DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS

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I. EUROPEAN COURT OF JUSTICE, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* (JOINED CASES C-402/05 P AND C-415/05 P) JUDGMENT OF 3 SEPTEMBER 2008

A. Summary of Facts and Judgment

UN Security Council (UNSC) Resolution 1267 (1999) was one in a series of resolutions which attempted to prevent the planning and carrying out of terrorist attacks by Usama bin Laden and the Al-Qaeda network. The freezing of funds of the Taliban, who the Security Council saw as providing both a safe haven for bin Laden and a base for developing international terrorist activities, as well as the funds of those suspected of being associated with bin Laden, is one of the principal means by which the aims of the Resolutions are to be achieved. Paragraph 6 of the Resolution established a Sanctions Committee, which is responsible, amongst other tasks, for creating a list of individuals and entities designated as associates of bin Laden. States are responsible for freezing the funds and assets of those individuals and entities on the list.

The European Union (EU) adopted Common Position 1999/727/CFSP pursuant to the provisions on the Common Foreign and Security Policy (CFSP) which prescribed the freezing of funds according to the terms of Resolution 1267. The common position was swiftly followed in February 2000 by Council Regulation 337/2000 concerning a flight ban and the necessary freezing of funds. Further UNSC Resolutions were passed, followed by CFSP Common Positions and EC Regulations, which strengthened the restrictive measures. Regulation 467/2001 defined the nature of 'funds' and 'freezing of funds' and listed, in Annex I, the individuals and entities designated by the Sanctions Committee as affected by the freezing of funds.

Kadi, a national of Saudi Arabia, and the Al Barakaat International Foundation, established in Sweden, were placed on the Sanctions Committee's renewed lists on 17 October and 9 November 2001 respectively. They were subsequently added to Annex I of Regulation 467/2001.[1] The contested Regulation (881/2002) was adopted

[1] Namely regulations 2062/2001 of 19 October 2001 (Kadi) and 2199/2001 of 12 November 2001 (Al Barakaat).

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on 27 May 2002 following a further UNSC Resolution and CFSP common position, all which continued and widened the measures directed at the Taliban, bin Laden and Al-Qaeda. The regulation repealed the previous Regulation 467/2001 but the definitions of funds and freezing of funds were identical. Both Kadi and Al Barakaat remained on the list in Annex I. Regulation 561/2003 introduced an amendment whereby a Member State may allow for exceptions to the freezing of funds as permitted by the UNSC: the Member State must inform the Sanctions Committee (and the other Member States), who must not object to the exception being granted.

Kadi, as a 'non-privileged applicant' for the purposes of judicial review at the EU level, brought an action before the Court of First Instance (CFI) seeking annulment of the Regulation in so far as it related to him. His arguments were based on four grounds: one on lack of EC competence and three on breaches of his fundamental rights (right to a fair hearing; the right to respect for property and the principle of proportionality; and the right to effective judicial review).

The CFI rejected all of the arguments.[2] On the competence issue, the CFI found that although articles 60 and 301 EC only expressly mention sanctions which can be imposed on third countries (and not, therefore, individuals), recourse to the 'residual powers' of article 308 EC[3] was justified. However, the Court refused to endorse the Commission's argument that the fight against international terrorism fell within the residual competence of article 308 in order to achieve a Community objective. This, in the view of the CFI, would 'deprive many provisions of the Treaty on European Union of their ambit and would be inconsistent with the introduction of instruments specific to the CFSP'.[4] Nevertheless, when the effects of articles 60, 301 and 308 were combined, this justified their use in the present case and did not constitute a widening of 'the scope of Community powers beyond the general framework created by the provisions of the Treaty'.[5]

On the fundamental rights arguments, the CFI was unwilling to find that it had the power to review UNSC resolutions to assess their conformity with the fundamental rights at stake. The CFI concluded that since UNSC resolutions are binding on Member States and, as a matter of customary international law, a state 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty',[6] such resolutions fall outside the ambit of the Court's judicial review, the Court cannot therefore 'call in question, even indirectly, their lawfulness in the light of Community law'.[7] The CFI noted, however, one limit on the binding nature of UNSC resolutions, namely that they must observe peremptory norms of general international law, or *jus cogens*. If the resolution did not do so, then the Court would be empowered to carry out indirect judicial review; as the CFI noted 'in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, highly exceptionally, extend to determining whether the superior rules of international law

[2] Judgments of 21 September 2005 in Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council* and Case T-315/01 *Kadi v Council and Commission*.

