

**HITTING TWO BIRDS WITH ONE STONE IN KADI:
DEFINING SUPREMACY AND FUNDAMENTAL RIGHTS
PROTECTION IN THE EUROPEAN LEGAL ORDER***

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*“Those who would give up essential liberty to
purchase a little temporary safety deserve neither
liberty nor safety”*

– Benjamin Franklin, 1759¹

INTRODUCTION

During the last decade, the United Nation Security Council (UNSC) has been preoccupied with the campaign against terrorism, largely employing economic sanctions in their battle against the ever increasing spate of terrorist activities.² This fight against terrorism has drastically reoriented the UN's security policy, moving beyond state boundaries to reach private individuals and organizations. Thus, economic sanctions, which were traditionally imposed only on states, have increasingly been aimed at individuals and organizations engaged in, or suspected to be engaged in, terrorist activities.³ It was a drastic shift from the UN's “state-centred” paradigm which penalized nations hostile or dangerous to the maintenance of peace and security.⁴

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¹ BENJAMIN FRANKLIN, HISTORICAL REVIEW OF PENNSYLVANIA (1759) at <http://www.quotationspage.com/quote/1381.html> (last visited Feb. 15, 2010).

² Daniel Halberstam & Eric Stein, *The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individuals Rights in a Plural World Order*, 46 COMMON MARKET L. REV. 13 (2009).

³ *Id.*

⁴ Martin Nettesheim, U.N. *Sanctions Against Individuals – A Challenge to the Architecture of European Union Governance*, 44 COMMON MARKET L. REV. 567 (2007).

The European Community's (Community) participation in the UN's anti-terrorist campaign resurrected difficult issues concerning its relationship with the UN and the international legal order as well as the complex interplay between their respective fundamental rights protection regime.⁵ The European Council's transformation of UNSC Resolutions into operative EU law not only resulted in the EU Member States' suddenly being bound by obligations under both international law and the EC Treaties⁶ but also set the stage for a battle for competence, supremacy and autonomy, calling into question the very foundation of European integration and its fundamental rights protection policy.

FIGHTING THE COMMON ENEMY: UN AND EU TERRORIST LISTS

At the turn of the millennium, the UNSC adopted two resolutions (UNSC Resolutions)⁷ which required all UN Member States to freeze the funds and other financial resources owned or controlled by the Taliban and their associates. A UN Sanctions Committee was organized which was tasked to draw up a list of persons and entities whose funds would be frozen pursuant to the said resolutions. In order to give the UNSC Resolutions and the Sanctions Committee Decisions effect within the EU, the Council of the European Union (Council), citing Articles 60 and 301 of the EC Treaty (EC), adopted two Common Foreign and Security Policy (CFSP) Common Positions⁸ which were in turn implemented by two Council regulations⁹. A system within the EU was also set up whereby a list¹⁰ is maintained of "persons, groups and entities involved in terrorist acts" as determined by a "competent authority". Under said regulations, EU Member States are obliged to freeze the funds, financial assets and economic resources of

⁵ Halberstam & Stein, *supra* note 2; Takis Tridimas, *Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order*, 34(1) EUR. L. REV. 103 (2009).

⁶ Halberstam & Stein, *supra* note 2; The European Economic Community, comprising of six original Member States, (Belgium, the Netherlands, Luxembourg, Italy, Germany and France) was formed in 1958 under the EEC Treaty. On 1 November 1993, the Treaty of Maastricht came into force supplementing the EEC Treaty and created the European Union. It also changed the name of the EEC to the EC (European Community).

⁷ UN Security Council Resolution 1267(1999) dated Oct. 15, 1999 and Resolution 1333 (2000) dated Dec. 19, 2000.

⁸ Common Position 1999/727/CFSP, providing restrictive measures against the Taliban and Common Position 2001/154/CFSP, amending Common Position 96/746/CFSP and providing additional restrictive measures against the Taliban.

⁹ Regulation 337/2000 banning of flights and freezing of funds and other financial resources of the Taliban and Regulation 467/2001 which repealed Regulation 337/2000 and prohibited the export of certain goods and services to Afghanistan; Tridimas, *supra* note 3.

¹⁰ The list is contained in Annex I of the regulations.

individuals and organizations listed therein.¹¹ Furthermore, funds, financial assets, economic resources and financial or other related services will not be made available to them.¹² The list is reviewed at least once every six months to determine whether grounds remain to keep the individuals and organisations on the list.¹³ After the demise of the Taliban regime, the UNSC adopted two further resolutions¹⁴ which also provided for the freezing of funds, this time directed against Osama bin Laden, members of Al-Qaeda network, and the Taliban. Since these individuals no longer controlled the Afghan government, the latter resolutions solely targeted individuals and non-state actors. These resolutions were similarly implemented at EU level. The Council, this time relying upon Articles 60, 301 as well as 308 EC, adopted two new CFSP Common Positions¹⁵ which were subsequently implemented by two Council regulations.¹⁶

Regardless of whether or not the UNSC sanctions, as well as the process by which the UN Sanctions Committee decided, were at odds with international or national fundamental rights standards, listed entities do not have access to direct judicial protection against the UNSC as they have no standing in international courts. They are left with petitioning their own national government for diplomatic protection at the international level as their only recourse.¹⁷ Furthermore, the International Court of Justice itself has not established any power of judicial review over UNSC Resolutions,¹⁸ it having only the competence to control measures of the UNSC by way of advisory opinion procedures which could only be initiated by either the UN General Assembly or the UNSC itself.¹⁹ This procedural gap left individuals bereft of a legal remedy and brought to the fore issues concerning fundamental rights protection in the international, regional and national levels.²⁰

¹¹ Bjorn Kunoy & Anthony Dawes, *Plate Tectonics in Luxembourg: The Menage A Trois Between EC Law, International Law and the European Convention of Human Rights Following the UN Sanctions Cases*, 46 COMMON MARKET L. REV. 73 (2009).

¹² *Id.*

¹³ Angus Johnston, *Thawing Out? The European Courts and the Freezing of Terrorist Assets*, 66(2) CAMBRIDGE L.J. 273 (2007).

¹⁴ UN Security Council Resolution 1390 dated Jan. 28, 2002 and Security Council Resolution 1453 dated Dec. 24, 2002.

¹⁵ Common Position 2002/402/CFSP and Common Position 2003/140/CFSP.

¹⁶ Regulation 881/2002 imposing specific restrictive measures against persons and entities associated with Osama bin Laden, the Al-Qaida network and the Taliban and Regulation 561/2003 providing for exceptions to the freezing of funds and economic resources; Tridimas, *supra* note 3.

¹⁷ Nettesheim, *supra* note 4.

¹⁸ Halberstam & Stein, *supra* note 2.

¹⁹ Nettesheim, *supra* note 4.

²⁰ Halberstam & Stein, *supra* note 2; Grainne de Burca et al., *The European Courts and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci*, 20 EUR. J. OF INT'L L. 853 (2009).

It came as no surprise that following their listing, a number of individuals and organizations resorted to the European Community Courts²¹ to petition for the annulment of the Community regulations.²² Interestingly, beneath what appears to be a mundane question of whether or not the individual or organization's inclusion in the list is justified lie transcendental issues of profound significance.

