

Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the *Kadi* Case

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In this short contribution I intend to address two of the controversial issues raised by the ECJ's decision in *Kadi*. The first concerns the effect of Security Council (SC) resolutions within the European (EC) legal order; the second, closely interrelated to the first, concerns the competence of the ECJ to review the legality of SC resolutions under higher international standards. I will examine these two issues in the order just described, and only to the extent that they are interrelated. If consideration of the first issue led to the conclusion that SC resolutions produce no effect within the EC legal order, there would be no need to consider the second issue. If this were the case, indeed, the fact that Community law was enacted with the intent to give effect to SC resolutions would be legally irrelevant and would entail no change in the procedure of monitoring compliance with fundamental rights.

The relevance of SC resolutions within the EC legal order is quite an old question, mostly answered in the negative by the prevailing scholarly opinion.

The issue can be examined from two different angles. First, one could ask whether the relevance of SC resolutions might derive from their status as binding international law for the EC. Second, even if SC resolutions were not internationally binding for the EC, they could nonetheless be indirectly relevant within the EC legal order by virtue of reference made to them by rules of Community law.

These two options roughly correspond to two different approaches, adopted respectively by the CFI and by the ECJ in their decisions in *Kadi*.

In its decision of September 2005,¹ the CFI seemed to assume that SC resolutions are part of international law, which binds the EC. In para 203, the Court said:

in so far 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.

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¹ Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Judgment of 21 September 2005 [2005] ECR II-3649.

As is well known, from this assumption the CFI drew consequences in terms of both its competence to control the legality of SC resolutions in light of higher international law and its lack of jurisdiction to control the legality of the resolutions in light of higher Community law.

It is worth noting that the CFI did not proceed further with this reasoning and did not identify more precisely the legal order in which this binding effect is produced. Nor is this revealed by the Court's reasoning, which is consistent with both options, ie it could be read as being in accord with the proposition that the EC is bound to observe SC resolutions under international law or, equally, with the proposition that the obligations flow solely from an implicit rule of Community law.

In its decision of September 2008,² the ECJ abstained from expressly addressing the issue. However, the decision contains a number of arguments which are not always entirely consistent. At first reading, the underlying conceptual basis of the decision is given by the full autonomy of the EC legal order from international law. Consequently, the ECJ's analysis focuses on the lawfulness of Community law implementing SC resolutions, and not on SC resolutions as such.³

If one looks under the surface, however, this impression might change. Within the tortuous lines of reasoning in the decision there are occasional passages which shape a more variegated framework for the relationship between UN law and the Community legal order.

Certain attention must be devoted, first, to the section in which the ECJ rules out the possibility that the judicial review of domestic law implementing SC resolutions must be limited by virtue of international obligations deriving from the UN Charter. This conclusion is somewhat surprising. If UN law had no legal relevance within the EC legal order, the possible existence of such an obligation would be equally irrelevant and should not be considered by the ECJ. However, in para 298, the Court goes on to say:

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.

The meaning of this proposition is mysterious and, to some extent, disquieting. Its most natural reading is that domestic judicial review of EC law implementing

² 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*, Judgment of the Court (Grand Chamber), Judgment of 3 September 2008, nyr.

³ See, in particular, para 326 of the decision.

SC resolutions is permitted because the Charter of the UN does not contain the obligation to give direct effect to SC resolutions within municipal legal orders.

This interpretation, however, would appear highly questionable. Even if the Charter imposed on the Member States the obligation to give full effect to SC resolutions within their municipal legal order, this would certainly not entail a prohibition on subjecting the implementing domestic law to judicial review. Were the UN Charter to be construed as preventing any form of control over the internal lawfulness of domestic law implementing SC resolutions, the question would probably arise, in many contemporary legal orders, as to the lawfulness of the Charter itself.⁴

It is common knowledge that, in the context of well established case law, the lack of direct effect of international law has been used defensively, in order to exclude its use as a standard of legality for conflicting EC secondary law. In *Kadi*, however, the ECJ seems to use the same argument offensively. The lack of direct effect of SC resolutions seems to be the decisive element which prevents international law from interfering with the functioning of the system of guarantees set up by the Founding Treaties. One is left with the question of what devastating effect international law would have on the Community legal order if it were simply provided with direct effect.

