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Introduction to the Forum

The *Kadi* Case: Towards a More Substantive Hierarchy in International Law?

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On 3 September 2008 the European Court of Justice (ECJ) delivered its judgment in the so-called *Kadi* case. This judgment may have an impact on the traditional monist approach of the European Community towards international law and hence on the way we look at hierarchy in the international legal order. With regard to the question of whether or not UN Security Council Resolutions should enjoy immunity from jurisdiction as to their lawfulness in the Community legal order, the Court held:

> 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, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.[1]

* R.A. Wessel is is co-editor of this Journal.

[1] ECJ, Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi* and *Al Barakaat International Foundation v. Council* and *Commission*, 3 September 2008, para. 327. See for a recent analysis also S. Griller, "International Law, Human Rights and the European Community's

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In this case the acts of the European Union and the European Community[2] were to be seen as a direct implementation of Security Council Resolution 1267 (1999).[3] Mr. Kadi was one of the persons on the UN list of individuals and entities associated with Usama bin Laden or the Al-Qaeda network and hence appeared on the list of the European Union as well.

In 2001 Yassin Abdullah Kadi, together with Ahmed Yusuf and the Al Barakaat Foundaton filed an action with the Court of First Instance of the European Communities (CFI), claiming that the Court should annul the implementing EC and EU acts which brought them within the scope of the sanctions.[4] In these cases Yusuf and Kadi had argued that:

> the contested regulation infringes their fundamental rights, in particular their right to the use of their property and the right to a fair hearing, as guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), inasmuch as that regulation imposes on them heavy sanctions, both civil and criminal, although they had not first been heard or given the opportunity to defend themselves, nor had that act been subjected to any judicial review whatsoever. With more particular regard to the alleged breach of the right to a fair hearing, the applicants stress that they were not told why the sanctions were imposed on them,

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Autonomous legal Order: Notes on the European Court of Justice Decision in *Kadi*", *EUConst* 4:3 (2008), 528-553.

2) Respectively EU Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them, OJ L 139/4, 29.5.2002; and Regulation (EC) No. 881/2002 imposing certain specific restrictive measurements directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, OJ L 139/9, 29.5.2002.

3) Resolution 1267 (1999) provides that all the States must, in particular, "freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorised by the Committee on a case-by-case basis on the grounds of humanitarian need" (para. 4b).

4) CFI, Cases T-304/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission* and T-315/01, *Kadi v. Council and Commission*, 21 September 2005. See on these cases earlier in this journal: R.A. Wessel, "Editorial: The UN, the EU and Jus Cogens", *IOLR*, 2006, 1-6.

> that the evidence and facts relied on against them were not communicated to them and that they had no opportunity to explain themselves. The only reason for their names being entered in the EU list is the fact that they were entered in the list drawn up by the Sanctions Committee on the basis of information provided by the States and international or regional organizations. Neither the Council nor the Commission examined the reasons for which that committee included the applicants in that list. The source of the information received by that committee is especially obscure and the reasons why certain individuals have been included in the list, without first being heard, are not mentioned.[5]

While the Court of First Instance in its judgment in 2005 agreed with the applicants that in the current anti-terrorism cases there is "no judicial remedy available" (para. 340), it concluded "that the Resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law." While many lawyers pointed to a "legal protection deficit" which thus became apparent, others were more worried about the part of the judgment in which the Court claimed to be competent to check the lawfulness of the resolutions of the Security Council with regard to *jus cogens*. Although the Court came to the conclusion that none of the allegedly infringed rights formed part of *jus cogens*, the very idea of a regional Court checking the validity of UN Security Council resolutions proved to be a source for heated academic debates.

In that respect, the recent appeals judgment before the Court of Justice in the *Kadi* case, can be seen as yet another step in this debate as it reversed several findings of the CFI. Most importantly, the ECJ found that the CFI had erred in law when it held that a regulation designed to give effect to UN Security Council resolutions must enjoy immunity from jurisdiction as to its internal lawfulness save with regard to its compatibility with the norms of *jus cogens*. The ECJ held that:

> the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights (para. 285).

To arrive at this conclusion without having to challenge the validity of norms flowing from UN Security Council resolutions, the Court pointed

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5) Paras 190-191 of the *Yusuf* judgment.

to the fact that the UN Charter leaves the members "the free choice among the various possible models for transposition of those resolutions into their domestic legal order" (para. 298). This would allow for judicial review of the "internal lawfulness" of the EU and EC acts, keeping in mind that fundamental rights form an integral part of the general principles of law, the observance of which is to be ensured by the Court.

Although the Court's focus is on the *implementation* of the Security Council resolutions by the Union and the Community, rather than on the validity of the international norms as such, the consequence of this exercise could very well be that any implementation of a Security Council resolution could entail the violation of fundamental EU rights. In this concrete case the Court annulled the contested acts (while maintaining the legal effects for three months).[6] Rather than taking the formal hierarchical relationship between UN law and EU/EC law as the basis for establishing the immunity from jurisdiction of Security Council resolutions (as was done by the CFI), the Court chooses to look at this hierarchy in more substantive terms. Security Council resolutions remain "untouchable", but the acts by which the EU/EC implements the resolutions are not and are subject to the fundamental rights and principles that form the basis of the Community/Union legal order. This certainly offered the Court a smart way out of the dilemma, but in the absence of judicial remedies at the UN level, the consequence can (and perhaps should) be that the EU may not be able to fully implement SC resolutions that are in conflict with fundamental human rights obligations flowing not only from the EU legal

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6) See para. 375: "Having regard to those considerations, the effects of the contested regulation, inso far as it includes the names of the appellants in the list forming Annex I thereto, must, by virtue of Article 231 EC, be maintained for a brief period to be fixed in such a way as to allow the Council to remedy the infringements found, but which also takes due account of the considerable impact of the restrictive measures concerned on the appellants' rights and freedoms." The only action taken was not by the Council itself, but by the Commission, which on 28 November 2008 (5 days before the deadline) adopted Regulation (EC) 1190/2008 (OJ L 322/25, published 2.12.2008, one day before the deadline). In this decision the Commission claims that it has communicated the narrative summaries of reasons provided by the UN Al-Qaeda and Taliban Sanctions Committee, to Mr. Kadi and to Al Barakaat International Foundation and given them the opportunity to comment on these grounds. The comments received from Mr. Kadi and Al Barakaat formed a reason for the Commission to conclude on a justified listing.

order and the European Convention for the Protection of Human Rights and Fundamental Freedoms, but also from the UN Charter itself.

The richness of this judgment, in terms of different possible interpretations and consequences, is reflected in the short commentaries in this Forum. As will be shown – depending on one's perspective – it is possible to view this judgment as going too far, or not going far enough. All authors have been asked to focus on the main points they wish to make, while perhaps leaving out some of the factual details of the case – which can be found in this introduction.