TESTING THE LIMITS OF COOPERATION: THE KADI CASE

On 8 March 2001, the UN Sanctions Committee published its first consolidated list of the entities and persons whose funds must be frozen pursuant to the UNSC Resolutions.²³ That list has since been amended and supplemented several times. Consequently, the European Commission (Commission) adopted various regulations which has amended or supplemented Annex I of the initial Council Regulation.²⁴ On 17 October and 9 November 2001, the Sanctions Committee published two new additions to its summary list which included in particular Yassin Abdullah Kadi, a Saudi Arabian national, who has substantial assets in the EU, and Al Barakaat International Foundation, a Swedish organization. Subsequently, the Commission issued two regulations²⁵ adding Mr. Kadi's and Al Barakaat's name to Annex I of the Council Regulation.²⁶ As a consequence of these regulations, which had direct legal effect in the national legal systems of all EU Member States, all their funds and financial assets in the EU were frozen.²⁷

Kadi and Al-Barakaat (hereinafter collectively "Kadi") brought proceedings against the Council and the Commission before the Court of First Instance of the European Communities (CFI)²⁸ seeking the

²¹ The Court of First Instance of the European Communities and the European Court of Justice.

²² Kunoy & Dawes, *supra* note 11; Johnston, *supra* note 13.

²³ UN Security Council Resolution 1267(1999) dated Oct. 15, 1999 and Resolution 1333(2000) dated Dec. 19, 2000.

²⁴ Regulation 467/2001.

²⁵ Commission Regulation (EC) No. 2062/2001 dated Oct. 19, 2001, amending, for the third time, Council Regulation No. 467/2001 adding Mr. Kadi's name, with others, to Annex I, and Commission Regulation (EC) No. 2199/2001 dated Nov. 12, 2001 amending, for the fourth time, Council Regulation No. 467/2001 adding Al Barakaat, with others, to Annex I.

²⁶ Regulation 467/2001.

²⁷ Grainne de Burca, *The European Court of Justice and the International Legal Order after Kadi*, Jean Monnet Working Paper No. 01/2009 available at <http://centers.law.nyu.edu/jeanmonnet/papers/09/090101.html> (last visited Feb. 15, 2010).

²⁸ Set up in 1989 as part of a two-tiered judicial system, the CFI ensures that the Community institutions and Member States comply with the law in interpreting and applying the founding treaties. The CFI is made up of at least one judge from each Member State and are appointed by the governments of the Member States for a renewable term of six years. The judges of the CFI appoint their President from amongst themselves

nullification of the Community regulation with respect to them.²⁹ They denied any involvement in terrorism and claimed to be victims of a serious miscarriage of justice. They argued, *inter alia*, that the Council was not competent under the EC Treaty to adopt the regulation, and that the regulation was in breach of their fundamental rights, namely, the right to property, the right to be heard and the right to judicial review.³⁰

In response, the Council and the Commission, relying on the UN Charter,³¹ argued that similar to the EU Member States, the Community was itself bound by international law to give effect to the UNSC resolutions, especially those adopted under Chapter VII of the UN Charter. The Council further argued that any claim of jurisdiction on the part of the CFI would not only be “tantamount to indirect and selective judicial review of the mandatory measures decided upon by the UNSC in carrying out its function of maintaining international peace and security”³² but would also “cause serious disruption to the international relations of the Community” and would “fall foul of the Community’s duty to observe international law.”³³

DIPLOMACY AND INTERNATIONALISM: THE CFI’S KADI RULING

The CFI began by identifying two sources of the Member States’ obligations under the UN Charter, to wit: customary international law, as codified in the Vienna Convention on the Law of Treaties, whereby a party to a treaty cannot invoke the provisions of domestic law as a justification for its failure to perform a treaty obligation;³⁴ and the UN Charter itself which provides for the primacy of Members States’ Charter obligations over any other international agreement.³⁵ This primacy, according to the CFI, extends to decisions of the UNSC which the UN Member States are required to implement under Article 25 of the UN Charter.³⁶

who shall serve for a renewable period of three years. The CFI sits in chambers of five or three judges or, in some cases, as a single judge. Following the entry into force of the Treaty of Lisbon on 1 December 2009, the CFI is currently known as the “General Court”.

²⁹ Halberstam & Stein, *supra* note 2.

³⁰ Tridimas, *supra* note 3; Andrea Gattini, Comment, *Joint Cases C-402/05 & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission*, Judgment of the Grand Chamber of 3 September 2008, 46 COMMON MARKET L. REV. 213 (2009); De Burca, *supra* note 27.

³¹ Charter of the United Nations, Jun. 26, 1945, Arts. 24(1), 25, 41, 48(2) & 103.

³² Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission* [2005] ECR II-3649, par. 162.

³³ *Id.* at par. 162.

³⁴ Vienna Convention on the Law of Treaties, May 23, 1969, Art. 27; Case T-315/01, *supra* note 32, par. 182.

³⁵ UN Charter, *supra* note 31, Art. 103; Case T-315/01, *supra* note 32, par. 183.

³⁶ Case T-315/01, *supra* note 32, pars. 184 & 189; Halberstam & Stein, *supra* note 2.

The CFI further stated that the EC Treaty itself echoes the primacy of UN obligations. For instance, Article 307 EC states that existing obligations between EC Member States and third countries are not affected by the EC Treaty;³⁷ and Article 224 (now 297) EC, which requires Member States to “consult each other with a view to taking together steps...in order to carry out obligations it has accepted for the purpose of maintaining peace and international security”,³⁸ such “measures”, according to the CFI, include UNSC Resolutions.³⁹ Hence, “pursuant both to the rules of general international law and to the specific provisions of the Treaty, (EU) Member States *may, and indeed must leave unapplied any provisions of Community law,* whether a provision of primary law or a general principle of that law, that raises any impediment to their proper performance of their obligations under the Charter of the United Nations.”⁴⁰ The CFI clarified that while Member States, by virtue of their accession to the UN Charter, are bound by UNSC resolutions, the Community itself is not similarly bound by international law to carry out the same. Indeed, while the Community “must respect international law” and Community law must be interpreted “in the light of the relevant rules of international law”,⁴¹ this does not immediately translate into a Community obligation to obey UNSC decisions.⁴² The CFI explained that “the reason is that the Community is not a member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor of the rights and obligations of the Member States for the purposes of public international law.”⁴³

However, after having ruled out the Community’s international legal obligation to implement UNSC resolutions, the CFI proceeded to “communitarize” that obligation,⁴⁴ stating that although the Community is not directly bound by the UN Charter, the Community “must be considered to be bound by the obligations under the Charter of the United Nations *in the same way as its Member States*, by virtue of the Treaty establishing it.”⁴⁵ Adopting a “functional succession” approach⁴⁶ the CFI ruled that “in so far

³⁷ *Id.* at pars. 185-186

³⁸ *Id.* at par. 188.

³⁹ *Id.* at par. 189.

⁴⁰ *Id.* at par. 190, italics supplied.

⁴¹ *Id.* at par. 199.

⁴² Halberstam & Stein, *supra* note 2.

⁴³ Case T-315/01, *supra* note 32, par. 192; Halberstam & Stein, *supra* note 2; Gattini, *supra* note 30.

⁴⁴ Halberstam & Stein, *supra* note 2.

⁴⁵ Case T-315/01, *supra* note 32, par. 193, italics supplied; Halberstam & Stein, *supra* note 2.

