



# THE COLUMBIA JOURNAL OF EUROPEAN LAW ONLINE

## THE *KADI* CASE: RETHINKING THE RELATIONSHIP BETWEEN EU LAW AND INTERNATIONAL LAW?

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### I. INTRODUCTION

In its recent *Kadi* judgment,<sup>1</sup> the European Court of Justice (ECJ) overruled the judgments of the Court of First Instance (CFI) in the cases *Kadi*<sup>2</sup> and *Yusuf*<sup>3</sup> and annulled Council Regulation 881/2002<sup>4</sup>—which had imposed restrictive measures against persons and entities associated with Osama bin Laden, the Al-Qaeda network, and the Taliban—because it found a breach of fundamental rights of the European Union (EU). The case is special due to the adoption of the annulled regulation by the Council of the EU pursuant to resolutions of the UN Security Council. Even though the ECJ emphasized that it had no authority to call into question the lawfulness of UN Security Council resolutions, this judgment leaves a wide range of interpretations regarding the interplay between international law and EU law.

### II. BACKGROUND

The case is related to economic sanctions against individuals. UN Security Council Resolution 1267 (1999)<sup>5</sup> established a “Sanctions Committee” responsible in particular for designating the funds or other financial resources which all States must freeze in order to ensure that those funds or financial resources are not made available to, or for the benefit of, the Taliban or any undertaking owned or controlled by the Taliban. In Resolution 1333 (2000),<sup>6</sup> the UN Security Council instructed the Sanctions Committee to maintain an updated list of the individuals and entities designated as associated with Osama bin Laden, and held that States must freeze funds and other financial assets of these individuals and entities. In order to implement this resolution, the Council of the EU adopted, *inter alia*, the contested Council Regulation 881/2002 on the basis of Articles 60, 301, and 308 of the Treaty Establishing the European Community (EC Treaty).<sup>7</sup> Regulation 881/2002 provided that all funds and economic resources shall be frozen that belonged to, or were owned or held by, a natural or legal person, group, or entity designated by

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<sup>1</sup> Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat v. Council of the European Union*, 3 C.M.L.R. 41 (2008).

<sup>2</sup> Case T-315/01, *Kadi v. Council & Comm’n*, 2005 E.C.R. II-3649.

<sup>3</sup> Case T-306/01, *Yusuf & Al Barakaat Int’l Found. v. Council & Comm’n*, 2005 E.C.R. II-3533.

<sup>4</sup> 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) No 467/2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan, 2002 O.J. (L 139) 9 (EC).

<sup>5</sup> S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

<sup>6</sup> S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 13, 2000).

<sup>7</sup> Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 33 [hereinafter EC Treaty].

the Sanctions Committee and listed in Annex I.<sup>8</sup> Mr. Yassin Abdullah Kadi and the Al Barakaat International Foundation, whose names were mentioned in Annex I, brought actions seeking annulment of the Regulation, alleging, in particular, breaches of the right to be heard, of the right to respect for property, and of the right to effective judicial review.

In its judgments, the CFI dismissed the actions for the reason that it had no jurisdiction to review the lawfulness of the decision of the EU institution in question. Due to the fact that the mere purpose of the Regulation was to put into effect a resolution of the UN Security Council, they acted under “circumscribed powers, with the result that they had no autonomous discretion.”<sup>9</sup> Any review of the internal lawfulness of EU law, especially with regard to the protection of fundamental rights, would imply that the Court was to consider, indirectly, the lawfulness of the UN Security Council resolutions. Such jurisdiction would be incompatible with the undertakings of the Member States under the UN Charter, especially Articles 25, 48, and 103.<sup>10</sup> Nevertheless, the CFI found<sup>11</sup> that it was empowered to check, indirectly, the lawfulness of the resolutions of the UN Security Council with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law.<sup>12</sup> This includes the bodies of the UN, from which no derogation is possible.<sup>13</sup> The CFI determined that there was no violation of *jus cogens* and consequently dismissed the actions in their entirety.

