## Developments

# Case-note on Joined Cases C-402/05 P & C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation* v. *Council of the European Union & Commission of the European Communities*

*By Maria Tzanou*[*]

> "Any society that would give up a little liberty to gain a little security will deserve neither and lose both."[1]

### A. Introduction

On 3 September 2008, the European Court of Justice (ECJ) handed down its long-awaited decision on the Kadi and Al Barakaat International Foundation[2] where, setting aside the relevant judgments of the European Court of First Instance (CFI)[3], the Court held that the Community judicature must ensure the full review of the lawfulness of all Community acts. This included those deriving from UN Security Council's resolutions, in the light of the fundamental rights as protected by Community law[4].

The ECJ's Kadi judgment is of constitutional significance regarding the relationship between the UN and the EU legal order, and the issue of the protection within the EC legal order of the human rights of the individuals targeted by measures taken in the on-going "war against terror." The purpose of the present Article is to analyze this judgment by assessing the role that the Community courts can play within the international context of the fight against terrorism. The analysis will proceed as follows. After referring briefly to

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[1] The phrase is attributed to Benjamin Franklin. This is a variety, the original being: "Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety".

[2] Joined cases C-402/05P & C-415/05P *Kadi & Al Barakaat International Foundation v. Council and Commission*, judgment of the Court of Justice of the European Communities (Grand Chamber), 3 September 2008.

[3] Case T-315/01 *Kadi v. Council and Commission* 2005 E.C.R. II-3649; and Case T-306/01 *Yusuf and Al Barakaat International Foundation v. Council and Commission* 2005 E.C.R. II-3533.

[4] See *Kadi, supra* note *2*, para 326.

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the legal and factual background of the Kadi and Al Barakaat cases (Part B), the Community's competence to adopt and implement restrictive measures against individuals and entities associated with international terrorism will be examined (Part C). Subsequently, the Article will consider the relationship between the international legal order under the UN and the EU legal order (Part D). Part E will discuss the fundamental question of protection of the human rights of the individuals targeted by the restrictive measures and finally, Part F will address the issue of compliance with ECJ's judgment in the *Kadi* case. Reference to the relevant analysis of the CFI and the Advocate General will be made, in order to clarify certain points of the ECJ's ruling and provide for the necessary comparisons.

## B. The legal and factual background

The fight against terrorism is one of the greatest challenges the world is facing today. Combating terrorism has been a key priority on the agenda of the United Nations for decades[5]. The international counter-terrorism efforts have culminated though, after the September 11, 2001[6] attacks against the World Trade Center in New York and the Pentagon in Washington DC, which shocked and horrified the whole world. Terrorism is considered nowadays, as a common threat to all states and people, which requires an international response.

Before the collapse of the Taliban regime, the Security Council of the United Nations (UNSC) adopted Resolutions 1267 (1999)[7] and 1333 (2000)[8], in which it affirmed its conviction that the suppression of international terrorism was essential for the maintenance of international peace and security. The Security Council deplored the fact that the Taliban continued to provide safe haven to terrorists and demanded that they should turn Usama bin Laden over to the appropriate authorities. In order to ensure compliance with that demand, all States were required to "freeze the funds and other financial resources" of individuals and entities associated with Usama bin Laden. Furthermore, the Security Council decided to establish a committee, composed of all its members ('the Sanctions Committee'), responsible for ensuring that the States implement the measures imposed. On 8 March 2001 the Sanctions Committee, based on information provided by the States and regional organisations, published a first consolidated list of the entities which and the persons who must be subjected to the freezing of funds. The list has

[5] See, for more details, the UN specific counter- terrorism activities available at: http://www.un.org/terrorism/, last accessed 23 February 2009.

[6] The international press has described September 11, 2001 as "The day that changed the world."

[7] SC Res. 1267 of 15 October 1999.

[8] SC Res. 1333 of 19 December 2000.

since been amended and supplemented several times. Taking the view that action by the EC was necessary in order to implement these Resolutions, the Council, upon the common positions adopted under the Common Foreign and Security Policy (CFSP) framework[9], adopted, on the basis of Articles 60 EC and 301 EC, Regulations (EC) 337/2000[10] and 467/2001[11].

Following the collapse of the Taliban regime, the Security Council adopted a second set of Resolutions, namely Resolutions 1390 (2002)[12] and 1453 (2002)[13] directed against Usama bin Laden, members of the Al-Qaeda network and the Taliban. In order to give effect to those Resolutions within the EC, the Council adopted two new CFSP common positions[14] and subsequently implemented them within the Community legal order by Regulations 881/2002[15] and 561/2003[16], to which Article 308 EC was added as a legal basis to Articles 60 EC and 301 EC.

[9] Council Common Position 1999/727/CFSP, 15 November 1999, concerning restrictive measures against the Taliban OJ L 294, 16/11/1999 P. 0001 – 0001; and Council Common Position 2001/154/CFSP, 26 February 2001 concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP. OJ L 057, 27/02/2001 P. 0001 – 0002.

[10] Council Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ 2000 L 43/1.

[11] Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000. OJ L 067; 09/03/2001 P. 0001 – 0023.

[12] SC Res. 1390 (2002) of 28 January 2002.

[13] SC Res. 1453 (2002) of 24 December 2002.

[14] Council Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP OJ L 139 , 29/05/2002 P. 0004 – 0005; and Council Common Position 2003/140/CFSP of 27 February 2003 concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP. OJ L 053, 28/02/2003 P. 0062 – 0062.

[15] Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan OJ L 139 , 29/05/2002 P. 0009 – 0022.

[16] Council Regulation (EC) No 561/2003 of 27 March 2003 amending, as regards exceptions to the freezing of funds and economic resources, Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban OJ L 082, 29/03/2003 P. 0001 – 0002.

The applicants, Yassin Andullah Kadi, a Saudi Arabian businessman and the Al Barakaat International Foundation, established in Sweden, which were designated by the Sanctions Committee as being associated with Usama bin Laden, Al-Qaeda or the Taliban, and subsequently listed in the implementing Community regulations, brought an action for annulment under Article 230 (4) [17] before the CFI, alleging that the regulations breached their fundamental rights to respect of property, of a fair hearing and of effective judicial review.

## C. Community competence to adopt and implement economic sanctions: the legal basis question

The first question that arose in *Kadi* concerned the Community's competence to adopt and implement economic sanctions against individuals. My analysis on this point will proceed as follows: first, I will describe briefly the so-called 'smart sanctions' practice (I), then I will present the approach taken by the CFI (II) and the ECJ (III) on the issue, by critically assessing it on the basis of the Court's existing case-law concerning legal basis questions (IV).

### *I. A New Approach to Sanctions: Smart Sanctions*

The practice of imposing sanctions[18] to third countries is not recent for the EC. In fact, the first economic sanctions of the Community date back in the 1960s and 1970s with the embargoes imposed against the apartheid regimes in Southern Rhodesia in 1966 and in South Africa in 1977. Since the end of the Cold War, sanctions were imposed against a number of countries such as Iraq, Former Republic of Yugoslavia, Libya, Somalia, Liberia, Haiti, Angola, Ruanda, Sierra Leone and Afghanistan. All the above measures were based on relevant UNSC Resolutions. The Community has also adopted its own autonomous sanctions against third countries. Examples are the sanctions in 1982 against the USSR following the introduction of martial law in Poland and against Argentina because of the Falklands- Malvinas war[19].

[17] The requirements of Art 230 (4) EC were met because the applicants were identified by name in Annex I to the contested regulation, thus, they were directly and individually concerned.

[18] There is no authoritative definition of "sanctions" under either international law or EU/EC law. Both the EC Treaty and the Treaty on European Union use the term "measures", while Article 41 of the UN Charter refers to "measures not involving recourse to armed force". In doctrine, the term "sanctions" is used to describe a general or specific export/import measure directed against a state, or a particular economic sector of it. See I. Cameron, 'Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play', Brussels, European Parliament, October 2008.

[19] A list including EU autonomous sanctions against governments/ governmental entities of third countries can be accessed at http://ec.europa.eu/external_relations/cfsp/sanctions/measures.htm

However, the devastating humanitarian impact on the civilian population of the general trade embargo[20] imposed by the UNSC against Iraq after the end of the second Gulf War, marked a turning point in the sanctions policy. To address the problem, the concept of targeted sanctions was developed. The term "targeted sanctions" refers to coercive measures directed against an individual or a corporate entity (such as a firm or a political party)[21]. The so-called "smart sanctions" are designed to reduce 'collateral damage' aiming to coerce regimes without imposing major harm on ordinary citizens[22]. Furthermore, smart sanctions are thought to increase the efficiency and credibility of the international response since they are applied in a more targeted and efficient manner than the comprehensive economic sanctions (e.g. the general trade embargos aimed at a country) that have an indiscriminate impact and can entail severe negative humanitarian consequences for the civilian population of third countries. During the 1990s and onwards the EU implemented targeted sanctions adopted at the UN level, but also imposed its own autonomous restrictive measures directed against individuals[23].