⁴⁶ The succession theory was accepted by the ECJ with respect to Member States’ obligation under GATT and the Convention on North-East Atlantic Fisheries, but not under the WTO Treaty. See Joined Cases 21-24/72, *International Fruit Company NV v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219, par. 18 thereof states “*in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member*

as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, *the provisions of that Charter have the effect of binding the Community*’.⁴⁷ The CFI explained that, at the time Member States concluded the EC Treaty, they were already previously bound by their UN Charter obligations. Hence, by concluding the EC Treaty creating the Community, the Member States could neither transfer to the Community more powers than they possessed nor withdraw from their obligations to third countries under the UN Charter. Hence, it followed that the Community was under an obligation to respect the Member States' obligations under the UN Charter.⁴⁸ This obligation explains the Council's adoption of the Common Position and the Commission's subsequent issuance of the regulations freezing Kadi's assets.⁴⁹

The CFI further ruled that the binding effect of the UN Charter barred it from reviewing the UNSC resolution's compatibility with Community law. The CFI explained that the Commission regulation sought to be annulled was enacted in implementation of a UNSC resolution, hence, review of the former would inevitably carry with it incidental review of the latter, which would be incompatible with the primacy of the UN Charter⁵⁰ since any indirect review of UNSC resolutions would trespass the prerogatives of the UNSC.⁵¹ The CFI similarly declined jurisdiction to review the Commission regulation's compliance with fundamental rights and ruled that the infringement of fundamental rights cannot affect the validity of a UNSC measure, as the same fall, in principle, outside the ambit of the CFI's judicial review.⁵² Hence, the CFI, citing “structural limits imposed by international law”⁵³ declined judicial review of the contested regulation.

After having declined jurisdiction to review the contested regulation, the CFI made an unexplained leap and stated that “none the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from

States in the area governed by the General Agreement [on Tariffs and Trade], the provisions of that agreement have the effect of binding the Community.”

⁴⁷ Case T-315/01, *supra* note 32, par. 203, italics supplied; Halberstam & Stein, *supra* note 2.

⁴⁸ *Id.* at pars. 194-195; Tridimas, *supra* note 3.

⁴⁹ De Burca, *supra* note 27.

⁵⁰ Case T-315/01, *supra* note 32, pars. 215-216; Tridimas, *supra* note 3.

⁵¹ *Id.* at pars. 215-216 & 221; Nikolaos Lavranos, *Judicial Review of UN Sanctions by the Court of First Instance*, 11 EUR. FOREIGN AFF. REV. 471 (2006).

⁵² Case T-315/01, *supra* note 32, par. 225; Kunoy & Dawes, *supra* note 11.

⁵³ *Id.* at par. 212, *Id.*

which no derogation is possible.”⁵⁴ The CFI then proceeded to examine whether the sanctions imposed upon Kadi complied with *jus cogens* norms.⁵⁵

The CFI considered Kadi’s right to property as being covered by *jus cogens* but ruled that such right has not been infringed by the freezing of funds. According to the CFI, the freezing of funds is a UN economic sanction which is essential for its fight against international terrorism,⁵⁶ moreover, the freezing order was a precautionary measure rather than a confiscation and “does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof”;⁵⁷ the CFI pointed out that, in any event, the contested regulations provide for exemptions and derogations from the freezing order such as those pertaining to funds “necessary to cover basic expenses, including payments for foodstuffs, rent, medicines and medical treatment, taxes or public utility charges.”⁵⁸ Furthermore, the UNSC resolutions provided for a means of reviewing the overall system of sanctions⁵⁹ and the persons concerned may present their case “at any time to the Sanctions Committee for review, through the Member State of their nationality or that of their residence.”⁶⁰

As regards Kadi’s right to be heard, the CFI distinguished between the right to a hearing before the European Council and before the UN Sanctions Committee. The CFI ruled that the right to be heard before the Council is irrelevant since the latter did not enjoy any discretion in implementing UNSC resolutions,⁶¹ and that while the UNSC resolutions did not provide for any right to be heard before the UN Sanctions Committee,⁶² “persons concerned may address a request to the same, through their national authorities, in order either to be removed from the list of persons affected by the sanctions or to obtain exemption from the freezing of funds.”⁶³ The CFI reiterated that the temporary “precautionary” character of the freezing measure as well as the urgency of the international community’s security obviated the need for “facts and evidence adduced against him to be communicated to him.”⁶⁴

⁵⁴ Case T-315/01, *supra* note 32, par. 226; De Burca, *supra* note 27.

⁵⁵ Tridimas, *supra* note 3.

⁵⁶ Case T-315/01, *supra* note 32, pars. 244-245.

⁵⁷ *Id.* at par. 248.

⁵⁸ *Id.* at par. 239.

⁵⁹ *Id.* at par. 249.

⁶⁰ *Id.* at par. 250; Comment, *Regulations Freezing Terrorist Assets Upheld*, 175 EU Focus 4 (2005).

⁶¹ *Id.* at pars. 257-258; Tridimas, *supra* note 3.

⁶² *Id.* at par. 261.

⁶³ *Id.* at par. 262.

⁶⁴ *Id.* at par. 274; Tridimas, *supra* note 3; Halberstam & Stein, *supra* note 2; De Burca, *supra* note 27.

In relation to the right of judicial review, the CFI ruled that the limitation on the right of access to a court is justified. It ruled that Kadi's "interest in having a court hear his case on its merits is not enough to outweigh the essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council in accordance with the Charter of the United Nations."⁶⁵ While the CFI acknowledged that no international court having jurisdiction to ascertain the legality of UNSC acts has been set up,⁶⁶ it nevertheless recognized that "the setting-up of a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined...constitute another reasonable method of affording adequate protection of the applicant's fundamental rights as recognized by *jus cogens*."⁶⁷

SUPREMACY AND CONSTITUTIONALISM: THE ECJ'S KADI RULING

The European Court of Justice (ECJ)⁶⁸ was faced with a difficult dilemma. At stake was not only the protection of Mr. Kadi's fundamental rights as an individual but also the EU's fundamental rights policy and its relationship with the international legal order. If the ECJ upholds the CFI's ruling on the legality of the disputed Community regulation, it may undermine the EU's fundamental rights regime which is characterized as being protective of all citizens of the Union. On the other hand, if it struck down the disputed regulation, it may give suspected terrorists an opportunity to move funds beyond the reach of the Union.⁶⁹

In stark contrast to the CFI, the ECJ was less concerned with the primacy of the UN Charter but was more preoccupied with compliance with EC Treaty norms.⁷⁰ Employing its ruling in *Les Verts*⁷¹ as a starting point, the ECJ stated in no uncertain terms that "the Community is based on the

⁶⁵ *Id.* at par. 289.

⁶⁶ *Id.* at par. 290.

⁶⁷ *Id.* at par. 290.

⁶⁸ The European Court of Justice (officially known as the Court of Justice), is the highest court in the European Union in matters of European Union law, but not national law. It is tasked with interpreting EU law and ensuring its equal application across all EU member states. Established in 1952, It is composed of one judge per member state. The ECJ rarely sits as a full court, rather, it sits as a 'Grand Chamber' of just 13 judges or in chambers of three or five judges. It is not possible to appeal the decisions of national courts to the ECJ, rather, national courts only refer questions of EU law to the ECJ and thereafter apply the resulting interpretation to the facts of any given case.

⁶⁹ Christopher Weema, *Kadi v. Council: Putting the United Nations in its Place*, 17 TULJ. OF INT'L & COMP. L. 571 (2008-2009).

⁷⁰ Tridimas, *supra* note 3.

