Hands off the Untouchable Core: A Constitutional Appraisal of the *Kadi* Case

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Abstract

The paper starts its investigation from the analysis of the recent – and by now landmark – decision of the Court of Justice of the European Communities in the *Kadi* case. After recalling the harshly criticised outcome of the Court of First Instance decision on the same matter, the paper underlines the constitutional implications of the new, pluralistic approach adopted by the European Court of Justice. In particular, it explores the nature of the new conflict settlement patterns which seem to emerge from the reasoning of the European Judge. Finally, after pointing out the consequences of the decision, the paper discusses a prospective new scenario of interactions between interconnected legal orders in the new season of cooperative constitutionalism in Europe.

A. The Decisions of the Court of First Instance and the 'U-turn' of the Court of Justice

On 3 September 2008, the Grand Chamber of the European Court of Justice (hereafter ECJ) pronounced a judgment (in joined cases C402/05P and C415/05P), of great importance: indeed, some authors have called it no less than 'historical'.[1]

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[1] *See for example* – among Italian authors – the title of the section devoted to this judgment in 10 Giornale di diritto amministrativo 1088 *et seq.* (2008): Terrorismo internazionale e principi di diritto. Una sentenza della Corte di giustizia che fa storia (with contributions by A. Sandulli, *Caso Kadi: tre percorsi a confronto*; S. Cassese, *Ordine comunitario e ordine globale*; E. Chiti, *I diritti di difesa e di proprietà nell'ordinamento europeo*; M. Savino, *Libertà e sicurezza nella lotta al terrorismo; quale bilanciamento?*; G. Vesperini, *Il principio del contraddittorio e le fasi comunitarie di procedimenti globali*; G. della Cananea, *Un nuovo nomos per l'ordine globale*).

On the judgment dated 3 september 2008 *see also* A. Gattini, *Joined Cases C–402/05 P & 415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, Judgment of the Grand Chamber of 3 September 2008*, 46 Common Market Law Review 213 (2009); S. Griller, *International Law, Human Rights and the European Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in Kadi*, 4 European Constitutional

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In this judgment, the Court reversed the approach the Court of First Instance (hereafter CFI) had followed three years earlier in the appealed decisions – as well as in other subsequent ones, albeit with some slight 'adjustments'.[2] The ECJ thus reaffirmed, at last, the fundamental rights and principles of European constitutionalism. For a few years, such principles and rights had been endangered, and even partially diminished, by certain Community regulations 'implementing' orders issued by the United Nations 'sanctions committee'[3] in the framework of the so-called 'fight against terrorism'. The regulations provided for a series of severe measures (including the freezing of assets and travel restrictions) against people and entities suspected of supporting terrorists and included in a sort of 'black list'. This list was drafted by the sanctions committee itself on the basis of confidential information provided by States and international organizations. No effective means of defense and control (either preventive or at least, and more reasonably, subsequent) were arranged: in fact, they were actually made impossible – due to the non-disclosure of circumstantial evidence[4] if nothing else.

Law Review 528 (2008); B. Kunoy & A. Dawes, *Plate Tectonics in Luxembourg: The Ménage à Trois Between EC law, International Law and the European Convention on Human Rights Following the UN Sanctions Cases*, 46 Common Market Law Review 73 (2009); *Case-note on Joined Cases C-402/05 P & C-415/05 P Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of European Union & Commission of European Communities*, 10 German Law Journal 123 (2009); M. Cremona, *European Law and International Law After Kadi*, speech given at Bristol University on 3 November 2008; R. Dickmann, *Il "principio di legalità comunitaria" nel sindacato della Corte di giustizia delle Comunità europee degli atti comunitari esecutivi di risoluzioni del Consiglio di sicurezza delle Nazioni Unite*, availabe at federalismi.it; G. F. Ferrari, *Verso una Corte di giustizia costituzionale?*, 1 Diritto pubblico comparato ed europeo 187 (2009).

[2] *See mainly* judgment of 12 December 2006 in *Case T-228/02, Organisation des Modjahedines du peuple d'Iran v. Council of the European Union*, [2006] ECR II-4665 (though in a slightly different context), discussed *infra*, as well as the previous judgments of 12 July 2006 in *Case T-253/02, Chafiq Ayadi v. Council of the European Union*, [2006] ECR II-2139 and *Case T-49/04, Faraj Hassan v. Council of the European Union and Commission of the European Communities* [2006] ECR II-52 (in a context which, on the other hand, is more similar to ours).

For a short but precise synthesis of the novelty elements contained in the latter judgments, *see* Chiti, *supra* note 1, at 1093. *See also*, among Italian authors, S. Cerini, *Ancora una decisione del Tribunale europeo di primo grado sulle pratiche di 'Blacklisting'*, 26 Rivista della cooperazione giuridica internazionale 113 *et seq.* (2007), and V. Bazzocchi, *Le Corti e la lotta al terrorismo*, available at www.europeanrights.eu (referring also to other decisions, which somehow fall under the fight against terrorism 'trend', as well as several other judgments of national Courts and of the European Court of Human Rights). Lastly, we may mention – on strictly connected issues – the Court's judgment of 26 April 2005, *Joined Cases T-110/03, T-150/03 and T-405/03, Jose Maria Sison v. Council*, [2005] ECR II-1429, and the subsequent Judgment of 1 February 2007 (deciding as court of appeal) in *Case C-266/05 P, Jose Maria Sison v. Council*, [2007] ECR I-01233, (in this regard *see* A. Vedaschi, *War on Terrorism v. Openness*, 2 Diritto pubblico comparato ed europeo 694 *et seq.* (2007)).

[3] *See, in particular*, Security Council Resolutions 1267(1999) of 15-10-1999 and 1333(2000) of 19-12-2000, and the subsequent Resolutions 1390(2002) of 16-1-2002, 1452(2002) of 20-12-2002 and 1455(2003) of 17-1-2003.

[4] For a more thorough reconstruction of the whole matter (and for a few critical considerations on the CFI approach, now overruled by the Court, as suggested at the time) we take the liberty to refer to V. Sciarabba, *I diritti e i principi fondamentali nazionali ed europei e la problematica*

Now, in the case at hand – to adopt the actual framing of the heart of the matter offered by the ECJ itself (at item 280 of the decision of 3 September) – there was a need to "consider the heads of claim in which the appellants complain that the Court of First Instance, in essence, held that it followed from the principles governing the relationship between the international legal order under the United Nations and the community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, could not be subject to judicial review of its internal lawfulness, save with regard to its compatibility with the norms of *jus cogens*, and therefore to that extent enjoyed immunity from jurisdiction."[5]

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comunitarizzazione delle risoluzioni antiterrorismo dell'ONU (2005), available at www.associazionedeicostituzionalisti.it, and in 1 Rassegna Forense 147 (2006).

Among the many works that have discussed the mentioned twin judgments of 21 September 2005, we mention, in Italy: B. Conforti, *Decisioni del Consiglio di sicurezza e diritti fondamentali in una bizzarra sentenza del Tribunale comunitario di primo grado*, 3 Il diritto dell'Unione europea 333 *et seq.* (2006), E. Chiti, *La prevalenza del diritto delle Nazioni Unite su quello europeo*, 12 Giornale di diritto amministrativo 150 *et seq.* (2006), G. Della Cananea, *Una indebita limitazione del due process of law da parte delle Nazioni Unite e dell'Unione europea*, 12 Giornale di diritto ammnistrativo 155 *et seq.* (2006), B. Concolino, *L'applicazione delle sanzioni del Consiglio di sicurezza nella CE: competenza vincolata c. tutela dei diritti umani*, 1 Diritto pubblico comparato ed europeo 147 *et seq.* (2006), R. Dickmann, *L'efficacia delle risoluzioni del Consiglio di sicurezza delle Nazioni unite nell'ordinamento comunitario*, available at federalismi.it, A. Gianelli, *Il rapporto tra diritto internazionale e diritto comunitario secondo il Tribunale di primo grado delle Comunità europee*, 1 Rivista di diritto internazionale 131 *et seq.* (2006), P. Bonetti, *In nome della sicurezza internazionale si possono limitare i diritti di difesa, di giusto processo e di proprietà di potenziali finanziatori del terrorismo?*, 1 Quaderni costituzionali 144 *et seq.* (2006).

