

The increasing role of the European Court of Justice in protecting fundamental rights and freedoms

(the importance of the Kadi judgement)

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Abstract

*The role of the European Court of Justice has increased significantly in recent years and will continue to do so even in the years to come in the future. This is further evidence of the European Union becoming a union of important values, apart from an economic and political union, particularly with the incorporation of the Charter of Fundamental Rights as a formal part of the *acquis communautaire* since the Lisbon Treaty. There are different perspectives to the issues raised which, for the purposes of this essay, are those as viewed from the lenses of an international and EU legal scholar. The questions raised highlight issues of judicial review, protection of fundamental rights, the European legal order and, most importantly, the broader concern of the relationship between European Union (EU) law and international law.*

Introduction

The role of the European Court of Justice (ECJ) in protecting rights and freedoms has increased significantly in recent years. In Europe, the European Court of Human Rights has been considered for many years as the main watchdog of such rights, which it continues to be at present as well. But particularly after the Lisbon Treaty, which incorporates the Charter of Fundamental Rights, the ECJ has risen to its task as a key actor for protecting key human rights and freedoms. This is enshrined in Article 2 of the Treaty on the European Union, which states as follows:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons

belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

In *Kadi & Al Barakaat International Foundation v. Council and Commission*, the judgement of the ECJ has significant implications on a number of contested issues.¹ The judgement concerns the protection of fundamental human rights in light of a United Nations (UN) resolution for the maintenance of international peace and security. The questions raised highlight issues of judicial review, protection of fundamental rights, the European legal order and, most importantly, the broader concern of the relationship between European Union (EU) law and international law.

There are different perspectives to the issues raised which, for the purposes of this essay, are those as viewed from the lenses of an international and EU legal scholar. For the latter, the judgement in *Kadi* is one that boldly reaffirms the foundational principles of EU law, namely the autonomy of the European legal order, the primacy of its laws and the judicial review of measures adopted by its institutions. On the other hand, the international legal scholar would regard the judgement as disregarding the binding effect of measures adopted under the UN Charter, disrupting the war against terrorism and the maintenance of international peace and security, and fragmenting the relationship of international law and EU law.

This paper will assess the significance of *Kadi* in light of these views and identify a middle ground that draws from both perspectives. The decision of the ECJ is commendable and necessary for the protection of fundamental rights, particularly due to the lack of judicial protection at the international level. It reaffirms the autonomy of the EU legal order to review measures of its institutions that adopt UN resolutions. However, the ECJ ought to have been more deferential to international law and the UN in its judgement. The EU is an important actor in the international community and represents a standard for other countries and organisations. The ECJ's role is therefore one of upholding and strengthening the EU's status of fidelity towards international law.

In this paper I will initially analyse the premises for the decision of the ECJ in *Kadi*, focusing on the autonomy of the EU legal order to protect fundamental rights and issues of judicial review. Next, I will assess the implications of the decision on the relationship between international and EU law. This part will examine theoretical approaches to the international legal order and propose the soft constitutionalist approach as the most preferable one. Finally, I will discuss alternative routes the ECJ could take in cases such as *Kadi* so as to improve the EU's image as a global actor and its relations to international law and institutions.

¹ C-402/05 P *Kadi & Al Barakaat International Foundation v. Council & Commission* Case (2008) E.C.R. I-6351.

The Autonomy of the EU, Fundamental Rights and Judicial Review

In *Kadi*, an individual challenged the implementation by the EU of a UN Security Council resolution, which had requested his assets to be frozen on the grounds of being involved with terrorism. The resolution was adopted under the UN Charter for the maintenance of international peace and security. The appellant claimed a breach of his fundamental rights, in particular the right to property and the right to a fair hearing. The Court of First Instance (CFI) initially rejected his claims on the ground that it had no authority to review UN resolutions, but on appeal the ECJ decided for the appellant by annulling the EU measure implementing the resolution on the basis that it violated fundamental rights.

