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## Kadi v. Commission: A Case Study of the Development of a Rights-Based Jurisprudence for the European Court of Justice

Alisa Shekhtman  
*University of California, Berkeley*

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# KADI V. COMMISSION: A CASE STUDY OF THE DEVELOPMENT OF A RIGHTS-BASED JURISPRUDENCE FOR THE EUROPEAN COURT OF JUSTICE

**Alisa Shekhtman**

## INTRODUCTION

The creation of the European Union (EU) has been the world's most significant experiment in multinational organization, bringing with it unparalleled opportunities for the enforcement of human rights on an international scale. A long line of international agreements from the Treaty of Rome to the most recent Lisbon Treaty have deepened the integration between the member states to the point where the EU's institutions are firmly entrenched in the political mindset and economic realities of Europe. One of these institutions is the European Court of Justice (ECJ), which is charged with interpreting EU law and ensuring that it is applied across the Member States. Due to the establishment of the doctrines of "supremacy" and "direct effect" in the landmark court cases of the 1980's, the European Court of Justice no longer has to defend its existence but can instead move to expand its jurisdiction, most recently in the area of human rights. This paper will attempt to answer the following question: to what extent has the European Court of Justice developed its rights-based jurisprudence, and what implications could its approach have for the future of European integration, and of the Court itself?

This paper will examine the increasingly activist role of the Court of Justice towards its own jurisprudence, through the lens of the *Kadi* litigation. *Kadi* is a series of three cases concerning a Saudi Arabian national whose assets were frozen in response to a U.N. directive which ordered all of its member states to freeze the financial resources of individuals associated with terrorist groups. On September 30th, 2010, the General Court<sup>1</sup> ruled that the Commission's actions to fulfill this directive infringed on Mr. Kadi's right to defense, right to judicial review, and right to property (*Yassin Abdullah Kadi v. Commission*, Case T-85/90). Its argument is grounded in EU law rather than in international law, an aspect which emphasizes the autonomy of the European legal order.

The confidence inherent in such a decision seems to indicate that the ECJ has moved well past its initially timid approach to human rights cases, ushering in a new era of judicial

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<sup>1</sup> Formerly known as the Court of First Instance of the European Court of Justice.

activism. A close analysis of this case reveals that the ECJ's activism may be horizontal, as well as vertical; *Kadi* is also an example of the increasingly frequent cases in which the ECJ annuls the actions of the European Commission, cementing its own authority while limiting that of its brother-institution.

These three cases take the form of a judicial dialogue between the European Court of Justice (ECJ) and the Court of First Instance (CFI). Following the protocol of the Community's judiciary institutions, cases are first heard at the Court of First Instance, leaving open the possibility to appeal to the higher court. While in other circumstances, a discussion between two courts regarding the finer points of judicial review could have been brushed aside as an esoteric question, the content of the case ensures that the debate was broadcast to the international community.

To receive the full impact of the Court's changing attitude towards its jurisprudence through the lens of the *Kadi* story, it is important to start at the beginning with an in-depth look at the reasoning behind the decision made in each case. Through a close examination of the grounds used in *Kadi* (2005), *Kadi* (2008) and *Kadi* (2010), it is possible to see the extent to which the ECJ's approach to the issue has changed, and thus offer conclusions as to what that could mean for the Court's rights-based jurisprudence as a whole.

#### FACTUAL AND LEGAL BACKGROUND OF THE *KADI* STORY

Under the Common Foreign and Security Policy of the EC, listed under the Second Pillar of the EC Treaty, the Council of the European Union can create regulations in order to implement an EU "Common Position", a policy concerning foreign affairs which, while binding on Member States, cannot be invoked by individuals in the domestic courts. After the events of September 11, 2001, the list of Common Positions included an agreement to implement a series of counter-terrorism resolutions proposed by the United Nations Security Council (UNSC). This body had issued a directive to freeze the financial assets of individuals associated with Al-Qaeda, Osama bin Laden and/or the Taliban, and created a Sanctions Committee in March 2001, which regularly amends the "Consolidated List" of these individuals. Mr. Kadi's name was added to the list in October 2001.

Under Chapter VII of the United Nations Charter, the Security Council is authorized to adopt such resolutions in order to "maintain or restore international peace and security," while members of the United Nations are obligated to "accept and carry out" such decisions according to Article 25 of the same Charter. On March 6, 2001, the Council of the European Union adopted Regulation (EC) 467/2001, replaced on May 27, 2002 by CR (EC) 881/2002, in order to comply with this requirement of the Charter, as well as implement the aforementioned Common Position. Mr. Kadi's name was included on the list of sanctioned individuals in both measures, and, as Council regulations are directly applicable in the national legal systems of all EU member countries, found his funds and financial assets frozen immediately as a result.