See also E. Cannizzaro, *Machiavelli, the UN Security Council and the Rule of Law*, Global Law Working Paper 11/05, available at www.law.nyu.edu, C. Tomuschat, *Primacy of the United Nations Law. Innovation Features in the Community Legal Order*, 43 Common Market Law Review 537 *et seq.* (2006), N. Lavranos, *Judicial Review of UN Sanctions by the Court of First Instance*, 11 European Foreign Affairs Review 471 *et seq.* (2006), E. Sciso, *Fundamental Rights and Article 103 of the UN Charter Before the Court of First Instance of the European Communities*, 15 Italian Yearbook of Int. Law 137 *et seq.* (2005), I. Ley, *Legal Protection Against the UN-Security Council Between European and International Law: a Kafkaesque Situation?*, 8 German Law Journal 279 *et seq.* (2007), C. Eckes, *Judicial Review of European Anti-Terrorism Measures. The Yusuf and Kadi Judgments of the Court of First Instance*, 14 European Law Journal 74 *et seq.* (2008).

More generally, on the issues in question, *see* A. Ciampi, Sanzioni del Consiglio di sicurezza e diritti umani (2007), and A. Lang, Le risoluzioni del Consiglio di sicurezza delle Nazioni Unite e l'Unione europea (2002).

Lastly, the first part of the work by Sciarabba, *supra*, deals thoroughly with the issue of the Community 'competence's' 'legal basis' to adopt measures such as those we are discussing – an issue we deem appropriate to skip entirely in this article (with regard to this problem *see also* the book by Ciampi just mentioned above, 198 *et seq.*; M. E. Bartolini, *L'ambito di applicazione ratione personae degli articoli 301 e 60 TCE nelle recenti sentenze Yusuf e Kadi*, 3 Il diritto dell'Unione europea 317 *et seq.* (2006); and, with regard to the Court judgment of 3 September 2008, the already mentioned comment by Ferrari, *supra* note 1.

[5] B. Conforti defines the reference to the *jus cogens* in this context as 'bizarre', Decisioni del Consiglio di sicurezza e diritti fondamentali in una bizzarra sentenza del Tribunale comunitario di primo grado, above, at 341. After developing a few critical considerations on this issue, the Author

Actually, the CFI (item 275 of the judgment T-306/01 dated 21 September 2005) had even considered the possibility of there being "infringements either of fundamental rights as protected by the community legal order or of the principles of that legal order" entirely irrelevant. This was simply a consequence of the overall construction of the relationship between the national, Community and international legal systems, on the basis of a sort of syllogism that can be summarised as follows:

I) in joining the United Nations, States have accepted (though – it should be noted – *at the international law level*) that the obligations deriving from the UN Charter prevail on any other conventional obligation,[6] as well as on any internal obligation;

II) the delegation of state functions to the European Communities has not put the principle of the prevalence of "UN obligations"[7] in discussion. On the contrary, this principle is said to be implicitly, or even expressly, accepted by the Community Treaties;[8]

III) therefore, the Community cannot validly infringe this principle when exercising its responsibilities, for instance by annulling, even in part, the effectiveness of Security Council resolutions, which are required (or intended) to be implemented at Community level.[9] Thus, such prohibition would not derive from specific international obligations of the Community (which, one must point out, is only marginally included, institutionally, in the

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expresses his well-grounded "impression that in the case at hand the transposition of the problem of the respect of fundamental rights from Community law to the international law level was only an easier way to adopt a negative solution in respect of the breach of the said fundamental rights" (ibidem, 341).

6 *See* art. 103 of the Charter of the United Nations.

7 *See* items 235, 240, 248 and 249 of the judgment T-306/01 of 21-9-2005.

8 The CFI refers, in particular, to art. 297 and 307 EC Treaty to reach the conclusion – far from unquestionable if one carefully considers the two mentioned provisions – that "the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it" (item 243). Moreover, *see* in this regard item 254.

9 A significant passage in this line of reasoning is the one in which the CFI firmly affirms that "the applicants' arguments based, on the one hand, on the autonomy of the Community legal order vis-à-vis the legal order under the United Nations and, on the other, on the necessity of transposing Security Council resolutions into the domestic law of the Member States, in accordance with the constitutional provisions and fundamental principles of that law, must be rejected" (item 258).

It is obvious – but, as an absolutely central point, worth mentioning – that between such *possibly* excessive (in its second part) instance, and the unsatisfactory approach of the CFI, *tertium datur*. Essentially: implementation at Community level – leaving problems of competence aside – but *in compliance with the fundamental principles of the relevant legal order*, and therefore, in principle, in compliance with the fundamental principles of single national orders, from which those of the Community order largely derive.

United Nations order),[10] but from a sort of 'communitarisation' of the States' international obligations.[11]

As it was observed at the time,[12] the main 'weakness' of this construction seemed to lie in the circumstance, which the CFI itself acknowledged at item 231 of its judgement, that the absolute and unconditioned prevalence of obligations deriving from the United Nations legal order was justified (and was exclusively arguable) "from the international point of view";[13] whereas, in respect of domestic rights, particularly but not exclusively in Italy, one could raise strong and intuitive objections, affecting the resulting position of the Community legal order.

B. The Formal Scheme Provided by Art. 307: A Constitutional Law Comparison

In light of the CFI's recalled argumentation, the issue of the relationship between international and EC law represents the real subject of the question.

Keeping this in mind and looking at the text of the Treaties, the first provision to consider is art. 307 ECT, which can be regarded as a sort of term of comparison with the national European clauses.

By national European clauses we refer to all the provisions included in the member States' constitutions, regulating the relationship between domestic and supranational law.

As we know, there is no real primacy clause at the European level (it was devised by the genius of the ECJ in *Costa/Enel*).[14] On the other hand, it is interesting to notice how diversified the perception of the European primacy is at national level.

As a matter of fact, while at the supranational level the primacy principle has been characterized by a changing nature, national legal orders have devised several 'strategies' in the attempt of guaranteeing primacy. They can be grouped as follows:

a) legal orders which accept a monist vision of the relationship between legal orders and provide for the unconditioned acceptance of EC law (the Netherlands, Belgium, Luxembourg).[15] In the Netherlands, for example, art.

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[10] *See* item 242, where the CFI states (in line with previous case-law) that "the Community as such is not directly bound by the Charter of the United Nations and that it is not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter. The reason is that the Community is not a member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law."

[11] Such operation is not new in itself, but here it is characterized by absolutely peculiar elements, profiles and effects.

[12] Sciarabba, *supra* note 4.

[13] "[And] what else could it state!," B. Conforti in this regard, *supra* note 4, at 342.

[14] Judgment of 15 July 1964 in *Case 6/64, Flaminio Costa v E.N.E.L*, [1964] ECR 585, at 614.

[15] For a similar schematization see: F. Palermo, *Nuove occasioni (mancate) per una clausola*

94 of the Constitution[16] – according to a generally accepted interpretation[17] – states that international law is not only part of, but it is also superior to, any domestic law. The same applies to EC law.

b) legal orders which expressly constitutionalize a set of limits to European integration (Germany,[18] Finland,[19] Sweden[20]). The German provision is the best example because for certain aspects it is a codification of the German Constitutional Court's claims in the well-known *Solange* saga (*Solange I*[21], *Solange II*[22], *Maastricht*[23], *Banana*[24]).[25] According to this view, Constitutions can accept supranational integration *as long as* ('solange' in German) it does not jeopardize the national constitutional structure.

