

**KADI: THE ECJ'S REMINDER OF THE ELEMENTARY DIVIDE
BETWEEN LEGAL ORDERS**

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Without even the benefit of hindsight, we may already wonder whether the controversy that was triggered by the 2005 *Yusuf* judgment of the Court of First Instance (hereafter the CFI)¹ and clinched by the 2008 *Kadi* ruling of the European Court of Justice (hereafter the ECJ)² was inevitable and necessary.³ Indeed, the 2008 ruling of the ECJ sets aside a flawed decision and recalls the abiding and inextricable divide existing between legal orders – whether domestic or international. This divide leaves it to each legal order to decide how amenable to the rules of other legal orders it wants to be. If this elementary truth had not been overlooked by the CFI, no such controversy would have ensued. Hence, has the debate that stretched on since 2005 been worthwhile?

It is argued here that the elementary reminder conveyed by the ECJ in its 2008 ruling may be of some use if seen in the light of the growingly successful international constitutionalist discourses that have permeated international legal scholarship – particularly since the end of the Cold War – and which have blurred the understanding by legal scholars – and obviously by judges as well – of the relationship between legal orders. Indeed, these discourses have disseminated the idea that domestic and regional legal orders are, in a way or another, embedded in the

¹ Case T-306/01, *Yusuf and Al Barakaat International Foundation v Council and Commission*, 21 September 2005, [2005] ECR II-3533; Case T-315/01, *Kadi v Council and Commission*, 21 September 2005, [2005] ECR II-3649.

² Join Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation*, 3 September 2008, available at <http://curia.europa.eu>. See also the earlier opinion of the Advocate General Poiares Maduro, 16 January 2008, Case C-402/05 P, *Yassin Abdullah Kadi v Council and Commission*, available at <http://curia.europa.eu>.

³ For a critical analysis of the various discourses that have permeated the case-law and the international legal scholarship on this question, see J. d'Aspremont and F. Dopagne, "Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal orders", *Heidelberg Journal of International Law* (ZaöRV), 2009 (forthcoming).

international legal order and may accordingly be subjected to the rules of the United Nations. It must be emphasized that these international constitutionalist discourses are very diverse and are driven by very different motives. We would be guilty of overgeneralization if we were to put them all in the same basket. For instance, they may be motivated by a rather pragmatic subordination of domestic and regional legal systems for the sake of bolstering the efficiency of the system of collective security. They may also rely on a more dogmatic faith in a hierarchy among legal orders within an overall structured and integrated international legal order. The idea of an international constitutional order sometimes aims at the promotion of allegedly global values as well.⁴ Whatever the motives underlying the constitutionalist approaches to international law may eventually be, there is little doubt that the *Kadi* judgment of the ECJ comes as a condemnation of such an understanding of the relationship between international law and European law. From that perspective, the reminder made by the ECJ is to be welcomed: by recalling that legal orders are naturally and inextricably estranged from each other, the decision may help wean legal scholars and judges off from the sirens of international constitutionalism⁵.

If the ECJ decision can eventually turn useful in this respect, it is interesting to expound briefly on how the ECJ faults the international constitutionalist vision of the relationship between legal orders. Generally speaking, the ECJ points out that the question with which the CFI was primarily confronted was a question of European “constitutional” law and not a question of international law.⁶ Behind the reasoning of the ECJ lies the idea

⁴ J. d’Aspremont, “International Law in Asia: the Limits to the Constitutionalist and Liberal Doctrines”, 13 *Asian Yearbook of International Law* (2008) 89-111.

⁵ For a more general criticism of the international constitutionalist doctrines, see J. d’Aspremont, “The Foundations of the International Legal Order” 12 *Finnish Yearbook of International Law* (2007).