More recently, the UNSC and the EU are using smart sanctions as a weapon in the 'war against terror' by targeting specific individuals and entities alleged to be associated with terrorist groups. Examples of the above measures are Security Council Resolutions 1267 (1999) and 1453 (2002), and Community Regulations 467/2001 and 881/2002, which implemented them within the EC.

The legal basis used under EC law for the adoption of sanctions against third countries is Article 301 EC[24] (and Article 60 EC[25] as an additional basis when the measures relate to the

[20] R. Geiss, *Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-up Assessment of Long-Term Effects*, 18 HARVARD HUMAN RIGHTS JOURNAL, 167 (2005); M. Reisman, *Assessing the Lawfulness of Nonmilitary Enforcement: The Case of Economic Sanctions*, 89 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS, 350 (1995).

[21] Cameron, *supra,* note 18*,* at 5.

[22] On the debate about smart sanctions see the results of the Interlaken Process -1st and 2nd Interlaken Seminars- on Targeting United Nations Financial Sanctions, documents available at http://www.smartsanctions.ch, last accessed 23 February 2009. See also, D. Drezner, *How Smart are Smart Sanctions?*, 5 INTERNATIONAL STUDIES REVIEW, 107 (2003); L. Herik, *The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual*, 20 LEIDEN JOURNAL OF INTERNATIONAL LAW, 797 (2007).

[23] As far as the 'listing of suspected terrorists' by the EU is concerned, we can distinguish three categories: the listing that derives from UNSC and where the institutions of the EU have no autonomous power to designate the persons and entities included in the list, the listing that derives from UNSC, which in this case do not refer to specific individuals, thus the EU institutions have the power to decide who will be included in the list, and the so-called 'home terrorists', who do not have any link with outside the EU. In the first two categories of listing, the Community can freeze the funds of the individuals since there exists a link between them and a third country, whereas that is impossible in the third category.

[24] Article 301 EC provides: "Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third

movement of capital and payments). Article 301 links foreign policy objectives with action in the commercial field by providing for a two stage procedure[26]: First, a political decision that calls for coercive action against a third country is taken under the Common Foreign and Security Policy (CFSP) framework; the second stage is for the Community to establish the economic arrangements necessary to give effect to the CFSP decision for the interruption of the normal economic relations between the EC and the third state concerned. Arts. 301 and 60 EC were used as the legal basis for the adoption of targeted sanctions against individuals in the 'war against terror'.

A first set of legal questions that arose in *Kadi* concerned the competence of the Community to adopt and implement smart sanctions directed against suspected terrorists. These questions can be further grouped into two categories. First, can Articles 60 EC and 301 EC serve as the legal basis for the adoption of measures that affect individuals, when their very wording suggests that they authorise the Council to take measures against third countries only? Secondly, is the combination of Articles 60 EC, 301 EC and 308 EC an appropriate legal basis for the adoption of measures freezing the financial assets of individuals when no link exists whatsoever between them and the territory or the governing regime of a third country?

*II. The approach of the CFI*

The CFI, after discussing the practice of smart sanctions used by the UN during the 1990s, found that nothing in the wording of Articles 60 and 301 EC makes it possible to exclude the adoption of restrictive measures directly affecting individuals or organisations[27], in so far as such measures actually seek to reduce, in part or completely, economic relations with one or more third countries. This was so in the present cases, where the measures at issue were intended to interrupt or reduce economic relations with a third country, in connection with the international community's fight against international terrorism and,

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countries, the Council shall take the necessary urgent measures. The Council shall act by qualified majority on a proposal from the Commission."

[25] Article 60 (1) EC reads as follows: "If, in the cases envisaged in Article 301 EC, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned."

[26] See generally: P. EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION- LEGAL AND CONSTITUTIONAL FOUNDATIONS, (OUP, 2004), 424;.MCLEOD, HENDRY and HYETT, THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITIES: A MANUAL OF LAW AND PRACTICE, (OUP, 1996), Ch.19; KOUTRAKOS, EU INTERNATIONAL RELATIONS LAW, (Hart, 2006), 429; and G. *Zagel, Sanctions of the European Community: A Commentary on Art. 301 TEC. Law of the European Union*, Available at SSRN: http://ssrn.com/abstract=862024, last accessed 23 February 2009.

[27] *Yusuf & Al Barakaat*, *supra* note 3, para 112.

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more specifically, against the Al-Qaeda network[28]. The CFI held that Articles 301 and 60 EC authorise the Council to take economic sanctions directed specifically against entities which or persons who physically control part of the territory of a third country. Hence, SC resolutions targeting the Taliban regime (which controlled the greater part of Afghanistan), established expressly a link with the territory of this country, and could be therefore implemented by the Community on the basis of Articles 60 and 301 EC[29].

However, after the collapse of the Taliban regime, as seen above, the UNSC adopted resolutions aiming no longer at the fallen regime, but rather directly at Usama bin Laden, the Al-Qaeda network and the persons and entities associated with them. For the implementation of those resolutions within the Community, Article 308 EC[30] was added as a legal basis, in order to supplement the base supplied by Articles 60 and 301 EC, as to make it possible to adopt measures not only in respect of [third countries] but also in respect of individuals who and non-State bodies which are not necessarily linked to the government or the territory of a third country[31].

In examining the appropriateness of the legal basis, the Court of First Instance commenced its analysis by stating that Articles 60 and 301 EC did not constitute in themselves a sufficient legal basis[32]. Similarly, Article 308 EC on its own could not serve as an adequate legal basis[33]. However, it held that Article 308 EC, in conjunction with Articles 60 EC and 301 EC, gave the Community institutions the power to adopt a Community regulation relating to the battle against the financing of international terrorism. Examining the conditions of the applicability of Article 308 EC, the CFI observed that recourse to this provision as the legal basis for a Community measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question; in such a situation, Article 308 EC allows the institutions to act with a view to attaining one of the objectives of the Community, despite the lack of a specific provision conferring on them the necessary power to do so. The CFI held that the first condition for the applicability of Article 308 EC was satisfied, as 'no specific provision of the EC Treaty provides for the adoption of measures relating to the imposition of economic

[28] *Yusuf & Al Barakaat*, *supra* note 3, para 121.

[29] *Kadi, supra* note 3, para 89.

[30] Article 308 EC provides: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

[31] *Kadi, supra* note 3, para 69.

[32] *Id.*, para 97.

[33] *Id.*, para 98.

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and financial sanctions, such as the freezing of funds, in respect of individuals and entities suspected of contributing to the funding of terrorism, where no connection whatsoever has been established with the governing regime of a third state'[34]. Furthermore, the CFI found that the second condition for the applicability of Article 308 EC also existed. It reached this conclusion by taking into account the 'bridge' explicitly established at the Maastricht revision between Community actions imposing economic sanctions under Articles 60 and 301 EC and the objectives of the Treaty on European Union in the sphere of external relations[35]. According to the CFI, Articles 60 and 301 EC are special provisions of the EC Treaty, in that they expressly contemplate situations in which action by the Community may be proved to be necessary in order to achieve, not one of the objects of the Community as fixed by the EC Treaty but rather one of the objectives specifically assigned to the Union by Article 2 EU, namely, the implementation of a common foreign and security policy. Therefore, under Articles 60 and 301 EC, action by the Community is in actual fact action by the Union, the implementation of which finds its basis on the Community pillar after the Council has adopted a common position or a joint action under the CFSP. Thus, 'in the specific context contemplated by Articles 60 and 301 EC, recourse to the additional legal basis of Article 308 EC is justified for the sake of the requirement of consistency laid down in Article 3 EU, when those provisions do not give the Community institutions the power necessary, in the field of economic and financial sanctions, to act for the purpose of attaining the objective of fighting against international terrorism and its funding, pursued by the Union and its Member States under the CFSP'[36].

*III. The approach of the ECJ*

The ECJ rejected the CFI's reasoning, by finding that the bridge between the measures of the Community under Articles 60 and 301 EC and the CFSP objectives could not extend to other provisions of the EC Treaty, including Article 308 EC[37]. According to the Court, recourse to the provision of Article 308 EC demands that the action envisaged should, on the one hand, relate to the ''operation of the common market'' and be intended to attain ''one of the objectives of the Community'' on the other[38]. In this respect, the interpretation of the CFI was not correct because Article 308 EC does not enable the EC to pursue a CFSP objective[39], as this would undermine the 'constitutional architecture of the

[34] *Id.*, para 100.

[35] *Id.*, para 123.

[36] *Id.*, para 128.

[37] *Kadi & Al Barakaat*, *supra* note 2, para 197.

[38] *Id.*, para 200.

[39] *Id.,* para 201.

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pillars, as intended by the framers of the Treaties'[40] and it would go against the principle of conferred powers, by widening the scope of Community powers beyond the general framework created by the EC Treaty[41].