In this respect, it is very interesting to notice that the *Solange* doctrine implies a sort of constitutional and moral superiority of the national legal orders *vis-à-vis* the supranational level. This form of constitutional superiority is usually justified by referring to the democratic deficit characterizing the EU. See, for example, *Solange I*: "The Community still lacks a democratically legitimated

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europea nella Costituzione italiana. Alcune osservazioni critiche, in *Diritto pubblico comparato ed europeo*, 2003, 1539-1550, 1546.

[16] Article 94 reading "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions." See also art. 93: "Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published."

[17] *See* for example C. F. Doebble, International Human Rights Law Vol. 1, at 9 (2004); M. Claes & B. de Witte, *Report on the Netherlands*, *in* A.-M. Slaughter, A. Stone Sweet & J. H. H. Weiler (eds.), The European Court and National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context 171 (1998).

[18] Article 23, 1: "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79."

[19] Sect. 94: "The acceptance of the Parliament is required for such treaties and other international obligations that contain provisions of a legislative nature, are otherwise significant, or otherwise require approval by the Parliament under this Constitution. The acceptance of the Parliament is required also for the denouncement of such obligations ..."

[20] Art. X-5: "The Riksdag may transfer a right of decision-making which does not affect the principles of the form of government within the framework of European Union cooperation. Such transfer presupposes that protection for rights and freedoms in the field of cooperation to which the transfer relates corresponds to that afforded under this Instrument of Government and the European Convention for the Protection of Human Rights and Fundamental Freedoms ..."

[21] *BVerfGE* 37, S. 271 ff.) in http://www.bundesverfassungsgericht.de/en/index.html.

[22] *BVerfGE* 73, 339, in http://www.bundesverfassungsgericht.de/en/index.html.

[23] *BVerfGE* 89, 155, in http://www.bundesverfassungsgericht.de/en/index.html.

[24] *BVerfGE* 102, 147, in http://www.bundesverfassungsgericht.de/en/index.html.

[25] On this point *see* J. Kokott, *Report on Germany*, *in* A-M. Slaughter, A. Stone Sweet & J. Weiler (eds.), The European Courts and National Courts – Doctrine and Jurisprudence 81 (1998).

parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level."

c) 'dualist' legal orders whose Constitutions – for different reasons – do not include any express 'European clause' (Italy before the 2001 art. 117 constitutional reform[26] and, for 'structural reasons', the United Kingdom). For instance, since its decision n. 183/1973,[27] and up to the 2001 constitutional reform, the Italian Constitutional Court identified the reference provision with Art. 11, which reads: "Italy ... agrees to limitations of sovereignty where they are necessary to allow a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed." This provision was originally conceived to justify Italy's membership to the United Nations, rather than to the EC. Membership to the EC, in fact, imposes limitations of sovereignty with a view to goals that clearly go beyond 'peace and justice between nations'. Thus, the Court was forced to 'manipulate' the original meaning of Art. 11 in order to allow broader limitations. Before 1992, something similar had happened in Germany, where the Constitutional Court interpreted Art. 24 of the *Grundgesetz* (devoted to the participation in international organizations) to explain the penetration of EC law.

d) a group of '*souverainiste*' legal orders which proudly reaffirm the sovereignty of the constitution (Hungary, Poland)[28] with regard to international and supranational integration.

When looking at art. 307 ECT,[29] one easily remarks a similarity between that provision and the second group of national clauses (clauses providing for a set of limits to integration at the higher level).

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[26] The Italian Constitution's new Art. 117, paragraph 1 expressly codifies the limit that supranational obligations represent for domestic law by ruling that: "Legislative power belongs to the state and the regions in accordance with the constitution and within the limits set by the European union law and the international obligations."

[27] Italian Constitutitional Court judgment No. 183/1973, available at www.cortecostituzionale.it.

[28] Art. 8 of the Polish Constitution: "1. The Constitution shall be the supreme law of the Republic of Poland. 2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise."

Art. 77 of the Hungarian Constitution: "1. This Constitution is the supreme law of the Republic of Hungary. 2. This Constitution and laws and statutes established in accordance with this Constitution are equally binding for everybody of the country." On this *see* A. Albi, *Supremacy of EC Law in the New Member States Bringing Parliaments into the Equation of 'Co-operative Constitutionalism'*, 3 European Constitutional Law Review 25 (2007).

[29] The article reads: "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.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

On the one hand, art. 307 gives precedence[30] – at least in principle – to rights and obligations descending from agreements existing before the Community Treaties entered into force: the article mandates national judges "to ensure that non-member states' rights under earlier agreements are honoured and the correlative obligations of Member States fulfilled."[31] Thus, Article 307 acknowledges the prevalence of international obligations under international agreements over EC law.

On the other hand, though, it expressly makes their compatibility with the EC Treaty a condition for this prevalence, by recalling the necessity that the Member States and the EC cooperate with a view removing possible incompatibilities (art. 10 ECT). At the same time, the ECJ clarified that Article 307 did not allow States to derive rights contrary to EC law from these agreements.[32]

With regard to the impact of international agreements to which Member States are parties on Community institutions, as it has been argued, "although an institution cannot compel a Member State to back out of its obligations under a prior agreement, art. 307 does not debar the Community from taking action at variance with those obligations."[33]

As previously said, the third paragraph of art. 307 involves the necessity to eliminate possible incompatibilities between prior international agreements and EC law.

In order to do so, the concerned State must:

1) start new negotiations to amend the prior agreement in order to make them consistent with EC law;
2) if these negotiations are unsuccessful, they must terminate the agreement;[34]
3) in case of absence of such a conduct, the Member State will be in breach its obligations under EC law.

Interestingly, despite this possible breach of EC law, "the application of the prior agreement will continue to be assured under the first paragraph of Art. 307 since that provision is primarily designed to protect the rights of non-member countries."[35]

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."

[30] *See* the article by P. Manzini, *The Priority of Pre-Existing Treaties of EC Member States Within the Framework of International Law*, 12(4) European Journal of International Law 781 (2001).

[31] K. Lenaerts & P. Van Nuffel, Constitutional Law of the European Union 751 (2005). Judgment of 27 February 1962 in *Case 10/61, Commission v. Italian Republic*, [1962] ECR 1.

[32] Judgment of 9 November 1995 in *Case C-475/93, Jean-Louis Thévenon and Stadt Speyer - Sozialamt v. Landesversicherungsanstalt Rheinland-Pfalz*, [1995] ECR I-3813.

[33] Lenaerts & Van Nuffel, *supra* note 31, at 753.

[34] Judgment of 4 July 2000 in *Case C-62/98, Commission v. Portuguese Republic*, [2000] ECR I-5171.

[35] Lenaerts & Van Nuffel, *supra* note 31, at 753. Judgment of 18 November 2003 in *Case C-216/01, Budějovický Budvar, národní podnik v. Rudolf Ammersin GmbH*, [2003] ECR I-13617.

Having in mind the framework provided by Art. 307 ECT and its comparison with national European clauses, one can read the *Kadi* saga as a progressive 'internalization' by the EC actors (CFI, Advocate General and ECJ) of the question concerning the relationship between and integration of legal orders at different levels. This paper will come back to this point after an account of the approach the Advocate General and the ECJ followed in *Kadi.*

C. The Construction of the Relationship Between the European Legal Order and the International Order: From Authority to Authoritativeness, from Hierarchy to Pluralism

Indeed, in *Kadi* the ECJ rejects the CFI's construction and essentially accepts the different, pluralistic view of the relationship between interacting legal orders, suggested by Advocate General Poiares Maduro.[36] This clearly emerges, among others, from the passages of the 3 September judgment immediately following item 280, mentioned above.