The reasoning of the ECJ is predominantly based on the autonomy of the EU legal order *vis-à-vis* other legal systems and the international legal order.² The ECJ emphasises on the priority of EU fundamental rules and that “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EU Treaty”.³ Accordingly, the ECJ maintains that no instrument of international law, including those under the UN Charter, can call into question the primacy of fundamental principles of EU law. An integral part of these principles are “fundamental rights recognised and guaranteed by the constitutions of the Member States, especially those enshrined in the ECHR”, which the appellant in *Kadi* claimed had been unjustifiably interfered.⁴ Therefore, the ECJ rejects the CFI findings that the contested measure is immune from review on the basis of the alleged primacy of UN resolutions.⁵ However, the ECJ stresses that it is concerned only with the review of the measure that gives effect to the resolution, and not with the latter as such.⁶

From a EU perspective, the ECJ in *Kadi* reaffirms long-established foundational principles of EU law and does not introduce anything new *per se*.⁷ The judgement reaffirms the autonomy of the EU legal order, established in the landmark ruling in *Van Gend en Loos*.⁸ It stresses the importance of fundamental rights within the EU constitutional legal order as an integral part of the general principles of EU

law.⁹ On this basis, the ECJ defends the supremacy of EU law from international obligations to ensure the well functioning of European constitutional law and to establish a standard of protection of fundamental rights. As Eecks argues, this is not something the ECJ does in isolation, but which it is required to do by national constitutional courts.¹⁰ The *Bundesverfassungsgericht* in *Solange II* is a classic example to this.¹¹ Moreover, the ECJ reiterates that the Community is based on the rule of law, and that all acts of its institutions are subject to judicial review.¹² In this regard, the fact that such acts implement binding instruments under international law is irrelevant to the Court’s jurisdiction to review.¹³

From an international law perspective, on the other hand, the reasoning of the ECJ is criticised for being robustly dualist and not deferential to international law and the UN Charter.¹⁴ In particular, commentators have dwelled on the fact that it undermines Security Council’s powers under Chapter VII of the Charter to adopt mandatory measures in its function of maintaining international peace and security.¹⁵ This argument is enforced by the fact that, according to Article 103 of the Charter, obligations under the Charter shall prevail over any obligation under international law. The ECJ makes little reference to such considerations in its judgement. In addition, although it acknowledges the primacy of Security Council resolutions in international law and is not concerned with their review, commentators regard the annulment of the EU measure as unavoidably touching on the legality of the resolution. Due to its literal transposition, any review of the measure necessarily amounts to review of the resolution.¹⁶ Therefore, the ECJ is criticised for indirectly challenging the authority and efficacy of the UN Charter by annulling the implementing measure.¹⁷

However, the ECJ in *Kadi* is concerned with the judicial protection of fundamental rights, which necessarily requires it to take a constitutional rather than an international discourse.¹⁸ It reviews the actions of its institutions in light of its autonomous legal order. Indeed, as Eeckout argues, it is difficult to see the effect of Article 103 of the UN Charter in the constitutional discourse of an

⁹ Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle fuer Getreide und Futtermittel* (1970) ECR 1125.

¹⁰ Eeckes, C (2012) ‘Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?’ (18) *European Law Journal* 230 p 237.

¹¹ BVerfGE 73, 339 (1986) (*Solange II*).

¹² Case 294/83 *Les Verts v. Parliament* (1986) ECR 1339, para 23.

¹³ Note 1, para 282.

¹⁴ De Burca, G (2009) ‘The European Court of Justice and the International Legal Order after *Kadi*’ *Jean Monnet Working Paper No 01/09*, available at <http://centers.law.nyu.edu/jeanmonnet/papers/09/090101.pdf> (last accessed 02/04/2013) p 26.

¹⁵ *Ibid*, p 29.

¹⁶ De Wet, E (2009) ‘The role of European Courts in the development of a hierarchy of norms within international law: evidence of constitutionalism’ (5(2)) *European Constitutional Law Review* 284 p 301.

¹⁷ *Ibid*, p 304.

¹⁸ Note 7, p 2.

² Note 1, para. 316.

³ Note 1, para. 285.