⁷¹ Case 294/83, *Les Verts v. Parliament* [1986] ECR 1339.

rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.”⁷² Without specifically mentioning the UN Charter, it continued that “an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system.”⁷³ It emphasised that “fundamental rights form an integral part of the general principles of law”⁷⁴ and that compliance thereto “is a condition of the lawfulness of Community acts and that measures incompatible with respect for human rights are not acceptable in the Community.”⁷⁵ Hence, “obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty.”⁷⁶

In broad strokes, the ECJ clearly and unapologetically defined the parameters of its judgment, to wit: the Community is based on the rule of law which does not preclude the review of any acts adopted; the Community is an autonomous legal order with the ECJ exercising exclusive review jurisdiction; and, the Community regards fundamental rights as an integral part of its general principles of law whose observance is guaranteed by the ECJ.⁷⁷ The ECJ clarified however that its review of the Community regulation is not to be construed as a review of the lawfulness of the underlying UNSC resolutions, such that denying the lawfulness of the Community measure “would not entail any challenge to the primacy of that resolution in international law.”⁷⁸ The ECJ then proceeded to evaluate the Community regulations against Community fundamental rights protection standards.

The ECJ acknowledged that the right to property, while a general principle of Community law, is not absolute and must be viewed in relation to its function in society. Consequently, its exercise may be restricted provided that such restrictions correspond to objectives of public interest and do not constitute a disproportionate interference such as to impair “the

⁷² Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the EU and Commission of the EC* [2008] ECR I-0000, par. 281; Tridimas, *supra* note 3.

⁷³ *Id.* at par. 282; De Burca, *supra* note 27.

⁷⁴ *Id.* at par. 283; Tridimas, *supra* note 3.

⁷⁵ *Id.* at par. 284; *Id.*

⁷⁶ *Id.* at par. 285; *Id.*

⁷⁷ Stephan Griller, *International Law, Human Rights and the European Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in Kadi*, 4 EUR. CONST. L. REV. 528 (2008).

⁷⁸ Joined Cases C-402/05 P and C-415/05 P, *supra* note 72, par. 288; Griller, *Id.*

very substance of the right so guaranteed”.⁷⁹ The ECJ took into account the exemptions on the freezing of assets covering basic expenses and the existence of a mechanism for periodic examination of the sanctions and ruled that the restrictive measures imposed by the Community regulation while constituting restrictions on the right to property may, in principle, be justified.⁸⁰ However, as applied to Mr. Kadi, the ECJ found that the contested regulation breached his right to property since it was adopted “without furnishing any guarantee enabling him to put his case to the competent authorities.”⁸¹ Hence, the ECJ ruled that the imposition of restrictive measures laid down by the contested regulation against Mr. Kadi “constitutes an unjustified restriction of his right to property.”⁸²

As regards his right to be heard, the ECJ ruled that the principle of judicial protection entailed the communication to the individuals or entities concerned the grounds on which they have been included in the list either at the time when the decision to include them in the list has been made or immediately thereafter in order to afford them an opportunity to exercise their right to bring an action.⁸³ This notification requirement not only enables those affected to defend their rights it also facilitates the exercise of judicial review by the Court.⁸⁴ The ECJ agreed with the CFI that “prior communication would be liable to jeopardize the effectiveness of the freezing of funds”⁸⁵ as such measures must, by their very nature, partake of an element of surprise and apply with immediate effect.⁸⁶ The ECJ also agreed that overriding considerations “may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.”⁸⁷ However, the ECJ found that the disputed regulation failed to provide, at the very least, a procedure both for communicating the evidence justifying the inclusion of the persons in the list and for hearing them, either at the same time as their inclusion in the list or immediately thereafter.⁸⁸ In fact, the Council never informed Kadi of the evidence adduced against him to justify his inclusion in the list.⁸⁹ Hence, the ECJ ruled that his right to be heard was likewise violated.

⁷⁹ *Id.* at par. 355; Tridimas, *supra* note 3.

⁸⁰ *Id.* at pars. 363-366; *Id.*

⁸¹ *Id.* at par. 369; Griller, *supra* note 77.

⁸² *Id.* at par. 370; Editorial, *Freezing of Funds Breached Fundamental Rights*, 241 EU Focus 2 (2008).

⁸³ *Id.* at par. 336.

⁸⁴ *Id.* at par. 337; Tridimas, *supra* note 3.

⁸⁵ *Id.* at par. 339; Griller, *supra* note 77.

⁸⁶ *Id.* at par. 340; Editorial, *supra* note 82.

⁸⁷ *Id.* at par. 342.

⁸⁸ *Id.* at par. 345.

⁸⁹ Editorial, *supra* note 82.

The absence of communication of the evidence against Kadi violated not only his right to be heard but also his right to judicial review since Community courts were effectively prevented from investigating the evidence supporting the freezing of assets.⁹⁰ While the ECJ recognized that the Community must respect international, and in particular, UN law in the exercise of its powers,⁹¹ it ruled that there is no basis in the EC Treaty to support the contention that measures taken for the implementation of UNSC resolutions are immune from judicial review.⁹² The ECJ clarified that its review of the validity of any Community measure in light of fundamental rights is anchored on the EC Treaty itself “as an autonomous legal system which is not to be prejudiced by any international agreement” including the UN Charter.⁹³ Hence, “the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, 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.”⁹⁴ Finding that the CFI erred in ruling that Community regulations giving effect to UNSC resolutions enjoy immunity from judicial review, the ECJ set aside the CFI’s judgment on that regard.

JUDICIAL MODESTY AND RESTRAINT: THE CFI AND A UNIFIED INTERNATIONAL LEGAL ORDER

The CFI approached judicial review with considerable restraint in the presence of what it calls the “structural limits” imposed by both general international law and the EC Treaty itself.⁹⁵ The CFI was of the view that Community courts have only limited jurisdiction to review the validity of Community measures when such measures constitute the implementation of UN law obligations since the Community had no “autonomous discretion” to act in any other way.⁹⁶ The CFI opined that giving Community courts full review jurisdiction would result in an indirect review of the lawfulness of the underlying UNSC resolutions, something which “cannot be justified either on the basis of international law or on the basis of Community law”⁹⁷. Given these factual constraints, the CFI set out to reach a “golden balance” of affirming on the one hand the primacy of the UN Charter over

⁹⁰ Joined Cases C-402/05 P and C-415/05 P, *supra* note 72, pars. 349-351; Griller, *supra* note 77; Tridimas, *supra* note 3.

⁹¹ *Id.* at par. 291.

⁹² *Id.* at pars. 285-286; Kunoy & Dawes, *supra* note 11.

⁹³ *Id.* at pars. 316-317; *Id.*

⁹⁴ *Id.* at par. 326, italics supplied.

⁹⁵ Halberstam & Stein, *supra* note 2; Kunoy & Dawes, *supra* note 11.

⁹⁶ Case T-315/01, *supra* note 32, par. 214; Kunoy & Dawes, *supra* note 11.

