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THE *KADI* SAGA AND THE RULE OF LAW WITHIN THE EU

*Koen Lenaerts**

THE “monism v. dualism” divide is not useful to assess the way in which international law is incorporated into European Union law (EU law). On the one hand, the incorporation of public international law into EU law follows, to some extent, a “monist approach.”¹ Once it has been established that the European Union (EU) is bound by an international obligation, the latter becomes an integral part of EU law. In other words, for an international agreement or for a principle of customary international law to be “the law of the land,” there is no need for the EU political institutions to pass secondary EU law “translating” such an agreement or principle into EU law. In addition, as Article 3(5) of the Treaty on European Union (TEU) states, “[i]n its relations with the wider world, the [European] Union . . . shall contribute to peace, security, . . . the protection of human rights . . . as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”² To a large extent, this provision codifies the case law of the European Court of Justice (ECJ) according to which the EU “must respect international law in the exercise of its powers.”³ On the other hand, the EU is an “autonomous legal order” whose constitutional features—such as the principle of direct effect, the primacy of EU law, and the protection of fundamental rights—distinguish it from public international law.⁴ Accordingly, in order for an international agreement (or a principle of customary international law) to form part of EU law, it must not call into question the constitutional structure and values on which the EU is founded. In particular, this means that the incorporation of international law into EU law must ensure compliance with fundamental rights as recognized in the Charter of Fundamental

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1. Koen Lenaerts, *Droit international et monisme de l'ordre juridique de l'Union*, REVUE DE LA FACULTÉ DE DROIT DE L'UNIVERSITÉ DE LIÈGE 505 (2010) (Fr.).

2. Consolidated Version of the Treaty on European Union art. 3(5), Oct. 26, 2012, 2012 O.J. (C 326) 1, 27 [hereinafter TEU].

3. Case C-286/90, *Anklagemyndigheden v. Poulsen*, 1992 E.C.R. I-6019, ¶ 9; Case C-162/96, *Racke v. Mainz*, 1998 E.C.R. I-3655, ¶ 45; Case C-366/10, *Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change*, 2011 E.C.R. I-13755, ¶ 123.

4. Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Admin.*, 1963 E.C.R. I-12.

Rights of the European Union (the EU Charter of Fundamental Rights).⁵

Accordingly, the incorporation of international law into EU law is the result of a balancing exercise between safeguarding the EU's constitutional identity and making sure that EU law does not become hostile to the international community, but that it is an active part of it. The purpose of my contribution to this symposium is thus to illustrate that contention by looking at the *Kadi I* and *Kadi II* judgments.⁶

I. THE *KADI I* JUDGMENT

The *Kadi I* case involved the implementation at EU level of a series of UN Security Council Resolutions (Resolutions) that contained a list of persons associated with Usama bin Laden, the Al-Qaeda network, and the Taliban whose assets had to be frozen.⁷ A Sanctions Committee established by the UN Security Council (UNSC Sanctions Committee) was responsible for amending and supplementing that list.⁸ It is worth pointing out that those Resolutions were adopted under Chapter VII of the Charter of the United Nations (UN Charter).⁹ This meant that since those Resolutions were adopted for the purposes of “maintain[ing] international peace and security,” they had to “be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.”¹⁰ “In the event of a conflict between the obligations of the Members of the United Nations under the [UN] Charter and their obligations under any other international agreement,” Article 103 of the UN Charter states that “their obligations under the [UN] Charter shall prevail.”¹¹

The EU implemented those Resolutions by adopting Regulation No. 881/2002, which reproduced that list, but without informing the persons concerned of the grounds for the freezing of their assets.¹² Mr. Kadi and the Al Barakaat International Foundation, whose names were included in that list, challenged Regulation No. 881/2002 before the European General Court (EGC, formerly the Court of First Instance).¹³ They argued

5. Charter of Fundamental Rights of the European Union art. 47, Dec. 12, 2007, 2007 O.J. (C 303) 1.

6. Joined Cases C-402 & C-415/05P, *Kadi & Al Barakaat Int'l Found. v. Comm'n* (*Kadi I*), 2008 E.C.R. I-6352; Joined Cases C-584, C-593, & C-595/10P, *Comm'n v. Kadi* (*Kadi II*), (July 18, 2013), <http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0584&lang1=en&type=TEXT&ancre=->. See generally, *Kadi on Trial: A Multifaceted Analysis of Kadi Trial* (Majet Aubel; et al. eds. 2014).