[3] 'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures'.

[4] Above (n 2) para 156.

[5] ibid, paras 132–3.

[6] ibid, para 182.

[7] ibid, para 225.

falling within the ambit of *jus cogens* have been observed, in particular, the mandatory provisions concerning the universal protection of human rights'.[8] On this basis, the CFI considered the claims based on fundamental human rights and found that none could succeed.

Both applicants lodged appeals with the European Court of Justice (ECJ) on the same grounds. Advocate General Maduro's opinion on the *Kadi* case[9] proposed that the Court should set aside the CFI's decision and annul the Regulations in so far as they concern the applicant. On the issue of competence, the Advocate General found that the CFI's interpretation of articles 60 and 301 was too narrow in restricting the imposition of sanctions on the governing regimes of third countries only. The mentioning of 'third countries' in these articles includes, according to the Advocate General, the economic relations with individuals and entities *within* third countries since 'the sanctions necessarily affect the overall state of economic relations between the Community and that country'.[10] There was no need, in his view, to bring in article 308 and to do otherwise would be to deprive article 301 of much of its use.

The Advocate General's opinion placed great emphasis on the right of the Community courts to review whether the regulation complies with the respect for the individual's fundamental rights as protected *within* the EU legal order. In a strongly worded assertion, the Advocate General found that 'it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order'.[11] As such, the Community institutions 'cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions in question within the Community legal order'[12] and cannot depart from their usual interpretation of fundamental rights as invoked by the applicant. Given the proposed availability of review of these measures by the ECJ, the Advocate General found that the closely connected rights invoked form part of the general principles of Community law as laid down by the ECJ in a series of cases.[13] Though the Court cannot necessarily know or second-guess whether or not the sanctions are disproportionate or misdirected, since there is no 'genuine and effective mechanism'[14] for allowing a right to be heard at the UN level, but merely an intergovernmental process to petition the Sanctions Committee, it must fall to the powers for judicial review within the Community legal order to ensure that a right to be heard is allowed.

The Grand Chamber of the ECJ gave its judgment on 3 September 2008.[15] It rejected the argument, put forward by the Commission and accepted by the Advocate General, that articles 60 and 301 are sufficient alone in allowing for the competence to

[8] ibid, para 231.

[9] Opinion of Poiares Maduro Advocate General, delivered on 16 January 2008. Similar wording is found in the Opinion delivered on the Al Barakaat International Foundation case on 23 January 2008.

[10] Above (n 9) paras 12–13.

[11] ibid, para 24.

[12] ibid, para 54.

[13] See Case C-32/95 P *Lisresal* [1996] ECR I-5373, Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

[14] Above (n 9) para 54.

[15] Judgment of the Court (Grand Chamber) of 3 September 2008—*Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (Joined Cases C-402/05 P and C-415/05 P).

adopt the contested regulation.[16] However, it accepted that article 308 could be used jointly with articles 60 and 301 'if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining on the objectives laid down by the Treaty'.[17] Such an objective in the present case was met, and the ECJ dismissed the appeal on this point.

As regards the substantive issues on the fundamental rights claims, the ECJ's approach is strikingly different from the CFI's judgment. In his appeal, Kadi claimed that the CFI erred in law in accepting the nature of UNSC resolutions as automatically part of European law and stating that the Community Courts have no power to review the lawfulness of UNSC resolutions except in relation to *jus cogens*. Kadi referred to the judgment of the European Court of Human Rights in *Bosphorus*[18] as evidence of the requirement of judicial review to be available at Community level when rights are at stake, even if the measure is ultimately derived from international law.