One can summarize the main issues concerning the relationship and interconnection between interacting legal systems emerging from the *Kadi* case into the following four questions:

1) Is there an interconnection between the international and the Community legal order?
2) If so, what is the degree of integration characterizing this interconnection?
3) At which level are the limits of integration set?
4) What is the resolution criterion to be adopted in case of conflict between the two legal orders?

The paper will now identify the most evident differences between the ECJ approach and that of the CFI with regard to the relationship between the Community and the global legal order. Basically, only the answer to the first of these questions is the same, whereas the answers given by the CFI and ECJ judges to the other three differ substantially. With regard to the first question, in the reasoning of the CFI, there is no possible doubt concerning the existence of an interconnection between the international and the Community legal order. The CFI builds its hierarchy-oriented view of the relationship between Community and international law, tending to monism,[37] entirely on that basis.

Turning to the ECJ's interpretation, in the words of the Advocate General, the international and the Community legal systems certainly do not pass by each other

[36] A few differences (which we do not consider as amounting to actual disagreements) between the arguments of the Court and those of the Advocate General have been highlighted and emphasized, among the others, by Sandulli, *supra* note 1.

[37] *See* in this sense, among others, Savino, *supra* note 1, at 1097.

ignoring one another "like ships in the night."[38] On the contrary, as the Advocate General emphasizes, the European Union has traditionally played an active and constructive role on the international arena. The interpretation of Community law and its application are therefore based on the assumption that the EU intends to honour its international commitments.

Whereas a certain degree of interaction between the two legal orders is a common basis for the construction by the CFI and the ECJ alike, their reasoning begins to diverge when it comes to answering the second relevant question: what level of integration characterizes such interaction?

According to the perspective of the CFI judges, the degree of interpenetration between the two orders is extremely high – so high indeed, that it leaves no room for European Courts to perform any judicial review over an EC regulation which confines itself to implementing a resolution adopted by the Security Council, pursuant to Chapter VII of the UN Charter – the only exception being the limited scrutiny over the regulation's compatibility with *ius cogens* rules. Thus, according to the CFI's reasoning, no characterizing and distinctive features may emerge in the European legal order; the fundamental law of the global constitutional system is that of the United Nations and EC law is necessarily subordinated to it. This implies that the ECJ has, so to speak, the same margin of discretion as the Supreme Court of any US State in front of a decision of the Federal Supreme Court on the same issue[39] – virtually no margin at all.[40]

The ECJ does not uphold the ruling of the CFI, a ruling based on a view of an extreme integration between the international and the Community orders, and alleging an absolute and unconditioned prevalence of the former on the latter. Since this is the position from which the ECJ is most distant, it is worth repeating that such prevalence would lead to the conclusion that European courts could not assess the lawfulness of an EC regulation merely implementing a Security Council Chapter VII resolution with any margin of discretion – not even concerning a possible breach of fundamental rights and principles of the European legal order.

On the contrary, the ECJ overrules the CFI decision and declares itself entitled to assess any alleged breach of fundamental rights by the appealed regulation.[41] Accordingly, although by way of a convenient application of Art. 231 ECT its effects are maintained for a period not exceeding three months,[42] the regulation is

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[38] Advocate General Poiares Maduro on 16 January 2008 in *Joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the EU and Commission*, [2008] ECR I-6351, at para. 22.

[39] With the far-from-slight difference that, in the case of the EU and the UN, the act upon which judicial control is excluded is not a decision by an impartial judge, adopted in compliance with the fundamental guarantees that are at the basis of the functioning of a judicial organ, but rather the decision of an organ of a mainly political nature, in which such guarantees are absent or considerably reduced.

[40] Sabino Cassese has compared the construction of the relationship between the two legal orders by the first instance judge to a French-style, centralist approach, in which "[the] Community has merely executive functions, with no discretion, and with limited competence." *See* Cassese, *supra* note 1, at 1091.

[41] That is Council Regulation 881/2002, OJ 2002 L 139.

[42] *See* items 373-376 of the judgment.

annulled so far as concerns the appellants, due to the infringement of their right of defense: in particular, their right to an adversarial procedure, the principle of effective judicial protection and that of property rights (depending on the circumstances in which the restrictions had been adopted).

As mentioned, this position is based on a different answer to the second question listed above, concerning the degree of integration between the international and the Community legal orders. The ECJ identifies a lower degree of integration between the two than the CFI had: to put it simply, the relationship seems to shift from almost complete monism to a sort of tempered dualism.

The mitigation of this degree of integration is directly proportional to the greater emphasis accorded to the constitutional maturity of the European legal order, which due to its peculiar features differs both from national and from international law. For this reason, Community law enjoys a well-defined autonomy, which the CFI's decision hardly addressed.

In particular, Advocate General Poiares Maduro stated in his conclusions that the "ECJ has, first of all, to protect the *constitutional structure* created by the Treaty that established the EC."[43] Likewise, in the decision at hand, the Court of Justice significantly points out that European institutions and Member States cannot be immune from control over the compliance by their acts with the *fundamental constitutional Charter*, that is the Treaty that established the EC (item 281), and that no international agreements may either infringe on the *autonomy* of the Community legal order (item 282), or breach the *constitutional principles* of the EC Treaty (item 285). In light of this, the Court expressly states that "the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a Community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which may not be prejudiced by an international agreement."[44]

In the quoted passages, it emerges quite clearly that, in mitigating the degree of integration between the international and the European legal orders affirmed by the CFI, the ECJ accepts not only the solution suggested by the Advocate General, but also the 'constitutional tune' of his arguments. In other words, the *leitmotiv* of the ECJ's and of the Advocate General's reasoning seems to be the binomial 'autonomy-constitutional relevance', which is seen as the characterising feature of the Community legal order.[45]

If this is the ECJ's answer to the second question, concerning the degree of integration between the international and the Community legal orders, it is not difficult to guess what answer the same judges, again in opposition the CFI's ruling, gave to the third issue, relating to the identification of the order which governs methods and sets the limits of this interaction.

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[43] Advocate General Poiares Maduro, *supra* note 38, para. 24.

[44] Judgment of 21 September 2005 in *Case T-315/01, Yassin Abdullah Kadi v. Council and Commission*, ECR [2005] II-3649, item 316.

[45] In this sense, and for a few more specific considerations, the similar interpretation *see* Dickmann, *supra* note 1, especially 9-11.

The CFI had no doubts in this regard: according to it, international law, and in particular the law of the United Nations, penetrates the Community legal order with an efficacy and extension governed by international law itself. Consequently, since the EC regulation at hand was aimed at implementing a resolution adopted by the Security Council which, pursuant to Chapter VIII of the UN Charter, left no margin for discretion, the CFI judges inferred that there was no room for judicial review on the regulation. The only detail, not exactly irrelevant, that faded in the CFI's excessively integrated construction of inter-order relationship is that such lack of margin only exists in an international law perspective, as the CFI adopted. Clearly, this perspective is a necessarily monist one, in which neither the Member States nor the European Community may refer to their internal legal order to avoid the performance of obligations under international law.[46]

Indeed, this is the issue in respect of which the ECJ distances itself most from the reasoning of the CFI: the perspective over the relationship and the possible conflicts between the international and the Community legal orders changes completely. "A judgment given by Community courts," the Court of Justice states at item 288, "deciding that a Community measure intended to give effect to a resolution of the Security Council 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*." The distinction between international and European law as sources of the obligation at hand, which seemed confused in the arguments of the CFI, clearly emerges here. Necessarily, this cannot but be followed by the ECJ's resolute choice in agreement with the Advocate General's indication that "the relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can only take effect in such order under the conditions prescribed by the constitutional principles of the Community."[47]

As one can easily see, if one substitutes the reference to international law with that to Community law, and the reference to the European legal order with that to a domestic constitutional order, this is nothing but a 'condensate' of the counter-limits theory ('*dottrina dei controlimiti*'[48]), strongly supported by the German and the Italian Constitutional Courts, among others.