Be that as it may, the use of this argument seems to prove what the ECJ seeks to exclude: namely that there are effects potentially produced within the EC legal order in relation to the existence of SC obligations. It would be highly incoherent to consider, even hypothetically, whether the UN Charter requires the granting of immunity to domestic law putting into effect SC resolutions, if one did not assume, in the first place, that such a hypothetical principle could produce domestic effect.

The ECJ seems to uphold the view that obligations flowing from SC resolutions fall under Article 307 TEC. Member States would therefore be enabled to disregard inconsistent EC law, including even obligations deriving from the Founding Treaties. In a quick passage, the ECJ seems to go even further and contend that SC resolutions also limit the exercise of the competence conferred to the EC.⁵

This assumption was probably inspired by the consideration that all the Member States are today under the obligation to abide by SC resolutions. It

⁴ In this regard, the ECJ might have relied on its case law on the relations between Community rules and national legal orders. As is well known, the ECJ has constantly held that national rules which, in whatever way, hinder the full effect of Community rules are inconsistent with the Treaty and must be set aside by national judges (see Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Judgment of 9 March 1978, [1978] ECR 629). It would be simplistic, however, to apply this logical scheme to the relationship between international law and municipal law. Even if a treaty contained an obligation to apply directly its provisions in the municipal order of the States Parties to it, this would not automatically entail that the treaty provisions are automatically granted immunity from internal judicial review.

⁵ See, in particular, paras 302–303.

might seem absurd that all the Member States can disregard Community law in order to comply with SC resolutions while the Community encounters no limits in relation to SC resolutions in exercising the competence bestowed upon it by the Member States.

In spite of its intuitiveness, this argument does not seem fully convincing. Article 307 can hardly be construed as a limit to the exercise of EC competence in correspondence with international commitments of the Member States. Since Article 307 concerns also, and perhaps primarily, international obligations undertaken only by some of the Member States, this would mean that engagements of a single Member State could condition the exercise of EC competence. Moreover, if one construed Article 307 as a limit to the exercise of EC competence in correspondence to obligations deriving from SC resolutions, Member States would be under an obligation to remove the cause of the conflict and secure the unimpeded exercise of EC competence.

This incongruity could be repaired if one assumed that international obligations binding for all the Member States, and falling within the scope of exclusive EC competence, are part of Community law *qua* international law binding the Community.⁶

Obviously, however, in the two perspectives pointed out above, the status and domestic effect of international law change quite dramatically. On the one hand, under Article 307, single Member States can temporarily disregard Community Law, and even provisions of the Treaty, in order to comply with pre-accession agreements. On the other hand, international agreements concluded by all the Member States, once becoming international law binding the Community, could limit the exercise of Community competence but cannot, as a rule, justify a derogation from the founding treaty. As we will see in the following paragraphs, this is precisely the kind of effect which the ECJ attributed to SC resolutions in *Kadi*.

A further interesting passage of the decision is where the ECJ refers to the possible existence of a system of human rights protection within the UN, as an element capable of alleviating the severity of domestic judicial scrutiny.⁷

Interestingly, the ECJ did not seem to conceive of such an element as part of the judicial activity of balancing interests. It seems rather to represent a limit to the Court's competence: a premise for recognizing a certain, albeit not unfettered, autonomy of an external legal order in discharging its functions, including the function of judicial review.