7. *Kadi I*, 2008 E.C.R. I-6352, ¶¶ 20-21.

8. *Id.* ¶¶ 15, 21.

9. *Id.* ¶ 73.

10. *Id.* ¶¶ 3, 9.

11. *Id.* ¶ 10; U.N. Charter art. 103.

12. Council Regulation 881/2002, 2002 O.J. (L139) 9 (EC) (imposing certain specific restrictive measures directed against certain persons and entities associated with the Al-Qaida network). The list of persons whose assets are to be frozen set out in that Regulation is regularly updated by the Commission. Commission Implementing Regulation 583/2014, 2014 O.J. (L 169) 27. As of May 28, 2014, that list has been modified on 214 occasions. *Id.*

13. *Kadi I*, 2008 E.C.R. I-6352, ¶¶ 1-2.

that Regulation No. 881/2002 violated their right to a fair hearing, their right to property, and their right to effective judicial protection.¹⁴

In essence, the EGC and, on appeal, the ECJ were asked to determine whether by implementing the relevant UN Security Council Resolutions, Regulation No. 881/2002 had become immune from judicial review, as such review would call into question the primacy of the UN Charter.¹⁵ The EGC took an “internationalist” approach in answering this question, whilst the ECJ gave priority to the constitutional identity of the EU.¹⁶

At the outset, the EGC noted that, since the EU is not a Member of the UN, it is not bound by the UN Charter by virtue of public international law.¹⁷ The EU is, however, bound by the UN Charter by virtue of EU law itself.¹⁸ To reach that conclusion, the EGC applied the “theory of succession” according to which “in so far as under the EC Treaty the [EU] has assumed powers previously exercised by Member States in the area governed by the [UN Charter], the provisions of that Charter have the effect of binding the [EU].”¹⁹ By adopting Regulation No. 881/2002, the EU had replaced its Member States in fulfilling their obligations under the relevant UN Security Council Resolutions.²⁰ Concomitantly to that transfer of powers, the EGC reasoned that the EU also became bound by the UN Charter.²¹ The EGC was thus precluded from examining the validity of Regulation No. 881/2002 under EU law, since such examination would run counter to the primacy of the UN Charter.²²

That being said, the EGC found that the validity of UN Security Council Resolutions could still be examined in the light of *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 which no derogation is possible.”²³ Whilst the notion of *jus cogens* endorsed by the EGC was broad enough to cover the fundamental rights relied upon by the applicants, the level of protection afforded to them was significantly lower than that granted under EU law. For the case at hand, this meant that none of the applicants’ fundamental rights had been violated.²⁴

First, *jus cogens* only protected the applicants against arbitrary deprivations of property.²⁵ Here, this was not the case, since the freezing of their

14. *Id.* ¶¶ 49-50.

15. *Id.* ¶ 280.

16. Daniel Halberstam & Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMMON MKT. L. REV. 13, 50, 62. (2009).

17. Case T-315/01, *Kadi v. Council & Comm’n*, 2005 E.C.R. II-3649, ¶ 192.

18. *Id.* ¶ 193.

19. *Id.* ¶ 203; *see*, in this regard, *Joined Cases 21-24/72, Int’l Fruit Co. v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, ¶ 18.

20. *Kadi v. Council and Comm’n*, 2005 E.C.R. II-3717-18, ¶¶ 200-04.

21. *Id.*

22. *Id.* ¶ 225.

23. *Id.* ¶ 226.

24. *Id.* ¶¶ 252 276, 291.