The ECJ confirmed that fundamental rights, in particular those found in the European Convention on Human Rights (ECHR), are an integral part of the general principles of law[19] and that the lawfulness of Community acts depends on their respect for human rights,[20] despite the general obligation on the Community to respect international law.[21] A review, such as the one in the present case, is of the Community act, and not the international agreement.[22] The ECJ utilized various EC Treaty provisions in support of its view that derogations from the principles of human rights are not possible and that these constitute a 'constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement'.[23] The existence of the procedure whereby states may petition the Sanctions Committee on behalf of an individual did not constitute a generalised immunity from jurisdiction within the EC legal order.[24] The ECJ was therefore unimpressed with arguments that it should show full deference to the UN's legal order since the guarantees for judicial protection were not in place at the UN level. Since the ECJ found that the CFI was wrong to find that it had no jurisdiction to consider the claims based on fundamental rights, the ECJ felt no need to consider the aspects of the appeal dealing with *jus cogens*.

The ECJ did, however, consider the nature of the fundamental rights at stake. The Court felt that neither the regulation nor the CFSP Common Position afforded Kadi the right to be heard. Though this would not be expected before the act comes into effect—the 'element of surprise' being an essential component of the freezing of funds—as there was no means by which they could make their point of view or exercise rights of defence,[25] they were therefore deprived of this right. On the right to property, whilst a relationship of proportionality between the aim and means of the restrictive measure 'might, in principle, be justified',[26] the current application of the regulation to Kadi infringed his fundamental right to respect for property. The ECJ's reasoning on this point was closely linked to the lack of opportunity for him to put his case to the

[16] ibid, paras 174–6.
[17] ibid, para 211.
[18] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* (2005) (Application no. 45036/98).
[19] Above n 15, para 283.
[20] ibid, para 284. See also *Opinion 2/94* [1996] ECR I-1759, para 34 and Case C-112/00 *Schmidberger* [2003] ECR I-5659 para 73.
[21] ibid, para 291.
[22] ibid, para 286.
[23] ibid, para 316.
[24] ibid, paras 318–21.
[25] ibid, para 348.
[26] ibid, para 366.

authorities.[27] However, since the ECJ was unaware of the evidence which had led to Kadi being placed on the Sanctions Committee list in 2001, it also stated that 'on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified'.[28] The result was that notwithstanding the upholding of the appeals, the effects of the regulation would be maintained (pursuant to article 231 EC) for a period of three months until the Council could remedy the infringements, which it since has done.

B. Commentary

The judgment of the ECJ in *Kadi* is a significant—though perhaps not a groundbreaking—decision in understanding the relationship between EU law and public international law, specifically the UN Charter and, more especially, the exercise of Chapter VII powers by the Security Council. The approach of the ECJ is ultimately premised upon three key understandings, namely the autonomy of the EU legal system, the constitutionality of the EU legal system and the centrality of fundamental rights to the operation of that legal system. Thus, the reason that the *Kadi* judgment should not be characterised as radical is because it reflects the long-standing view of the Court that the EU legal system is an autonomous legal framework independent of, and not reliant upon, public international law. Moreover, the ECJ in seeing and speaking of itself as a court protecting constitutional guarantees is also not a novel innovation.[29] In both respects, the Court has simply applied its settled jurisprudence in a way that is consistent with past practice.

The judgment nevertheless raises a range of issues on both EU and international law; this note limits itself to two. First, the place of the UN Charter and UNSC resolutions in EU law, and second, whether the current understanding of article 103 UN Charter in marginalising human rights arguments in favour of security measures can be supported in the light of a less atomistic interpretation of the UN Charter.