⁹⁷ *Id.* at par. 221, *Id.*

Community law and subjecting on the other hand the UNSC resolution to *jus cogens* principles.⁹⁸ This explains why the CFI in one breath states that review of the “internal lawfulness” of the Community regulation, especially in light of Community fundamental rights standards, would indirectly question the lawfulness of the relevant UNSC resolutions which could not be justified under either international law or Community law,⁹⁹ but on the same breath states however that “mandatory provisions concerning universal human rights” fall under *jus cogens* norms and hence “highly exceptionally” within the scope of the its review power.¹⁰⁰ The CFI expressly rejected the dualist argument advanced by Kadi wherein “the Community legal order is a legal order independent of the United Nations, governed by its own rules of law”,¹⁰¹ and instead subordinated Community acts to that of the UNSC and ruled that it was bound by the obligations imposed by the UN Charter on Member States.¹⁰² This subordination notwithstanding, the CFI assumed jurisdiction to review UNSC resolutions for compatibility, not with Community fundamental rights standards under EC law, but with peremptory norms of international law.¹⁰³

The CFI adopted an internationalist approach, ruling that while the Community is not bound by the UN Charter by virtue of international law, it is so bound by virtue of the EC Treaty itself.¹⁰⁴ Its conception of the international legal space is a vertical and integrated one with “decentralised review processes”¹⁰⁵ whereby *vis-a-vis* the UN, the EC legal order is no different from any other “domestic” order, all of whom are subordinated to the UN Charter, but lower courts like the CFI are nonetheless empowered, at times even obliged by international law itself, to apply peremptory norms of international law to the organs of the UN.¹⁰⁶ It painted a “provocative picture of a regional organization at once faithful and subordinate to, yet simultaneously constituting itself as an independent check upon, the powers exercised in the name of the international community under the UN Charter.”¹⁰⁷

⁹⁸ Tridimas, *supra* note 3 at 112.

⁹⁹ Case T-315/01, *supra* note 32, par. 221; Halberstam & Stein, *supra* note 2 at 50.

¹⁰⁰ *Id.* at par. 231; Halberstam & Stein, *supra* note 2.

¹⁰¹ *Id.* at par. 208; De Burca, *supra* note 27.

¹⁰² *Id.* at pars. 215-216; *Id.*

¹⁰³ De Burca, *supra* note 27.

¹⁰⁴ Case T-315/01, *supra* note 32, pars. 192 & 203-204; Tridimas, *supra* note 3.

¹⁰⁵ Rory Brown, Comment, *Kadi v Council of the European Union and Commission of the European Communities: Executive Power and Judicial Supervision at European Level*, 4 EUR. HUM. RTS. L. REV. 456 (2006).

¹⁰⁶ De Burca, *supra* note 27; Kunoy & Dawes, *supra* note 11; Case T-315/01, *supra* note 32, par. 181.

¹⁰⁷ *Id.* at 28.

In a way, the CFI's approach, wherein the EU legal order was viewed as being merely similar to any other legal order, is "revolutionary"¹⁰⁸ and represented a "new line of thinking with respect to the interaction between UN law and EC law"¹⁰⁹ but was at odds with the "traditional" paradigm under European Community law jurisprudence. The CFI's ruling in *Kadi* was a paradigmatic shift from the landmark *Costa*¹¹⁰ case which created an autonomous and distinctive *European* legal order. The distinctiveness of the EC Treaties led the ECJ to rule therein that "by contrast to ordinary international treaties, *the EEC Treaty has created its own legal system.*"¹¹¹ Indeed, the CFI in *Kadi* established "a new hierarchy of norms in the Community legal order"¹¹² which is difficult to reconcile with standing jurisprudence holding that the EC Treaty has established a *complete* system of legal remedies and procedures designed to permit the ECJ to review the legality of *all* Community measures¹¹³ in the light of EC law.¹¹⁴ Moreover, by reviewing the impugned regulations on the basis of *jus cogens*, the CFI disregarded the elementary divide between the UN and EU legal orders. By doing so, it not only reviewed a Community measure on the basis of a norm found in a foreign legal order, it also reviewed an act of that legal order as well. In adopting an internationalist stance, it went from being a European constitutional court applying European norms and values to being a European court intercalating international values and principles into the European legal order.¹¹⁵ Furthermore, it took upon itself the (indirect) review of UNSC resolutions, when the International Court of Justice, the UN's judicial organ, was itself unwilling to engage in such a review.¹¹⁶

The CFI's ruling that infringement of fundamental rights as protected by the Community legal order cannot affect the validity of a UNSC measure as they fall outside the CFI's review jurisdiction¹¹⁷ has far reaching consequences on the Community's fundamental rights protection regime. Following the CFI's reasoning, acts of the UNSC affecting fundamental rights, provided they meet *jus cogens* standards, are supreme over

¹⁰⁸ Kunoy & Dawes, *supra* note 11 at 98.

¹⁰⁹ *Id.* at 76.

¹¹⁰ Case 6/64, *Costa v. Enel*, [1964] ECR 1141.

¹¹¹ *Id.* at par. 592, italics supplied.

¹¹² Lavranos, *supra* note 31 at 478.

¹¹³ Case 294/83, *supra* note 71, par. 23; Kunoy & Dawes, *supra* note 11.

¹¹⁴ Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125, par. 24; Kunoy & Dawes, *supra* note 11.

¹¹⁵ Jean d'Aspremont & Frederic Dopagne, *Kadi: The ECJ's Reminder of the Elementary Divide Between Legal Orders*, INT'L ORGS. L. REV. (2008) available at <http://ssrn.com/abstract=1341982> (last visited Feb. 15, 2010).

¹¹⁶ De Burca, *supra* note 27.

¹¹⁷ Case T-315/01, *supra* note 32, par. 221.

EC law.¹¹⁸ While the CFI asserted the Community's competence to implement UNSC resolutions on the one hand, it reduced fundamental protection for individuals to below acceptable Community standards on the other.¹¹⁹ It lost sight of the fact that competence and fundamental rights protection were inextricably linked such that the response to the question of competence determines the level and standard of fundamental rights protection afforded.¹²⁰ By adopting a "hands-off" approach¹²¹, and blaming the existence of "structural limits", the CFI judgment left individuals vulnerable to UNSC measures without adequate legal protection.¹²² Hence, as a result of the CFI's ruling, individuals would have to request their national authorities to safeguard their fundamental rights directly at the international level instead of seeking recourse in Community courts.¹²³

JUDICIAL INDEPENDENCE AND AUTONOMY: THE ECJ AND A HEGEMONIC EUROPEAN LEGAL ORDER

In contrast to the CFI's monist and internationalist approach, the ECJ's reasoning was manifestly dualist and sovereigntist, repeatedly emphasizing not only the separateness and autonomy of its legal order from the international legal order but also prioritizing the Community's fundamental rights policy as well.¹²⁴ Exuding "constitutional confidence and distrust towards any invasion on due process,"¹²⁵ the judgment is compelling in its (dis)regard of the UN Charter and emphasis on the Community's detachment from the separate and parallel universe of international law whose norms, principles and values are barred from entry into the Community legal order.¹²⁶

The ECJ positioned itself as a "court of a quasi-domestic legal order" which is "autonomous from the international legal order"¹²⁷ and asserted Community law's "constitutional hegemony" preventing the primacy of the UN Charter from invading the constitutional space of the Community legal order. It also made a clear distinction between the

¹¹⁸ Christina Eckes, *Judicial Review of European Anti-Terrorism Measures – The Yusuf and Kadi Judgments of the Court of First Instance*, 14(1) EUR. L.J. 74 (2008).

¹¹⁹ Takis Tridimas & Jose Gutierrez-Fons, *EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?*, 32 FORDHAM INT'L. L.J. 660 (2008-2009).

¹²⁰ *Id.*

¹²¹ Lavranos, *supra* note 31 at 475; Eckes, *supra* note 118.

¹²² Kunoy & Dawes, *supra* note 11.

¹²³ *Id.*

¹²⁴ De Burca, *supra* note 27.

¹²⁵ Tridimas, *supra* note 3 at 116.