⁶ See para. 285, *supra* note 2: “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty”. On this point, the CFI’s position, although generally endorsing a very constitutionalist understanding of the relationship between EU Law and UN Law, has been ambiguous. It clearly and

that the relationship between legal orders is essentially designed by the constitutional rules and principles of each legal order. In other words, each legal order decides for itself whether or not it incorporates rules laid down in another legal order and, if so, how such an incorporation must be carried out. And this is not different in the case of the European legal order as was more expressly recalled by the Advocate General Poirares Maduro⁷, and, subsequently, by the ECJ⁸. The relation between European law and international law is governed by *European law* to the same extent as the relationship between municipal law and interational law is governed by municipal law.⁹ It is true that, as was observed by the Court in *Van Gend en Loos*, the Community legal order is an order “of international law”¹⁰ in that the Community legal order *is created by an instrument of international law* which is itself governed by international law. This, however, only means that the European treaties are subject to the fundamental rules of the law of treaties.¹¹ That does not involve that the European legal order as a whole is subject to the basic principles and mechanisms of international law.

generally gave priority to UN Law on the basis of international law as if such a divide between the UN legal order and the European legal order did not exist (paras 231, 233, 240 of the 2005 *Yusuf* decision) while, at the same time, it alluded to article 307 as seemingly buttressing the prevailing status of UN Law (para. 235 of the 2005 *Yusuf* decision).

⁷ Opinion of Advocate General Poirares Maduro, *supra* note 2, at para. 24: “Thus, it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community”.

⁸ *Supra* note 2, para. 283-287.

⁹ For a similar understanding of the EU legal order as a domestic legal order, see A. von Bogdandy, “Pluralism, direct effect and the ultimate say: On the relationship between international and domestic constitutional law”, *International Journal of Constitutional Law* (2008) 1-17, esp. 3. See also G. Arangio-Ruiz who, more generally, advocates that the relationship between the legal order created by the constitutive treaty of international organizations and international law should be patterned after the relationship between domestic legal orders and international law: G. Arangio-Ruiz, “International Law and Interindividual Law”, in J. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law* (Oxford, 2007), at 39-43, esp. at 42.

¹⁰ It is remarkable however that the qualifier “of international law” was quickly abandoned by the Court when it later repeated that the EC was an autonomous legal order (See in particular Case 294/83, *Parti écologiste ‘Les Verts’ v European Parliament*, [1986] ECR 1339) It is similarly striking that the Advocate General Poirares Maduro in its aforementioned opinion also omitted that qualifier when referring to that famous precedent (*supra* note 2, at para. 21)

¹¹ 1969 Vienna Convention on the Law of Treaties.

Since, according to this reasoning, it behooves the European legal order to decide whether or not to incorporate rules of the international legal order and determine upon which conditions such an incorporation should be realized, it remains to see to which extent the European legal order has opened itself to the rules of international law and which conditions it has set for their incorporation. It is interesting to note that, in the case of the European legal order, the extent of the amenability towards international law has been defined by the ECJ and the CFI themselves. In this respect, the European Courts have followed a solution found in most monist countries by significantly easing the formalities of incorporation of international conventions.¹² Likewise, they have adopted a very liberal position towards customary international law making it almost automatically an integral part of European law.¹³ In its 2008 decision in *Kadi*, the ECJ is however very cautious not to conflate this openness of the European legal order towards international law with the idea that the European legal order would now be partly embedded in the international legal order.¹⁴ Such a “fast” or “automatic” incorporation is not imposed by international law as it still hinges on European law.¹⁵ In that sense, the ECJ demonstrates that monism is simply a “modality of dualism”.¹⁶

If the UN legal order and the European legal order are two separate legal orders as is rightly underscored by the ECJ, it follows that the rules of the UN system are not automatically part of the European legal order. The CFI – and the international constitutionalist approach that it reflects – had disregarded this elementary divide between the UN and European legal orders since it decided to review the legality of the impugned Regulation on the basis of the peremptory norms of *international*

¹² Case 181/73, *Haegeman v. Belgium*, [1974] ECR 449, paras 2-6. On this debate, see A. Peters, “The Position of International Law Within the European Community Legal Order”, 40 *German Yearbook of International Law* 9 (1997), 21-34.

¹³ See Case T-115/94, *Opel Austria v Council* [1997] ECR II-39; Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3655.

¹⁴ *supra* note 2 para. 291-299.

¹⁵ G. Arangio-Ruiz, “International Law and Interindividual Law”, *supra* note 9, at 19-20.