### III. THE JUDGMENT OF THE ECJ

Following the Opinion of Advocate General Maduro,<sup>14</sup> the ECJ set aside the judgments of the CFI and annulled Council Regulation 881/2002. The ECJ rejected the first ground of appeal, which alleged a lack of any legal basis for the contested regulation, by stating that Articles 60, 301, and 308 of the EC Treaty constitute the legal basis of the contested regulation.<sup>15</sup>

In contrast to the judgment of the CFI, the ECJ stated:

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, including review of Community measures which, like the contested regulation,

<sup>8</sup> Council Regulation 881/2002, *supra* note 4, art. 2(1).

<sup>9</sup> *Kadi*, 2005 E.C.R. II-3649, ¶ 214; *Yusuf & Al Barakaat*, 2005 E.C.R. II-3533, ¶265.

<sup>10</sup> U.N. Charter, available at <http://www.un.org/aboutun/charter/index.shtml> (last visited Feb. 17, 2009).

<sup>11</sup> *Kadi*, 2005 E.C.R. II-3649, ¶ 226; *Yusuf & Al Barakaat*, 2005 E.C.R. II-3533, ¶277.

<sup>12</sup> Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

<sup>13</sup> *See, e.g.*, Erika de Wet, *Holding International Institutions Accountable: The Complementary Role of Non-judicial Oversight Mechanisms and Judicial Review*, 9 GERMAN L.J. 1987, 2003–06 (2008), available at <http://www.germanlawjournal.com/article.php?id=1051>.

<sup>14</sup> Advocate General Maduro stated, *inter alia*, that “[t]he relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.” Opinion of Advocate General Maduro, Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat v. Council*, 3 C.M.L.R. 41 (2008), ¶ 24. As regards the UN system, Advocate General Maduro criticized that it does not have built-in institutional safeguards regarding human rights and fundamental freedoms and stated that the “[r]espect for other institutions is meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them.” *Id.* ¶ 44.

<sup>15</sup> *Kadi*, 3 C.M.L.R. 41 (2008), ¶¶ 158–236.

are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.<sup>16</sup>

This review of the validity of any Community act in the light of fundamental rights “must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.”<sup>17</sup>

The ECJ emphasized that this review of lawfulness applied merely “to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.”<sup>18</sup> The ECJ made clear that Community courts (i.e. ECJ and CFI) have no power to review the lawfulness of resolutions adopted by the UN Security Council under Chapter VII of the UN Charter, “even if that review were to be limited to the examination of the compatibility of that resolution with *jus cogens*.”<sup>19</sup> Furthermore, the ECJ highlighted the principle of primacy of obligations under the UN Charter: Even if any judgment given by the Community courts holds that “a Community measure intended to give effect to [a UN Security Council] resolution is contrary to a higher rule of law in the Community legal order [this] would not entail any challenge to the primacy of that resolution in international law.”<sup>20</sup> In conclusion, the ECJ held that the CFI erred in law by stating that the contested regulation must enjoy immunity from jurisdiction, since it is designed to give effect to a resolution adopted by the UN Security Council.<sup>21</sup>

With regard to the concrete compliance of the contested regulation with fundamental rights, the ECJ held that the rights of defense, in particular the right to be heard, as well as the right to effective judicial review of those rights, were “patently not respected.”<sup>22</sup> In particular, the EU Council neither communicated to the appellants the evidence used against them to justify the restrictive measures imposed on them nor afforded them the right to be informed of that evidence within a reasonable period of time after those measures were enacted. Therefore, “the appellants were not in a position to make their point of view in that respect known to advantage.”<sup>23</sup> Furthermore, the ECJ held that the imposition of the restrictive measures laid down by the contested regulation in respect to Mr. Kadi, by including him in the list contained in Annex I to that regulation, constituted an unjustified restriction of his right to property.<sup>24</sup> As a consequence, the contested regulation, so far as it concerns the appellants, was annulled by the ECJ.<sup>25</sup> The ECJ

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<sup>16</sup> Id. ¶ 326.

<sup>17</sup> Id. ¶ 316.

<sup>18</sup> Id. ¶ 286.

<sup>19</sup> Id. ¶ 287.

<sup>20</sup> Id. ¶ 288.

<sup>21</sup> Id. ¶ 327.

<sup>22</sup> Id. ¶ 334.

<sup>23</sup> Id. ¶ 348.