1. EU law and UN Security Council resolutions

The upholding, by the Court, of fundamental rights by the way of 'the guarantee of judicial protection'[30] has unquestionably powerful symbolic rhetoric, especially when placed against the revised, yet still limited, political review mechanism of the Sanctions Committee. The Court can barely hide its criticism of the 'diplomatic and intergovernmental' procedure, which it states 'cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community'.[31] In developing this line of argument, the Court adopts the general view that 'the Community judicature must … ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law'.[32] In the abstract, this would appear both reasonable and sound; it is when it is placed against the normative framework of

[27] ibid, para 372–3.
[28] ibid, para 374.
[29] See, inter alia, *Internationale Handelsgesellschaft* [1970] ECR 1125.
[30] Above (n 15) para 322.
[31] ibid, para 321.
[32] ibid, para 326.

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binding resolutions of the UN Security Council however that it becomes contentious in its application.

Nevertheless, in many ways, the Court's judgment is clearly to be favoured over that of the decision of the Court of First Instance (CFI). Although some welcomed the CFI's step in acknowledging the primacy of the UN legal system over the Community legal order,[33] the argument that the EU was denied the right to judicially review one of its own measures simply because it was adopted to implement a UN resolution, particularly one that potentially infringed the fundamental rights inherent within the Union's legal framework, seemed incompatible with the whole tenor of the ECJ's jurisprudence on fundamental rights. At the same time, the CFI's certainty at being able to review the compatibility of the regulation against norms of *jus cogens*, seemed inconsistent with the continuing doctrinal debate surrounding judicial review at the global level.[34] It is perhaps wise, therefore, that the ECJ declined to confront this issue directly.

The ECJ emphasised in its judgment that 'an international agreement cannot affect the . . . autonomy of the Community legal system'[35] and the constitutional guarantee 'stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement'.[36] It is not stated by the ECJ whether the UN Charter is considered to be an international agreement for these purposes, which is problematic given the requirement, also recognised by the Court, for EC law to 'respect international law in the exercise of its powers' and that 'a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law'.[37] Reading the latter in the light of the former suggests that the ECJ itself was not following its own dicta.

On this point, the wording of paragraph 286 is instructive: '[T]he review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter *as such*'.[38] While the inclusion of the words 'as such' may be incidental and insignificant, on the other hand it leaves open the possibility—doctrinal if not actual—of the ECJ undertaking a de facto review of the underlying UN resolution.

More specifically, was the ECJ right to equate the UN Charter with international agreements adopted under article 300(7) EC Treaty[39] and thus not hierarchically superior to the primary law of the EU, including fundamental rights?[40] One argument is that the ECJ was clearly wrong on this point as the UN Charter does not fall under article 300(7) EC Treaty[41] but article 307 EC Treaty?[42] On this issue, does the Court adopt a purposive (rather than a textual) approach when it notes that while article 307

[33] For example, C Tomuschat, 'Note on Kadi v Council and Commission (CFI)' (2006) 43 Common Market Law Review 537–551.

[34] See generally R Wessel, 'The UN, the EU and *Jus Cogens*' (2006) 3 International Organizations Law Review 1–6.

[35] Above (n 15) para 282.

[36] ibid, para 316.

[37] ibid, para 291.

[38] Emphasis added.

[39] Above (n 15) para 307.

[40] ibid, para 308.

[41] Article 300(7) EC Treaty: 'Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'.

[42] Article 307 EC Treaty: 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty'.

may allow derogations from the primary law in certain instances, '[t]hose provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in article 6(1) EU as a foundation of the Union'.[43] These are grand words, but they also contribute to a perceivable tension between the Court's insistence on respect for international law and the 'special importance' attached to the role of the UNSC under Chapter VII of the Charter[44] on the one hand, and its own right to review measures in terms of fundamental rights, on the other.