¹²⁶ De Burca, *supra* note 27.

¹²⁷ De Burca et al., *supra* note 20 at 863.

international obligations of the Community and the effect of Community norms within the Community legal order¹²⁸ and treated all EC recognized “fundamental rights “as belonging to a “normatively superior category”.”¹²⁹ Unlike the CFI, the ECJ confined itself to the EC Treaty, the “basic constitutional charter”, as the sole authority in evaluating the validity of Community actions.¹³⁰ This foreclosed the idea that its ruling would affect the legality of the UNSC resolution which the Community regulation intends to give effect.¹³¹ It also rejected the idea that Community courts have jurisdiction to review UNSC actions even on *jus cogens* grounds¹³²

The ECJ’s position in *Kadi* is consistent with its own settled jurisprudence that EC law and international law operate on separate spheres and reinforced the view that the relationship between the international and Community legal orders is dictated solely by the Community legal order itself.¹³³ It asserted that “even if the obligations imposed by the UN Charter were to be classified as part of the ‘hierarchy of norms within the Community legal order’ they would rank higher than legislation but lower than the EC Treaties and lower than the ‘general principles of EC law’ which have been held to include ‘fundamental rights.’”¹³⁴

It is unsurprising that, proceeding from this premise, the ECJ considered the UN Charter as similar to any other international agreement. This approach guaranteed that neither the UN Charter nor any other norms of international law would be able to affect, much less question, the nature, meaning and primacy of the Community’s fundamental rights regime.¹³⁵ This bifurcated framework also allowed the ECJ not only to dodge the question of the Community’s legal obligations under principles of public international law (i.e., whether the EC is obliged to implement the UNSC resolutions) but also to address solely the question of whether such the Community’s implementation of the UNSC resolutions would exempt it from fundamental rights review at the Community level.¹³⁶

¹²⁸ Tridimas, *supra* note 3.

¹²⁹ De Burca, *supra* note 27 at 36.

¹³⁰ Joined Cases C-402/05 P and C-415/05 P, *supra* note 72, par. 281.

¹³¹ *Id.* at par. 286; Halberstam & Stein, *supra* note 2.

¹³² *Id.* at par. 287; *Id.*

¹³³ Kunoy & Dawes, *supra* note 11.

¹³⁴ De Burca, *supra* note 27 at 35; Joined Cases C-402/05 P and C-415/05 P, *supra* note 72, pars. 305 - 308.

¹³⁵ Kunoy & Dawes, *supra* note 11.

¹³⁶ Halberstam & Stein, *supra* note 2.

**THE CFI'S AND THE ECJ'S RULING IN KADI:
A COMPARATIVE REVIEW**

While both the CFI and ECJ decisions constitute landmark decisions on a number of transcendental constitutional issues, to wit: the relationship between Community law and international law; fundamental rights protection under Community law and international law; and, the legality of the anti-terrorism measures undertaken by the Community and international legal orders, they differ in many ways.¹³⁷ Whereas the ECJ exuded an aura of judicial confidence in its declamation of Community constitutional principles, the CFI adopted a more subdued tone and skirted broader fundamental rights concerns.¹³⁸ While the ECJ grandly asserted the “constitutional hegemony” of the Community legal order; zealously protected its own autonomy; and, perpetually suspected intrusions on its authority, the CFI reached out in search of allies in both the international and domestic legal space.¹³⁹ While the CFI cautiously balanced Community fundamental rights protection against compliance with obligations flowing from UN law, the ECJ embarked on a stringent and rigorous, albeit indirect, review of UNSC resolutions vis-à-vis Community fundamental rights standards.¹⁴⁰

The different starting points of the CFI and the ECJ determined respectively the scope and intensity of their fundamental rights review as well.¹⁴¹ While the CFI looked outwards in search for fundamental rights norms in international law, the ECJ looked inwards and exclusively applied the Community’s own fundamental rights principles.¹⁴² Furthermore, while both CFI and ECJ engaged in an implicit balancing between fundamental human rights protection vis-à-vis the collective security interests of the UN, the results were markedly different.¹⁴³ The CFI was more conscious of institutional hierarchy and deference to the UN, giving greater weight to collective security interests of the UNSC than to individual fundamental rights, the ECJ focused on substantive values, according more weight to fundamental rights protection,¹⁴⁴ and less weight to the fact that the sanctions originated from the UNSC.¹⁴⁵ While the ECJ agreed to attaching

¹³⁷ Griller, *supra* note 77.

¹³⁸ Tridimas, *supra* note 3.

¹³⁹ *Id.*

¹⁴⁰ Griller, *supra* note 77.

¹⁴¹ Tridimas, *supra* note 3.

¹⁴² Halberstam & Stein, *supra* note 2.

¹⁴³ Pasqualie de Sena & Maria Vitucci, *European Courts and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values*, 20(1) EUR.J. OF INT'L. L. 193 (2009).

¹⁴⁴ *Id.*

¹⁴⁵ Tridimas, *supra* note 3.

“special importance” to UNSC resolutions, it was not in favour of granting any special status to Community resolutions implementing the same and subjected the sanctions to unforgiving and full review based on their compatibility with Community fundamental rights protection standards.¹⁴⁶

The ECJ clearly did not succumb to the authority of the UNSC but instead indirectly challenged its authority by annulling the Community regulation implementing the UNSC Resolutions,¹⁴⁷ in contrast, the CFI’s internationalist approach not only failed to provide effective access to justice, it also undermined the autonomy of the European legal order.¹⁴⁸ The CFI’s ruling guaranteed the EU’s external legitimacy and viewed international law as a coherent legal order where Community law is merely a part of this hierarchy with the UN Charter located at its tip.¹⁴⁹ The ECJ, opting for internal legitimacy, promoted a vision of the EU as a self-contained order whose highest constitutional norms determine the outer boundaries of its competence.¹⁵⁰

HITTING TWO BIRDS WITH ONE STONE: SUPREMACY AND FUNDAMENTAL RIGHTS PROTECTION IN KADI

In its 1963 *Van Gend*¹⁵¹ decision, the ECJ ruled that the then EEC Treaty was “more than an agreement” between the contracting states and that “the Community *constitutes a new legal order of international law* for the benefits of which the states have *limited their sovereign rights*...the subjects of which comprise *not only Member States but also their nationals*.”¹⁵² It clarified the relationship between EU law and the domestic (national) law of an EU Member State, an area not addressed by the founding treaties of the EU. Since then, case law and practice have consistently adopted the position that in conflicts between EU law and domestic law, EU law prevails. *Van Gend* is often touted as Europe’s *Marbury v. Madison*,¹⁵³ in both cases the highest courts, amidst competing claims of legal authority, took upon themselves the role as ultimate arbiter of central government authority.¹⁵⁴ In *Marbury*, the

¹⁴⁶ *Id.*

¹⁴⁷ De Burca, *supra* note 27.

¹⁴⁸ Halberstam & Stein, *supra* note 2.

¹⁴⁹ Tridimas & Gutierrez-Fons, *supra* note 119.

¹⁵⁰ *Id.*

¹⁵¹ Case 26/62, *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1; Case 6/64, *supra* note 110.

¹⁵² *Id.* at par. 12.

¹⁵³ 5 U.S. (1 Cranch) 137 (1803).