¹⁶ J. Combacau & S. Sur, *Droit International Public* (Montchrestien, 6th ed. 2004), p. 181 (our translation).

law. But the CFI not only reviewed a European legal act on the basis of a norm of reference found in another legal order; it also ventured to review a legal act originating in another legal order (i.e. a Security Council resolution). The CFI thus repudiated its role of *European* constitutional court by basing its review on constitutional norms of reference lying outside the European legal order and by engaging in a review of the legality of a non-European legal act on the basis of the fundamental principles of the international legal order. Ceasing to be a European constitutional court applying European constitutional principles, the CFI adopted an international constitutionalist posture as it transformed the values and principles of the international community into values and principles of the European legal order which it incorporated into the standards of its control of legality.

The CFI also negated the fundamental divide between the UN legal order and the European legal order by constricting its review to reflect the hierarchy of the UN legal order. Indeed, the CFI concluded that it had no authority to review the lawfulness of Security Council resolutions in the light of fundamental rights as enshrined in Community law and limited its review to the peremptory norms of the international legal order.¹⁷ However, the CFI, not being itself an organ of a party to the UN system, was under no obligation to respect the “internal distribution of powers” within the UN system – and in particular the central position of the Security Council, under chapter VII of the Charter.¹⁸ The binding character of the UN Charter and of the Security Council resolutions on the European institutions – if ever demonstrated¹⁹ – does not prevent the EU Courts from reviewing

¹⁷ *Yusuf*, *supra* note 1, esp. paras 272 and 276.

¹⁸ Confusingly, the CFI held that “determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts” (*Yusuf*, *supra* note 1, at para. 270, emphasis added).

¹⁹ In that respect, the “succession theory” whereby the Union (or the Community) has succeeded the member States in their obligations towards the United Nations in the area of competence of the Union is hardly convincing despite its endorsement by the ECJ with respect to the GATT (Cases 21-24/72, *International Fruit Company*, [1972] ECR 1219). This argument is however commonly used by some scholars: see C. Tomuschat, 43 *CML Rev.* (2006), 543; see T. Ahmed and I. de Jesus Butler, “The European Union and

UN acts.²⁰ The mechanism of article 103 of the UN Charter designed to solve the conflicts of norms arising between UN obligations and other international obligations does not impinge on that conclusion as it simply addresses such a conflict from the vantage point of the UN Charter. This mechanism does not sort out conflicts of norms which may arise within the legal order of member States or within the legal order of international organizations. The CFI however chose to yield to the central position of the Security Council within the UN system²¹ as if it were not only a Court of the European legal order but also a judicial organ of the UN. The 2008 ECJ decision demotes this status of international court to which the CFI had elevated itself and makes it clear that the CFI is only a *court of European law* empowered to review acts of European Law in the light of the fundamental principles of the European legal order.²²

It is important to emphasize that the idea of the inextricable separation of legal orders underlying the 2008 ECJ decision should not be seen as an attempt to preserve the autonomy of the European decision-making process and keep outside interferences at bay. Claiming that the European Union is autonomous as far as its legal order is concerned does not make it less receptive to the outside world. Indeed, as was explained above, the European legal order has proven very monist in that it has not subjected the incorporation of treaty law²³ and customary international law²⁴ to any formal act of incorporation. The position of the CFI and, more generally, the international constitutionalist understanding of the embedment of regional orders in the UN legal order that it reflects is oblivious of that

Human Rights: An International Law Perspective”, 17 *EJIL*, 771-801 (2006), esp. 777 and 788; see also Schermers and Blokker, *International Institutional Law* (2003), para. 1574, at. 995.

²⁰ See P. Eeckhout, “Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit”, 3 *European Constitutional Law Review* 183 (2007) at 191-192.

²¹ *Yusuf*, *supra* note 1, at para. 277. Assuming (para. 279) that *jus cogens* encompasses (at least certain) fundamental rights, the CFI then engaged in a review of the conformity of UN resolutions with the peremptory norms which it deemed relevant, and decided that no violation had occurred (paras 284-347).

²² *Kadi*, *supra* note 2, esp. paras 281 ff., 299 and 316.

²³ Case 181/73, *Haegeman v Belgium*, [1974] ECR 449.

²⁴ Case T-115/94, *Opel Austria v Council* [1997] ECR II-39; Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3655.

openness and can actually yield the opposite effect. If the European legal order were to be automatically subordinated to values and principles to which it may some day be loath²⁵, this could prompt an end to the current receptiveness of EU law towards international law and bring about a more radical isolationist reaction.