1. An alternative approach: revisiting the scope of article 103 UN Charter

There is a growing tendency, albeit a reluctant one, to accept the Security Council as increasingly omnipotent, especially when dealing with global threats such as Al-Qaeda, so that a combination of articles 25[45] and 103[46] of the UN Charter will even override human rights.[47] In effect, supposedly constitutional provisions (especially article 103)[48] are being used to override constitutional rights. This seemed, until the European Court of Justice's judgment in *Kadi* in 2008, to be the orthodoxy emerging in a number of judgments from various regional and domestic courts (the English House of Lords in A*l-Jedda*,[49] the European Court of Human Rights in *Behrami*,[50] and the European Court of First Instance in *Kadi*—notwithstanding the token *jus cogens* point). This note seeks to argue that such a doctrinal position is not clearly established in international law, either by the International Court or is indeed what the Security Council itself intends.

The Security Council is a political body whose decisions have legal consequences, but the political compromise behind each resolution does not anticipate with any precision what those consequences might be. Admittedly resolution 1267 (1999), which is the decision that initiated the listing of suspected terrorists and terrorist organizations, calls upon 'all States to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of rights and obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to the date of coming into force of the' measure. Though this could be said to rely on article 103, it is interesting that it uses the invocation 'calls upon' instead of 'decides' and is therefore a weak assertion of primacy, and further its references to

[43] Above (n 15) para 303. [44] ibid, para 294.

[45] Article 25 UN Charter: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

[46] Article 103 UN Charter: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

[47] See, for example, JE Alvarez, *International Organizations as Lawmakers* (Oxford University Press, Oxford, 2005) 207.

[48] See R Bernhardt, 'Article 103' in B Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, Oxford University Press, Oxford, 2004) 1299.

[49] *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.

[50] *Behrami and Saramati v France, Germany and Norway* (2007) (Admissibility of Application No 71412/01, and Application No 78166/01). Though the case was decided on the basis that the acts and omissions in question were attributable to the UN and not a state party to the ECHR, the Court did seem to accept the supremacy of Security Council decisions at paras 147–8.

contracts and licences in the latter part of the paragraph suggests that the type of international agreement referred to might only be a bilateral one governing trade or assets, rather than a multilateral one, particularly one governing human rights. In other words the intent may be simply to push aside inconsistent contractual treaty obligations, not inconsistent constitutional ones.

Furthermore, such an approach is not out of line with the original purpose of article 103, which was to remove directly conflicting obligations—so that an arms embargo imposed by the Security Council would absolve member states from any treaty commitments they had made with the target state to supply it with arms.[51] Of course, it is possible for a provision such as article 103 to be widened by practice but that practice has to be accompanied by clear institutional intent, which is not present here.

In its Declaration on Combating Terrorism (2003) the Security Council, meeting at the level of Foreign Ministers, declared that states 'must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt measures in accordance with international law, in particular international human rights, refugee, and humanitarian law'.[52] This is hardly institutional *opinio juris* to the effect that its resolutions enable states to by-pass their human rights obligations because they are subject to a binding resolution of the Council requiring them to freeze the assets of named individuals. Rather, such assets must be frozen in accordance with the human rights obligations of the member states, including those arising under a regional treaty. On this basis a Member State would be in compliance with Resolution 1267 if it froze the assets of a named individual, but that person had the opportunity to challenge it before a court. The lack of human rights mechanisms at the Security Council level does not mean that they are also rendered inapplicable at the domestic or indeed regional levels by means of a Security Council resolution.

At the outset of the *Kadi* judgment the ECJ does cite relevant provisions of the UN Charter (including articles 25 and 103), but also significantly mentions article 24,[53] paragraph 2 of which states that the Council in carrying out its duties to maintain international peace and security 'shall act in accordance with the Purposes and Principles of the United Nations'. The purposes and principles contained in articles 1 and 2 of the Charter are broad but they include the achievement of international co-operation 'in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, language, or religion'. It is in fulfilment of this purpose that instruments such as the 1948 Universal Declaration of Human Rights were adopted by the General Assembly, embedding human rights in the UN system, and being the source of customary law and the inspiration for treaties both international and regional. Thus when article 103 speaks in terms of 'a conflict of obligations . . . under the present Charter and . . . obligations under any other international agreement', the matter is not a simple application of articles 25 and 103, as stated—if only prima facie—at the provisional measures stage of the 1992 *Lockerbie* cases[54] and, it seems, more conclusively in the recent spate of cases mentioned above.

