 331. These norms effectively set limits on what states can agree to do, by treaty or otherwise. See LOWE, *supra*, at 59. Which norms constitute *jus cogens*, however, is disputed. See *id.* Widely-accepted examples include the prohibition against genocide and slavery. *Id.* Other examples have less traction, including the prohibition on racial discrimination or the right to self-determination. *Id.* It follows that providing the full spectrum of due process protections in a counter-terrorism context is not likely required under *jus cogens*. See *id.*

²³ See *Kadi CFI Case*, 2005 E.C.R. II-3649, ¶¶ 238–243.

The ECJ did not take the CFI's approach.²⁴ The ECJ first noted that it did not *per se* have authority to review a Security Council resolution.²⁵ The court held, however, that it did have the duty to review the implementing regulation for internal lawfulness; that is, to determine whether the implementing regulation respected the fundamental rights guaranteed by the EU legal order.²⁶ The ECJ then found the asset freeze, as applied to Mr. Kadi, to be an unjustified deprivation of his fundamental rights.²⁷ Many lauded this decision for championing human rights,²⁸ but its significance also lies with the ECJ's dualist²⁹ reasoning, which emphasized the EU legal order's autonomy and separateness from international law.³⁰

While *Kadi I* was pending, the Security Council passed Resolution 1822, which required states to provide details justifying each individual's listing along with their proposed submissions to the Consolidated List.³¹ Immediately after *Kadi I*, the Sanctions Committee provided Mr. Kadi with the reasons justifying his listing.³² Soon after, Mr. Kadi submitted his response to the relatively vague allegations contained in this summary.³³ Nevertheless, the Commission included Mr. Kadi on the list when it adopted its revised Regulation (EC) No. 1190/2008, informing him that it had "complied with" the ECJ judgment, which did not require any further evidence to be provided against him.³⁴

²⁴ Forcese & Roach, *supra* note 17, at 244.

²⁵ *Kadi I*, 2008 E.C.R. I-6351, ¶ 287.

²⁶ *Id.* ¶ 326.

²⁷ *See id.* ¶¶ 348–353, 369–371.

²⁸ Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1, 1–2 (2010).

²⁹ *See id.* at 2. Professor de Búrca explains that dualism emphasizes the separateness of international and domestic law. *Id.* at 2 n.4. Under this philosophy, international law is only incorporated into the domestic legal order insofar as it comports with domestic principles, with little effort to shape the relationship between these two legal spheres. *Id.* An illustrative example of dualism is the treatment of international law in U.S. Supreme Court jurisprudence in cases such as *Medellin v. Texas*, in which the Court held that an International Court of Justice judgment is not valid in the United States absent congressional action. 552 U.S. 491, 513 (2008); de Búrca, *supra* note 28, at 2 & n.5.

³⁰ *See de Búrca, supra* note 28, at 2.

³¹ *See* S.C. Res. 1822, ¶ 12, U.N. Doc. S/RES/1822 (June 30, 2008).

³² *Kadi II*, 2010 E.C.R. _____, ¶¶ 49–50.

³³ *Id.* ¶¶ 55, 157.

³⁴ *Id.* p.mbl., ¶¶ 60–61; Commission Regulation 1190/2008, Amending for the 101st Time Council Regulation (EC) No 881/2002 Imposing Certain Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida Network, and the Taliban, 2008 O.J. (L 322) 25, 25–26 [hereinafter Commission Regulation 1190/2008].

II. DISCUSSION

A. *The Dilemma of United Nations Accountability in the Sanctions Regime*

Commentators have noted the recent shift in the role of the UN Security Council.³⁵ The Security Council has traditionally occupied the role of an “enforcer of collective security,” issuing non-binding resolutions that apply to specific conflicts or situations.³⁶ In contrast, targeted sanctions are binding and apply generally, not just to states, but to individuals.³⁷ In this sense, the Security Council acts like a “world legislator” or “global law maker.”³⁸

Despite the fact that the sanctions regime affects individuals directly,³⁹ the Security Council has not created an independent, impartial tribunal to review challenges to Sanctions Committee decisions, including those regarding placement on the Consolidated List.⁴⁰ Until 2002, there was no way for a listed person to be formally removed from the Consolidated List.⁴¹ Following significant legal and humanitarian criticism, the Sanctions Committee permitted humanitarian exceptions and established a procedural “focal point” through which de-listing and derogation requests could be directly submitted.⁴²