⁴ Case 4/73 *Nold v. Commission* (1974) E.C.R. 491, para 13.

⁵ Note 1, para 305.

⁶ Note 1, para 286.

⁷ Eeckout, P (2009) ‘*Kadi and Al Barakaat*: Luxembourg is not Texas – or Washington DC’ *European Journal of International Law: Talk*, available at <http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/> (last accessed 02/04/2013) p 1.

⁸ Case 294/83 *Van Gend en Loos* (1953) ECR 1, p 12.

international court that operates under its autonomous legal order.¹⁹ Furthermore, the ECJ found itself bound to protect individual rights in *Kadi* due to the lack of judicial protection at the UN level under the sanctions system.²⁰ Had the ECJ declined judicial review of the measure, it would have created a “legal vacuum of responsibility”.²¹ To do so would constitute a significant derogation from its commitment to protect fundamental rights under the EU Treaties. In that regard, the ECJ could have hardly decided differently.²²

Furthermore, critics have put the ECJ judgement in context by comparing it to the position taken by the European Court of Human Rights (ECtHR) and their conception of the international legal order.²³ In the cases of *Behrami* and *Saramati*, the ECtHR demonstrated strong deference to the UN and avoided any review of Security Council resolutions.²⁴ It argued that any Chapter VII resolution was “fundamental to the mission of the UN to secure international peace and security” and declined to exercise jurisdiction over acts attributable to the UN.²⁵ However, as Maduro points out in his opinion in *Kadi*, those cases mainly concern issues of extraterritoriality and effective control, which cannot be considered as setting a precedent of the ECtHR limiting its jurisdiction to Security Council obligations.²⁶ Even if so, there are important differences between the ECJ and the ECtHR, in that the latter observes commitments and obligations undertaken in an intergovernmental fashion among contracting States whereas the former acts as a constitutional court of an autonomous legal order where States and individuals have immediate rights and obligations.²⁷ Accordingly, a comparison between the case law of the two is unconvincing, despite the fact that they draw inspiration from one another.

The relationship between International and EU law

As regards the broader picture of the relationship between EU and international law, the judgement in *Kadi* is not particularly helpful. Although the primary concern of regional and domestic courts, including the ECJ, is enforcing the law of their own

¹⁹ Note 7, p 2.

²⁰ Note 1, para 322.

²¹ Note 14, p 11.

²² Kokott, J & Sobotta C (2012) ‘The *Kadi* case – constitutional core values and international law – finding the balance?’ (23(4)) *European Journal of International Law* 1015 p 1019.

²³ Note 14, p 30.

²⁴ *Behrami v. France, Saramati v. France, Germany & Norway* (2007) Apps. No 71412&78166/01.

²⁵ *Ibid*, para 149.

²⁶ Case C-402/05, Opinion of Advocate General Poiares Maduro, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005C0402:EN:HTML> (last accessed 02/04/2013), footnote 42.

²⁷ *Ibid*, para 37.

legal order, they also have “a secondary role in enforcing the emerging international constitutional order”.²⁸ While the adoption of an approach that views legal systems as separated and autonomous is justified for the protection of fundamental rights, the ECJ ought to have been more deferential to the international system as a whole in its judgement. In other words, despite the distinct legal nature of the EU from the international legal order, they do not “pass by each other like ships in the night”.²⁹

The classic theoretical approaches to the relationship between the EU and international legal order have been described as pluralist and constitutionalist.³⁰ Constitutional approaches emphasise on the supposition of a single integrated legal system. Proponents of this theory advocate for a unitary system with a hierarchy of rules that resolve conflicts of authorities among different levels.³¹ Accordingly, international lawyers adopting this approach to *Kadi* would claim for the Security Council resolution, and implementing measure, to have priority due to Article 103 of the UN Charter that would govern the single integrated legal order. On the other hand, pluralist approaches share the same foundational principles with dualism in that they emphasise on the existence of separate and distinct legal orders. Its advocates claim that pluralism avoids mutual rejection of claims for authority from the various levels and through this promotes administrative accountability.³² For that reason, from the EU perspective, one could categorise the ECJ judgement in *Kadi* as adopting the pluralist approach.