[51] N Bentwich and A Martin, *A Commentary on the Charter of the United Nations* (Routledge & Kegan Paul, London, 1950) 179–80; J Frowein and N Krisch, 'Article 41' in Simma (n 48) 745.

[52] SC Res. 1456 of 20 January 2003.

[53] Above (n 15) para 4. Article 24 of the UN Charter is also mentioned at para 294.

[54] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* [1992] ICJ Rep 114, 126.

Article 103 applies to both primary and secondary obligations arising under the Charter,[55] but only, it is argued, to Security Council resolutions adopted in accordance with the Purposes and Principles of the UN. Thus the targeted sanctions against Kadi created overriding obligations for member states only to the extent that they were consistent with 'promoting and encouraging respect for human rights'. Member states are obliged to apply them within their legal orders as far as they are consistent with respect for human rights. The Court of First Instance made a mistake in restricting the applicability of human rights limitations on the freezing order to *jus cogens* norms. Although the Security Council is bound by *jus cogens* norms, it is also limited in its competence by the Purposes and Principles of the Charter, and therefore arguably it also cannot adopt measures which oblige member states to disregard the broader array of human rights.[56]

Given that the Charter does not itself contain a list of human rights the question is always raised as to which human rights must be respected. At this point we must avoid falling back just on *jus cogens*, and instead look to the basic international instruments promoting and respecting human rights, which are binding upon states, either in terms of customary (some or all of the Universal Declaration) or treaty law (under international or regional treaties on human rights). By adopting this approach the European Court of Justice could have expressly reconciled its judgment with the UN Charter. Indeed, this type of reasoning seems to underlie its judgment, but the Court failed to be clear on this issue, possibly out of deference to the fact that that would amount to review of Council decisions, a power that should be exercised by the International Court alone. The ECJ refused to review Security Council resolutions, even for their incompatibility with *jus cogens*.[57] But as the Advocate General argued in his opinion in the absence of any effective mechanism of review at the UN level, regional courts may be faced with no choice on the matter.[58]

The Court's reasoning is not incompatible with the above approach to Security Council resolutions, though it was limited to the issue of the implementation of regulations within the EU legal order. The Court was very clear though on the fundamentals of the EU legal order which is based on the rule of law, and a legal order which contains a 'complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions'.[59] Unlike in the Advocate General's opinion[60] there is no critique of the UN system, but there is clearly a less developed legal order within the UN, to the extent that we can say that though lawmaking and judicial elements are present it is not governed by the strict application of the rule of law, exemplified in the workings of the Security Council where judicial, legislative and executive powers are intertwined and almost completely subject to political judgment. To give a political body power to override human rights, even in the name of peace and security, would be to allow it to subvert the rule of law in domestic and regional systems.

[55] LM Goodrich, E Hambro and P Simons, *Charter of the United Nations* (3rd edn, Columbia University Press, New York, 1969) 616.

[56] R Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 ICLQ 586.

[57] Above (n 15) para 287.

[58] Above (n 9) para 54.

[59] Above (n 15) para 281.

[60] Above (n 9) para 54.