Subsequent Security Council resolutions ensured that the individuals listed, and their countries of nationality and host countries, would be notified of their listing.⁴³ Security Council Resolution 1822 also requires nations to provide a list of reasons justifying why an individual or group should be added, and for summaries of these reasons to be made available on the Sanctions Committee’s website.⁴⁴ As

³⁵ See Finlay, *supra* note 1, at 489–90; Hudson, *supra* note 2, at 203.

³⁶ Finlay, *supra* note 1, at 489–90.

³⁷ Hudson, *supra* note 2, at 205; see Finlay, *supra* note 1, at 490.

³⁸ Finlay, *supra* note 1, at 489–90.

³⁹ *Id.* at 490. For a personal account from one of the individuals on the Consolidated List, see Neal Rockwell, *Abousfian Abdelrazik’s Statement to the UN 1267 Committee*, COOP MÉDIA DE MONTRÉAL (June 17, 2011), <http://montreal.mediacoop.ca/video/abousfian-abdelraziks-statement-un-1267-committee/7513>.

⁴⁰ See Case T-85/09, *Kadi v. Comm’n (Kadi II)*, 2010 E.C.R. _____ (not yet published, decided Sept. 30, 2010), ¶ 128, _____ available at <http://curia.europa.eu/juris/document/document.jsf?text&docid=83733&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1039687>; True-Frost, *supra* note 3, at 1239.

⁴¹ Hudson, *supra* note 2, at 207–08.

⁴² Forcese & Roach, *supra* note 17, at 223, 225; see Finlay, *supra* note 1, at 481–82.

⁴³ S.C. Res. 1822, *supra* note 31, ¶¶ 12, 15.

⁴⁴ *Id.* ¶¶ 13, 23. For examples of these summaries, see *Narrative Summaries of Reasons for Listing*, AL-QAIDA SANCTIONS COMM., http://www.un.org/sc/committees/1267/individuals_associated_with_Al-Qaida.shtml (last visited Nov. 5, 2012).

pointed out by the General Court in *Kadi II*, however, these summaries are often “general, unsubstantiated, vague and unparticularised,” and do not require the production of any evidence to buttress the allegations contained therein.⁴⁵

Further emphasizing the separation between the individual and the Sanctions Committee, Mr. Kadi received his summary of reasons through France’s permanent representative to the UN.⁴⁶ Mr. Kadi ultimately contested these allegations, not in front of the Sanctions Committee itself, but in front of the Commission, which decided, nevertheless to include him in Regulation 1190/2008’s revised list.⁴⁷ The General Court, as well as some commentators, noted how difficult reviewing the evidence against Mr. Kadi would be for the Commission: it is not likely to gain access to sensitive national security information guarded closely by the state that has nominated an individual for listing.⁴⁸

The Sanctions Committee has since taken steps to ameliorate various procedural concerns, including the establishment of an Office of the Ombudsperson, which impartially and independently reviews requests for removal from the Consolidated List.⁴⁹ In 2010, however, the General Court found that the Office of the Ombudsperson did not constitute a sufficiently robust improvement in procedure because Committee consensus was still required to de-list an individual.⁵⁰ Despite this finding, the most recent resolution continues the term of the Ombudsperson.⁵¹ In an effort to increase transparency, the resolution also urges, but does not require, Member States to identify themselves when submitting a proposed individual’s name to the Consolidated List.⁵² To date, it appears that the Commission has not substantially re-

⁴⁵ *Kadi II*, 2010 E.C.R. _____, ¶ 157.

⁴⁶ *See id.* ¶¶ 49–50.

⁴⁷ *Id.* ¶¶ 55–58; *see* Commission Regulation 1190/2008, *supra* note 34, at 25.

⁴⁸ *See Kadi II*, 2010 E.C.R. _____, ¶ 98; Finlay, *supra* note 1, at 495; Forcese & Roach, *supra* note 17, at 219; Richard Barrett, *Al-Qaeda and Taliban Sanctions Threatened*, WASH. INST. (Oct. 6, 2008), <http://www.washingtoninstitute.org/templateC05.php?CID=2935>.