¹⁵⁴ Daniel Halberstam, *Constitutionalism and Pluralism in Marbury and Van Gend*, University of Michigan Public Law Working Paper No. 104 (2008) available at <http://ssrn.com/abstract=1103253> (last visited Feb. 15, 2010).

contest was among the colliding powers of the Court, the President and Congress under the US Constitution, in *Van Gend* the conflict was between the legal orders of the EU and its Member States under the EC Treaty.¹⁵⁵

Van Gend established the “internal dimension of European constitutionalism”, a declaration of both independence and supremacy of EU law over the Member States’ domestic law.¹⁵⁶ However, the “new legal order” established in *Van Gend* is but “half the promise of an autonomous legal order”.¹⁵⁷ To complete the promise of a truly autonomous legal order, a certain measure of independence from international law seems to be called for as well.¹⁵⁸ *Van Gend* appears to be in search for its better half—the “external dimension of European constitutionalism” which is essential to complete the portrait of a truly independent and supreme European legal order.¹⁵⁹

The search ended 45 years later in 2008 when the ECJ in *Kadi* shattered the chains which bound the EU to the shallow *Grundnorm* of international law allowing it to sail off happily into deep and uncharted waters.¹⁶⁰ *Kadi* is the EU’s *Marbury* once again as it had occasion to assert the ECJ’s judicial review powers over Community acts, this time in conflicts between EU law and international law.¹⁶¹ In *Kadi*, the ECJ sat at “the intersection between domestic and international law like no other court in the world.”¹⁶² It was the first time that any court in the world has ruled, albeit indirectly, that UNSC counter-terrorism measures violate fundamental rights.¹⁶³ It was also the ECJ’s first time not only to review a Community measure giving effect to UNSC resolutions, but also to annul the same for violating Community fundamental rights principles.¹⁶⁴

Kadi went further than merely establishing the ECJ’s authority of judicial review, it ruled that Community acts in compliance with international agreements are allowed only in so far as it does not conflict

¹⁵⁵ *Id.*

¹⁵⁶ Daniel Halberstam, *Local, Global, and Plural Constitutionalism: Europe Meets the World*, University of Michigan Public Law Working Paper No. 176, page 25 (2009) available at <http://ssrn.com/abstract=1521016> (last visited Feb. 15, 2010).

¹⁵⁷ *Id.* at 26.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*; Gattini, *supra* note 30.

¹⁶¹ Weema, *supra* note 69.

¹⁶² Halberstam, *supra* note 156 at 35.

¹⁶³ Christopher Michaelsen, *The Incompatibility of the United Nations Security Council’s 1267 Sanctions Regime with European Due Process Guarantees*, 10 MELBOURNE J. OF INT’L L. 329 (2009).

¹⁶⁴ *Id.*

with EC Treaty obligations.¹⁶⁵ Henceforth, EU Member States must not only set aside¹⁶⁶ domestic law when it comes into conflict with EU law, it must similarly set aside international law obligations as well, notwithstanding the fact that either the domestic law or international agreement may have predated the EU legal measure.¹⁶⁷ The ECJ maintained that every international agreement which is “previous in time, universal in character and political in scope”, such as the UN Charter, which predated the EU by over thirty years, cannot impinge on the Community legal order.¹⁶⁸ *Kadi* is undoubtedly the ultimate expression of dissent against a constitutionalist view of the international law—EU law relationship as espoused by the CFI.¹⁶⁹ It was a sober call to those inebriated with the charms of international constitutionalism.¹⁷⁰

Seen from a fundamental rights protection perspective, the reasoning in *Kadi* echoes that of *Medellin*¹⁷¹ as well, albeit arriving at a different result. In *Medellin*, Mexico filed a case against the United States before the International Court of Justice (ICJ) and asserted, on behalf of 51 Mexican nationals who were sentenced to death by the Texas Supreme Court without having their national consulate notified, that the US had violated the Vienna Convention on Consular Relations which requires local authorities to inform foreign nationals being held on criminal charges of their right to consult with their country’s diplomats. The ICJ ruled that the United States was obliged to have the defendants’ cases reopened and reconsidered.¹⁷² The US government, in seeking to overturn the Texas ruling, argued before the US Supreme Court that the Texas ruling, if not reversed, “will place the United States in breach of its international law obligation” to comply with the ICJ’s decision.¹⁷³ However, the US Supreme Court ruled that while an international treaty may constitute an international commitment, it does not bind domestic law unless Congress has enacted a

¹⁶⁵ Joined Cases C-402/05 P and C-415/05 P, *supra* note 72, par. 285.

¹⁶⁶ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629, the ECJ ruled in par. 21 thereof that “...every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule” underscoring supplied.

¹⁶⁷ *Weema*, *supra* note 69.

¹⁶⁸ *Id.*; Gattini, *supra* note 30 at 224.

¹⁶⁹ d’Aspremont & Dopagne, *supra* note 115.

¹⁷⁰ *Id.*

¹⁷¹ *Medellin v. Texas*, 552 U.S. 491 (2008).

¹⁷² *Case Concerning Avena and Other Mexican Nationals (Mex. v. U. S.)*, 2004 I.C.J. 12, (Judgment of Mar. 31) (*Avena*).

¹⁷³ *The Medelin Constitutional Crisis*, Jan. 4, 2008, citing Amicus curiae brief of James A. Thessin, Acting Legal Adviser for the U.S. State Department, and Paul D. Clement, Solicitor General of the United States Supreme Court, available at <http://www.johntfloyd.com/comments/january08/04a.htm> (last visited Feb. 15, 2010).

statute implementing said treaty, it further ruled that decisions of the ICJ are not binding on domestic law. On 25 March 2008, the US Supreme Court rejected the US government's arguments and paved the way for Texas to execute the sentence.

Both *Kadi* and *Medellin* asserted the "separateness of international law from the domestic constitutional order"¹⁷⁴ (i.e. the UNSC Resolutions in *Kadi* and the ICJ ruling in *Medellin*). The ECJ's assertion of independence from the UN legal order in *Kadi* placed fundamental rights protection at the forefront of the Community legal order and paved the way for the ECJ's inauguration as the ultimate guardian of fundamental rights protection in the EU.¹⁷⁵ This approach resulted in both protecting the individual's fundamental as well as ensuring Community law's supremacy and independence.¹⁷⁶ By hitting two birds with one stone, the ECJ had its cake and ate it too.

The ECJ should be credited for spearheading a deeper and more robust fundamental rights discourse within the Union.¹⁷⁷ However, far from writing *finis* to the issue, *Kadi* can be seen as merely signaling "the start of a long debate on a number of important questions with regard to the protection of fundamental rights, the hierarchy of norms within the Community legal order, the relationship between international law and Community law as well as the relationship between the EC, EU and its Member States."¹⁷⁸

OF EUROCENTRICS AND EUROSCEPTICS: SOME CRITICISMS TO ECJ'S RULING IN KADI

Academics and practitioners who consider themselves EU lawyers and view the EU as an autonomous legal order applaud *Kadi* while those who consider themselves international lawyers and view the international legal landscape as a unified whole under the UN's leadership are critical of the judgment.¹⁷⁹ They characterize the ECJ's judgment as "euro-centric"¹⁸⁰ "solipsistic and imperialistic", tending to see only one's own legal system and

¹⁷⁴ De Burca, *supra* note 27 at 3.

¹⁷⁵ Kunoy & Dawes, *supra* note 11.

¹⁷⁶ Halberstam & Stein, *supra* note 2.

¹⁷⁷ Elizabeth Defeis, *Human Rights and the European Court of Justice: An Appraisal*, 31 FORDHAM INT'L. L.J. 1104 (2007-2008).