In December 2001, Mr. Kadi applied to annul this regulation insofar as it affected him, claiming that he had never been involved in the financing or perpetration of any terrorist activity, but was rather the victim of mistaken identity. Despite the fact that the results of the regulation limited his basic right to property, Mr. Kadi was not given the opportunity to present his case before either the Security Council or the relevant EU institutions. Accordingly, when representing his situation before the Court of First Instance (CFI), Mr. Kadi alleged three infringements on his fundamental rights – the right to a fair hearing, the right

to judicial review, and the respect for property and principle of proportionality.

## A POLICY OF JUDICIAL DEFERENCE? *KADI* (2005)

### *Court of First Instance's 'ratio decidendi'; A Hierarchy of Norms*

The case was first brought to the Court of First Instance (CFI) in 2005. The Court stated that the Community's legal order is not independent of the United Nations Case T-315/01 *Kadi*, para 208), as the individual member countries of the EU are bound by international law to implement the resolutions of the U.N. Security Council (Article 103, 25 of the U.N. Charter). Although these international legal obligations do not necessarily bind the EU itself, the CFI's judgment declared that "Community law must be interpreted, and its scope limited, in the light of the relevant rules of international law" and thus, that its right to review the case did not extend further than "ascertaining whether the Community measures at issue were appropriate and proportionate in relation to the resolutions of the Security Council which they put into effect" (Case T-315/01 *Kadi*, para 199). It proceeded to conclude that the effects of the Regulation did not constitute an interference with the right to private property, nor did it violate the principle of *jus cogens*<sup>2</sup>.

This judgment reveals that the CFI aimed to define the EU's place in the international order as "at once faithful and subordinate to, yet simultaneously constituting itself as an independent check upon, the powers exercised in the name of the international community under the UN Charter."<sup>3</sup> In his 2008 article on *Kadi* decision of the same year, Jo Murkens argues that the Court of First Instance used this judgment to create a hierarchy of norms in which actions by the EU Council are subordinate to its U.N. obligations, but which also allows the Court to review the Security Council's resolutions for violations of the norms of international law. Murkens further maintains that, while the 2005 judgment seems to be the Court's decision to integrate EU law into an international order, it also resulted in "a policy of judicial deference to a compelling public interest, such as collective security, which was deemed to justify not only the freezing of the funds held by individuals and legal entities suspect of supporting terrorism, but also the denial of judicial review, save in the most egregious of circumstances" (Murkens, 2009, p. 37).

Such a claim, if true, would be a stark contrast to the ECJ's previous delineation of its jurisdiction, as described in earlier cases. For instance, in *Unión de Pequeños Agricultores v. Council of the European Union*, the Court claimed that it had jurisdiction to review "all actions by the EC institutions that produce legal effects in relation to third parties, to ensure the compatibility of their acts with the Treaty and with the general principles of EC law, which include fundamental rights."<sup>4</sup> A similar assertion of the Court's powers of review is seen in multiple earlier cases, which declare that "using Articles 6 and 13 ECHR in addition to the constitutional traditions common to the Member States as the starting point, the

2 Article 53 of the Vienna Convention on the Law of Treaties (1969) states that a treaty is void if it conflicts with a peremptory norm of general international law (*jus cogens*), which is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" (Murkens 2009, p. 31)

3 See G de Búrca, "The European Court of Justice and the International Legal Order after *Kadi*," Jean Monnet Working Paper 01/09, as cited in Murkens (2009).

4 See Case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, para 38

ECJ now protects the right to an effective judicial remedy as a matter of Community law.”<sup>5</sup> The force of these statements, when combined, seems to leave EU courts with an obligation to examine the legality of measures which could infringe the basic rights protected by the Community legal order, which Murkens describes as their “primary legal commitments” (Murkens, 2009, p. 30).

The true issue at stake in *Kadi* (2005), then, is the Court of First Instance’s authority to review these and other comparable Council regulations, which are enacted in the name of international security. In order to investigate Murkens’ claim, it is necessary to examine the arguments for and against judicial review of the case.

### **Arguments for and against Judicial Review**

The case against judicial review by Community courts put forth by the Council of the EU, the Commission, and the United Kingdom, advocates the importance of the “integrated international order” approach.<sup>6</sup> The argument here is that, while the European Union is not a state and so cannot be a member of the United Nations, it can nevertheless voluntarily accept to be bound by the U.N. Charter to implement the resolutions of the U.N. Security Council, especially those issued under Chapter VII. In this scenario, Community institutions would not have the option of annulling U.N. resolutions, as Article 103 of the U.N. Charter states that “in the event of conflict between the obligations of the Members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” This line of reasoning thus creates a hierarchy of norms, in which obligations under Security Council resolutions reign supreme over any other potential legal commitment. The U.K. went further, arguing that “the obligations imposed on the Community and its Member States by the Charter of the UN prevail over every other obligation of international, Community or domestic law” (Case T-315/01 *Kadi*, para 177) and asked the Court “as a matter of principle to decline all jurisdiction to undertake such indirect review of the lawfulness of those resolutions” (para 217), as any judicial interference could unintentionally heighten the international terrorist threat to peace and security.