⁴⁹ S.C. Res. 1904, ¶¶ 20–21, U.N. Doc. S/RES/1904 (Dec. 17, 2009).

⁵⁰ *See Kadi II*, 2010 E.C.R. _____, ¶ 128; Joined Cases C-402 & 415/05, *Kadi v. Council (Kadi I)*, 2008 E.C.R. I-6351, ¶ 323.

⁵¹ S.C. Res. 1989, ¶¶ 20–21, U.N. Doc. S/RES/1989 (June 17, 2011). A listing of resolutions related to the operation of the 1267 Committee is available online; the most recent of these resolutions is 1989. *See Security Council Resolutions Related to the Work of the Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, AL-QAIDA SANCTIONS COMM., <http://www.un.org/sc/committees/1267/resolutions.shtml> (last visited Nov. 5, 2012).

⁵² *See* S.C. Res. 1989, *supra* note 51, ¶ 14.

vised its procedures; rather, it has continued to update the Consolidated List in step with the Sanctions Committee.⁵³

B. *Judicial Responses to Security Council Resolution Implementation
in the Sanctions Context*

The ECJ noted in *Kadi I* that the UN Charter stipulates no specific model for implementing Security Council resolutions,⁵⁴ and indeed not all Member States use the same method as the EU.⁵⁵ For example, the United States implements Security Council resolutions through its executive branch, therefore U.S. courts have not yet addressed the relationship between the domestic legal order and Security Council resolutions.⁵⁶

The ECtHR has, in contrast, adopted a deferential stance regarding Security Council determinations.⁵⁷ The ECtHR completely rejected the possibility of exercising jurisdiction over acts “ultimately attributable” to the Security Council.⁵⁸ In *Behrami v. France*, the ECtHR justified its deference by noting the similarity in values underlying both the ECHR and the UN Charter.⁵⁹ The court also stated that asserting jurisdiction would impermissibly disrupt the Security Council’s mission in that case.⁶⁰

The CFI took a similar tack in *Kadi I*, holding that the UN Charter has primacy over all other international obligations, including agreements concluded between EU countries, and thus rejected a dualist

⁵³ See, e.g., Commission Implementing Regulation 876/2011, Amending for the 157th Time Council Regulation (EC) No 881/2002 Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with the Al-Qaida Network, 2011 O.J. (L 227) 11, 11 (implementing the Sanctions Committee’s decision to remove an individual from the list by removing that individual from Annex I of Regulation (EC) No 881/2002).

⁵⁴ *Kadi I*, 2008 E.C.R. I-6351, ¶ 298.

⁵⁵ See Forcese & Roach, *supra* note 17, at 258. In the United States, terrorist designations are made through the Office of Foreign Assets Control, a branch of the Department of the Treasury, pursuant to Executive Order. See *Islamic Am. Relief Agency v. Gonzalez*, 477 F.3d 728, 731, 734 (D.C. Cir. 2007); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 159, 160 (D.C. Cir. 2003).

⁵⁶ See Forcese & Roach, *supra* note 17, at 258.

⁵⁷ de Búrca, *supra* note 28, at 11, 15.

⁵⁸ *Id.* at 14, 16. Interestingly, the ECJ asserted in *Kadi I*, without much explanation, that the contested regulation “cannot be considered to be an act directly attributable” to the UN. See *Kadi I*, 2008 E.C.R. I-6351, ¶ 314. The ECJ stated that the circumstances under which *Kadi I*’s jurisdictional questions arose were in “fundamentally different circumstances.” *Id.*

⁵⁹ de Búrca, *supra* note 28, at 15.