¹⁷⁸ Nikolaos Lavranos, *Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, 36(2) LEGAL ISSUES OF ECON. INTEGRATION 157, 180 (2009).

¹⁷⁹ De Burca et al., *supra* note 20.

¹⁸⁰ Tridimas, *supra* note 3 at 117.

judging everything from that perspective.¹⁸¹ This stubborn and self-centred stance is in stark contrast to the EU's traditional self-presentation as a virtuous international actor committed to international law and institutions.¹⁸²

Critics cannot help but sit uneasy with *Kadi's* "chauvinist and parochial tones", so much so when such statements emanate from the highest judicial organ of an international organization which owes its very existence to international law itself.¹⁸³ This "hard-headed, pick-and-choose attitude to international obligations,"¹⁸⁴ which "europeanized" every measure and treated them as falling within its jurisdictional competency,¹⁸⁵ is reminiscent of the US approach in *Medellin*. The withdrawal into its own "constitutional cocoon"; blatant disregard of the international locus of the facts; and, myopic focus on its own internal constitutional precepts are acts hardly expected from the highest judicial branch of a major citizen in the international demos.¹⁸⁶

Parties critical of *Kadi* point out that the Vienna Convention does not distinguish between ordinary and extraordinary treaties, hence the ECJ's position, that the EC Treaty is distinct from any other international agreement, has no legal leg to stand on. Further, *Kadi* violates both elementary international law principles that "in the relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty"¹⁸⁷ and "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law."¹⁸⁸ The ECJ's disregard of these long-settled principles was a high price to pay "in terms of coherence and unity of the international legal system."¹⁸⁹

It was proposed that, instead of emphasizing on "the Community's" fundamental rights policy, the ECJ could have drawn directly from human rights principles found in international law, such as the basic principles of due process and human rights protection, adopting an "internationally-

¹⁸¹ Kunoy & Dawes, *supra* note 11 at 85.

¹⁸² De Burca, *supra* note 27; De Burca et al., *supra* note 20.

¹⁸³ *Id.*

¹⁸⁴ De Burca et al., *supra* note 20 at 855.

¹⁸⁵ Joseph Weiler, Editorial, *Kadi: Europe's Medellin*, 19 EUR.J. OF INT'L.L. 895, 896 (2008).

¹⁸⁶ *Id.*

¹⁸⁷ *Greek and Bulgarian Communities Case*, Advisory Opinion, 31 July 1930, PCIJ Rep 1930, Ser. B, No. 17, p. 32; Kunoy & Dawes, *supra* note 11 at 83.

¹⁸⁸ *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 4 Feb. 1932, PCIJ Rep 1943, Ser. A/B, No. 44, p. 24, Kunoy & Dawes, *supra* note 11 at 84.

¹⁸⁹ Gattini, *supra* note 30 at 224.

engaged” approach while still reaching the same substantive result (i.e., striking down the Community regulations implementing the UNSC resolutions).¹⁹⁰ In this manner, the ECJ could have contributed to a discourse which regarded due process as part of customary international law and which would potentially benefit the international community as a whole.¹⁹¹ By ignoring international law and focusing only on “the Community’s” fundamental rights guarantees, the ECJ missed an opportunity to promote discourse on this issue which would have been beneficial to both the EU and UN legal orders.¹⁹²

Another approach suggested was for the ECJ, while still proceeding from a strictly dualist paradigm, to adopt a “*Solange*”¹⁹³ approach, reminiscent of the German Federal Constitutional Tribunal’s decision. Therein, the German Court ruled that “as long as” the EC did not have codified fundamental rights, the German courts would continue to recognize the fundamental rights of Germany as supreme and reserved the right to review the legality of Community measures with German Basic Law.¹⁹⁴ In this manner, the ECJ asserts its jurisdiction only, and “so long as”, the UN failed to put in place any judicial or quasi-judicial review measure.¹⁹⁵

While coherence and consistency are indispensable to the existence of a viable international legal system,¹⁹⁶ it must not be forgotten that the ECJ is first and foremost the “Guardian of the Treaties” whose primary task is to ensure its proper interpretation.¹⁹⁷ Proceeding from this premise, the ECJ can hardly be faulted for having adopted a stance which, while striking a delicate balanced between fighting terrorism and protecting fundamental rights, managed to uphold the rule of law in both situations.¹⁹⁸ The ECJ is to be commended for reversing the CFI’s ruling and choosing instead the road less travelled of fundamental rights protection, refusing to sacrifice such rights to heed the more popular and politically attractive call to fight terrorism.¹⁹⁹ In doing so, the ECJ not only safeguarded the supremacy of

¹⁹⁰ De Burca, *supra* note 27 at 57.

¹⁹¹ *Id.* at 57-58.

¹⁹² *Id.* at 58.

¹⁹³ Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr - und Vorratsstelle fur Getreide und Futtermittel* [1970] ECR 1125.

¹⁹⁴ Kunoy & Dawes, *supra* note 11.

¹⁹⁵ Gattini, *supra* note 30.

¹⁹⁶ De Burca et al., *supra* note 20.

¹⁹⁷ Kunoy & Dawes, *supra* note 11.

¹⁹⁸ Lavranos, *supra* note 178.

¹⁹⁹ Mehرداد Pavandeh, & Heiko Sauer, Comment, *European Union: UN Sanctions and EU Fundamental Rights*, 7(2) INT’L.J. OF CONST. L. 306 (2009).

fundamental rights protection, but also its own supremacy in the Community legal order as well.²⁰⁰

In the end it is safe to observe that, whether the relationship between EU law and international law is to be characterized as either hierarchical, as advocated by the CFI, or as distinct and separate, as advocated by the ECJ, in large part depends upon the perspective of the entity or person engaged in the characterization.²⁰¹ Furthermore, the divergence of opinion towards *Kadi* highlights the respective “normative points of references” adopted, with EU lawyers asserting the primacy of the EC Treaties and international lawyers asserting the primacy of international law norms.²⁰²

CONCLUSION

Since *Van Gend*, the discourse on European constitutionalism has focused mainly on a legal order both independent and superior to those of the Member States.²⁰³ However, this internal constitutionalism was only half the picture of an autonomous legal order as it portrayed only the relationship between the legal orders of the Community and the Member States.²⁰⁴ The other end of the discourse is found in *Kadi*.

Beyond its factual milieu, *Kadi* was a dramatic moment for the ECJ to clarify the Community legal order’s relationship with that of international law²⁰⁵ as well as an opportunity for the ECJ to “make whole its promise” of an “external dimension to European constitutionalism”²⁰⁶ Furthermore, as both Europe’s *Marbury* and *Medellin*, it was also one of the ECJ’s most important judgments on fundamental rights,²⁰⁷ for it not only emphasized the centrality of fundamental rights protection in this autonomous legal order,²⁰⁸ it also placed fundamental rights protection at the “apex of the Community edifice.”²⁰⁹

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²⁰⁰ *Id.*

²⁰¹ De Burca et al., *supra* note 20.

²⁰² Paul Cardwell et al., Comment, *Kadi v. Council of the European Union (C-402/05 P)*, 58(1) INT’L. & COMP. L.Q. 229, 241 (2009).

²⁰³ Halberstam & Stein, *supra* note 2.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ De Burca, *supra* note 27 at 60-61.

²⁰⁷ Tridimas & Gutierrez-Fons, *supra* note 119.

²⁰⁸ Cardwell, *supra* note 202.

²⁰⁹ Tridimas, *supra* note 3 at 126.