This new awareness is one of the most important contributions of the decision at hand: that is, the consciousness that European law is a mature constitutional order, which claims the possibility to protect, through its highest judicial body, its own 'constitutional' principles against the risks that may derive from the international order. The reference is to European law's *own* constitutional principles because, with particular regard to the protection of fundamental rights, the completeness

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[46] *See* Article 27 of the Vienna Convention on the Law of Treaties, but also several judgments by the Permanent Court of International Justice and the International Court of Justice, especially: the Wimbledon case, (1923), PCIJ, A series, n. 1, 19; the Fisheries case, ICJ Reports, 1951, 116 (132) and the Nottebohm case, ICJ, Reports, 1955, 4 (21-1).

[47] Advocate General Poiares Maduro, *supra* note 38, item 24.

[48] This formula has been introduced in the Italian scholarly debate by Paolo Barile, *Ancora su diritto comunitario e diritto interno, in* VI Studi per il XX anniversario dell'Assemblea costituente 49 (1969).

and autonomy of a constitutionally mature order are grounded in its ability to make do without the 'crutches' of the common constitutional traditions of the Member States and to find the basis for the protection of those principles, the breach of which would jeopardize the very survival of the European legal order, in *itself.*

Lastly, we should examine the answers that the CFI and the ECJ have given to the fourth question we identified concerning the relationship between interacting legal orders in the *Kadi* case, namely how the possible conflicts between international order and Community order should be solved.

Again, the CFI chooses an unequivocal solution. Due to its strongly hierarchical characterization, the CFI's construction of the relationship between the international and the EU legal orders is quite similar to the interpretation that the Court of Justice had proposed forty years earlier in the famous *Costa v. Enel* case, with regard to the relationship between the Community legal system and member States' national orders. In fact, the latter decision – reaffirmed for many years thereafter – upheld the primacy of Community law over member States' domestic law as a whole, including national constitutional principles. Similarly, the decision of 21 September 2005 upheld an unconditioned prevalence of international law over the whole of Community law, including principles of constitutional nature, on which EC law is based. In both cases, the conflict has very much to do with the idea of hierarchy between the sources of law: in the *Kadi* case decided by the CFI, the *Grundnorm* is international law; in the *Costa v. Enel* case, it is EC law.

In other words, the CFI seems to identify a equation, describing the level of autonomy necessary for a global order to stand effectively. The equation seems to be as follows: international law: EC law = EC law: national law. We have already mentioned the implication of such an equation, which is by no means of secondary importance: through the EC law's 'automatic converter', elaborated by the CFI, the law of the United Nations goes from binding the Member States by virtue of an obligation under international law to binding them by virtue of an obligation under Community law.

It seems now important to add that, if the ECJ answers the fourth question differently, this is largely due to the failure of the precondition at the basis of the equation imagined by the CFI, namely the application of the hierarchical criterion as a basis for the solution of conflicts between legal orders.

The integration between the Community and the international legal orders is not formal and complete; there is no global system where higher level sources prevail unconditionally on those of the lower order – though perhaps this was the CFI's idea. Indeed, when one examines the ECJ judgment (and even more so in light of the opinion of the Advocate General), the Court seems to identify *a different form of interaction and interconnection between the Community and the international levels.* In other words, in respect of the Community order, one can speak of autonomy, but not of 'isolation'. In the Advocate General's own words, "in a world of increasing interdependence, different legal orders should try and find methods and models for the harmonisation of their reciprocal instruments of appeal. Interconnections are increasingly frequent, also, because of the common

challenges set by an international global order that is more and more connected with legal systems of international regional, Community and national level; which leads the Court of Justice to say that the Community, in giving effect resolutions adopted by the Security Council pursuant to chapter VII of the United Nations Charter, is bound to *give particular importance* to the circumstance that, according to Art. 24 of the same Charter, the adoption of such resolution "represents the exercise of the main responsibility, with which the Security Council is vested in order to keep, on a world scale, peace and security."

In the light of the constitutional perspective chosen by the ECJ, in case of conflict between the law of the United Nations and secondary Community law, a constitutionally mature legal order, such as the Community order, can only take a step backwards and admit the primacy of international law by virtue of 'spontaneous', responsible deference towards an international organization whose main purpose is the protection of the fundamental values of peace and security – not pursuant to a *stricto sensu* legal obligation (item 308). However, even this voluntary obedience is *not* possible in the case of conflicts between the law of the United Nations and the *'constitutional' principles of the Treaties*, which include *inter alia* "the principle that all Community measures must respect the fundamental rights," as the Court itself pointed out (item 285). This is clearly the most important novelty of the decision.

In other words as the Advocate General also pointed out in his conclusions, respect and deference towards other institutions and other legal orders have full meaning and are admissible only provided that they are grounded on a commonly accepted construction of the protection of fundamental rights. On the contrary if, as in the case at hand, the protection afforded by the global international level results to be inadequate – and in the specific circumstances of the case, examining the United Nations system of 'sanctions', the ECJ proved that this occurred – then the drawbridge connecting autonomous but interacting legal orders, which the Luxemburg judges *voluntarily* lowered, is raised again. Consequently, one can actually play the 'counter-limits at Community level' card against the international order.

D. Does *Kadi* Belong to the *Solange* 'Family'?

At first sight, the *Kadi* saga seems to feature a progressive 'appropriation/ internalization' of the question of the relationship between international and EC law.

When looking at the CFI judgement, one can notice that the pivotal issue affecting the possibility to review the regulation implementing the UN resolution was *jus cogens*, that is to say a *corpus* of norms originally alien to the body of EC law. Instead, the Advocate General's conclusion stressed the potential violation by the UN resolution of some norms – internal and peculiar to EC law.

It seems to us that in *Kadi* the ECJ stresses this point by constantly referring to the autonomy of EC law. In this sense it was rightly stressed that Kadi is "a direct, if late, offspring of the *van Gend en Loos* and *Costa/Enel* jurisprudence."[49]

The issue of the autonomy of EC law is all the more emphasized, as the Court neglects what was an essential step in Maduro's Opinion: the analysis of the question from the viewpoint of Art. 307 ECT.

Starting from art. 307, Maduro attempts to stress that no obligations envisaged therein can be interpreted "so as to silence the general principles of Community law and deprive individuals of their fundamental rights."[50]

In Maduro's view, it is fundamental to find the right way for the European order to interact with the international legal order's obligations and judges. It is not a coincidence that the Advocate General devotes some lines of his Opinion to recall the importance of judicial deference in the relationship between the ECJ and other judges. This deference, though, must find a limit in the possible risk for the fundamental values of the EC legal order: "Consequently, in situations where the Community's fundamental values are in the balance, the Court may be required to reassess, and possibly annul, measures adopted by the Community institutions, even when those measures reflect the wishes of the Security Council."[51]

In Maduro's own words, these values represent "the constitutional framework created by the Treaty."[52]

In its argumentations, the ECJ seems to pay attention more to the peculiar nature of the EC legal order than to its relationship with international law. This can be noticed by looking at the several references to the autonomy of EC law contained in the judgement.

Thus, one could say that the ECJ's initial assumptions were not centred around the terms of the relationship between international and EC law, but rather around the constitutional and peculiar nature of EC law. This is also proved by the fact that the ECJ missed the opportunity to clarify the scope of art. 307, for example, specifying "its position on the consequences if the 'appropriate steps' of Member States remain unsuccessful."[53]

The ECJ disregards Art. 307 ECT following a precise argumentative strategy: the need to contextualize the question of the relationship between international and Community law within the boundaries of its own legal order (the European legal order, see above), to attempt to give it an 'internal answer' and to insist on the values of its own 'order', where it deemed that the key to the case must lie.