However, surprisingly enough, the ECJ agreed with the CFI's conclusion that Article 308 EC could be included in the legal basis of the contested regulation, jointly with Articles 60 and 301 EC. It noted that, provided that the conditions for the applicability of Article 308 EC were met, this could be used to empower the Community to extend the material scope of Articles 60 and 301 EC[42]. According to the ECJ, inasmuch as these Articles provide for Community powers to impose restrictive measures in order to implement actions decided on under the CFSP, they are the expression of an 'implicit underlying objective, namely, that of making it possible to adopt such measures through the efficient use of a Community instrument'[43]. This implicit objective may be regarded as constituting an objective of the Community, and thus, the first condition for the applicability of Article 308 EC is met. The ECJ found that the second condition is also satisfied, since economic measures such as those imposed by the contested regulation might affect the operation of the common market if they were imposed unilaterally by every Member State[44]. Moreover, an additional argument justifying the inclusion of Article 308 EC as a legal basis of the contested regulation was that it "enabled the European Parliament to take part in the decision-making process relating to the measures at issue which are specifically aimed at individuals whereas, under Articles 60 and 301 EC, no role is provided for that institution"[45].

*IV. The constitutional architecture of the EU and the interface between the 1st and the 2nd pillar: a 'bridge' or an 'implicit objective'?*

A first controversial question is whether Article 301 EC can be used as a legal basis to impose sanctions against non-state actors, despite the fact that it refers to the interruption or reduction of economic relations 'with one or more third countries'. Article 301 EC (was

[40] *Id.,* para 202.

[41] *Id.,* para 203.

[42] *Id.,* para 216.

[43] *Id.,* para 226.

[44] *Id.,* para 230. According to the ECJ, the unilateral restrictive economic or financial measures could affect the movement of capital and payments, and on the exercise by economic operators of their right of establishment. In addition, they could create distortions of competition, because any differences between the measures unilaterally taken by the Member States could operate to the advantage or disadvantage of the competitive position of certain economic operators although there were no economic reasons for that advantage or disadvantage.

[45] *Id.,* para 235.

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inserted by the Maastricht Treaty[46] with the purpose of providing a specific legal basis, which would enable the Community to adopt economic sanctions. Before that, the political decision for the adoption of sanctions was taken under the European Political Cooperation (EPC), and it was implemented by the Community on the basis of Article 113 EEC (now Article 133 EC). As the *lex specialis* in the EC Treaty, it could be argued that Article 301 EC can be interpreted in such a way so as to enable the Community to adopt economic sanctions against non-state actors. Otherwise, a restrictive reading of Article 301 EC would run counter to the considerations of effectiveness and the humanitarian concerns that are linked with the very rationale behind smart sanctions[47]. Such a restrictive interpretation would lead to the rather peculiar result, the Community being able to adopt economic measures against third countries, with all their implications to the civilian population, while at the same time being incapable to target specifically their rulers in order to put pressure to them. Therefore, one should not focus on a formalistic interpretation based only on the wording of Article 301 EC. Moreover, if a specific reference to non-state actors is not included in Article 301 EC, it is because at the time of the introduction of that provision, smart sanctions were most probably not known as instruments of foreign policy[48].

As the CFI has rightly pointed out, the wording of Article 301 EC does not exclude the adoption of restrictive measures directly targeting individuals when a link exists between them and the territory of a third country. A further argument in this direction, could be based on a historical interpretation of Article 301 EC, in the sense that its drafters had no intention to exclude smart sanctions from its scope[49], but did not refer to measures against individuals because simply they did not exist at that time. Finally, one could be based also on a teleological interpretation of Article 301 EC, in order not to deprive this provision of its *effet utile*, especially with regard to the recent developments of international law in the field of sanctions directed against non-state actors. The alternative method of imposing sanctions, namely the unilateral imposition by the Member States, which has been tried in the late 1960s, proved not to be satisfactory, as it was characterised by inconsistencies, delays and other problems[50]. Thus, it can be concluded that Article 301 EC (and 60 EC) was

[46] Formerly Article 228a.

[47] *Yusuf & Al Barakaat*, *supra* note 3, para 116.

[48] T. Tridimas and J. A. Gutierrez- Fons, *EU law, International law and economic sanctions against terrorism: The judiciary in distress?*, Available at SSRN: http://ssrn.com/abstract=1271302, last accessed 23 February 2009, at 13

[49] *Id.*, at 14.

[50] P. KOUTRAKOS, *Legal Basis and Delimitation of Competence in EU External Relations,* in EU FOREIGN RELATIONS LAW, CONSTITUTIONAL FUNDAMENTALS, 171, 195 (M. Cremona & B. de Witte eds.), (Hart 2008) who notes "Therefore, it was through trial and error that the Member States chose the EC legal framework as the most appropriate mechanism for the imposition of sanctions. It would be a retrograde step if the Member States felt compelled to resort to national law to implement UN sanctions: the Community legal order would be prevented from exploring its full potential as an international actor, the Member States would be tempted to under utilize the Community mechanism and the effectiveness of the sanctions regimes would be undermined".

an appropriate legal basis for the adoption by the Community of smart sanctions targeting Usama bin Laden and the Taliban regime when the latter controlled the territory of Afghanistan.

However, after the collapse of the Taliban regime, when there was nothing to link the sanctions with the territory or the governing regime of a third country, it is hard to see how Articles 60 and 301 EC could serve as a sufficient legal basis for the implementation of such sanctions. In this respect, it is worth examining a bit closer the arguments put forward by the Commission and the Opinions of Advocate General Maduro in *Kadi* and *Al Barakaat*[51]. The Commission took the view that Articles 60 and 301 EC are in themselves an appropriate and sufficient legal base for the adoption of the Community regulation targeting individuals, even after the collapse of the Taliban regime. AG Maduro agreed with this view, noting that "by affecting economic relations with entities within a given country, the sanctions necessarily affect the overall state of economic relations between the Community and that country. Economic relations with individuals and groups from within a third country are part of economic relations with that country; targeting the former necessarily affects the latter. To exclude economic relations with individuals or groups from the ambit of 'economic relations with … third countries' would be to ignore a basic reality of international economic life: that the governments of most countries do not function as gatekeepers for the economic relations and activities of each specific entity within their borders"[52]. This interpretation of Articles 60 and 301 EC seems unduly broad, and as the ECJ observed correctly, it fails to take any account of their wording that provides that measures must be taken against third countries[53]. This, combined with the fact that the purpose of the EC regulation is to combat international terrorism and"not to affect economic relations between the Community and each of the third countries where those persons or entities are"[54] proves that Articles 60 and 301 EC alone cannot be accepted as providing an adequate legal basis for the adoption of smart sanctions when no link with the territory of a third country exists.

It remains now to be examined whether the inclusion of Article 308 EC to Articles 60 and 301 EC could be seen as an appropriate legal basis for the contested regulation. In this respect, the main question that has to be assessed is if the conditions for applicability of Article 308 EC are satisfied. Both the CFI and the ECJ answered to the affirmative, but adopted a different reasoning.

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[51] Opinions of Advocate General Poiares Maduro in Case C-402/05 P *Kadi*, delivered on 16 January 2008 and in Case C-415/05 P *Al Barakaat*, delivered on 23 January 2008.

[52] *Id.,* Opinion of AG Maduro in *Kadi,* para 13.

[53] *Kadi & Al Barakaat*, *supra* note 2, para 167.

[54] *Id.,* para 168.

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We will take a closer look at the ECJ's approach. As mentioned above, the Court held that Articles 60 and 301 EC are the expression of 'an implicit Community objective', which is to make it possible to put into effect acts adopted under the CFSP with the objective of preventing persons associated with international terrorism from having at their disposal any financial or economic resources, through the efficient use of a Community instrument. However, it seems difficult to see how the prevention of persons associated with international terrorism from having at their disposal financial resources, is an objective of the Community, albeit an implicit one as the ECJ found. First, this objective cannot be distinguished from the more general objective of fighting against international terrorism[55], which is undeniably a CFSP objective[56]. Furthermore, it is highly unlikely that the above objective falls even broadly within the purview of the activities referred to in Articles 3 and 4 EC, interpreted in the light of the different elements constituting the task of the Community, as defined by Article 2 EC[57].

Of course, one can understand the anxiety of the ECJ to protect the integrity of the Community legal order against any 'bridge' established between the 1st and the 2nd pillars that would eventually insert CFSP objectives in the EC. It is certain that the Court cannot be accused of inconsistency at this point. In case C-91/05 *Commission v Council (Small Arms and Light Weapons)*[58], it held that: "it is … the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title V of the Treaty on European Union … do not encroach upon the powers conferred by the EC Treaty on the Community"[59]. However, in this case it seems that the Court, by 'finding' an 'implicit EC objective'[60] arrived to the very same result it sought to avoid, namely it introduced implicit CFSP objectives in the EC Treaty.