⁶⁰ *Id.*

vision of the relationship between the Community and international legal orders.⁶¹ The CFI reasoned that only applying *jus cogens* norms, a narrow and contested body of international law, could check the Security Council.⁶²

In contrast, Advocate General Poiares Maduro, the ECJ, and most recently the General Court, refused to grant Security Council resolutions immunity from review.⁶³ These three opinions stated that the EC regulations implementing Security Council resolutions should comport not with international rights protections, but with guarantees of *fundamental rights* protected by the EC Treaty.⁶⁴ Article 6(1) of the EU Treaty sets forth these “fundamental rights,” including the “principles of liberty, democracy, and respect for human rights.”⁶⁵ In both *Kadi I* and *Kadi II*, the courts noted that Mr. Kadi’s right to judicial protection was denied because the UN employed inadequate procedures to review listing decisions.⁶⁶ The ECJ did not clarify, however, whether it would be willing to accept the decision of an independent court or tribunal that provided sufficient judicial protection in the course of reviewing the merits of Mr. Kadi’s or others’ claims.⁶⁷ After noting the absence of adequate procedural protections at the Sanctions Committee level, the General Court in *Kadi II* stated that it then fell to Community institutions, not necessarily to the Sanctions Committee, to ensure implementation of adequate safeguards.⁶⁸

III. ANALYSIS

Many commentators agree that the sanctions regime, despite various reforms, continues to violate due process.⁶⁹ The Sanctions Commit-

⁶¹ See Case T-315/01, *Kadi v. Council (Kadi CFI Case)*, 2005 E.C.R. II-3649, ¶ 208; de Búrca, *supra* note 28, at 19–20.

⁶² See de Búrca, *supra* note 28, at 19, 20–21.

⁶³ *Kadi I*, 2008 E.C.R. I-6351, ¶ 321–322; Opinion of Advocate General Poiares Maduro in Case C-402/05, *Kadi v. Council (Kadi I)*, 2008 E.C.R. I-6363, ¶ 28, 40 [hereinafter Opinion of AG Maduro]; see *Kadi II*, 2010 E.C.R. _____, ¶¶ 112, 126. The Advocate General (AG) of the ECJ provides an advisory opinion in advance of the ECJ’s final decision. See de Búrca, *supra* note 28, at 22–23. The AG’s opinion is considered persuasive, but not binding, on a subsequent ECJ decision. *Id.* at 23.

⁶⁴ de Búrca, *supra* note 28, at 41; see *Kadi II*, 2010 E.C.R. _____, ¶¶ 125–126; *Kadi I*, 2008 E.C.R. I-6351, ¶¶ 285, 316–317, 322; Opinion of AG Maduro, *supra* note 63, ¶ 40.

⁶⁵ *Kadi II*, 2010 E.C.R. _____, ¶ 119.

⁶⁶ See *id.* ¶¶ 157, 171, 180; *Kadi I*, 2008 E.C.R. I-6351, ¶¶ 324, 352.

⁶⁷ See *Kadi I*, 2008 E.C.R. I-6351, ¶¶ 322–330; de Búrca, *supra* note 28, at 25.

⁶⁸ See *Kadi II*, 2010 E.C.R. _____, ¶ 187.

⁶⁹ See Finlay, *supra* note 1, at 481; Forcese & Roach, *supra* note 17, at 219; Hudson, *supra* note 2, at 213.

tee has reaffirmed that the nature of the sanctions are preventative and not punitive, yet review of the sanctions as applied to specific individuals renders this assertion difficult to support.⁷⁰ The Sanctions Committee listed most individuals in 2001, the vast majority of whom still remain on the Consolidated List.⁷¹ The indefinite duration and severity of these sanctions result in the functional equivalent of a criminal punishment, yet virtually none of the guarantees of due process are observed.⁷²

Even with the added oversight offered by the Ombudsperson, an applicant seeking de-listing faces significant obstacles, including contesting vague allegations backed by sensitive national security evidence that most states refuse to reveal.⁷³ A shroud also surrounds the efficacy of the system itself—it is unclear whether the sanctions scheme provides benefits significant enough to warrant the rights deprivations it imposes.⁷⁴ As such, the vesting of concentrated power with the Sanctions Committee, and with the national executives who bypass their legislatures to implement Security Council measures, becomes even more troubling.⁷⁵ This concentration of power emphasizes the importance of judicial intervention in the sanctions context.⁷⁶

Navigating the legal framework of Security Council resolutions and domestic constitutional law poses significant challenges to national and regional courts.⁷⁷ In this situation, however, courts serve as a crucial safeguard of domestic constitutions and the rights they confer.⁷⁸ The

⁷⁰ S.C. Res. 1989, *supra* note 51, pmb.; see Case T-85/09, *Kadi v. Comm'n (Kadi II)*, 2010 E.C.R. ____ (not yet published, decided Sept. 30, 2010), ¶ 150, available at <http://curia.europa.eu/juris/document/document.jsf?text&docid=83733&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1039687>; Forcese & Roach, *supra* note 17, at 237; Hudson, *supra* note 2, at 218.