Nevertheless, none of these theories represent a satisfactory vision of the relationship that ought to exist between the international and EU legal order. In particular, it is to be observed that at issue is the UN, the highest authority under international law with almost universal membership that pursues fundamental goals of international peace and security. The judgement lacks interaction with norms that originate from the UN by only focusing in a pluralistic fashion on internal constitutional principles.³³ This approach is also at odds with the EU’s traditional commitment towards international law and its institutions and its image as a “global actor”.³⁴

Therefore, it is argued that, de Burca’s *soft constitutionalist approach* is the one that best reflects the relationship between these two legal orders, to be embraced

²⁸ Note 16, p 305.

²⁹ Note 26, para 22.

³⁰ Note 14, p 36.

³¹ Note 14, p 41.

³² Krisch, N (2006) ‘The Pluralism of Global Administrative Law’ (17) *European Journal of International Law* 247, p 256.

³³ Weiler, JHH (2008) ‘Editorial’ (19) *European Journal of International Law: Talk*, available at http://www.ejiltalk.org/letters-to-the-editor-respond-to-ejil-editorials-vol-195/#footnote_1_343 (last accessed 02/04/2013) p 2.

³⁴ Note 14, p 51.

by the ECJ in future judgements.³⁵ This approach is based on three elements: first, the assumption on the existence of an international community; secondly, the emphasis on universalisability; and thirdly, the importance of common norms and principles for addressing a given conflict.³⁶ In this manner, the ECJ would create a dialogue between international and EU law while protecting fundamental rights at the same time. This would also resemble de Wet's view that "the different functional regimes within the international legal order function as complementary of a larger whole".³⁷ Indeed, this approach would attempt to find the right balance between protecting core constitutional values and deference to international instruments.³⁸ On the basis of the above, the final part of this paper will try to identify possible routes for the ECJ to follow in future cases in light of the soft constitutionalist approach proposed.

Judicial alternatives for the ECJ after *Kadi*

One of the alternative routes the ECJ itself implicitly identified in *Kadi* was to adopt the *Solange II* approach of the *Bundesverfassungsgericht*.³⁹ The judgement, which concerned a similar conflict to that in *Kadi*, embraces elements of mutual recognition and dialogue in the relationship between national and EU law.⁴⁰ The German Constitutional Court ruled that it would not examine whether EU legislation is compatible with fundamental rights *as long as* there was adequate protection of such rights by the ECJ.⁴¹ However, as evidenced by the ECJ, such an approach is not conceivable, as the UN sanctions system does not guarantee effective judicial protection of fundamental rights.⁴² For as long as no such protection is guaranteed at the UN level, the *Solange II* alternative for the ECJ is not plausible.

A more preferable alternative would have been to insist on the implementation of the resolution in a way that takes into account fundamental rights.⁴³ Indeed, the ECJ noted in its judgement that the UN Charter leaves a free choice to member States on the manner of transposition of Security Council resolutions.⁴⁴ Within this freedom of transposition, the ECJ could have concluded that the resolution

must be adapted to include protection of fundamental rights in the implementing measure. In this way, the ECJ could have still annulled the measure on the basis of fundamental rights while adopting an "internationally-engaged approach".⁴⁵ This would have created a dialogue with international law on matters of due process and developed a pathway for mutual influence between the two legal orders, instead of focusing on the protection of fundamental rights exclusively on the particularities of EU law.

Nevertheless, the judgement as it stands has been described by some commentators as not dismissive of international law but rather as an incentive for its development.⁴⁶ De Wet refers to these as "bottomup spillover" effects, which put pressure on UN institutions for better recognition of human rights standards.⁴⁷ In fact, since the judgement the UN level of review procedures has been improved. Among others, albeit with limited powers, the Security Council has introduced the office of an independent Ombudsman.⁴⁸ While these are positive signals, it remains to be seen whether such improvements suffice for the ECJ to embrace a *Solange* approach in the future.