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[55] *Id.,* para 221, where the ECJ noted "The United Kingdom takes the view that the purely instrumental specific objective of the contested regulation, namely, the introduction of coercive economic measures, must be distinguished from the underlying CFSP objective of maintaining international peace and security".

[56] *Kad,i supra* note 3, para 116, The CFI held that the fight against international terrorism cannot be made to refer to one of the objects which Articles 2 EC and 3 EC entrust to the Community.

[57] D. WYATT &.A. DASHWOOD, EUROPEAN UNION LAW, *(*5th ed., Sweet &Maxwell 2006), 90.

[58] Case C-91/05 *Commission v Council* (Judgment of 20 May 2008)

[59] *Id.*, para 33.

[60] In this respect see N. Emiliou, *Opening Pandora's Box: The legal basis of Community measures before the Court of Justice*, European Law Review 19 (5), 488 (1994), who notes that: "the application of the theory of implied powers in the system of the Treaties can only relate to existing powers of action. It cannot fill a gap in the totality of the specific powers conferred on the institutions for the activities of the Community--for this purpose, a provision like Article 235 EC [now Article 308 EC] has been created--but it can only supplement a specific power to act, explicitly conferred on the Community, which shows a gap".

Even if we accept that in fact the objective of preventing persons associated with terrorism from having at their disposal any financial or economic resources is an 'implicit EC objective', the ECJ fails to convince how the second condition for the applicability of Article 308 EC, which requires that the action affects 'the operation of the common market' is met. It refers generally and without any substantive analysis to effects 'on trade between Member States, especially with regard to the movement of capital and payments' and to 'distortions of competition' that might be caused by a unilateral imposition of smart sanctions by every Member State. The CFI in its judgment, had dealt thoroughly with this issue[61] and it held that "if a mere finding of a risk of disparities between the various national rules and a theoretical risk of obstacles to the free movement of capital or payments or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 308 EC as a legal basis …, not only would the provisions of Chapter 3 of Title VI of the EC Treaty be rendered ineffective, but also review by the Court of the correctness of the choice of the proper legal basis might be rendered wholly ineffective"[62]. Here, it is worth noting that in its *Tobacco Advertising*[63] judgment, the ECJ ruled that measures that can be adopted under Article 95 EC must be designed to remove genuine obstacles to free movement or appreciable distortions of competition, not purely abstract risks. Therefore, general and unspecified effects on trade and distortions of competition cannot be accepted in the present case, to trigger the application of Article 308 EC. Besides, Article 308 EC[64] is known as the 'flexibility clause' or the 'default mechanism'[65] that "cannot be used as a basis for the adoption of provisions whose effect could, in substance, be to amend the Treaty"[66].

The 'democratic principle' argument put forward by the Court, namely that the addition of Article 308 EC to the legal basis of the contested regulation enabled the European Parliament to take part in the decision-making process[67] relating is equally not persuasive. In the *Bovine Registration Regulation* case[68] the ECJ clearly rejected such an argument,

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[61] *Kadi, supra* note 3, paras 105-110.

[62] *Id.,* para 111.

[63] Case C-376/98 *Germany v. Parliament and Council* [2000] E.C.R. I-8419.

[64] R. Schuetze, *Organized Change towards an "Ever Closer Union": Article 308 EC and the Limits to the Community's Legislative Competence*, 22 YEARBOOK OF EUROPEAN LAW, 79 (2003).

[65] D. WYATT & A. DASHWOOD, *supra* note 59, 86.

[66] Opinion 2/94 [1996] E.C.R. I-1759, para 30.

[67] It is worth noting that some commentators read the judgment of the Court in the Case C-300/89 *Commission v Council (Titanium dioxide)* [1991] E.C.R. I-2867, as favouring the legal basis which offered the greatest opportunity for participation of the European Parliament in the legislative process.

[68] Case C-269/07 *Commission and Parliament v. Council,* 2000 E.C.R. I-2257.

holding that "the fact that an institution wishes to participate more fully in the adoption of a given measure, the work carried out in other respects in the sphere of action covered by the measure and the context in which the measure was adopted are irrelevant"[69].

On the contrary, the approach of the CFI which favours a dynamic interaction of the pillars by establishing a 'bridge' between them is preferable. One can certainly argue that the CFI's interpretation is based on a broad reading of Articles 60 and 301 EC. While this is true, we cannot disregard the fact that the *raison d'être* of those provisions is primarily to enable the Community to implement the political decisions taken under the CFSP. Furthermore, Article 3 TEU refers to the consistency of the Union's external relations as a whole. Thus, having regard also to the principle of effectiveness, the CFI's reasoning seems more convincing than the ECJ's[70]. Both Courts undeniably stretch the wording of Articles 60 and 301 EC, but at least, the Court of First Instance does not go that far so as to find 'implicit objectives' in the EC Treaty concerning the fight against international terrorism, and does not pretend that smart sanctions affect the operation of the common market.

In conclusion, it can be said that the question of the appropriate legal basis[71] for the adoption and implementation of smart sanctions by the Community is highly controversial. Both the CFI and the ECJ tried to come up with a mechanism that would enable the EC to act in this field. Their interpretation, either based on the 'bridge' between the 1st and the 2nd pillar, or on an 'implicit EC objective', inevitably widens the scope of Article 308 EC. However, in any case, it is aimed to achieve the 'effectiveness' of the sanctions regime. In reality, it is very difficult to imagine that the ECJ would have held that the Community had no competence whatsoever to adopt smart sanctions, especially after taking into account the fact that the Lisbon Treaty has introduced specific legal bases for this reason[72].

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[69] *Id.*, para 44.

[70] C. Tomuschat, Case-note on Yusuf/ Kadi- judgments, 43 CMLR, 539, 540 (2006), that finds the Court's answer "intelligent" and its line of reasoning "entirely persuasive". Also Koutrakos (note 52), at 194, observes that the CFI's argument is "entirely proper and wise". On the other hand, C. Eckes, *Judicial Review of European Anti-Terrorism measures –The Yusuf and Kadi judgments of the Court of First Instance*, EUROPEAN LAW JOURNAL 14 (1), 74, 81 (2008), concludes that: "the Court disregarded the constitutional boundaries of the Treaty, in particular the principle of conferred powers and the principle of subsidiarity. This results in a threat to the human rights of those sanctioned… Additionally, the judgments endanger the power balance between the Community and the Member States…".

[71] It must be noted here that the choice of the appropriate legal basis is not a minor issue, rather it has 'constitutional significance' as the ECJ held in *Opinion 2/00* 2001, E.C.R. I-9713, para 5. For a more detailed analysis see R. Barents, *The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation*, CMLR 30, 85 (1993); H. Cullen and A. Charlesworth, *Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States*, CMLR 36, 1243 (1999).

[72] Article 75 of the Treaty on the Functioning of the EU provides that: "Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as

**D. The relationship between UN and EU**

The most important question that arose in *Kadi* concerned the relationship between the international legal order under the UN and the 'domestic or Community legal order'[73]. The answer to this would effectively determine the scope of the judicial review that Community courts can carry out regarding the legality of EC measures implementing UN sanctions. In this respect, the CFI (I) and the ECJ (II) adopted substantially different positions, which necessarily led them to different conclusions. Below, I assess the relationship between the EU and the UN legal order as analysed by the two Courts (III) and examine their respective answers concerning the issue of the scope of the judicial review (V).

*I. The approach of the CFI*

The CFI began its analysis by referring to the principle of primacy of international law under the UN Charter on Member State's domestic law obligations, including those under the EC Treaty[74]. This 'rule of primacy' derives from Article 103 of the UN Charter[75] and "extends to decisions contained in a resolution of the Security Council, in accordance with Article 25 of the Charter of the UN, under which the Members of the United Nations agree to accept and carry out the decisions of the SC"[76]. Thus, resolutions adopted by the SC under Chapter VII of the Charter of the UN are binding on all the Member States of the Community which must therefore, in that capacity, take all measures necessary to ensure that those resolutions are put into effect[77], even if that means that they "may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law

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the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities'. Article 215 provides: '1) Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2) Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities".

[73] *Kadi, supra* note 3, para 178.

[74] *Id.,* para 181.

[75] Article 103 of the UN Charter provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

[76] *Kadi, supra* note 3, para 184.

[77] *Id.,* para 189.

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or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the UN"[78].

However, unlike its Member States, the Community is not directly bound by the UN Charter under international law because "it is not a member of the United Nations or an addressee of the resolutions of the SC, or the successor to the rights and obligations of the Member States for the purposes of public international law"[79]. Nevertheless, the CFI found that the Community is bound by the UN Charter by virtue of its own Treaty[80], based on the conclusion that 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[81].