This is an updated and revised version of the classic *Solange* argument, forged in ECJ style, which stresses the need to consider rules coming from another legal

⁶ This perspective has been advocated expressly by some commentators. See, for example, L M Hinojosa Martínez, *Bad Law for Good Reasons: The Contradictions of the Kadi Judgment*, (2008) 5 IOLR 339.

⁷ See paras 318 *et seq* of the decision.

system not in isolation but rather as part of a comprehensive legal system and, therefore, primarily subject to the dynamics of that legal system.

Recourse to this technique by Member State constitutional courts is commonly believed to have encouraged, in the past, the development of an autonomous body of Community fundamental rights. In spite of the undeniable differences between the two situations, and even considering the lack of homogeneity among the Members of the UN in relation to human rights issues, one might argue that an analogous attitude by domestic judges might gradually favour the emergence of a body of fundamental rights constituting a limit to SC action within the UN system. This development would be necessary if the UN legal system evolved from a classic interstate organization into an entity which possesses powers whose exercise could deeply affect the situations of individuals. By setting up the UN, the States could hardly have meant to endow it with the unlimited power to govern individual situations without some form of restraint which, in their municipal legal order, accompanies the wielding of public authority.⁸

Without going too far into shaping the functioning of this mechanism, I wish only to point out one of its implications which is of relevance for the current analysis. By accepting the recognition of primary competence of a hypothetical mechanism for the protection of human rights within the UN, and by accepting the curtailing of its own competence in respect thereof, the ECJ seems to conceive of the UN system as being connected to the Community legal order, in the sense that it pursues objectives and discharges functions which fall within the Community's set of values and interests. It is only to avoid any impediment to the achievement of these objectives and therefore any interference with the way in which the UN absolves its functions, that it is conceivable for the ECJ to admit the existence of a limit 'to judicial 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'.⁹

Passing now to the second aspect which falls within the scope of this study, the question arises as to the competence of the ECJ to review the legality of SC resolutions under international law.

It is opportune here to recall a passage of the decision which has already become famous among commentators.

[I]t 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. With more particular regard to a Community act which, like the contested

⁸ For a more in-depth analysis of this argument, I refer to my article 'A Machiavellian Moment? The UN Security Council and the Rule of Law' (2006) 3 IOLR 189.

⁹ According to the concise and clear expression employed in para 326.

regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*. 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.¹⁰

In the Court's wording here the idea of the full and unreserved autonomy of the Community legal order is pervasive. This conclusion falls into two parts: first the ECJ says that the object of judicial review is Community law; the fact that these rules were enacted in order to give effect to SC resolutions changes neither the object nor the standard of judicial review;¹¹ second, it says that SC resolutions cannot be judicially reviewed either in the light of higher Community law or of higher international law. Finally, the ECJ stressed that judicial review of implementing domestic law does not touch upon the effect of SC resolutions in international law, which is a truism on the one hand, but which also has a rhetorical effect on the other, and tends to play down the consequence of the ECJ's somewhat dramatic tone.

Not surprisingly, the prevailing view among commentators is that this passage is inspired by a radical dualism.¹² By severing the link between SC resolutions and Community implementing law, and by narrowing down the scope of judicial review to Community law only, the ECJ undoubtedly intended to play down the systemic implications of its decision. By affirming the autonomy of Community law and its separation from international law, the ECJ has, in other words, defused the potential conflict between international obligations and fundamental domestic values.

The price to be paid is however very high, from a variety of perspectives.

Philosophically, this conception shaped by the ECJ tends to seal the Community legal order, conceived as *insula felix*, and to safeguard it from the evil influence of the outer world. Whilst it was probably appropriate at a time in which international law was mainly considered as the legal form of *realpolitik*, today it is much less appropriate, since domestic legal orders, including the Community legal order, can benefit from the positive influence of international law in a variety of cases.

This conception also seems at variance with previous case law, inspired rather by the constant search for a balance between the need to open the Community order to principles and values of the law of nations and the need to safeguard

¹⁰ Paras 286–288.