As submitted above, the ECJ approach reminds one of that which national constitutional Courts adopted in the 1970s when dealing with the ECJ and facing one of the most important phases of integration.

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[49] Gattini, *supra* note 1, at 224.

[50] Advocate General Poiares Maduro, *supra* note 38, para. 34.

[51] *Id.*, para. 44.

[52] Moreover: "The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community," *id.*, para. 24.

[53] Gattini, *supra* note 1, at 235.

Before providing some conclusive remarks on the similarity/difference between the national and supranational courts' argumentation, it is worth briefly recalling concepts like the *Solange* method and the *counter-limits doctrine*.

The *Solange* method[54] refers to the practice by certain national Constitutional Courts[55] to recognize a 'reserve jurisdiction' for domestic courts and to acknowledge EC law a sort of limited primacy. In other words, the primacy of EC law on national law is guaranteed as long as it does not affect national constitutional fundamental principles (the 'counter-limits').

From a *substantive* point of view, 'counter-limits' are thus conceived as a form of '*contrepoids au pouvoir communautaire*',[56] an ultimate wall to the full application of EC law, an intangible core of national constitutional sovereignty.[57]

From a *procedural* point of view and looking at the relationship between the Constitutional Courts and the ECJ, one could notice some common points between the *Solange* method and the comity principle – *Solange* being a way to find a solution to the matter of jurisdictional competition induced by the fragmentation of law.[58]

From this perspective, the *Solange* method is a mechanism "for determining the scope of the 'reserve jurisdiction' of one court in relation to the existing jurisdiction of another court. Applying this *Solange* method results in refraining from exercising an existing jurisdiction of one court in favour of an existing jurisdiction of another court."[59]

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[54] On the *Solange* method *see* N. Lavranos, *Towards a Solange-Method Between International Courts and Tribunals?*, *in* Y. Shany & T. Broude, The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity 217 (2008); N. Lavranos, *The Solange-Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals*, 30 Loyola Los Angeles International and Comparative Law Review, forthcoming.

[55] Although the *Solange* method was devised by the German Constitutional Court in 1974, in the following years many Constitutional guardians followed the German and Italian example: the French Conseil Constitutionnel in the 2004-505 DC and the Tribunal Constitucional in Spain in its decision n 1/2004.

[56] About the notion of *contrepoids au pouvoir see* B. Manin, *Frontières, freins et contrepoids – La séparation des pouvoirs dans le débat constitutionnel américain de 1787*, 44 Revue française de sciences politiques 257 (1994); T. Georgopoulos *The Checks and Balances Doctrine in Member States as a Rule of EC Law: The Cases of France and Germany*, 9 European Law Journal 530 (2003).

[57] It is very interesting to notice that the notion of counter-limits implies a sort of constitutional and moral superiority of national legal orders *vis-à-vis* the supranational level. This form of constitutional superiority is usually justified referring to the EU democratic deficit. See, for example, *Solange I* (*BVerfGE* 37, S. 271 ff.): "the Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level."

[58] "From the analysis above it can be concluded that the Solange-method can help to reduce the chance of conflicting or diverging rulings, and thus the potential for fragmentation of fundamental rights in Europe is contained. Similarly, a wider application of the Solange-method by all international courts and tribunals could equally reduce the risk of fragmentation of international law." Lavranos, *Towards a Solange-Method*, *supra* note 54, 232.

[59] *See* N. Lavranos, *Regulating Competing Jurisdictions Among International Courts and Tribunals*, 68 Heidelberg Journal of International Law (HJIL) 575 (2008).

In light of these considerations, it is easy to bring the *Solange* method into the boundaries of what public international law scholars call 'judicial comity'. This formula refers to all those practices[60] which alleviate the difficult aspects of jurisdictional competition by encouraging judges to accommodate related procedures.[61]

Even though the ECJ has jurisdiction over a particular (neither international nor constitutional) legal order, there are many contributions concerning the relationship between the ECJ and other international tribunals.[62] In his latest book, Shany himself 'applies' the notion of judicial comity to the interactions between Constitutional Courts and the ECJ, though unfortunately he does not examine the concept thoroughly.[63]

Does the *Kadi* case belong the the *Solange* family?

As said above, there are many analogies between the approaches of the two Courts. i.e. the ECJ and the German Constitutional Court. Perhaps the only element standing in the way of a perfect comparison is the absence of a judicial interlocutor on the other side of the table.

Moreover, analyzing the case one could wonder whether the ECJ was forced to pay particular attention (particular in that it justifies a partial rupture with the UN legal order) to the due process of law partly because in the case at hand there was no proper trial and no proper judge figure.

In our opinion, there is yet another element that distinguishes the *Solange* method and the argumentative approach in *Kadi*: the self-consciousness of the ECJ.

In other words, "the difference, however, is that the ECJ, in its own understanding, is not such an international supervisory body [a human rights supervisory body] but a juridical body analogous to a domestic court."[64] Following this argumentative approach and framing the question exclusively within the perspective of EC law, the ECJ avoids any explicit comparison between human rights protection in the EU and outside its jurisdiction.

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[60] For an overview *see* Y. Shany, The Competing Jurisdictions of International Courts and Tribunals 260 (2003).

[61] "Comity should arguably be acknowledged as a positive device in the promotion of the systematic nature of international law." Shany, *id.*, at 261.

[62] *See, for example*, among the other contributions of 1(2) European Journal of Legal Studies (2007) especially: P. M. Dupuy, *The Unity of Application of International Law at the Global Level and the Responsibility of Judges*, and U. Petersman, *Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with 'Principles of Justice and International Law'?*. The EJLS is available at: http://ejls.eu.

[63] Y. Shany, Regulating Jurisdictional Relations Between National and International Courts 181 (2007).

[64] Gattini, *supra* note 1, at 234-235.

E. Decisions 'Follow-up' and Unsolved Problems

Before drawing some conclusions, the present paper will give account of the 'follow-up' of the 3 September decision. It will also address a few other (partly related) matters which are still somewhat lingering and which in any event seem worth dwelling on in a future perspective.

Firstly, concerning the judgment's 'follow-up', one must deal once more with those passages of the reasoning, mentioned above, where the Court pointed out:

- that "the annulment [...] of the contested regulation with immediate effect would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by the regulation and which the Community is required to implement, because in the interval preceding *its replacement by a new regulation* Mr Kadi and Al Barakaat might take steps seeking to prevent measures freezing funds from being applied to them again";
- that "[f]urthermore, in so far as it follows from this judgment that the contested regulation must be annulled so far as concerns the appellants, by reason of breach of principles applicable in the procedure followed when the restrictive measures introduced by that regulation were adopted, *it cannot be excluded that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified*";
- and that, therefore, "[h]aving regard to those considerations, the effects of the contested regulation, in so far as it includes the names of the appellants in the list forming Annex I thereto, must, by virtue of Article 231 EC, be maintained for a brief period to be fixed in such a way as to *allow the Council to remedy the infringements found*, but which also takes due account of the considerable impact of the restrictive measures concerned on the appellants' rights and freedoms." Accordingly, "[i]n those circumstances, Article 231 ECT will be correctly applied in maintaining the effects of the contested regulation, so far as concerns the appellants, for a period that may not exceed three months running from the date of delivery of this judgment."