Murkens dismisses this position as “executive unilateralism” based on an argument which claims that 1) fighting global terrorism should stay at the level of international politics, 2) national executives are in a uniquely qualified position to manage risks of terrorist activity, and 3) certain fundamental rights should be suspended “as they entail unacceptable risks” (Murkens, 2009, p.23). The Council, the Commission and the U.K. jointly argued in *Kadi* (2005) that “any effort ... to provide administrative or judicial procedures for challenging the lawfulness of the sanctions imposed by the contested regulation would contravene the underlying Security Council resolutions and ... jeopardize the fight against international terrorism” (Case C-402/05 P *Kadi v Council and Commission*, para 50). It was also reiterated in the 2008 case, in which the U.K. maintained that any “action taken by a Member State to perform its obligations with a view to maintaining international peace and security is

5 See Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 18 and Case C-424/99 *Commission v Austria* [2001] ECR I-9285, para 45; Case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677, para 39.

6 So described by RS Brown, ‘Kadi v Council of the EU and Commission of the European Communities: Exec Power and Judicial Supervision at European Level’ (2006) 4 *European Human Rights Law Review* 456, 463, as cited in Murkens (2009).

protected against any action founded on Community law” (para 276). Murkens points out that this line of reasoning is “politically strong but doctrinally weak,” an aspect which may have struck the attention of the ECJ more forcibly in 2008 than it had the CFI in 2005, four short years after the United States joined the global campaign against terrorism in earnest.

Perhaps pressured by the forceful political arguments of the time, the Court of First Instance was less inclined to hear Mr. Kadi’s claim that the Community courts were fully within their rights to examine his client’s situation. His counsel defined the Security Council’s resolutions as “smart sanctions” aimed at individuals and organizations, rather than entire member states, avoiding the abstract language used by the European Council, which would categorize terrorism as a threat requiring economic sanctions, unilateral executive action, and a judicial policy of deference (under Article 297 TEC). Such a classification would make the EC regulations fall under the Community’s Third Pillar (Police and Judicial Cooperation in Criminal Matters) or under its Second Pillar (Common Foreign and Security Policy), as sanctions. Placing the regulations within the EC legal order in this way would virtually force the hand of the Court to issue a ruling on their legitimacy. Moreover, such a decision could easily annul the effects of the U.N. resolution itself, since actions of the Security Council are not directly applicable in the EC legal order and can only affect individuals through a Council Regulation (Murkens, 2009, p. 24).

The fundamental rights approach of this argument gives it another level of persuasiveness, framing the case as one of “supranational public law litigation” which would require judicial intervention on behalf of a victim of executive unilateralism. Mr. Kadi’s counsel insisted that Community institutions such as the Court of First Instance “cannot abdicate their responsibility to respect his fundamental rights by taking refuge behind decisions adopted by the Security Council, especially since those decisions themselves fail to respect the right to a fair hearing” (Case T-315/01 *Kadi*, para 150). In a separate report, a panel of jurists urged that “the UNSC, the Council of the EU and other organizations using a listing system should urgently comply with basic standards of fairness and due process, including, as a minimum, allowing affected persons and organizations the right to know the grounds of listing and the right to challenge such listing in an adversarial hearing before a competent, independent and impartial body.”<sup>7</sup>

Mr. Kadi’s counsel strove to add urgency to his plea by pointing out that no other court was equally qualified to review the case. There is no judicial body attached to the Security Council to redress potential grievances it commits, while the International Court of Justice, the closest equivalent to such an institution, is not free to hear applications by individuals, and moreover is not competent to review acts of the Security Council. Mr. Kadi’s counsel thus requested that the Court declare that the Security Council’s resolutions infringed on individual fundamental rights, as protected by the Community legal order.

According to Murkens, the Court’s response to this rights-based argument clearly reveals what he describes as its “*faux* internationalism” (Murkens, 2009, p. 35). In its judgment, the CFI claimed that Article 103 of the U.N. Charter establishes an international legal system in which EC law would always be subordinate to Security Council resolutions, creating a hierarchy which prevents the European court from questioning the legality of such resolutions in light of Community law (Case T-315/01 *Kadi*, para 231). Almost every state maintains a relationship between national and international law which ranges from moderately dualist to

7 See “Assessing Damage, Urging Action” in *Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, Geneva 2009, 167, as cited in Murkens (2009).

moderately monist, creating “specific conflict rules based on the relative ranking of domestic and international sources.”<sup>8</sup> Murkens classifies the CFI’s unequivocal ranking of Security Council resolutions as superior to domestic and Community law as a form of “radical monism,” and insists that it must be rejected (Murkens, 2009, p. 32).