Unlike under the European legal order, decisions of the Security Council do not have direct effect so that States decide on how to implement these decisions within their domestic legal orders,[61] and while accepting their obligations to implement these decisions governments must also uphold other obligations that may qualify but do not prevent the implementation of the decision. While human rights obligations may mean that freezing orders cannot remain unchallenged in the domestic order, they do not directly conflict with the freezing order unlike, say, an obligation to trade would conflict with a trade embargo. Thus there is a choice as to the breadth and depth of the effects of article 103 within any legal order—we can disregard all potential hurdles to the most efficient implementation of the decisions, or we can disregard only those treaty obligations that are directly in the path of the obligations created by the resolution. In the context of *Kadi*, while an asset freeze might directly infringe an individual's right to property, at least temporarily, it does not conflict with a right to a fair hearing. In the context of *Al-Jedda*, the power to detain granted by Security Council Resolution 1546 (2004) clearly conflicts with the right to liberty, but again only temporarily since it does not directly conflict with due process rights. However, the House of Lords appeared to interpret the effect of the overriding obligations deriving from Resolution 1546 more broadly than necessary to uphold the detention of the appellant without charge or trial, though Lord Bingham did say that the UK 'must ensure that the detainee's rights under article 5 [of the ECHR] are not infringed to any greater extent than is inherent in such detention'.[62]

It is strongly argued that the effect of executive orders within any legal order based on the rule of law must be interpreted narrowly. It must not simply be assumed that they override human rights. As has been stated in a different security context, the term 'necessary measures' used by the Security Council to authorize a use of force is not intended to signify that the use of force can be exercised with disregard to inconsistent humanitarian norms, such as the prohibition on targeting civilians.[63] It would be inconceivable to read a Security Council resolution such as Resolution 678 (1990) authorizing the use of force against Iraq as allowing violations of humanitarian law, so why should targeted sanctions be interpreted to permit a violation of human rights norms?

The European Court of Justice in *Kadi* puts fundamental rights at the heart of the EU legal order drawing 'inspiration' from the domestic legal order of member states and from international instruments, especially the ECHR. Thus 'respect for human rights is a condition of the lawfulness of Community acts',[64] with the result that implementation of obligations imposed under the UN Charter within the EU legal order cannot undermine human rights.[65] As has been stated, this approach could be applied, at least

[61] Above (n 15) para 298.

[62] Above (n 49) para 39. In her opinion in *Al-Jedda*, Baroness Hale said that the right to liberty 'is qualified but not displaced . . . the right is qualified only to the extent required or authorised by the resolution' (para 126). Lord Carswell went further and identified a number of safeguards that would minimise the infringement of the detainee's rights: '[T]he compilation of intelligence about such persons which is accurate and reliable as possible, the regular review of the continuing need to detain each person and a system whereby that need and the underlying evidence can be checked and challenged by representatives on behalf of the detained persons, so far as is practicable and consistent with the needs of national security and the safety of other persons' (para 130).

[63] Liivoja (n 56) 589.

[64] Above (n 15) paras 283–4.

[65] ibid, para 285.

in principle, to the Security Council itself on the basis of article 24(2) of the UN Charter, so that any Security Council resolution cannot be used to undermine the human rights obligations of member states. The Court however stopped short of reviewing Security Council resolutions in this light stating that it was simply reviewing the Community acts that implemented Security Council resolutions. Nevertheless, the Court's statement that its judgment did 'not entail any challenge to the primacy of that resolution in international law',[66] is only truly reconcilable with Security Council resolutions if the above interpretation—that is founded upon respect for human rights within the UN as well as European legal order—is adopted.

By allowing the Council of Ministers a brief period of time to fix the regulations 'to remedy the infringements found, but which also takes account of the considerable impact of the restrictive measures concerned on the appellant's rights and duties',[67] the European Court of Justice is in effect recognising that targeted sanctions are lawful if they are imposed in such a way as to be human rights compliant. The essence of the above argument is this reasoning is not incompatible with the UN order, indeed it reflects the approach that should be taken to the Security Council resolutions themselves. Maybe the ECJ is not the right judicial forum to make this statement, but in failing to do so it leaves itself open to the argument that its reasoning is undermining the international legal order. It could and should have based its arguments more clearly on the international legal order, which has a central place for human rights, though not always the mechanisms to protect them.[68] The Court did state that 'the European Community must respect international law in the exercise of its powers' and that 'a measure adopted by virtue of these powers must be interpreted, and its scope limited, in the light of the relevant rules of international law',[69] but it failed to clarify the limitations imposed by international law. While welcoming its protection of human rights, which are after all fundamental elements of the international, as well as regional, legal orders, the Court's failure to put the Security Council's decisions themselves within that international legal order was disappointing though not unexpected.