⁷¹ Hudson, *supra* note 2, at 206–07; see *True-Frost*, *supra* note 3, at 1198 n.46, 1209, 1218.

⁷² Hudson, *supra* note 2, at 218; See *Joined Cases C-402 & 415/05, Kadi v. Council (Kadi I)*, 2008 E.C.R. I-6351, ¶¶ 322–324, 352; Forcese & Roach, *supra* note 17, at 237.

⁷³ See *Kadi II*, 2010 E.C.R. ____, ¶¶ 128, 157; Forcese & Roach, *supra* note 17, at 266–68.

⁷⁴ See Forcese & Roach, *supra* note 17, at 262; Hudson, *supra* note 2, at 224–25.

⁷⁵ See Forcese & Roach, *supra* note 17, at 237; Kim Lane Scheppele, *Global Security Law and the Challenge to Constitutionalism After 9/11*, Public Law Lecture, Glasgow, Scotland, (Feb. 18, 2010). Scheppele notes that the domestic legislatures of Member States often do not have the opportunity to decide whether to implement a law under Security Council resolutions; rather, they are only able to decide how to implement that law once instructed to do so. See *id.* In the United Kingdom and the United States, Security Council Resolutions are implemented by Orders in Council and Executive Orders, respectively, in which the executive need not consult the legislature before implementing the asset-freezing regime. *Id.*

⁷⁶ See Scheppele, *supra* note 75.

⁷⁷ See *id.* at 19–20.

⁷⁸ See *id.* at 22–23.

ECJ's message regarding the sanctions regime's impermissibility mirrored the sentiments of many Member States, and very likely influenced the Sanctions Committee's choice to grant some form of standing to listed individuals.⁷⁹ In addition, it seems that the Sanctions Committee actually expected a response from national courts.⁸⁰ The judiciary clearly has a crucial role in navigating and shaping this complex area of law. Therefore the messages sent by the court through its reasoning in decisions like *Kadi I* and *Kadi II* become ever more critical.⁸¹

One commentator, Gráinne de Búrca, suggests that the ECJ's reasoning should have emphasized "respect for basic principles of due process and human rights protection under *international law*," rather than using dualist language to separate the EU legal order from international law.⁸² Rather than dualism being interpreted as "inherently bad or good," however, "[t]he ultimate question is the ends to which dualism . . . is employed."⁸³ An approach emphasizing international legal principles would have reaffirmed the EU's status as a "normative power," but *Kadi I*'s dualist reasoning helped expose the injustice in the 1267 sanctions regime.⁸⁴

Professor de Búrca also presents the reasonable alternative that the ECJ should have proceeded as the German Constitutional Court did in its *Solange I & II* decisions.⁸⁵ If the ECJ had engaged in this dialogue, de Búrca argues, the ECJ would have been better able to shape the relationship between the EU and UN by harmonizing these two legal orders.⁸⁶ *Solange I* involved a conflict between domestic and Community law, which mirrors the international-or-supranational conflict in *Kadi I*.⁸⁷ The German Constitutional Court in *Solange I* reviewed

⁷⁹ See S.C. Res. 1989, *supra* note 51, pmb. ("Recognizing the [legal] challenges . . . welcoming improvements to the Committee's procedures and the quality of the Consolidated List, and expressing its intent to continue efforts to ensure that procedures are fair and clear."); Forcese & Roach, *supra* note 17, at 253, 271; True-Frost, *supra* note 3, at 1210 n.90, 1241.

⁸⁰ See Opinion of AG Maduro, *supra* note 63, ¶ 38.

⁸¹ See de Búrca, *supra* note 28, at 41–42; True-Frost, *supra* note 3, at 1241.