¹¹ See, in particular, para 326.

¹² See, for example, L van den Herika and N Schrijver, 'Eroding the Primacy of the UN System of Collective Security: The Judgment of the European Court of Justice in the Cases of Kadi and Al Barakaat' (2008) 5 *IOLR* 329 at 336.

internal values and principles. Nor is it fully consistent with other parts of the *Kadi* decision itself, where, as seen above, the ECJ seems to conceive of the UN as a legal order which is somehow interconnected with the Community legal order.

This criticism addresses, in particular, the part in which the ECJ imperatively excludes domestic judges from being able to control the legality of international 'ordinary' law in the light of international peremptory law. In a conceptual framework based on the premise of the radical irrelevance of international law in domestic legal orders, this conclusion appears correct. There is no point in assessing the legality of something which is legally irrelevant.

As shown above, however, in other parts of the decision the ECJ refers to the effect produced, directly or indirectly, by SC resolutions within the Community legal order. Yet the precondition for the production of these effects is that SC resolutions must constitute valid international law; that is to say that they must conform to both procedural and substantive rules whose observance constitutes the condition of their validity in the legal order in which they are primarily designed to produce their effect.

The existence of these effects is manifestly inconsistent with the idea that the ECJ does not have the competence to pass on the international validity of SC resolutions in the light of a higher international standard. If a court of justice is called upon to appreciate the effect produced by international rules, directly or by means of reference made to them by a domestic source of law, the same court is implicitly empowered, as a preliminary matter, to pass on the international validity of these rules.¹³

Even from a judicial policy perspective, the course taken by the ECJ appears unconvincing. The empirical observance of the relationship between international law and domestic law shows that the influence between these two dimensions of legal experience is necessarily mutual. Domestic legal orders can benefit from influence coming from international law and vice versa. *Kadi* is the typical example of how domestic judges can contribute to the evolution of international law by promoting a development that remains consistent with the basic values and principles of their own domestic order. In such a situation, indeed, the ECJ had an exceptional opportunity to lay down the conditions with which international organizations must comply in order to be recognized as entities entitled to govern individual activities directly. By refusing to review SC resolutions in the light of international *jus cogens*, the ECJ missed an opportunity to have a say in the process of development of this concept.¹⁴

¹³ This argument has been developed in particular by P Palchetti, 'Può il giudice comunitario sindacare la validità internazionale di una risoluzione del Consiglio di Sicurezza?' (2008) 91 *Rivista di diritto internazionale* 1085.

¹⁴ Analogous observations have been made by a number of commentators. See, for example, A Gattini in (2009) 46 *CML Rev* 213.

Nor does the deference owed to the cultural diversity reflected in the universal composition of the UN justify the self-restraint exhibited on this occasion by the ECJ.¹⁵ Even in that regard, a balance must be struck between the tendency of domestic courts towards self-restraint, which entails the recognition of the autonomy of the international legal order, governed by interests and values distinct from those developed in the internal legal experience, and the opposite tendency to judicial activism, which, if uncontrolled, could amount to a sort of legal imperialism of domestic values. It would be wholly inappropriate for a court of justice of one among the manifold and variegated components of the international community to impose its view unilaterally about what *jus cogens* should be, and to shape it upon its own domestic set of fundamental individual rights. To claim a role in the complex process of developing that concept, and to lay down some minimum conditions in order to acquiesce in the establishment of international institutions with the power to govern individual situations, is, however, quite a different thing. In this sense, too, this finding of the Court appears highly infelicitous in the context of a decision inspired by the commendable attempt to assert the rule of law over and above the harsh realities of present international life.

¹⁵ This argument is mostly referred to in order to stress the need for domestic judges to avoid imposing their own view about individual rights upon decisions made at an international level. See, for example, L M Hinojosa Martínez, *Bad Law for Good Reasons: The Contradictions of the Kadi Judgment*, above n 6, at 344.