After having established that the EC is bound by resolutions of the Security Council adopted under Chapter VII of the UN Charter, the Court proceeded to examine the scope of the review of legality that the Community Courts must carry out on Community measures that implement such resolutions. Remarkably enough, it started its examination by stating the principle established in *Les Verts*[82] that the EC is based on the rule of law, but it found that it could not review the legality of a regulation implementing a SC resolution having regard to the general principals of Community law relating to the protection of fundamental rights, because this would imply that the CFI indirectly considers the lawfulness of the SC resolutions[83]. According to the CFI, in the present situation, the Community institutions acted under circumscribed powers, with the result that they had no autonomous discretion[84], and thus, in case the Court annulled the regulation because it infringed the fundamental rights of the applicant, this would indirectly mean that the SC resolutions infringed those fundamental rights[85].

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[78] *Id.,* para 190.

[79] *Id.* para 192.

[80] *Id.,* para 193.

[81] *Id.,* para 203.

[82] Case 294/83 *Les Verts v. Parliament* 1986 E.C.R. 1339, para 23 where the ECJ held that: "the European Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question whether their acts are in conformity with the basic constitutional charter, the 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".

[83] *Kadi, supra* note 3, para 215.

[84] *Id.,* para 214.

[85] *Id.,* para 216.

However, it found that indirect judicial review of the lawfulness of the SC resolutions is possible as far as the observance of *jus cogens* is concerned[86]. According to the CFI's reasoning, there exists one limit to the principle that SC resolutions have binding effect: namely, that they must respect the fundamental peremptory provisions of *jus cogens*. "If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community"[87].

*II. The approach of the ECJ*

The ECJ commenced its analysis from a totally different point than the CFI: it stated that the Community is based on the rule of law[88] and quoted the relevant passage from the *Les Verts* judgment[89]. It observed that "an international agreement cannot affect the allocation of powers fixed by the Treaties or the autonomy of the Community legal system"[90], and therefore it "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"[91]. It went on by drawing a distinction between the international agreement and the EC measures that intend to give effect to the former[92], and clarified that while it is not for the Community judicature to review the lawfulness of a SC resolution[93], "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"[94].

The Court stressed that the Community must respect international law[95] and is bound by the EC Treaty to take the necessary measures to implement SC resolutions[96], however, since the UN Charter does not impose the choice of a particular model for the

[86] *Id.*, para 226.

[87] *Id.*, para 230.

[88] *Kadi & Al Barakaat*, *supra* note 2, para 281.

[89] *Id*.

[90] *Id.,* para 282.

[91] *Id.,* para 285.

[92] *Id.,* para 286.

[93] *Id.,* para 287.

[94] *Id.,* para 288.

[95] *Id.,* para 291.

[96] *Id.,* para 296.

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implementation of SC resolutions, it is free to choose among the various possibilities for their transposition[97]. Furthermore, the ECJ held that immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of primacy of UNSC resolutions adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty[98]. According to the ECJ, neither Article 307 EC nor Article 297 EC can be understood to authorise "any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6 (1) EU as a foundation of the Union"[99].

As far as the scope of the judicial review regarding EC measures implementing SC resolutions is concerned, the Court observed that this question "arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights"[100]. Thus, the ECJ concluded that "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, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the SC under Chapter VII of the UN Charter"[101].

*III. The EU legal order and the UN: subordination or autonomy?*

We can discern two parts in the ECJ's reasoning concerning the relationship between the EU and the UN legal order: in the first the Court focuses on the internal order of the Community, assessing the constitutional principles on which it is based; in the second it examines how these can be reconciled with its international law obligations.

In the first part of its analysis, the ECJ adopted a diametrically opposite approach from that of the CFI: the Court did not begin by talking about Article 103 of the UN Charter and the primacy of international law, it rather underlined the principle that the Community is based on the rule of law. This very conscious choice of the Court's starting point of analysis, gives a clear message of what is about to follow. It seems to imply that the

[97] *Id.,* para 298.

[98] *Id.,* para 300.

[99] *Id.,* para 303.

[100] *Id.,* para 317.

[101] *Id.,* para 326.

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'complete system of legal remedies and procedures'[102] established by the basic constitutional charter of the Community, the EC Treaty, puts on the Court the obligation to undertake full review of a Community act challenged before it, when it has the jurisdiction to do so. In a second step, the ECJ turned to the constitutional principle established in the seminal ruling in *Van Gend en Loos*[103], namely the autonomy of the Community legal system, that it is for the Court to ensure that it will not be affected by an international agreement. It then proceeded by stressing that the respect for fundamental rights, which form an integral part of the general principles of Community law, is a condition of the lawfulness of Community acts. Thus, the ECJ, by referring to three constitutional principles of the EC law, namely the rule of law, the autonomy of the Community legal order and the respect for fundamental rights, reached the preliminary conclusion in this first part of its analysis concerning the relationship between the EU and the UN, that an international agreement cannot prejudice the constitutional principles of the EC Treaty and more particularly, the principle that all Community acts must respect fundamental rights, a principle the observance of which is for the Court to review in the framework of the complete system of legal remedies established by the EC Treaty.

In the second part of its analysis, the ECJ turned to examine what this preliminary conclusion means in terms of the international obligations of the EC. In this respect, it drew a very important distinction between the UNSC resolution on the one hand, and the EC regulation that implements it on the other. While the Community judicature can review the lawfulness of the later, it cannot examine the former. Furthermore, such a review of the EC implementing measure would not challenge the primacy of the UNSC resolution in international law. To support this thesis, the ECJ recalled the judgment in the case *Germany v Council*[104] where the Court annulled a Community measure approving an international agreement on the basis that it had breached the principle of non-discrimination, without affecting the existence of the international agreement. However, as AG Maduro stressed in his Opinion, the Community's municipal legal order and the international legal order do not "pass by each other like ships in the night"[105]. On the

[102] The credibility of the EC's statement that the EC provides a 'complete' system of legal remedies and procedures will not be discussed here. In this respect, on the issue of standing of 'non-privileged' applicants see: A. Albors Llorens, *The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?*, CLJ, 72 (2003);A. Arnull, *Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty*, CMLR 32, 7 (1995); A. Arnull, *Private Applicants and the Action for Annulment since Codorniu*, CMLR 38, 7 (2001); L. Gormley, *Judicial Review in EC and EU Law – Some Architectural Malfunctions and Design Improvements?*, 4 C.Y.E.L.S., 167 (2001); and X. Lewis, *Standing of Private Plaintiffs to Annul Generally Applicable European Community Measures: if the System is broken, where should it be fixed?* FORDHAM INTERNATIONAL LAW JOURNAL, 1496 (2006-2007). Should make these into separate footnotes

[103] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* 1963 E.C.R. 1.

[104] Case C-122/95 *Germany v. Counci,l* 1988 E.C.R. I-973.

[105] Opinion of AG Maduro in *Kadi, supra* note 54, para 22.

contrary, the Community respects its international law obligations under the UN Charter. But, since this does not impose the choice of a particular model for the implementation of SC resolutions, the Community has the free choice to decide on the model for their transposition. According to the ECJ, the question of the possibility of a judicial review of the implementing measure is linked to the model chosen for the transposition of the UNSC resolution. Here the Court seems to say that deciding on the method of implementation means also deciding whether judicial review of the implementing measure will exist. Thus, it concludes in this second part of its analysis that the principles governing the UN legal order do not exclude the judicial review of the lawfulness of the implementing measure.

It is clear that the ECJ adopted an internal, constitutional law perspective when examining the relationship between the Community legal order and the UN. It did so, by laying down the constitutional principles of the EC, which it has assumed the power to safeguard. As AG Maduro stressed in his Opinion, "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 under the conditions set by the constitutional principles of the Community"[106]. In this respect, the Court acts as the guardian of the integrity and functionality of the EC system[107]. Does this mean that the ECJ is adopting an excessively euro-centric approach, a sort of 'constitutional idolatry'[108] that closes the Community door to acts of international origin? More importantly, does it assume the role of some kind of a universal human rights protector that is watching other international organisations such as the United Nations and other bodies such as the UN Security Council? At this point, we should be reminded that the ECJ, by establishing the principle of primacy of EU law, does not accept that the national constitutional courts of the Member States can play this role with respect to it. In my view, there are two reasons that advocate in favour of the ECJ's self-oriented approach: first, concerning the serious deficits of the UN system as regards the observance of the fundamental rights of the individuals, it would be very dangerous to accept an unconditional submission of the EC to its decisions[109]. Secondly, the Court does not seek to establish itself as the guardian of the global legal order, since it does not review the UNSC resolutions, but the EC implementing measures. The ECJ put forward an additional argument: the UN legal system cannot determine the status and the effect of SC resolutions within the domestic legal order. The question whether the EC will allow the judicial review of the Community implementing measure with regards to higher

[106] *Id.*, para 24.

[107] M. Nettesheim, *U.N. Sanctions Against Individuals – A Challenge to the Architecture of European Union Governance*, CMLR 44, 567, 582 (2007).