25. *Id.* ¶ 242.

assets was a temporary precautionary measure that did not apply to basic expenses and pursued a legitimate objective, namely the maintenance of international peace and security.²⁶ Second, whilst acknowledging that the applicants had no right to be heard before the UN Sanctions Committee, the EGC found that such limitation was, for the purposes of *jus cogens*, acceptable in light of the objectives pursued by the UN Security Council.²⁷ Third, the EGC reached the same conclusion regarding the right to effective judicial protection.²⁸ In spite of the fact that the applicants had no judicial remedy against the decisions of the UN Sanctions Committee, such limitation on their right of access to a court was also legitimate with regard to the objectives pursued by the UN Security Council.²⁹ As a result, the EGC dismissed the action for annulment brought by the applicants.³⁰

On appeal, the ECJ took a different view. It held that the EGC had erred in law by considering that an EU Regulation implementing a UN Security Council Resolution was, for the purposes of EU law, immune from judicial review.³¹ In that regard, the ECJ recalled that the EU must respect international law in the exercise of its powers.³² However, “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the [Treaties].”³³ For the case at hand, this meant that the approach followed by the EGC ran counter to “the [constitutional] principle that all [EU] acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the [ECJ] to review in the framework of the complete system of legal remedies established by the Treat[ies].”³⁴ An international obligation that is in breach of those constitutional principles cannot form part of the EU legal order.

Accordingly, the ECJ annulled Regulation No. 881/2002 in so far as it concerned the appellants, since “[their] rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.”³⁵ This was so because they had not been informed of the grounds for their inclusion in the list containing the names of the persons whose assets had to be frozen.³⁶ Regarding the right

26. *Id.* ¶¶ 239-243, 247, 289.

27. *Id.* ¶ 268.

28. *Id.* ¶¶ 285-88.

29. *Id.* ¶ 289.

30. *Id.* ¶¶ 291-92.

31. *Kadi I*, 2008 E.C.R. I-6351, ¶ 330.

32. *Id.* ¶ 291.

33. *Id.* ¶ 285.

34. *Id.* ¶ 285.

35. *Id.* ¶ 334.

36. *Id.* ¶¶ 334, 336. In this regard, the ECJ found that the Council had failed to comply with its obligation to communicate to the appellants the grounds on which their names were included in the list laying down a body of restrictive measures, “so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable [them] to exercise, within the periods prescribed, their right to bring an action.” *Id.* ¶ 336. It is true that

to property, the ECJ recognized that threats to international peace and security posed by acts of terrorism may justify the freezing of assets of the persons identified by the UN Security Council as being associated with Al-Qaeda.³⁷ However, since Regulation No. 881/2002 did not enable the appellants to put their case before the competent authorities, the freezing of their assets constituted an unjustified restriction of their right to property.³⁸

Kadi I was commented on by academia at length.³⁹ Scholars have traditionally examined that judgment of the ECJ from three different, albeit closely related, perspectives—namely from a constitutional perspective,⁴⁰ from an international-law perspective,⁴¹ and from a fundamental rights perspective.⁴² First, on a constitutional level, the *Kadi I* judgment stresses the fact that EU law is an “autonomous legal order” and that the EU judiciary plays a fundamental role in protecting that autonomy.⁴³ The ECJ is first and foremost committed to upholding the “rule of law” within the EU which reflects fundamental rights recognized as general principles of EU law which are now enshrined in the EU Charter of Fundamental Rights.⁴⁴ Thus, when EU fundamental rights are at stake, the incorporation of international law into EU law is not automatic. In order for international law to become “the law of the land,” it must pass muster under the EU Charter of Fundamental Rights.⁴⁵

Second, it is true that the *Kadi I* judgment demonstrates that international obligations entered into by the EU are not absolute, as they may not prevail over the basic constitutional tenets of the EU legal order.

“overriding considerations to do with safety or the conduct of the international relations of the [EU] and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters. However, that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the [EU] judicature once it has been claimed that the act laying them down concerns national security and terrorism.”

Id. ¶¶ 342-43. Moreover, the ECJ ruled that “the contested regulation, in so far as it concerns the appellants, was adopted without any guarantee being given as to the communication of the inculpatory evidence against them or as to their being heard in that connection, so that it must be found that that regulation was adopted according to a procedure in which the appellants’ rights of defen[c]e were not observed, which has had the further consequence that the principle of effective judicial protection has been infringed.” *Id.* ¶ 352.

37. *Id.* ¶ 363.

38. *Id.* ¶¶ 369-70.

39. For a survey of the literature, see Sara Poli & Maria Tzanou, *The Kadi Rulings: A Survey of the Literature*, 28 Y.B. EUR. L. 533, 533-58 (2009).