⁸² de Búrca, *supra* note 28, at 2 & n.4, 4, 41–42 (emphasis added).

⁸³ Forcese & Roach, *supra* note 17, at 270, 271.

⁸⁴ *Id.* at 271; see de Búrca, *supra* note 28, at 6 n.19, 47 n.240, 48–49.

⁸⁵ de Búrca, *supra* note 28, at 42–43. Although the EU is a party in both cases, in *Kadi*, the ECJ occupies the same role as the German Constitutional Court did in *Solange I & II*, as it acts as the "constitutional court of the municipal legal order" relative to the UN. Opinion of AG Maduro, *supra* note 63, ¶ 37; see de Búrca, *supra* note 28, at 43–44.

⁸⁶ See de Búrca, *supra* note 28, at 42–44.

⁸⁷ See *id.* at 42–43. Professor de Búrca notes that the dispute in *Solange* "was not only between a provision of the German Basic Law and an EC Regulation but also between the

an EC regulation for compatibility with German law, emphasizing not the autonomy of the German domestic legal structure—as the ECJ did with Community law in *Kadi I*—but rather, the “mutually disciplining relationship between the two legal systems.”⁸⁸ In 1986, twelve years after *Solange I*, the court decided *Solange II*, and held that that because of progress in rights protections, the EC regulation was immune from review for compliance with domestic fundamental rights.⁸⁹ This decision effectively disclaimed domestic jurisdiction over similar cases as long as the ECJ adequately safeguarded those rights.⁹⁰

The ECJ’s reasoning does not clarify what level of judicial protection would justify finding an EC regulation that implements Security Council resolutions immune from review, like the German Constitutional Court did in *Solange II*.⁹¹ Given the ECJ’s unwillingness to engage in the soft-constitutionalist, dialogic approach of the German Constitutional Court, or to base its decision on fundamental rights guaranteed by international law as de Búrca suggests they might have chosen to do, it is unclear whether it would adopt either approach in the future.⁹²

The sanctions regime’s encroachment on domestic protections guaranteed by Community law is severe.⁹³ The nature of this encroachment may have deterred the ECJ from using gentler, more harmonious language, and perhaps even warranted the creation of distance between the Security Council and the EU legal order.⁹⁴ The ECJ’s impending decision in the *Kadi II* appeal may reflect a middle ground: the court may reinforce the EU’s legal autonomy to remain consistent with *Kadi I* while simultaneously applying pressure to the UN, instead of the EC, to implement appropriate due process protections.⁹⁵

internal constitutional norms of one political entity and the legal requirements imposed by an international or supranational system of which the former entity is a part.” *Id.*

⁸⁸ See *id.* 43–44.

⁸⁹ See *id.*

⁹⁰ See *id.* at 42 n.214, 43–44.

⁹¹ See de Búrca, *supra* note 28, at 44; see also *Kadi I*, 2008 E.C.R. I-6351, ¶¶ 322–330.

⁹² See *Kadi I*, 2008 E.C.R. I-6351, ¶ 329; de Búrca, *supra* note 28, at 41–44.

⁹³ See *Kadi II*, *supra* note 70, ¶¶ 119, 171, 192–196.

⁹⁴ See de Búrca, *supra* note 28, at 41–44; Forcese & Roach, *supra* note 17, at 271; Scheppele, *supra* note 75.

⁹⁵ See *Kadi II*, 2010 E.C.R. _____, ¶ 187; Iain Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 NORDIC J. INT’L L. 159, 159, 166 (2003); de Búrca, *supra* note 28, at 44; Forcese & Roach, *supra* note 17, at 265, 271; Hudson, *supra* note 2, at 226; True-Frost, *supra* note 3, at 1241.