In the light of the foregoing, it can be reasonably asserted that the ECJ's reminder of these elementary realities is welcome as the abovementioned principles had recently been obfuscated by the international constitutionalist discourses on the relationship between legal orders. One may nonetheless wonder whether the benefit of the controversy flared by the CFI extends beyond this stark reminder by the ECJ and, in particular, bears upon the advancement of the promotion of human rights. It is true that the abovementioned reasoning leads the ECJ to subject EC measures implementing UN Security Council resolutions to strict fundamental rights standards, be those of the EC and not those of the (allegedly) peremptory international human rights as in the CFI's decision. More importantly, by recalling the elementary divide between legal orders, the ECJ also makes it clear that the UN sanction system is currently not consistent with the fundamental rights standards of the EC. In that respect, it would be fair to say that – whatever the sweeping practical difficulties which member States now face to comply with their UN obligations – the ECJ decision may help shed some light on the incompatibility of the UN sanction committees' re-examination procedures with some fundamental human rights. It is interesting to note that by pointing to the weaknesses of the UN sanction mechanisms, the ECJ does exactly what the German and Italian Constitutional Courts did more than three decades ago when interpreting their relationship with the EC legal order

²⁵ On the current impact on the overall legitimacy of the EU external action that the lowering of the standard of protection of fundamental rights in the field of foreign policy can have, see I. Canor, "Can Two Walk Together, Except They Be Agreed?' The Relationship Between International Law and European Law: the Incorporation of United Nations Sanctions Against Yugoslavia Into European Community Law Through the Perspective of the European Court of Justice", 35 *CML Rev.* 137 (1998) at 169.

which they deemed at odds with the human rights standards of their respective municipal legal order.²⁶

The foregoing brings us back to our initial question: was the whole controversy triggered by the CFI worthwhile? Although, as has been explained here, one may welcome the ECJ's useful reminder of the divide between legal orders and nod to the inconsistency of the UN sanction system with fundamental rights, it is still doubtful whether the CFI's gesture can be seen as at all appropriate. Indeed, such a debate should not have been initiated by adventurous European judges. The abovementioned problems, and especially the infringement of human rights in the UN sanction system, are too serious to be quickly patched up by any judiciary despite the latter's wide potential lawmaking powers. If the system has to be amended, it can only be so by the international and European lawmakers. This is why triggering a wide-ranging debate by overlooking the elementary estrangement of legal orders as the CFI did can eventually be perceived as a brash and unnecessary action by an emboldened judiciary.

International legal scholars have probably not bristled at this new attempt of judges to stir debate and initiate change by defending unconventional positions. Indeed, this is far from being unprecedented. We all remember the similar judge-ignited theoretical debate spawned by the ICTY on questions of attribution.²⁷ At the end of the day, the unorthodox departure from the general principle – which was fixed by the ICJ some years later²⁸ – proved short-lived and yielded very little technical clarification. It only provided international legal scholars with

²⁶ See the 'Solange' decision of the Bundesverfassungsgericht (BVerfG), [1974] 2 CLMR 540, esp. 549-50 and 'Solange II' decision, BVerfG, *Re Wunsche Handelsgesellschaft*, [1987] 3 CLMR 225, 265. See also the decision of the Italian Constitutional Court, *Frontini c. Ministero delle Finanze* [1974] 2 CMLR 372.

²⁷ See ICTY (Appeals Chamber), *Prosecutor v Dusko Tadic* (IT-94-1), 15 July 1999, paras. 99 ff. On this question, see F. Dopagne, "La responsabilité de l'Etat du fait des particuliers: les causes d'imputation revisitées par les articles sur la responsabilité de l'Etat pour fait internationalement illicite", *Belgian Review of International Law* 498-532 (2001).

²⁸ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, 26 February 2007, paras 396 ff.

some unexpected material for scholarly discussion²⁹ but without any real scholarly benefit. If the fruits to be reaped from the *Yusuf* and *Kadi* judgments are exclusively limited to providing legal scholars with fugacious material for debate, it can be surmised that this whole controversy will probably be quickly forgotten.

²⁹ On the tendency of international legal scholars to pick and choose object of studies according to their own needs, see J. d'Aspremont, "Softness in International Law: A Self-Serving Quest for New Legal Materials", 19 *European Journal of International Law*, vol. 5 (2008) 1075-1093.