As one would expect, following such an explicit 'solicitation', a regulation was adopted (though by the Commission, not by the Council as the literal text of the decision seemed to anticipate) on 28th November, 2008, "amending for the 101st time Council 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."[65]

After pointing out (a) that "[t]he Court of Justice decided on 3 September 2008 to annul Regulation (EC) No 881/2002, insofar as it concerns Yassin Abdullah Kadi and the Al Barakaat International Foundation"; (b) that "[a]t the same time the Court ordered the effects of Regulation (EC) No 881/2002 to be maintained, so far as concerns Mr Kadi and the Al Barakaat International Foundation, for a period that may not exceed three months running from the date of delivery of the judgment"; (c) that "[t]his period was granted to allow a possibility to remedy

[65] Commission Regulation (EC) No 1190/2008.

the infringements found", the 2008 regulation states that "*[i]n 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.*"

Accordingly, "*[a]fter having carefully considered the comments received* from Mr Kadi in a letter dated 10 November 2008, and given the preventive nature of the freezing of funds and economic resources, the *Commission considers that the listing of Mr Kadi is justified* for reasons of his association with the Al-Qaida network"; likewise, "[a]fter having carefully considered the comments received from Al Barakaat International Foundation in a letter dated 9 November 2008, and given the preventive nature of the freezing of funds and economic resources, the Commission considers the listing of Al Barakaat International Foundation is justified for reasons of its association with the Al-Qaida network."[66]

Indeed, in front of such (temporary?) 'solution' of the issue, one can raise at least a few questions, which can be summarized as follows:

1) Is the adoption by the Commission of such a regulation sufficient to remedy the infringements the Court identified in its judgment?[67] This is extremely relevant, all the more so as the 2008 regulation does not rely on any statement of substantial reasons – the sentence "given the preventive nature of the freezing of funds and economic resources" certainly not being one.
2) From another standpoint, could the new Commission regulation in turn be appealed? The present paper has pointed out that one of the problems – perhaps *the* essential problem – of the case at hand was that the sanctions were not subject to judicial control.

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[66] It is also worth specifying that the new 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."

[67] Likewise, and in a way moving 'up stream', one may wonder whether the 'remedies' introduced by Security Council Resolution 1822 (2008) of 30 June 2008 (available at www.unchr.org) are sufficient to offset the serious *deficits* within the UN system discussed above. Resolution 1822 refers to the necessity that the procedures for inclusion into, and removal from, the 'black lists' (so-called *listing* and *delisting*) be 'fair and clear' (par. 28 of the resolution). However, this may sound like wishful thinking, since this necessity *is not accompanied by effective means of judicial control.* Be that as it may, for purposes of 'fairness and clarity', the Resolution provides that the reasons underlying the adoption of the measures be made partially accessible (par. 12 and 13) and establishes notification obligations (par. 15 and 17). Moreover, it modifies the procedure for review on request from the interested person in part (par. 19, 20 and 21). For some considerations in this regard, *see* G. della Cananea, *supra* note 4, esp. at 1104.

From a European law perspective, Antonio Cassese proposed detailed arguments which deserve thorough attention and may be useful for our purposes. Cassese upholds the unlawfulness of the 2008/583/EC decision of the Council dated 15 July 2008 concerning the PMOI (People's Mujahidin Organization of Iran): *see* A. Cassese, *The Illegality of the EU Council Decision 2008/583/EC Concerning PMOI – Expert Opinion* (10-9-2008), available at www.fffi.se/NCRI/Cassese_final_opinion.pdf.

3) Finally, and above all: what could the scope and the characteristics of the review by Community Courts over the regulation be?

The present paper will try and answer these questions reaching directly to the core of the issue, so to speak, without looking at certain, more specific aspects. To this end, it seems appropriate to move from a few passages of an important CFI decision (case T-228/02, *Organisation des Modjahedines du peuple d'Iran c. Council of the European Union*, judgment of 12 December 2006,[68] items 155 and 156) where – after considering that in situations such as those at issue judicial control is "all the more imperative because it constitutes the only procedural safeguard ensuring that a fair balance is struck between the need to combat international terrorism and the protection of fundamental rights" – the Court clearly stated that, "[s]ince the restrictions imposed by the Council on the right of the parties concerned to a fair hearing must be offset by a strict judicial review which is independent and impartial (see, to that effect, Case C-341/04 *Eurofood* [2006] ECR I-3813, paragraph 66), the Community Courts must be able to review the lawfulness and merits of the measures to freeze funds *without it being possible to raise objections that the evidence and information used by the Council is secret or confidential.*"[69]

These considerations were made in a context in which European institutions were not strictly implementing the UN decisions, but acting with large autonomy. Yet, they seem to be applicable to the current case of measures adopted in strict compliance with Security Council resolutions, which is only apparently different. In fact, in light of the 3 September judgment, it is now clear that, although it is relevant for other purposes, the different 'provenance' of the measures cannot justify a disparity of treatment in respect of essential fundamental rights and principles – even less so an almost complete renunciation to protection. As the Court unmistakably confirmed, these fundamental rights and principles include judicial review over highly restrictive measures such as those at issue (which also affect one's reputation). Moreover, the Court itself expressly stated that "it is ... *the task of the Community judicature to apply*, in the course of the judicial review it carries out, *techniques which accommodate*, on the one hand, legitimate *security* concerns about the nature and 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*" (item 344 of the 3 September decision, significantly referring to another decision by the Strasbourg Court, i.e. *Chahal v. United Kingdom*, which as seen above the CFI had already mentioned).

Thus, the point is to balance the opposite interests to the secrecy of certain information, on the one hand, and to full judicial review over 'sanctions', on

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[68] With regard to such decision *see* G. della Cananea, *Return to the Due Process of Law: The European Union and the Fight Against Terrorism*, 32 European Law Review 895 (2007).

[69] And "[a]lthough the European Court of Human Rights recognises that the use of confidential information may be necessary when national security is at stake, that does not mean, in its view, that national authorities are free from any review by the national courts simply because they state that the case concerns national security and terrorism" (*see Chahal v. United Kingdom*, ECHR (1996) No 70/1995/576/662, § 131, and case-law cited, and *Öcalan v. Turkey*, ECHR (2003), No 46221/99, § 106, and case-law cited).

the other. Certainly, in doing so one must devote utmost attention to the need to prevent terrorism and defer to the activity of the organs that perform the relevant investigations. Yet, one could perhaps take inspiration from some indications by the CFI[70] and devise a mechanism as follows: when the Sanctions Committee, the European CouncilSecurity , and the European Commission consider that the case file contains information that should not be communicated to the interested parties, the judge may nevertheless be acknowledged the power to access such information.[71] This way, it would be possible to 'offset' at an 'objective' level[72] the compression of the subjective right to defense, which the 'withdrawal of information' from the addressees of the measures would otherwise imply.[73]

Surely, one must acknowledge that this matter deserves more thorough examination. Although this goes beyond the scope of the present analysis, this paper is hopefully a first step in a useful direction.

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[70] In fact, at item 147 of the mentioned *Modjahedines* judgment of 12-12-2006, the CFI prefigured a system of "reasoning 'at two levels'" (defined so by M. Savino, *supra* note 1, at 1098, n. 13): "a detailed publication of the complaints put forward against the parties concerned might not only conflict with the overriding considerations of public interest which will be discussed in paragraph 148 below, but also jeopardise the legitimate interests of the persons and entities in question, in that it would be capable of causing serious damage to their reputation. Accordingly, the Court finds, exceptionally, that only the operative part of the decision and a general statement of reasons, of the type referred to in paragraph 143 above, need be in the version of the decision to freeze funds published in the *Official Journal*, it being understood that the actual, specific statements of reasons for that decision must be formalised and brought to the knowledge of the parties concerned by any other appropriate means."