Murkens goes on to explain that such radical monism is not in fact supported by the Treaty of the European Community (TEC). He acknowledges that Article 300 (7) TEC states that international treaties to which the EC is a party “shall be binding on the institutions of the Community and on Member States.” However, earlier European case law has already determined that international treaties to which the EC is not a party, such as the U.N. Charter, are not formally binding on the Community<sup>9</sup>, and that such treaties do not prevail over Community law<sup>10</sup>. The CFI instead used Article 297 and 307 TEC to claim 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” (Case T-315/01 *Kadi*, paras 188, 185, 193). Murkens responds to this assertion with a nuanced distinction between obligation and excessive deference:

“[T]hese Treaty provisions do not address the Community, only the Member States. These norms stipulate that the Member States cannot be prevented from fulfilling their UN obligations by other international treaty commitments (such as Community law). They do not, however, regulate the setting aside of legal norms (such as Community law) so as to fulfill the UN obligations. It is not possible to construe them, as the CFI does, to stipulate that the European Community is automatically bound by the same international treaty commitments as its Member States.” (Murkens, 2009, p. 33)

He concludes that such obligations require the Community to implement international law only insofar as it is covered by Community law. Murkens further cautions that the radical monism displayed in the CFI’s first ruling raises legitimacy concerns, pointing out that such a doctrine essentially allows executive representatives of international organizations to “by-pass national constitutional commitments” to create regulations which would be “directly applicable and would take priority over all other forms of Community and, by extension, national law” (Murkens, 2009, p. 34).

Murkens is not alone in accusing the Court of jeopardizing the foundation of the rule of law through an excessively deferential approach to Security Council resolutions. Advocate General Poaires Maduro expressed a similar idea in his dissenting opinion, warning of the repercussions which could come from such a policy. Couching his argument in Community law, rather than the supremacy of the U.N. Charter, Maduro wrote that the Court’s primary responsibility is to “preserve the constitutional framework created by the EC Treaty,” arguing that international law can only permeate the legal order of the Community under the con-

8 See N Walker, “Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders” (2008) 6 *International Journal of Constitutional Law* 373, 379–81, as cited in Murkens (2009).

9 See Case T-184/95 *Dorsch Consult v Council and Commission* [1998] ECR II-667, para 74

10 See *Opinion 1/91 (EEA Agreement)* [1991] ECR 6079, para 21



ditions set by its own constitutional principles<sup>11</sup>. While acknowledging that institutions such as the Security Council are “sometimes better placed to weigh ... fundamental interests,” Maduro insists that the Court cannot “in deference to the views of those institutions, turn its back on the fundamental values that lie at the basis of the Community legal order and which it was the Court’s duty to protect” (para 44). Any other guiding principle, he cautions, could result in any and all anti-terrorism measures being immune from judicial review, and that “the mere existence of that possibility is anathema in a society that respects the rule of law” (para 53).

Maduro’s opinion and Murkens’ analysis of the 2005 decision bring up an important point, offering the European judiciary system the opportunity to rely on its own constitutional model in order to satisfy individual concerns on fundamental rights issues. The European Court of Justice takes up this banner in the sequel to the Court of First Instance’s 2005 decision, which we will examine in more detail below.

### **KADI (2008): AN ACTIVIST RESPONSE**

#### ***The ruling of the Court of Justice: Eurocentrism at its finest?***

The second installment of the *Kadi* story presents an abrupt about-face to the judgment pronounced three years earlier by the Court of First Instance. Similarly to the Court of First Instance, the ECJ introduced its judgment by repeating the Community’s obligations to the international legal order, writing that Europe must “respect international law in the exercise of its powers” (Joined Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat International Foundation*, para 291). It went on to restrict the Court’s powers of judicial review where the CFI would have expanded them, declining jurisdiction over resolutions made by the Security Council, even on the basis of *jus cogens* (paras 286-7 and 327).

While this tentative beginning limited the ECJ’s role in the international sphere, the judgment went on to emphasize the depth of the Court’s obligation to review the legality of acts on the Community scale. The Court declared that “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty” (para 285). Moreover, the ECJ emphasized that “fundamental rights constitute a condition of legality ... they invalidate Community or national measures which are contrary to them ... and are no longer merely invoked as a principle of interpretation” (Murkens, 2009, p. 38)<sup>12</sup>. Limiting the scope of the ECJ’s jurisdiction but strengthening its powers within that narrower field led to a very different conclusion, in which the Court declared that the EC regulations should be annulled, insofar as they concerned Mr. Kadi and the Al-Barakaat Foundation, and that Mr. Kadi’s claims of infringement of his right to be heard, right to property, and right to an effective legal remedy had been well-founded (Murkens, 2009, p. 39).