Conclusion

To conclude, it is submitted from the analysis above that the role of the European Court of Justice has increased significantly in recent years and will continue to do so even in the years to come in the future. This is further evidence of the European Union becoming a union of important values, apart from an economic and political union, particularly with the incorporation of the Charter of Fundamental Rights as a formal part of the *acquis communautaire* since the Lisbon Treaty.

The judgement of the ECJ in *Kadi* is evidence of such developments at the European level. At the same time, the *Kadi* judgement of the ECJ has raised many important issues relating to the EU legal order and its relationship with the international legal order. The impact and significance of the case depends on the perspective one takes for its interpretation. The assessment and analysis has evidenced the ECJ's ruling in *Kadi* like "a Freudian drawing: people see it taking the shape of either their hidden fears or their secret desires".⁴⁹ Some have considered it as strengthening core principles of the EU in light of the protection of fundamental rights; others have been sceptic as to its treatment of international law and in particular the UN.

³⁵ *Ibid*, p 44.

³⁶ *Ibid*.

³⁷ Note 16, p 288.

³⁸ Note 22, p 1024.

³⁹ Note 1, para 318-319.

⁴⁰ Note 11, p 225.

⁴¹ *Ibid*, p 265.

⁴² Note 1 para 323.

⁴³ Note 16 p 295-296.

⁴⁴ Note 1 para 298.

⁴⁵ Note 14, p 47.

⁴⁶ Note 7, p 3.

⁴⁷ Note 16, p 305.

⁴⁸ Note 22, p 1020-1021.

⁴⁹ Note 10 p 250.

While the decision in *Kadi* is justified on its merits under EU law, the ECJ ought to have shown greater deference to the UN Charter and international law. It has been argued that the way forward after *Kadi* is finding the proper balance between the protection of constitutional core values and the maintenance of peace and security in light of the war against terrorism. To achieve this, the ECJ should adopt the proposed soft constitutionalist approach to find a judicial dialogue with international law and its main actors.

Bibliography

- De Burca, G (2009) 'The European Court of Justice and the International Legal Order after *Kadi*' *Jean Monnet Working Paper No 01/09*, available at <http://centers.law.nyu.edu/jeanmonnet/papers/09/090101.pdf> (last accessed 02/04/2013)
- De Wet, E (2009) 'The role of European Courts in the development of a hierarchy of norms within international law: evidence of constitutionalism' (5(2)) *European Constitutional Law Review* 284
- Eeckes, C (2012) 'Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?' (18) *European Law Journal* 230
- Eeckout, P (2009) '*Kadi* and *Al Barakaat*: Luxembourg is not Texas – or Washington DC' *European Journal of International Law: Talk*, available at <http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/> (last accessed 02/04/2013)
- Kokott, J & Sobotta, C (2012) 'The *Kadi* case – constitutional core values and international law – finding the balance?' (23(4)) *European Journal of International Law* 1015
- Krisch, N (2006) 'The Pluralism of Global Administrative Law' (17) *European Journal of International Law* 247
- Weiler, JHH (2008) 'Editorial' (19) *European Journal of International Law: Talk*, available at http://www.ejiltalk.org/letters-to-the-editor-respond-to-ejil-editorials-vol-195/#footnote_1_343 (last accessed 02/04/2013)

Cases

- BVerfGE 73, 339 (1986) (*Solange II*)
- Behrami v. France, Saramati v. France, Germany & Norway* (2007) Apps. No 71412 & 78166/01
- Case 294/83 *Van Gend en Loos* (1953) ECR 1
- Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle fuer Getreide und Futtermittel* (1970) ECR 1125
- Case 4/73 *Nold v. Commission* (1974) E.C.R. 491
- Case 294/83 *Les Verts v. Parliament* (1986) ECR 1339
- C-402/05P *Kadi & Al Barakaat International Foundation v. Council & Commission* Case (2008) E.C.R. I-6351
- Case C-402/05P, Opinion of Advocate General Poiares Maduro, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005C0402:EN:HTML> (last accessed 02/04/2013)

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