Harmonizing International Politics with Fundamental Human Rights and the Rule of Law: the *Kadi* Judgment

The *Kadi* judgment\(^1\) of the European Court of Justice (ECJ) served to illustrate a number of issues that cut across institute sessions. First, participants had the opportunity to analyze the complex interplay between politics and justice in the *Kadi* case. The judgment also showed how human rights issues are increasingly being raised before international judicial institutions that are not specifically designated as human rights courts. Participants wondered how such courts should resolve conflicts around human rights norms when they arise. Finally, this case touched upon the subject of court remedies for alleged human rights violations committed by international organizations.

In the *Kadi* case, the ECJ reviewed the consistency with EU human rights standards of an EU regulation implementing sanctions adopted by the UN Security Council to combat terrorism.

The appellants, Yassin Abdullah Kadi, a resident of Saudi Arabia, and the Al Barakaat International Foundation, established in Sweden, were deemed by the United Nations Sanctions Committee to be associated with Osama bin Laden, Al-Qaeda, or the Taliban. Pursuant to a number of Security Council resolutions, all UN member states were required to freeze the funds and other financial resources of these designated persons or entities. The Council of the European Union accordingly adopted a regulation ordering the freezing of the funds and other financial resources of the persons and entities whose names appeared in a list annexed to that regulation.\(^2\) However, these persons and entities had not been informed that their names were included on the list or the reasons and evidence for inclusion, nor were they given an opportunity to challenge this status through review mechanisms.

Both the Court of First Instance (CFI) and the ECJ were confronted with a conflict between fundamental human rights norms recognized in EU law, such as due process and property rights, and UN Security Council resolutions adopted under Chapter VII of the United Nations Charter, which are meant to prevail over “any other international agreement” in the event of a conflict.\(^3\) However, each treated this conflict of norms in its own way.

The CFI refused to review the lawfulness in EU law of the contested EU regulation giving effect to Security Council resolutions because, in its view, UN Charter obligations “clearly prevail over every other obligation of domestic law or of international treaty law.”\(^4\) However, the CFI opined that it could review “indirectly” the validity of Security Council resolutions with regard to peremptory norms of international law (*jus cogens* rules) on the grounds that resolutions violating these norms would cease to bind UN member states and, in consequence, the EU.\(^5\) In the present case, the CFI found that there had been no violations of *jus cogens* rules.\(^6\) Accordingly, the CFI dismissed the action.\(^7\)

On appeal, the ECJ did not follow the same path. The ECJ asserted jurisdiction to review the lawfulness in EU law of the contested EU regulation, despite the primacy of UN Charter obligations, on the grounds that the relevant Security Council resolutions had been implemented by a regulation of
the EU, that is, a “Community act.” As such, that regulation could not avoid review of its conformity with fundamental human rights standards recognized in EU law since “the Community is based on the rule of law.” The Court also opined that respect for human rights is a condition of the lawfulness of Community acts and that “measures incompatible with respect for human rights” are not “acceptable” in the Community (see pertinent excerpts from the ECJ judgment on page 46).

The ECJ then found that the EU regulation at issue had breached the appellants’ “rights of the defense, in particular the right to be heard, and the right to effective judicial review.” The Court also found that Mr. Kadi’s fundamental right to respect for property had been infringed. As a result, the ECJ decided to annul the contested EU regulation, in relation to the appellants, but maintained the effects of that regulation for a period of three months following the judgment in order to allow the Council of the European Union to replace it by a new regulation remedying the infringements found.

While the CFI has explicitly accepted the possibility of reviewing the lawfulness of Security Council resolutions – albeit in narrowly defined circumstances – the ECJ preferred to avoid a direct confrontation by stating that it was only reviewing the validity of the contested EU regulation in EU law. Still, both levels of the EU court system have agreed to perform some form of direct or indirect judicial review of the lawfulness of Security Council resolutions, to varying extents, in the Kadi case.