Scholars have criticized the Court for emphasizing the autonomy of Community

11 See Case C-402/05 P *Kadi v Council and Commission*, Opinion of Advocate General Miguel Poaires Maduro of 16 January 2008, available online at: [www.curia.europa.eu](http://www.curia.europa.eu) (“AG Maduro Opinion”), para 24, as cited in Murkens (2009).

12 Murkens, (2009, p.38). To justify this claim, Murkens cites *Kadi* para 326, which states that the ECJ “must ... ensure the review ... of the lawfulness of all Community acts in the lights of the fundamental rights forming an integral part of the general principles of Community law”. He also points out that it echoes Case 5/88 *Wachauf* [1989] ECR 2609, 2639: “The requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules”.



law from international law, calling the decision a blatant disregard for relevant international rules. It has been labeled “inward-looking” and “domestically minded” by some commentators<sup>13</sup>, while others have denounced it as “chauvinist and parochial”<sup>14</sup> and “bold and unsophisticated.”<sup>15</sup> However, a second group has come out in favor of the Court’s approach, among them Peter Eeckhout, who writes,

“I do not see what is chauvinist and parochial about the Court applying fundamental rights norms which are shared between 27 European countries ... norms ... which are very similar to those which one finds in UN human rights instruments such as the International Covenant on Civil and Political Rights.”<sup>16</sup>

Murkens is also a champion of the ECJ’s decision, declaring that “The ECJ sent an unequivocal message in response to the CFI’s judgment, and did so within earshot of the national constitutional courts and the international community, so that anti-constitutionalism would not receive the seal of judicial approval in the EU” (Murkens, 2009, p.41).

Murkens’ view on the issue, in light of this paper, is particularly interesting. He argues that the 2008 decision was not an attempt to change the relationship between Community and international law, but rather to maintain the existing balance between the ECJ and national courts:

“If the ECJ is involved in a judicial conversation with another institution, it is the national courts and not the UN Security Council. The ECJ is not attempting to separate the EU from other parts of the international system, but it is anticipating a constitutional challenge from the national constitutional courts. *Kadi* should be seen as the ECJ taking an opportunity to reinstate the EU’s constitutional credentials in order to reassure national constitutional courts, and not in order to undermine the authority and integrity of international law” (Murkens, 2009, p.43)

This claim is especially relevant to this paper, as the ECJ’s dependence on the will of national courts is an important indicator of how far its own jurisprudence has developed. The following section will examine this idea in more detail, after a brief explanation of its historical background.

### ***Judicial Activism as Pre-Emptive Jurisdictional Control***

While the EU founding treaties do reveal an underlying support for the concept of human rights, they conspicuously lack a real catalogue of fundamental rights which could serve as a guide for the EU’s legislative or judicial institutions. In his 1999 article, European legal scholar Bruno De Witte explains that, within the context of ECJ cases, the concepts of human rights are treated as “general principles of community law” which have a dialectic relationship with the supremacy of Community law. This language of “general principles” is

13 See D Halberstam and E Stein, “The United Nations, the EU, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order” (2009) 46 *CML Rev* 13, as cited in Murkens (2009).

14 See de Búrca (see 4 above), as cited in Murkens (2009).

15 See JHH Weiler, “Editorial” (2008) 19 *EJIL* 895, 896, as cited in Murkens (2009).

16 See P Eeckhout, “*Kadi and al Barakaat*: Luxembourg is not Texas -- or Washington DC”, available at: [www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc](http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc), as cited in Murkens (2009).

frequently used by both international and national courts to fill gaps in their legal system. De Witte notes that the motives for filling these legal lacunae are usually a way of pre-empting national courts' encroachment on EC jurisdiction, saying that the ECJ's recognition of an unwritten "Community Bill of Rights" resulted in part from a direct challenge by the German Constitutional Court, a point to be discussed in more detail later. However, he adds that "the Court's activism must also be seen as a response to ... the Community's growing capacity to affect fundamental rights to an extent unforeseen at the time the European Communities were created."

In its early case law, the Court limited itself to examining the actions of Community institutions so as not to openly conflict with national courts. However, this self-imposed duty of judicial review later expanded to include national legislation that lies "within the scope of EC law" by either dealing with the implementation of the law or by potentially threatening to restrict the principles of free movement originally described in the Treaty of Rome. Anne-Marie Slaughter, a legal scholar as well as a policy analyst, has suggested that the move to secure the power to review the acts of member countries for rights violations was not voluntary, but rather driven by a need to suppress an "incipient rebellion against supremacy led by national courts" (Slaughter, 1991).