[108] The expression is used by J. Baquero Cruz to describe the position of the German Constitutional Court with regards to European Community law; J. Baquero Cruz, *The Legacy of the Maastricht – Urteil and the Pluralist Movement*, EUROPEAN LAW JOURNAL 14 (4), 389, 407 (2008).

[109] M. Nettesheim, *supra* note 110, 592.

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Community norms is purely an internal one. In essence, what the Court is saying is that it will subject EC measures to its review, especially as far as fundamental rights are concerned, notwithstanding the fact that they derive from UN law.

But the Court did not stop there. It sought to examine whether there exists any basis in the EC Treaty that grants immunity from jurisdiction to a Community measure implementing a Security Council Resolution adopted under Chapter VII of the UN Charter. This part of the ECJ's analysis constitutes essentially its answer to the CFI's assessment that the Community is bound by the UN Charter by virtue of its own Treaty. At this point, it is worth taking a closer look at the CFI's reasoning. Article 307 EC, plays a prominent role in it. Article 307 (1) EC provides that: "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty". In this context, the CFI applied the judgment of the Court in *International Fruit Company*[110] by analogy, and reached the conclusion that "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"[111]. However, this finding of the CFI is problematic for a number of reasons. Firstly, the provision of Article 307 (1) EC does not imply a 'duty' of the Community to assume obligations previously exercised by the Member States[112]. Secondly, the reasoning of *International Fruit Company* cannot be applied to the EC's obligations under the UN Charter, as the two situations are fundamentally different. The Community has certainly taken up the Member States obligations in the area governed by GATT, as common commercial policy is a field where it claims exclusive competence, but it is very difficult to see how it has assumed the Member States powers in the area governed by the UN Charter, since it is no objective whatsoever of the Community to ensure international

[110] Joined Cases 21/72 to 24/72 *International Fruit Company and Others* ('*International Fruit*') 1972 E.C.R. 1219. In *International Fruit Company* the Court was asked to rule on the question whether a trade regulation was invalid for violation of the provisions of GATT. The Court therefore had to examine whether GATT was binding on the Community, notwithstanding the fact that the Community had never formally become a Contracting Party. It considered the fact that when the European Community was established the Member States were already Contracting Parties of the GATT, but the conclusion of the Treaty did not mean that they could withdraw from their obligations to third countries. On the contrary, their desire to observe the GATT followed from the provisions of the EEC Treaty and from their declarations in GATT. The Community had assumed the functions inherent in the tariff and trade policy by virtue of (old) Articles 111 and 113 EEC. By conferring those powers on the Community, the Member States showed their wish to bind it by the obligations entered into under GATT. It therefore appeared that, in so far as under the EEC Treaty the Community had assumed the powers previously exercised by Member States in the area governed by GATT, the provisions of that agreement had the effect of binding the Community.

[111] *Kadi, supra* note 3, para 203.

[112] M. Nettesheim, *supra* note 110, 584.

peace and security[113], the latter falling exclusively within the objectives of the European Union[114].

This interpretation of the CFI is not convincing for an additional reason: it grants Article 307 (1) EC 'a special status'[115] within the constitutional framework of the Community that authorises derogations from the principles enshrined in Article 6 (1) TEU. This reading of Article 307 EC was correctly rejected by the ECJ as unacceptable, since "Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights"[116]. The ECJ thus re-established the hierarchy of norms within the Community legal order, which was seriously challenged by the CFI's ruling[117]. In this context, it held that any primacy of the UN Charter can only be accepted over acts of secondary Community law and cannot extend to primary law, and in particular to the general principles of which fundamental rights form part[118]. This finding of the Court is to be applauded because it preserves the constitutional legal order of the Community, as it was initially established by the EC Treaty and subsequently interpreted by the case law of the ECJ, without departing from the fundamental principles on which it is based.

*IV. ECJ and ECtHR: a conflict?*

The Community judicature has not been the only one that has dealt with issues arising from the UN Charter. The European Court of Human Rights has been also called upon to rule in this respect. In *Behrami and Saramati*[119] the Strasbourg court held that it lacked jurisdiction *ratione personae* to review any conduct attributable to the UN. The case concerned the complaints brought by the Behramis for the death and serious injury of two children in Kosovo by the explosion of undetonated cluster bombs which had been dropped by NATO, and the complaint brought by Mr Saramati for his extra-judicial detention by KFOR, the security force established in Kosovo by UNSC Resolution 1244 (1999). It is not the purpose of the present article to comment on the various problems in

[113] See *Kadi, supra* note 3, para 117.

[114] *Id.*, para 118.

[115] See Opinion of AG Maduro in *Kadi, supra* note 54, para 31.

[116] *Kadi & Al Barakaat*, *supra* note 2, para 304.

[117] N. Lavranos, *Judicial Review of Sanctions by the Court of First Instance*, (2006) EUROPEAN FOREIGN AFFAIRS REVIEW 11, 471, 478; and A. Rosas, *"The European Court of Justice and Public International Law"*, in J. Wouters, P. A. Nollkaemper, E. de Wet (eds), THE EUROPEANISATION OF INTERNATIONAL LAW, 71, 78 (2008).

[118] *Kadi & Al Barakaat, supra* note 2, paras 307-308.

[119] Joined Cases *Behrami and Behrami v. France* (Appl. No. 71412/01) and *Saramati v. France, Germany and Norway* (Appl. No. 78166/01), 45 EHRR SE10. See case-note by A. Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, HRLR 8 (1), 151 (2008)..

the reasoning of the ECtHR, suffice it to say that the *Behrami and Saramati* decision is to be distinguished from *Kadi*. The Strasbourg court ruled on the issue of jurisdiction and concluded that it was incompetent *ratione personae* to decide on the case, as the involved actions and omissions were not ascribable to the respondent States, but directly to the UN, and concerned more particularly, a subsidiary organ of the UN created under Chapter VII, or actions falling within the exercise of powers lawfully delegated by the SC under that Chapter. On the contrary, in *Kadi* since the ECJ held that the Community had the competence to adopt and implement smart sanctions, the Court consequently had jurisdiction to review the legality of such measures with regard to primary EC law. In other words, the ECJ did not have to deal with the question of jurisdiction, as the measures before it, were adopted by the Community itself, even if they derived from UNSC resolutions, and were under no circumstances to be attributable to the UN. As the ECJ rightly held, the question of the Court's jurisdiction arises in the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights.

There is an additional argument that favours the position that *Behrami and Saramati* is different from *Kadi*. This comes from the case law of the ECtHR itself and concerns the finding of the Strasbourg court in *Bosphorus*[120]. The case concerned the impoundment by the Irish authorities of an airplane leased by the Turkish airline Bosphorus from JAT, the state-owned Yugoslav airline. This was carried out in conformity with an EC regulation implementing UN Security Council sanctions against the Federal Republic of Yugoslavia. The ECtHR did not consider that any question arose as to its competence, notably *ratione personae*, vis-à-vis Ireland despite the fact that the source of the impugned seizure was an EC Council Regulation, which, in turn, applied a UNSC Resolution, and proceeded to pronounce on the merits of the case. In this context, it is unimaginable how the ECJ would decline jurisdiction to review the legality of a Community measure in the light of primary EC law, when the Strasbourg court has assumed jurisdiction to examine a national measure implementing a Community regulation, taken pursuant to a SC resolution. If the Luxembourg court were to adopt such an approach, this would be also problematic from the point of view of the ECtHR, which ruled in *Bosphorus* that "any presumption [of equivalence of the protection of human rights provided by an international organization] can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights"[121].

[120] Case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* ( App. No. 45036/98). See case-note by S. Douglas-Scott, *CM LR* 43, 243 (2006).

[121] *Bosphorus v. Ireland*, *supra,* note 124, para 156.

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Thus, it seems clear that there is no conflict between the Luxembourg and the Strasbourg court regarding their position with respect to the UN Charter. However, it remains to be seen how the Strasbourg court will react if it is called upon to rule whether there has been a breach of the Convention by national measures that implement a SC resolution imposing smart sanctions, and which have been adopted by a Contracting Party, which is not a Member of the EU (such as Switzerland). In this case, it is certainly very interesting to see whether the ECtHR will adopt a deferential approach towards the UN, or whether it will follow the path opened by the ECJ's landmark decision in *Kadi*.

*V. The scope of the judicial review: Who has the last word?*

Unlike the CFI, which considered that it could not review the Community regulation imposing smart sanctions on the basis of fundamental rights since that would mean that it was reviewing indirectly the SC resolutions, the ECJ held that it had the obligation to ensure the full review of such a measure[122]. This is not contrary to international law under the UN since the ECJ did not assess the lawfulness of the SC resolution, but undertook the judicial review of an internal, Community act giving effect to an international Treaty. The review, therefore, by the Court of the validity of a Community measure in the light of fundamental rights is the expression of a 'constitutional guarantee' stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement[123].