Many BIIJ participants expressed views on issues raised by the Kadi case. A participant stated that the Security Council should always be held accountable for its alleged human rights violations. Another pointed out that in discharging its duties for the maintenance of international peace and security, the Security Council is obliged to “act in accordance with the Purposes and Principles of the United Nations,” and one of the “Purposes” of the United Nations is “[t]o achieve international co-operation […] in promoting and encouraging respect for human rights and for fundamental freedoms for all […]”

In the view of one participant, the ECJ appears, in effect, to be sending a “political signal” to the Security Council to respect fundamental human rights when it adopts sanctions against individuals. Another noted a parallel that could be drawn between the Kadi case and the 1974 Solange case in which the German Constitutional Court refused to recognize the primacy of EU law if it did not provide adequate protection of the fundamental human rights enshrined in the German Constitution. The Solange case was widely perceived, at the time, as a warning by the German Constitutional Court to the EU regime to tighten up its human rights protection.

“In the fight against terrorism, there can be no peace without justice,” affirmed a participant. “In my view, any individual has the right to a judicial process and the right to be heard.”

But some participants wondered whether it would even be possible to implement the Security Council sanction regime without violating human rights. At the same time, if the so-called “autonomy” of the EU legal regime prevents EU member states from implementing UN sanctions, could it undermine the global fight against terrorism undertaken by the Security Council?

A participant said, “I wonder if the ECJ would have made the same decision four or five years ago, when the balance between security and human rights appeared to be different.” This proposition was firmly rejected by two participants. One of them reacted by saying that the judgment builds upon fifty years of human rights protection and development, and asserted, “The question before the Court was whether there should be an exception to the rule of law for dealing with terrorism. The Court said ‘no.’”
Some participants took issue with the United Nations and its member states for failing to provide adequate mechanisms to address human rights claims arising from their operations, including peacekeeping operations. A participant stated, “When the UN creates subsidiary bodies, it should foresee protection for human rights. States parties are also responsible for raising these issues when creating subsidiary bodies within the UN.” Currently, arbitration is the ordinary venue for individuals having human rights claims against the United Nations. Another participant agreed, and insisted, “An internal mechanism should be set up to ensure that the UN is acting in conformity with international human rights instruments.”

Will other international courts follow suit and review the conformity with human rights standards of domestic statutes or regulations adopted pursuant to Security Council resolutions? Some were inclined to think it likely.

Several agreed that the Kadi case also illustrates one of the many difficulties created by the absence of a formal hierarchy among international courts, or the absence of a coordinated “system” of international justice. In this case, a regional European court with a limited geographical scope ended up reviewing indirectly the lawfulness of Security Council resolutions, which bind virtually all of the states in the world. Two participants asked, if this judgment had been issued by another regional court with a less established reputation, would it have been considered legitimate and acceptable by the international community? Another one responded, “Now that regional courts are examining the legality of Security Council sanctions indirectly, it may provide an incentive to the ICJ to do it itself. It would be more legitimate to proceed this way.”

During the preceding institute in 2007, participants had examined international courts’ preference to avoid conflicting jurisprudence in order to maintain the unity of international law, despite the absence of a formal hierarchy among courts. But they had asked, “Might international courts reach a point where they make unwarranted distinctions or restrain themselves excessively in their decisions, simply to avoid conflicts?” In 2008, the ECJ in the Kadi case addressed and resolved a conflict of norms by prioritizing fundamental human rights and the rule of law over inconsistent standards.
Excerpts from the *Kadi* judgment  (European Court of Justice)

281 In this connection it is to be borne in mind that the Community is based on the 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 [...].

282 It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system [...].

283 In addition, according to settled case law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance [...].

284 It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts [...] and that measures incompatible with respect for human rights are not acceptable in the Community [...].

286 In this regard it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.

288 However, any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law. [...]  

291 In this respect it must be emphasised that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level [...].

294 [...] It is necessary for the Community to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level [...].

298 It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

299 It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.

300 What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty.
Notes

1. Judgment of the European Court of Justice, Grand Chamber, 3 September 2008 in the joined cases Kadi/Al Barakaat (C-402/05 P and C-415/05 P) [hereafter “Kadi”].

2. See Kadi, paras.11-45.


4. Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities, supported by United Kingdom of Great Britain and Northern Ireland, Judgment of the Court of First Instance, Second Chamber, Extended Composition, 21 September 2005 (Case T-315/01) [hereafter “Kadi CFI”], para. 181. See paras. 221-225, and paras. 215 and 216:

“Any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions. […] In particular, if the Court were to annul the contested regulation, […] such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicant asks the Court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order.”


11. See Kadi, para. 334. See, generally, paras. 333-353.


13. See Kadi, paras. 372-376.


15. Charter of the United Nations, supra note 13, Article 1(3).