<sup>24</sup> Id. ¶ 370.

<sup>25</sup> As a follow-up to the judgment in *Kadi*, the Commission adopted Regulation (EC) No 1190/2008, which amended Regulation 881/2002 for the 101st time. Commission Regulation 1190/2008, Imposing Certain Specific 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 (EC). In this regulation, after communicating the narrative summaries of reasons provided by the Sanctions Committee to Mr. Kadi and to Al Barakaat International Foundation and giving

allowed the effects of the contested regulation to remain in force for a period of three months running from the date of the judgment.<sup>26</sup>

#### IV. CONCLUSION

The ECJ's *Kadi* judgment leaves us with a number of open questions regarding its effects on the structure of the international legal order.<sup>27</sup> Indeed, the question must be asked whether the primacy of UN Charter obligations is jeopardized.<sup>28</sup>

In fact, the ECJ did not establish a new hierarchical structure regarding the interplay between international law and European law. Rather, the Court emphasized the primacy of obligations under the UN Charter. It also highlighted that the (European) review of lawfulness applies only to Community acts and never to acts of the UN Security Council under Chapter VII of the UN Charter, even if such a review were to be limited to examination of the compatibility of that resolution with *jus cogens*. Thus, at first the ECJ did not challenge the existing hierarchy of norms within the international legal order. But at the same time, by emphasizing the rule of law the Court stated that the judicial review also covers all Community acts, even if they are designed merely to give effect to resolutions adopted by the UN Security Council.

In effect, this approach of reciprocal concessions only works if there is a way to implement UN Security Council resolutions in conformity with fundamental rights of the EU. If it would only be possible to put a resolution into effect by adopting a Community act which breaches fundamental rights—if there were a real conflict between obligations arising under the UN Charter on the one hand and EU fundamental rights as “principles that form part of the very foundations of the Community legal order”<sup>29</sup> on the other—EU fundamental rights prevail. Thus, the ECJ's commitment to accept the primacy of UN Charter obligations and the integrity of UN Security Council resolutions ends in the absence of discretionary power to implement such resolutions in a fundamental rights-friendly way. Therefore, a lack of discretion implies an obligation to give preference to fundamental rights even if this means a breach of UN Charter obligations; this could entail a “challenge to the primacy of that resolution in international law,” in contradiction to the explanations of the ECJ.<sup>30</sup>

The judgment of the ECJ in *Kadi* represents a strong commitment to fundamental rights and the (European) rule of law. Advocate General Maduro found an appropriate summary in advance: “[M]easures which are incompatible with the observance of human rights . . . are not acceptable

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them the opportunity to comment on these grounds, the Commission again added Mr. Kadi and the Al Barakaat International Foundation to Annex I of Council Regulation (EC) No 881/2002.

<sup>26</sup> *Kadi*, 3 C.M.L.R. 41 (2008), ¶ 376.

<sup>27</sup> See Grainne de Burca, *The EU, the European Court of Justice and the International Legal Order after Kadi*, 51 HARV. INT'L L.J. \_\_\_\_ (forthcoming 2009) (developing the issue in detail). De Burca sees a “striking similarity between the reasoning and interpretative approaches of the US Supreme Court in *Medellin* and that of the ECJ in *Kadi* to the relationship between international law and the ‘domestic constitutional order.’” *Id.* at \_\_\_\_.

<sup>28</sup> See U.N. Charter art. 103.

<sup>29</sup> *Kadi*, 3 C.M.L.R. 41 (2008), ¶ 304.

<sup>30</sup> *Id.* ¶ 288.

in the Community.”<sup>31</sup> From a global perspective, the ECJ’s insistence on the protection of European fundamental rights standards means that political bodies are now on the ball. The ECJ made it harder for the UN Security Council to adhere to violations of fundamental rights. As such, *Kadi* stands for a new bottom-up process in which a regional court pressures the UN Security Council to change its policy towards fundamental rights.

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<sup>31</sup> Op. Advoc. Gen, 3 C.M.L.R. 41 (2008), ¶ 31 (quoting Case C-112/00, Eugen Schmidberger Internationale Transporte Planzuge v. Austria, 2003 E.C.R. I-5659, ¶ 73).