In this respect, the Court could not but reject the argument put forward by the Commission that 'so long as' under the sanctions system the individuals and entities concerned have an 'acceptable opportunity to be heard through a mechanism of administrative review', the Court must not intervene in any way whatsoever[124]. According to the Court, 'an acceptable opportunity to be heard' cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community, more importantly as the re-examination procedure before the Sanctions Committee does not offer the guarantees of judicial protection[125]. At this point, the ECJ took into account the improvements that had taken place concerning the de-listing procedure before the Sanctions Committee, in particular with the creation of the 'focal point'. However, it did not hesitate to reach the conclusion that the Community judicature must ensure the full review of all Community acts, thus underlying that it is the Community courts that have the last word over EC measures, even if those seek to implement SC resolutions.

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[122] *Kadi & Al Barakaat*, *supra* note 2, para 326.

[123] *Id.,* para 316.

[124] *Id.,* para 319.

[125] *Id.,* paras 321-322. The Sanctions Committee can be characterized as an administrative, rather than a judiciary body, since the procedure for listing and de-listing individuals is in essence diplomatic and intergovernmental, and does not provide in any case for the full guarantees of judicial protection.

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*VI. Concluding remarks*

The ECJ's assessment on the issues of the relationship between the EU legal order and the UN and the scope of the judicial review that the Community courts must carry out are undoubtedly of paramount importance concerning the fundamental legal principles underpinning the Community legal order. In this context, one wonders whether the ECJ was fundamentally dualist in its approach vis-à-vis international law. I disagree with such an argument. The Court in numerous points in its analysis stressed that the Community respects international law, and what the ECJ has jurisdiction to review is a Community measure and under no circumstances the SC resolution. On the other hand, the Court's judgment certainly cannot be categorised as monist in character. However, the ECJ did not disregard or ignore the SC but sent the clear message that it is the Community's judicature constitutional role to uphold the rule of law and the protection of fundamental rights within the Community legal order. Does this mean that the ECJ sought to engage in a dialogue with the SC? More importantly, does it mean that the Court 'threatened' the SC that if it does not provide an adequate protection of fundamental rights then the ECJ will assume this role? In essence, is *Kadi* the 'Solange' decision of the ECJ? As it is known, the German Federal Constitutional Court in a series of decisions[126], starting from 1974 reserved the competence to exercise its jurisdiction with regard to Community law if it was not satisfied with the protection of fundamental rights within the EC legal order. The 'Solange principle' was employed subsequently by a number of constitutional courts to question the principle of primacy of the Community legal order. Pursuant to the 'Solange principle' respect is made for competing jurisdictions conditional on the assessment that those from their part respect constitutional principles of human rights and the rule of law.

It is very arguable whether the Court employed such a conditionality approach vis-à-vis the SC in *Kadi*. It certainly referred to the re-examination procedure before the Sanctions Committee and found that it did not offer the necessary safeguards as it was 'in essence diplomatic and intergovernmental'[127]. However, it did not seem to adopt explicitly a Solange argument[128]. In my view, this approach taken by the Court is correct. It demonstrates its respect towards international law, while at the same time safeguards the constitutional principles of the domestic legal order. At the end of the day, it is not

[126] BverfG 37, 327 (Solange I), BverfG 73, 339 (Solange II) and BverfG 89, 115 (Maastricht- Urteil).
[127] *Kadi & Al Barakaat*, *supra* note 2, para 323.

[128] In my view, a Solange argument can more easily be found in AG's Opinion who observes: "… as the system governing the functioning of the United Nations now stands, the only option available to individuals who wish to have access to an independent tribunal in order to obtain adequate protection of their fundamental rights is to challenge domestic implementing measures before a domestic court … Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists". Opinion of AG Maduro in *Kadi* (note 54), paras 38 and 54.

fundamentally important whether the ECJ's judgment can be categorized as monist, dualist or pluralist. What is important is whether the Court has found a mechanism to ensure that fundamental rights are observed within the Community legal order even in times "when the risks to public security are believed to be extraordinarily high"[129]. Thus, the importance of the ECJ's judgment in *Kadi* lies in the role of the judiciary within the EC legal order, which, by applying the highest level of judicial scrutiny for the protection of fundamental rights, established itself as the constitutional guardian of those rights.

## E. The protection of fundamental rights

The CFI and the ECJ adopted different positions concerning the protection of the fundamental rights of the individuals targeted by smart sanctions. This section will analyse their respective approaches (I and II), and provide a comment on the issue of the protection of the rights of the suspected terrorists within the EC legal order (III).

### *I. The approach of the CFI*

As mentioned above, the Court of First Instance considered that "the resolutions of the SC fall, in principle, outside the ambit of the Court's judicial review and ... the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law"[130]. However, it held that it was empowered to check indirectly the lawfulness of those resolutions 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 which no derogation is possible"[131].

Applying this standard of judicial review, which amounted in essence to an examination of whether 'inhuman or degrading treatment' had taken place, the CFI found that there was no breach of the applicant's rights. In particular, according to the Court as far as the right to respect for property was concerned, there was no arbitrary deprivation of this right. Moreover, with regard to the right to a fair hearing, the CFI drew a distinction between on the one hand, the right of the applicants to be heard by the Council of the EU in connection with the adoption of the contested regulation and their right to be heard by the Sanctions Committee in connection with their inclusion in the sanctions list on the other. In both cases, the Court held that there was no violation of the fundamental right to fair hearing. Similarly, the CFI concluded that there was no breach of the right to effective judicial review, since the Court had accepted to review the lawfulness of the contested regulation,

[129] Opinion of AG Maduro in *Kadi, supra* note 54, para 35.

[130] *Kadi, supra* note 3, para 225.

[131] *Id.,* para 226.

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and indirectly of the resolutions of the SC, with regard to *jus cogens*. According to the CFI, the limitation of the applicants' right of access to a court, as a result of the immunity from jurisdiction enjoyed by resolutions of the SC adopted under Chapter VII, "is inherent in that right as it is guaranteed by *jus cogens*"[132].

*II. The approach of the ECJ*

As seen above, the ECJ applied a high level of judicial scrutiny, and concluded that "the 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"[133].

The Court stressed the importance of the obligation to communicate to the individuals the grounds for their inclusion in the 'terrorist list' in order to enable them to exercise their rights of defence, and also to put the Community judicature in a position in which it may carry out the review of the lawfulness of the EC measure in question. The ECJ accepted the 'surprise effect'[134] that contributes to the effectiveness of the sanction before the name of a person or entity is entered in the list for the first time[135]. However, this does not mean that smart sanctions escape all review by the Community judicature[136]. Thus, according to the Court the contested regulation was adopted according to a procedure in which the appellants' rights of defence were not observed, which had the further consequence that the principle of effective judicial protection was infringed[137].

The ECJ sought also to examine Mr. Kadi's plea with regard to breach of the right to respect of his property. It observed that this right is not absolute, but concluded that in so far the contested regulation did not furnish any guarantee enabling Mr Kadi to put his case to the competent authorities, "in a situation in which the restriction of his property rights must be regarded as significant", it constituted an unjustified restriction of his right to property[138].

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[132] *Kadi, supra* note 3, para 288.

[133] *Kadi & Al Barakaat, supra* note 2, para 334.

[134] By 'surprise effect' here the Court means the surprise element that smart sanctions must, 'by their very nature' take advantage of, in that prior communication of such measures to the persons targeted by them, could be liable to jeopardize their effectiveness.

[135] *Kadi & Al Barakaat*, *supra* note 2, paras 338-342.

[136] *Id.,* para 343.

[137] *Id.,* para 352.

[138] *Id.,* paras 368-371.

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*III. Fundamental rights and the fight against terrorism: A victory?*

The ECJ's judgment in *Kadi* is one of the most important that the Court has delivered on the protection of fundamental rights within the EC legal order. The Court commenced its analysis by referring to the principle of effective judicial protection as a general principle of Community law stemming from the constitutional traditions of the Member States, but also enshrined in Articles 6 and 13 ECHR and in Article 47 of the Charter of Fundamental rights of the EU[139]. It then examined together the rights to be heard and the right to effective judicial review, as violation of the former would necessarily imply that the latter cannot be exercised effectively. In other words, if the grounds for the inclusion of an individual or an entity in the terrorist list are not communicated to him, he cannot exercise his rights of defence, and furthermore the Community judicature is not in a position to carry out full judicial review. While it accepted that within the context of the fight against terrorism, 'overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States' may limit the right to a fair hearing, that does not mean a total immunity from jurisdiction with regard to measures concerning national security and terrorism. The ECJ sought to engage in a balancing exercise, in order to accommodate, on the one hand, the "legitimate security concerns about the nature and the sources of information taken into account in the adoption of the act concerned", and on the other, "the need to accord the individual a sufficient measure of procedural justice". This is certainly not an easy task, but it provides once more a clarification of the Court's position: it does not examine the information available at the level of the SC for the inclusion of the individuals in the terrorist list, which is based on intelligence sources, but it will not tolerate that the individuals concerned are totally deprived of their due process rights. Thus, because the Council neither communicated to the persons concerned the evidence used against them to justify the imposition of smart sanctions, nor afforded them the right to be heard, their rights of defence were violated, with the further consequence that the right to an effective legal remedy was also infringed.