The now famous *Solange I* (1974) decision seems to corroborate this view. The ECJ first used this language of "general principles" in its 1972 decision in *Internationale Handelsgesellschaft*, in which a German exporter argued before a court in Frankfurt that his rights under the German constitution had been infringed by an EC regulation. The Frankfurt court appealed to the German Federal Constitutional Court (GFCC) to declare the EC regulation unconstitutional. The GFCC assented and began to annul Community acts, stating that "as long as the integration process has not progressed so far that Community law also possesses a catalogue of rights ... of settled validity, which is adequate in comparison with a catalogue of fundamental rights contained in the German constitution", it maintained the prerogative to ensure that European law did not violate fundamental rights, as described in the German constitution.

The ECJ saw this as an attack on its supremacy, and responded in the only way it could – instead of sitting back and watching national courts fill the gaps in its jurisdiction, it began to expand its influence to include national legislation lying "within the scope of Community law." The German court responded with *Solange II* (1987), in which it prohibits preliminary references from German courts attacking EU legislation on constitutional grounds, "as long as the European Community, and in particular the European Court of Justice, ensured an effective protection of fundamental rights." This judicial exchange shows the Court adopting a more aggressive approach to its human rights jurisprudence as a response to the concerns of national courts, but it also indicates just how much the ECJ requires the approval of these courts in order to maintain and further develop its own authority.

After the Court's decision in *Kadi* (2005), several prominent German judges have raised the question of whether the GFCC should step in again to ensure that the ECJ's protection of fundamental rights remains at the standard described in the German constitution. Roman Herzog, former German President and former President of GFCC, has wondered "whether the *excessive* legal practice of the ECJ should in future once again be subject to stricter controls by the GFCC, or whether the FCC should resign once and for all from its watchdog

position” (emphasis added)<sup>17</sup>. In an informal interview with *Der Spiegel*, Hans-Jurgen Papier, the President of the GFCC, spoke about the repercussions of the *Kadi* (2005) decision, both for the individual whose assets were frozen and for the changing role of the EU judiciary. Papier explains that being denied access to funds for over a decade constitutes a severe violation of fundamental rights, particularly when “the underlying evidence is not conveyed, and there is no effective judicial legal protection.” When asked whether the GFCC could protect German citizens in such cases, Papier responded as follows:

“If something like that happened in Germany it could be that the FCC would have to address those questions ... the FCC has held, regarding fundamental rights protection under the *Grundgesetz* [Basic Law] in relation to EC law, that it will only hold off for as long as the European level guarantees the equal protection of basic rights. This usually requires individual legal protection through independent courts that are equipped with adequate powers to review and decide. That is lacking here: the relevant Security Council Resolutions do not currently provide for effective judicial legal protection for the affected persons.”<sup>18</sup>

Although these remarks were given outside of the courtroom, the sentiment expressed is nevertheless clear; without a guarantee from the EU judiciary that fundamental rights issues would be decided according to the constitution, national courts are ready and willing to step in as intercessors on their behalf. Given the implied threat of resuming the hard-fought battle between national and European courts, it is easy to understand Murkens’ claim that the *Solange* case law reminds the ECJ that “its own authority to make fundamental rights claims is subject to the ultimate jurisdiction of the constitutional courts of the Member States” (see Murkens, 2009, p.43–44).

## **KADI (2010); A QUIET CONFIRMATION**

### ***Arguments of Applicant and Defendant***

In the 2010 installment of the *Kadi* series, the applicant’s counsel again urged the court to annul EC Regulations 467/2001 and 2062/2001, insofar as those regulations applied to him, on the grounds that those measures infringed on his right to effective judicial protection, right to property, and right to be heard. Such a ruling would naturally require the Court to apply an “intensive and anxious” standard of judicial review (Case T 85/09, *Kadi v. Commission*, para 82), which Mr. Kadi argued was necessary as the regulations not only constituted a breach of his fundamental rights, but also could be classified as punitive, as they “publicly brand the applicant as a terrorist or a supporter of terrorism” (para 83).

The Commission, meanwhile, again urged the Court to dismiss the action and insisted on its applying a “restricted” standard of review to EU measures which were enacted to comply with a separate international body’s directives, issued based on that institution’s assessment of the “evidence, facts and circumstances” surrounding the case. This form of judicial review would consist of checking the accuracy of the facts and that procedural rules had been followed, but not extend to evaluating whether the initial measure had been appropriate (para 87). It further emphasized that any more deliberate form of judicial review

17 See R Herzog and L Gerken, “Stop the European Court of Justice”, available at [www.cep.eu/fileadmin/user\\_upload/Pressemappe/CEP\\_in\\_den\\_Medien/Herzog-EuGH-Webseite\\_eng.pdf](http://www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite_eng.pdf), as cited in Murkens (2009).