The ECJ and General Court judgments in *Kadi I* and *Kadi II* reached correct outcomes.⁹⁶ Nevertheless, both courts should have encouraged the UN to establish an independent tribunal to ensure adequate due process protections, rather than leaving that responsibility with the EU.⁹⁷ The ECJ should not have drawn primarily from international law in its reasoning, as de Búrca suggests.⁹⁸ Instead, the court should have drawn, as the General Court did in *Kadi II*, on the jurisprudence of the ECtHR.⁹⁹

On the current appeal of *Kadi II*, the ECJ has the opportunity to decide to accept the decision of an “independent court or tribunal,” and whether that satisfies the ECtHR’s definition under Article 6 of the ECHR, ultimately delineating what constitutes a fair trial.¹⁰⁰ The ECtHR has discussed fair trials in the national security context.¹⁰¹ In *Öcalan v. Turkey*, for example, the ECtHR held that military tribunals trying individuals identified as national security threats must still be “independent of the executive and legislature at [all] stages of the proceedings.”¹⁰² Adopting the jurisprudence of the ECtHR would provide a clear standard by which to judge whether an applicant’s rights have been infringed, and would thereby send a clear message to the UN about satisfactory procedural protections.¹⁰³ This approach would also be consistent with *Kadi I*, because by relying on the ECtHR instead of the UN for its standards, the ECJ preserves the EU legal order’s independence from the Security Council.¹⁰⁴

⁹⁶ See Forcese & Roach, *supra* note 17, at 271; Scheppele, *supra* note 75; True-Frost, *supra* note 3, at 1241.

⁹⁷ See *Kadi II*, 2010 E.C.R. _____, ¶ 187; de Búrca, *supra* note 28, at 41–42; Forcese & Roach, *supra* note 17, at 265, 270, 271; Hudson, *supra* note 2, at 226.

⁹⁸ See de Búrca, *supra* note 28, at 41–42; Forcese & Roach, *supra* note 17, at 271.

⁹⁹ See Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Convention]; *Kadi II*, 2010 E.C.R. _____, ¶¶ 176–177; *Öcalan v. Turkey*, App. No. 46221/99, 41 Eur. H.R. Rep. 985, 1023 (2005); Opinion of AG Maduro, *supra* note 63, at I-6385; de Búrca, *supra* note 28, at 24–25, 44. Pursuant to the Treaty of Lisbon, the EU must accede to the European Convention on Human Rights. Press Release, Europa, European Commission and Council of Europe Kick Off Joint Talks on EU’s Accession to the Convention on Human Rights (July 7, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/906>.

¹⁰⁰ See Convention, *supra* note 99, art. 6; *Kadi II*, 2010 E.C.R. _____, ¶ 177; Opinion of AG Maduro, *supra* note 63, ¶ 54.

¹⁰¹ See, e.g., *Öcalan*, 41 Eur. H.R. Rep. at 1023; *infra* note 102 and accompanying text.

¹⁰² See, e.g., *Öcalan*, 41 Eur. H.R. Rep. at 1023.

¹⁰³ See Convention, *supra* note 99, art. 6; *Öcalan*, 41 Eur. H.R. Rep. at 1023; de Búrca, *supra* note 28, at 24, 25 (noting “the extensive and growing body of legal principles” that constitute fundamental rights, and that these principles are currently “determined almost entirely by the ECJ”).

¹⁰⁴ See *Kadi II*, 2010 E.C.R. _____, ¶¶ 176–177; de Búrca, *supra* note 28, at 44.

CONCLUSION

The bottom-line outcomes of both *Kadi I* and *Kadi II* appropriately invalidated the EU's implementation of the UN 1267 regime. The first incarnation of the sanctions regime provided no way to de-list individuals or formally allow them to challenge a listing decision. While the system has evolved considerably in response to judicial and political pressure, states can still nominate individuals anonymously and need not produce evidence to buttress their allegations. The sanctions regime continues to deny listing individuals fundamental due process protections, including the right to be heard and the right to effective judicial review.

The ECJ ultimately refused to grant the EC regulation at issue—which gave Security Council listing resolutions direct effect—immunity from review, and employed dualist language to emphasize the EU legal order's autonomy from international law. This approach was justified given the severity of the sanctions regime's encroachment on domestic rights guarantees. The ECJ should allocate to the UN, not to EU institutions, responsibility for ensuring protection of constitutional guarantees. It can do this by indicating it would accept the decision of a court that satisfies the ECtHR's definition of an independent and impartial tribunal under Article 6 of the ECHR. In this way, the ECJ can remain consistent with *Kadi I* by looking to the EU, rather than the UN, for its standards, but still encourage the UN to create a tribunal to remedy these rights violations.