40. Marise Cremona, *EC Competence, ‘Smart Sanctions,’ and the Kadi Case*, 28 Y.B. EUR. L. 559, 588 (2009).

41. Poli & Tzanou, *supra* note 39, at 535.

42. Enzo Cannizzaro, *Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi Case*, 28 Y.B. EUR. L. 593, 593-600 (2009).

43. *Kadi I*, 2008 E.C.R. I-6351, ¶¶ 282, 317.

44. Charter of Fundamental Rights of the European Union art. 51, 2007 O.J. (C 303) 1.

45. *Id.*

However, this does not mean that EU law has completely broken away from its international law origins. On the contrary, it shows that the ECJ does take into account the EU's international obligations when exercising its powers of judicial review. When striking the balance between the EU principle of effective judicial protection and international law, the *Kadi I* judgment reveals that the ECJ has paid due attention to the general interest of protecting international peace and security.

Third, the *Kadi I* judgment shows that the ECJ is seriously committed to the protection of fundamental rights. In so doing, it has shown that the EU Courts must operate as the guarantors of individual rights and that the EU's international obligations may not deprive fundamental rights of their substance. Notably, in the *Kadi I* case, the ECJ honored its role as protector of those who do not enjoy sufficiently strong political representation to have their voices heard, i.e. the persons blacklisted.

II. THE *KADI II* JUDGMENT

Soon after the ECJ delivered its judgment in *Kadi I*, the Commission sent Mr. Kadi a "narrative summary" elaborated by the UNSC Sanctions Committee, which stated the main reasons why his name was included in the list.⁴⁶ In light of that summary, the Commission decided to keep his name on the list, giving him the opportunity to comment on those reasons and to provide any information that he might consider relevant.⁴⁷ Mr. Kadi sent his comments to the Commission, requesting disclosure of the evidence supporting the assertions and allegations made in the narrative summary.⁴⁸ In its reply, the Commission stated that the *Kadi I* judgment did not require it to disclose further information and decided to include Mr. Kadi's name on the list by adopting Regulation No. 1190/2008 amending Regulation No. 881/2002.⁴⁹ Mr. Kadi successfully challenged that regulation before the EGC.⁵⁰

In *Kadi II*, the Commission, the Council, and the UK each brought an appeal against the ruling of the EGC.⁵¹ They argued, in essence, that the EGC had erred in law by applying a level of judicial scrutiny which was, in their view, excessive.⁵² However, the ECJ dismissed the appeals.⁵³ Confirming its previous findings in *Kadi I*, it ruled that the EU Courts

"must . . . ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order, including

46. Case T-85/09, *Kadi v. Comm'n*, 2010 E.C.R. II-5177, ¶¶ 49-54.

47. *Id.* ¶ 53.

48. *Id.* ¶ 55.

49. *Id.* ¶¶ 56-60.

50. *Id.* ¶¶ 193-95.

51. Joined Cases C-584, C-593, & C-595/10P, *Comm'n v. Kadi (Kadi II)* (July 18, 2013), <http://curia.europa.eu/juris/celex.jsf?celex=62010J0584&lang1=en&type=TEXT&ancre=>

52. *Id.* ¶ 74.

53. *Id.* ¶ 165.

review of such measures as are designed to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.”⁵⁴

Notably, this means that the EU Courts must examine whether rules as to procedure and rules as to competence, including whether or not the legal basis is adequate, are observed. They must also determine whether the competent EU authority has

(i) disclose[d] to the person concerned the summary of reasons provided by the Sanctions Committee which is the basis for listing or maintaining the listing of that person’s name in Annex I to Regulation No. 881/2002, (ii) enable[d] him effectively to make known his observations on that subject, and (iii) examine[d], carefully and impartially, whether the reasons alleged [were] well founded, in the light of the observations presented by that person and any exculpatory evidence that [might] be produced by him.⁵⁵

In that regard,

it is for that authority to assess . . . whether it [was] necessary to seek the assistance of the Sanctions Committee and, through that committee, the Member of the UN which proposed the listing of the individual concerned on that committee’s Consolidated List, in order to obtain . . . the disclosure of information or evidence, confidential or not, to enable it to discharge its duty of careful and impartial examination.⁵⁶

Additionally, the EU Courts must verify whether the competent EU authority has complied with the requirements flowing from Article 296 TFEU, and whether the contested decision “is taken on a sufficiently solid factual basis” (i.e. “whether [the] reasons [set out in the summary], or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated”).⁵⁷ Consequently, “it is for [the EU Courts], in order to carry out that examination, to request the competent [EU] authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination.”⁵⁸