C. Conclusion

Ultimately, regardless of the technicalities of the legal issues in question, the European Court justifies its decision on meta-political grounds; upon the autonomy of the EU legal order and that this constitutional framework would be undermined if it was 'prejudiced by an international agreement',[70] seemingly regardless of the international agreement at issue. This is a narrow, but not unsurprising, view from Luxembourg. However, as the European Court of Human Rights has shown, it is both possible for a regional convention to be self-standing while also situating itself within general international law. In *Behrami*, the Court noted both that 'the Convention cannot be interpreted and applied in a vacuum'[71] (sic) whilst at the same time recognising its own

[66] ibid, para 288.
[67] ibid, para 375.
[68] Cf Wessel (n 35) 6: 'In the face of the reality of these and perhaps future judgments in this field by regional or national courts, the Security Council will need to make this regime not only smart and targeted, but also develop its own comprehensive system for human rights protection'.
[69] Above (n 16) para 291.
[70] ibid, para 316.
[71] Above (n 59) para 122.

specific purpose as a 'constitutional instrument of European public order'.[72] The Strasbourg Court has seemingly grasped something that the Luxembourg Court has not; that it need not be a case of mutual exclusivity in the application of global and regional norms. Critics, of course, might rightly say that the European Court of Human Rights has so far only been able to achieve this by taking an interpretative—rather loose—approach to articles 25 and 103 of the UN Charter. For such critics, the House of Lords in *Al-Jedda* reveals the artificiality of such reconciliation. In turn, as noted above, *Al-Jedda* can itself be criticised for taking a restrictive understanding of article 103 UN Charter, with particular application to human rights norms.

The judgment in *Kadi* avoids direct investigation of article 103, but is arguably premised upon the assumption that as article 103 precludes human rights protection, it is reliant upon the EU to provide such guarantees. Nevertheless, as this note has suggested, a better approach all round might be if article 103 was not read in absolute terms, but rather one which reflects the constitutional limitations of its original scope, specifically recognizing the overriding human rights purposes of the United Nations. Whether, of course, such an interpretation would have induced the Luxembourg Court to have adopted a more integrationist view of international law is perhaps unlikely; it was not the interpretation of article 103 that resulted in the Court coming to the conclusion that it did, but rather the Court's view as to the EU's own particular position in the global legal order.

Moreover, the *Kadi* judgment also raises some interesting issues of fragmentation in approach. Regardless of whether the European Court of Justice was correct in its judgment as to the place of international legal norms within EU law, it nevertheless highlights a growing sense of divergence in opinion between EU and public international lawyers, especially in terms of our respective normative 'points of reference'—in the case of EU lawyers, the EU treaties, in the case of international lawyers, the UN Charter. While EU lawyers will continue to seek to assert the primacy of the EU treaties, international lawyers will point to the overarching framework in which they form but one part. To that extent, with such polarized starting positions, consensus between the two camps on the relationship between them continues to be unlikely.[73] Separately *Kadi* also raises an important dilemma for international lawyers, themselves. Though international lawyers instinctively mistrust anything that prejudices the global remit of international law, especially the UN Charter, which is often spoken of in constitutional terms, it would be somewhat perverse for international lawyers to demand human rights compliance by the UN Security Council and other key players in the so-called 'war on terror' but seek abstinence from regional judicial courts striving to ensure the same outcome.

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[72] *Bosphorus*, para 156 as quoted in *Behrami*, para 145, itself reliant upon *Loizidou v Turkey (preliminary objections)* (1995) para 75.

[73] This can perhaps explain why the three authors of this note, though sharing responsibility for its contents, do not necessarily agree on all aspects of the analysis.

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