18 See ‘Ohne Wenn und Aber’ in *Der Spiegel* 3/2008, 24, as cited in Murkens (2009, p.44).

could “undermine” the United Nations sanctions system, even without a direct assessment of that institution’s policies. The European Council added its weight to this argument, insisting that the right to examine the regulation itself remains “the exclusive responsibility of governments in the context of the fight against terrorism” (para 107).

Lastly, the Commission argued that the more recent regulation had fulfilled Mr. Kadi’s right to effective judicial protection. Following the results of the ECJ’s 2008 decision, the Commission had sent Mr. Kadi a summary of the reasons he had been added to the UNSC list, and given him the opportunity to reply. Only after receiving his communication did the Commission make the decision to add him to the list of sanctioned individuals and organizations annexed to Regulation 881/2002 (para 166).

### **General Court’s Ruling**

The General Court responded to this last claim unequivocally, observing that Mr. Kadi’s rights of defense have been “‘observed’ only in the most formal and superficial sense, as the Commission in actual fact considered itself ‘strictly bound by the Sanctions Committee’s findings and therefore at no time envisaged calling those findings into question in the light of the applicant’s observations’” (Case T 85/09, *Kadi v. Commission*, para 171). The Court found that the Commission “failed to take due account of the applicant’s comments” and that its procedure “did not grant him even the most minimal access to the evidence against him,” adding that “the few pieces of information and the imprecise allegations in the summary of reasons appear clearly insufficient to enable the applicant to launch an effective challenge to the allegations against him” (paras 172–174). Using the criteria applied by the ECHR in *A. and Others v United Kingdom*<sup>19</sup> as precedent, the CFI declared that this third set of sanctions issued against Mr. Kadi were adopted “in breach of [his] rights of defense” (para 179). The Court added that the regulation was enacted without providing “any real safeguard enabling the applicant to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant,” and thus constituted an “unjustified restriction of his right to property” (para 192–193). The General Court thus annulled the regulations so far as they concerned Mr. Kadi, complying with the suggestion sent its way by the ECJ.

### **An Echo of the ECJ’s Position on Judicial Review**

While the results of the Court’s judgment are not entirely surprising, given the earlier conclusions of the higher court, it is worthwhile to examine the reasoning which enabled it to approach the case. In many ways, it is an echo of the ECJ’s earlier decision, but it makes several new points about the interaction between international and EU law which merit a closer look.

The Court begins by recognizing the weight of Article 103 of the U.N. Charter, which states that “in the event of conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, the former are to prevail.” It points out that EU law agrees with this claim, as Article 351 TFEU states that “[t]he rights and obligations arising from agreements concluded before 1 January 1958 ... shall not be affected by the provisions of this Treaty” (para 7–8). However,

19 See *A and others v United Kingdom*, ECHR case of 19 February 2009, not yet published at the time of writing, as cited in Murkens (2009).

it adds another dimension of responsibility to the Charter, reminding the parties concerned that the document not only aims to maintain international peace and security, but also to “promote and encourage respect for human rights and fundamental freedoms” (Case T 85/09, *Kadi v Commission*, para 3). It goes on to address the Commission’s request that EU judiciary institutions refrain from assessing the need for UNSC resolutions such as those concerning Mr. Kadi. Despite the Commission’s insistence that such matters are best left to the executive, the General Court maintains that the Community courts must “none the less verify whether the adoption of a Community implementing measure is compatible with the constitutional principles of the EC Treaty, among which are fundamental rights.”

In his analysis of *Kadi* (2008), Peter Eeckhout suggests that the ECJ could have created a relationship between EC and international law which mirrored that of the EU and national courts by using language similar to the GFCC’s in *Solange II*, giving EU courts the prerogative to review cases based on their own constitutional standards “as long as the international legal order does not provide the individual listed in a UN Resolution with an effective remedy.”<sup>20</sup> Citing the 2008 ECJ decision, the Court adds that a “United Nations context therefore does not justify ‘generalized immunity from jurisdiction’ within the legal order of the Community, so long as the re-examination procedure before the Sanctions Committee does not offer guarantees of judicial protection” (Case T 85/09, *Kadi v Commission*, para 90). This language is crucially similar to that suggested by Eeckhout, which would create a similar relationship between EU and international law as currently exists between the EU courts and the national courts of Member States. Although it is softened by the proviso that the Court must “pay particular attention to the international context” (para 91) when determining the standard of judicial review, we will see that the General Court’s reasoning limits its jurisdiction in theory, but not in practice.