54. *Id.* ¶ 97. It is worth noting that Mr. Kadi was also subject to blocking orders in the US. *See*, in this regard, *Kadi v. Geithner*, 2012 WL 898778, at *2, *11 (D.D.C. Mar. 19, 2012). However, he was unsuccessful in challenging the decision of the Office of Foreign Assets Control that ordered the freezing of his assets. *Id.* at *11. Regarding the standard of review, the US District Court for the District of Columbia held that “[c]ourts are particularly mindful that their review is highly deferential when matters of foreign policy and national security are concerned.” *Id.* at *6; *see also* *Regan v. Wald*, 468 U.S. 222, 242 (1984); *Holy Land Found. for Relief & Dev. V. Ashcroft*, 219 F. Supp. 2d 57, 84 (D.C. Cir. 2002) (holding that “[b]locking orders are an important component of U.S. foreign policy, and the President’s choice of this tool to combat terrorism is entitled to particular deference”). *See* Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 341-44 (2014).

55. *Kadi II*, ¶ 135.

56. *Id.* ¶ 115.

57. *Id.* ¶ 119.

58. *Id.* ¶ 120.

If the competent EU authority is unable to obtain the relevant information or evidence from the UN,

it is then the duty of [the EU Courts] to base their decision solely on the material which has been disclosed to them, namely, in this case, the indications contained in the narrative summary of reasons provided by the Sanctions Committee, the observations and exculpatory evidence that may have been produced by the person concerned and the response of the competent [EU] authority to those observations.⁵⁹

It follows that “the fact that the party concerned and the [EU] Courts . . . do not have access to information or evidence which the competent [EU] authority does not have in its possession [does not constitute], as such, an infringement of the rights of the defence or the right to effective judicial protection.”⁶⁰

If, on the other hand, the competent EU authority manages to obtain the relevant information or evidence from the UN, the EU Courts must have access to all the relevant information and evidence that has been obtained by that authority.⁶¹ This means that vis-à-vis those Courts, “the secrecy or confidentiality of that information or evidence is no valid objection.”⁶² In that regard, “it is for the [EU Courts], when carrying out an examination of all the matters of fact or law produced by the competent [EU] authority, to determine whether the reasons relied on by that authority as grounds to preclude . . . disclosure [to the person concerned] are well founded.”⁶³

If . . . those reasons do not preclude disclosure, . . . [the EU Courts] shall give the competent [EU] authority the opportunity to make such disclosure to the person concerned. If that authority does not permit the disclosure of that information or evidence, in whole or in part, the [EU] Courts . . . shall then undertake an examination of the lawfulness of the contested measure solely on the basis of the material which has been disclosed.⁶⁴

Conversely, if the EU Courts find that the competent EU authority was right to oppose disclosure,

it is necessary to strike an appropriate balance between the requirements attached to the right to effective judicial protection, in particular respect for the principle of an adversarial process, and those flowing from the security of the European Union or its Member States or the conduct of their international relations.⁶⁵

As to Mr. Kadi, the ECJ upheld the operative part of the EGC judgment, observing that

59. *Id.* ¶ 123.

60. *Id.* ¶ 139.

61. *Id.* ¶ 124.

62. *Id.* ¶ 125.

63. *Id.* ¶ 126.

64. *Id.* ¶ 127.

65. *Id.* ¶ 128.

none of the allegations presented against Mr. Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.⁶⁶

CONCLUDING REMARKS

It follows from the *Kadi* judgments that considerations relating to international peace and security may not, as such, render decisions imposing restrictive measures upon named persons and entities immune from judicial review. Those considerations are not “political questions” outside the scope of such review. On the contrary, in compliance with Article 19 TEU, the EU Courts, as guarantor of the rule of law within the EU, must exercise their review powers *in full*.

66. *Id.* ¶ 163. Please note that on Oct. 5 2012, the UNSC Sanctions Committee removed the name of Mr. Kadi from the Al-Qaida Sanctions List. Press Release, Security Council, Security Council Al-Qaida Sanctions Committee Deletes Entry of Yasin Abdullah Ezzedine Qadi-From Its List, U.N. Press Release SC/10785 (Oct. 5, 2012).