It should be noted that, even when the CFI admits (at item 148; but *see also* items 133-137 of the same *Modjahedines* decision) that "overriding considerations concerning the security of the Community and its Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of the specific and complete reasons for the initial or subsequent decision to freeze their funds, just as they may preclude the evidence adduced against those parties from being communicated to them during the administrative procedure", it actually refers to information restrictions 'during the administrative procedure'. Whereas, with regard to the subsequent judicial procedure, the principle that "the Community Courts must be able to review the lawfulness and merits of the measures to freeze funds without it being possible to raise objections that the evidence and information used by the Council is secret or confidential" operates; therefore, "the judicial review of the lawfulness of the decision in question extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which that assessment is based" (items 154 and 155, this latter already mentioned before).

[71] Indeed, why should one assume that in a State (or a Community) subject to the rule of law certain information is safer kept by executive, rather than judicial organs, to the point that the latter are prevented from knowing – for purposes related to the exercise of their essential functions – of circumstances which, on the contrary, are known to the former?

[72] In fact, it would have evident importance as guarantee (although in a perspective that could be said to have 'inquisitory' nature, in technical sense and with no polemic intent) to recognize the possibility for the judge to have access to all elements, on the basis of which the 'sanctions' have been adopted, in order to evaluate their relevant or, however, to adopt the appropriate measures.

[73] At this point, one could assume that, once it accesses the elements classified as "officially secret", the judicial authority might even provide for the 'declassification' thereof, in whole or in part, should it deem the confidentiality reasons perfunctorily offered specious, or however not sufficiently grounded (see in this sense the last part of item 154 of the *Modjahedines* judgment).

F. A Few Conclusive Considerations on Inter-order Conflicts of Laws – Alternative Solutions in the New Season of Cooperative Constitutionalism in Europe

One must now sum up and draw some conclusions regarding the issue of relationship between legal orders. Perhaps, it is worth returning to the terms of the equation underlying the CFI's reasoning in the judgment of 21 September 2005 (international law: Community law = Community law: national law) and to the theory at the basis of such equation one last time.

One should note that international law can be to Community law as the latter is to domestic law insofar as both terms of the equation are united by the hierarchical criterion, a privileged instrument for the solution of conflicts between legal orders.[74]

On the contrary, we have noted that the ECJ adopted a different approach: an approach, one could say, informed by a logic of constitutional pluralism and based on a dialogic view of the relationship between the international legal order and the community legal order. One cannot simply justify the penetration of international law into the Community legal order by applying the *lex superior* principle. For this purpose, one must consider the limits set by the Community order to such penetration, and in particular the principle of compliance with the fundamental principles of the Community order itself. Thus, while the reasoning of the CFI was centered around a pyramidal, hierarchically ordered view, the ruling by the ECJ envisages the orders as interconnected, yet distanced and especially autonomous. In the ECJ's view, interconnection does not imply interpenetration. On the other hand, autonomy is not equal to isolation; rather, it is the basis for a dialogue and a balance aimed at verifying, in practice, at which level the fundamental rights that come into play are accorded the best protection.

If such protection can take effect at the international level in a measure at least equal to the EU level – which, as we have seen, was not the case in the case at hand – the *authoritativeness*, not the *authority* based on the *lex superior* principle, of the United Nations organization implies that the community legal order will draw back and give way to the reasons of international law voluntarily, not under

[74] It could even be possible to try to explain the CFI's approach in terms contrary to those outlined here. In particular, one could maintain that at a closer look the application of the *lex superior* principle (the *lex superior* being international law with regard to the relationship between global legal order and Community legal order, and European law with regard to the relationship between the Community legal order and the legal orders of the Member States) actually conceals behind its apparent monism an idea of closure of legal orders. As has been pointedly observed, "legal orders do not 'communicate', they do not dialogue, they do not balance each other – they each claim an exclusive authority to decide those issues, to which they give relevance" (G. Itzcovich, *Ordinamento giuridico, pluralismo giuridico, principi fondamentali. L'Europa ed il suo diritto in tre concetti*, VI Diritto pubblico comparato ed europeo (2009)). This is an expression of the principle of exclusivity of the legal order (*see* C. Pinelli, Costituzione e principio di esclusività (1990)). In other words, by virtue of this principle, Community law provisions have no relevance for the application of international law, in the same way as Member States' domestic law provisions, including constitutional provisions, have no relevance for Community law.

a legal obligation to do so. Therefore, the first term of the equation no longer relies on the application of the hierarchical criterion; rather, it is grounded on a new basis, centred on a pluralist view of the relationship between international law and Community law, which refrains from applying rules of hierarchy, shies away from rigidity and is open to the reasons of persuasion and authoritativeness instead.

To a closer examination, this trend on the EU external dimension, which sees EC law faced to international law finds support, on the EU internal dimension, in the recent ECJ case law on the relationship between community law and domestic law. In particular, after the enlargement of European Union to the east, it seems that the Court has shifted from an absolute, rigid vision of the *primacy* of Community law over domestic law, to a 'relative', 'reasonable' concept of it. In doing so, the Court has adopted a pluralist view and a perspective that is becoming more and more axiologically oriented.[75]

With regard to the second term of our equation (Community law to domestic law), should future case law uphold such metamorphosis from a radical, monolithic view to a more graduated one, in line with the constitutional identities of the member States, then one should no longer speak of the application of the *lex superior* principle, but of a 'milder' pluralist view (Almost needless to say, here we refer to 'internal' pluralism, i.e. pluralism in the relationship between the Community legal order and the legal orders of the Member States).

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[75] Compare, at least, the famous *Omega* judgment of 14-10-2004 and the less renowned, more recent *Dynamic Medien* case of 14-2-2008. There, in the words of Antonio Ruggeri, there has been a sort of "Europeanization of counter-limits", which is now codified by the new art. art. 4, par. 2 of the Treaty on the Constitution of the European Union (which we hope will soon enter into force), under which "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government," and by art. 67, par. 1 of the Treaty on the functioning of the European Union, which reads: "The Union establishes an area of freedom, security and justice while respecting the fundamental rights and the different legal systems and legal traditions of Member States." In this regard, in the present paper one can only mention the impression that this new, tempered tendency of the Court of Justice towards a pluralist view – both under the internal, Community-Member States dimension, aspect Community and under the external, European-international dimension, aspect – seems to find an explanation in the Court's reaction Community in front of the new challenges set by the inclusion of twelve countries of Central and Castern Europe in the European Union, in 2004 and 2007.

Likewise, one can only hint at a comparison between this recent approach of the European Court of Justice with the opposite reaction by the European Court of Human Rights. In respect of the new issues emerged in consequence of the recent extension of the Council of Europe towards the East, the latter Court adopted a centralistic approach, based on 'inter-order aggressiveness'. Combining the two judicial policies at issue, one can envisage a progressive reduction in the distance between the 'idea' of the inter-order relevance of their decisions that the Courts of Luxembourg and Strasbourg, respectively, have. However, one must verify whether this reduction is supported by the acceptance of such relevance at national level, by European States that are both EU members and parties to the European Convention on Human Rights and particularly by the judiciary of such States,. Community For an attempt to develop the subjects that have only been mentioned here, *see* O. Pollicino, *Strasbourg and Luxembourg at the Forefront of the Enlargement of Europe: an Antithetical Judicial Approach?*, *in* F. Fontanelli & G. Martinico (eds.), The ECJ Under Siege: New Constitutional Challenges for the ECJ (2009).

Now, if this shift towards 'relative, reasonable primacy' consolidates in the case law of the European Court of Justice, we will witness a peculiar construction of the CFI equation on the basis of constitutional pluralism[76] – external pluralism for the first term of the equation and internal pluralism for the second term, respectively.

[76] Among the now many supporters of the *constitutional pluralism* rule within the inter-order dynamics relevant to the European integration process, *see* at least N. MacCormik, *Beyond the Sovereign State*, 6 Modern Law Review I (1993); N. MacCormik, Questioning Sovereignty, Law State and Nation in European Commonwealth (1999); M. P. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, *in* N. Walker (ed.), Sovereignty in Transition 501 (2003).