The Court examined separately whether there had been a breach of the right to property. It noted that it is not absolute and may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the Community and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right. It accepted the importance of smart sanctions, in particular the freezing of funds, in the fight against terrorism and observed that those are temporary precautionary measures, and thus, they do not amount to confiscation. Moreover, even if they entail a considerable restriction to the individuals' right to property, this cannot *per se* be regarded as inappropriate or disproportionate with reference to an objective of general interest as fundamental to the international

[139] *Id.,* para 335.

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community as the fight against terrorism[140]. However, it found that there existed "a procedural requirement inherent in Article 1 of Protocol No 1 to the ECHR", namely that the person concerned was afforded "a reasonable opportunity of putting his case to the competent authorities"[141]. Therefore, in so far the contested regulation did not comply with this procedural requirement, it constituted an unjustified restriction of Mr Kadi's right to property.

The ECJ in its approach on the question of violation of the rights of the persons alleged to be associated with international terrorism, focused primarily on the protection of those fundamental rights by the Community legal order. It did not disregard the security concerns of the international community, but it took seriously its duty 'to preserve the rule of law'[142] by acting as the guardian of fundamental rights within the EC legal order. At this very point its approach is differentiated from that of the CFI. The latter adopted a very deferential position towards the SC, with the further result of failing to protect the fundamental rights of the individuals. This finding cannot be called into question by the fact that the Court engaged in a kind of a judicial review with regard to *jus cogens*. In fact, it is questionable both from the point of view of international law and European law how a regional court could define and apply *jus cogens* in order to review a domestic measure[143]. In my opinion, the ECJ's euro-centric approach is much more preferable from the point of view of fundamental rights. The Court managed to handle correctly a 'political question', without turning its back on the fundamental values that lie at the basis of the Community legal order[144].

In this respect, there is one more observation to be added. Many maintain that the ECJ should have applied international human rights standards rather than domestic ones. This position cannot be accepted because it would complicate things further. It is natural that the Court should apply the law of the legal order where it belongs. A different position would produce the same problematic results that arose with the interpretation and application of *jus cogens* by the CFI. In any case, it is well known that the ECJ draws inspiration from the protection of fundamental rights in international treaties, as well as in the common constitutional traditions of the Member States, since there exists at present no Community Bill of Rights. However, it is clear that what the Court applies is and should be its domestic law, namely EC law.

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[140] *Id.,* para 363.

[141] *Id.,* para 368.

[142] Opinion of AG Maduro in *Kadi, supra* note 54, para 45.

[143] P. Eeckhout, *Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit*, 3 EUROPEAN CONSTITUTIONAL LAW REVIEW, 183, 195 (2007).

[144] Opinion of AG Maduro in *Kadi, supra* note 54, para 44.

**F. Now what? Complying with the ECJ's ruling in *Kadi***

The Court annulled the Council regulation in so far as it froze Mr Kadi and Al Barakaat's funds, by reason of breach of their fundamental rights. However, it observed that it was conceivable that on the merits of the case, the imposition of the restrictive measures on the appellants may all the same prove to be justified[145]. Furthermore, it noted that the annulment of the regulation with immediate effect would be capable of "seriously and irreversibly prejudicing the effectiveness of the restrictive measures", because Mr Kadi and Al Barakaat "might take steps seeking to prevent measures freezing funds from being applied to them again"[146]. As a result, the ECJ maintained, on the basis of Article 231 EC, the effects of the regulation for a period of no more than three months running from the date of delivery of the judgment, in order to allow the Council to remedy the infringements found[147].

The Community institutions responded promptly to the ECJ's judgment and two Commission regulations were issued in this respect. The first issued on 6 November 2008[148] states that "the Commission will communicate the grounds on which this Regulation is based to the individuals concerned, provide them with the opportunity to comment on these grounds and review this Regulation in view of the comments and possible available additional information". The second of 28 November 2008[149] notes that "in order to comply with the judgment of the Court of Justice, the Commission has communicated the narrative summaries of reasons provided by the UN Al-Qaida and Taliban Sanctions Committee, to Mr Kadi and to Al Barakaat International Foundation and given them the opportunity to comment on these grounds in order to make their point of view known". It provides further that the Commission has received comments by Mr Kadi and Al Barakaat, and after having carefully considered the comments, considers their listing justified for reasons of their association with the Al-Qaida network. "This Regulation should apply from 30 May 2002, given the preventive nature and objectives of the freezing of funds and economic resources under Regulation (EC) No 881/2002 and the need to protect legitimate interests of the economic operators, who have been relying on the legality of the annulled Regulation".

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[145] *Kadi & Al Barakaat*, *supra* note 2, para 374.

[146] *Id.,* para 373.

[147] *Id.,* para 375.

[148] Commission Regulation (EC) No 1109/2008 of 6 November 2008 amending for the 100th time Council Regulation No 881/2002 imposing certain specific measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ L 299/03 of 8.11.2008.

[149] Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation No 881/2002 imposing certain specific measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ L 322/25 of 2.12.2008.

The question that arises therefore is whether the above-mentioned Commission regulations could be regarded as appropriate compliance with the ECJ's ruling in *Kadi*. The answer is probably to the negative, as it does not seem that the due process requirements asked for by the Court's decision are met. Mr Kadi and Al Barakaat merely received the 'narrative summaries of reasons' provided by the Sanctions Committee and were given the opportunity to comment on them. On this basis, they were re-added in the list. However, it should be noted that compliance of the EC institutions with the ECJ's ruling seems indeed a very difficult task, as the smart sanctions are decided at the UN level, and therefore the EU institutions cannot have more information than the UN is willing to provide, that being limited only to the narrative summary of reasons.

So, what should be done in order to fully comply with *Kadi*? In my view, that is not a question of the EU institutions any more. It is a matter of the UNSC whether it will establish a procedure, providing all the guarantees of an independent judicial review that will examine the listings and de-listings. If this is not possible due to the nature of the information at issue, then it seems that there is only one solution left: the abolition of the Sanctions Committee and its terrorist listing, and the adoption of smart sanctions by each State individually.

**G. Conclusions**

The ECJ was faced in *Kadi* with a number of issues of constitutional significance for the Community legal order. Its judgment is to be welcomed as it provided with a solid analysis brave answers to difficult questions. Certainly, the principles of the autonomy of the Community legal order, of the rule of law and of the protection of fundamental rights are not new in the Court's case law. However, based on them, it proved that it would not adopt a passive stance even when 'political questions' were concerned. Its position vis-à-vis the UN legal order is remarkable: the Court showed respect but not deference. On the contrary, the CFI's reasoning and more importantly its ruling are problematic for a number of reasons.

The part of the ECJ's analysis on the legal basis question is to be criticised as it is characterised by a number of inconsistencies and weaknesses. In this respect, the CFI's reasoning seems more convincing. However, both Courts reach the same conclusion and it is difficult to see how smart sanctions could be adopted and implemented effectively today unilaterally by each Member State. This finding is confirmed by the relevant provision of the Lisbon Treaty, which grants the EU the power to adopt restrictive measures against individuals.

The ECJ's analysis on the relationship between the Community legal order and the UN contains some core constitutional principles. *Kadi* could be arguably characterised as the 'Solange decision of the EU', although the Court is very careful with its formulation and it

certainly shows that it observes international law. Such an observance though, does not imply subordination and acceptance of a total immunity from judicial review. In the heart of the Court's analysis, lies the distinction drawn between the UNSC resolutions and its implementing measures at the EU level. This demonstrates exactly that the ECJ will not question the former, but it certainly has jurisdiction to examine the latter.

For those concerned on the fundamental rights issues that arise in the 'war on terrorism' the ECJ's judgment in *Kadi* is certainly a relief. Following the AG, the Court succeeded to establish a fair balance between the security interests and the protection of human rights. The Court was not interested whether the applicants were correctly included in the list, something that it is not in a position to examine, but whether their due process rights were respected. Once more, the CFI's analysis at this point based on *jus cogens* is very problematic.

The question of what are the steps to be taken in order to fully comply with the ECJ's judgment in *Kadi* still remains. It seems though that the answer to this is to be found at the UN rather than at the EU level.

In conclusion, *Kadi* constitutes undeniably a groundbreaking decision that marks the role of the judiciary in times when human rights suffer. As AG Maduro noted "this is precisely when courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of tomorrow"[150]. *Kadi* certainly proves that the Community judiciary is involved.

[150] Opinion of AG Maduro in *Kadi, supra* note 54, para 45.

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