The General Court acknowledges the criticism hefted at the ECJ’s 2008 judgment, which contends that the higher court failed to comply with Articles 25 and 103 of the U.N. Charter and various provisions of the EC and EU treaties<sup>21</sup>. It further points out that, while the ECJ’s decision consciously avoided challenging the primacy of UNSC resolutions in international law, the “necessary consequence of such a judgment – by virtue of which the Community measure in question is annulled – would be to render that primacy ineffective in the Community legal order” (para 118). The Court bows to these criticisms, admitting that “the Court of Justice thus seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law” (para 119). However, it sidesteps the issue, maintaining that it is not authorized to revisit points of law already decided by the ECJ, and that “it is for the Court of Justice itself to provide that answer in the context of future cases before it” (para 121). The General Court thus successfully extricates itself from the debate, effectively bringing it to an end.

Moreover, the 2010 decision does seem to operate as a *Solange III* on the international

20 See P Eeckhout, p. 205, as cited in Murkens (2009).

21 “Article 177(3) EC, Articles 297 EC and 307 EC, Article 11(1) EU and Article 19(2) EU (see, also Article 3(5) TEU and Article 21(1) and (2) TEU, as well as declaration No 13 of the Conference of the Representatives of the Governments of the Member States concerning the common foreign and security policy annexed to the Treaty of Lisbon, which stresses that ‘the [EU] and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its members for the maintenance of international peace and security’”. Case T 85/09, *Kadi v Commission*, para 115.

stage. Citing the ECJ's original reasons for annulling the regulation, the General Court states that "its task is to ensure ... 'in principle the full review' of the lawfulness of the contested regulation in the light of fundamental rights, without affording the regulation any immunity from jurisdiction on the ground that it gives effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations" (para 126, referring to *Kadi* (2008), para 326–327). The Court outlines the actions of the Security Council following *Kadi* (2005), pointing out that the international body has not established an "independent and impartial body" which could examine the case, and that there is no mechanism currently in place which would allow an individual to bring his case to such a court and defend it adequately, as the amount of information given to a blacklisted person is still at the discretion of the State which requested his addition to the list (para 128). The General Court concludes that it must step in and serve as a judicial recourse for any such individual, adding that this must remain the case "so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection" (para 127, emphasis added). This language recalls Eeckhout's remarks on the 2008 decision, and indicates a Court ready and willing to add more punch to the ECJ's already forceful judgment.

Moreover, the General Court's reliance on the decisions of national courts lends credence to Murkens' claim that the *Kadi* litigation is in fact a show of loyalty to the wishes of national courts, in an effort to pre-empt their encroaching on the EU courts' jurisdiction. The Court first found a precedent for the *Kadi* judgment in its own previous decision in *OMPI*, in which it ruled that an applicant whose situation mirrored Mr. Kadi's had been denied effective judicial protection. Pointing out that the ECJ's reasoning in *Kadi* (2008) parallels its own argument in *OMPI*, the Court concluded that "the Court of Justice approved and endorsed the standard and intensity of the review as carried out by the General Court" (para 138). However, *Kadi* (2010) also discusses decisions made on similar cases at the national level, in which courts in Switzerland, Canada and the U.K. ruled on whether the U.N. Sanctions Committee's listing process was compatible with the fundamental right of effective review (para 122). While there was no consensus between national courts on the issue, the emphasis given to their judgments in this case indicates how carefully the European court considered the reactions of its corresponding national bodies before ruling definitively on the case at hand.

The Court does attempt in a small way to incorporate *Kadi* into the international legal order, but it has little bearing on its ultimate decision. In discussing whether the measures against Mr. Kadi could be classified as preventative or punitive, the General Court cites the opinion of the United Nations High Commissioner for Human Rights, who argued that the open-ended nature of such sanctions could make their effects tantamount to criminal punishment, and that the inconsistent standards for evidence "poses serious human rights issues, as all punitive decisions should be either judicial or subject to judicial review."<sup>22</sup> While this reference indicates that the Court did take note of international opinion in its decision, its subsequent conclusion that "the principle of a full and rigorous judicial review of such measures is [thus] all the more justified" reveals that the criticisms of such a move circulating through the international community were ultimately given little weight (para 151).

*Kadi* (2010) thus serves as a quiet confirmation of the ECJ's earlier decision, arriving at the same conclusions through slightly more forceful means. The judgment also suggests that

<sup>22</sup> See "Report ... on the protection of human rights and fundamental freedoms while countering terrorism" (document A/HRC/12/22, point 42), as cited in *Kadi* (2010), para 150.



the Court recognizes that the development of its jurisprudence is tied to its good relationship with national constitutional courts, which is consistent with its earlier decisions in cases concerning fundamental rights. The Court's delicate treatment of those institutions which implicitly threaten its sphere of influence indicates that it is doing what it can to maintain the prerogative it currently holds on its decisions in rights-based cases.

## CONCLUSION

The effects of this last decision by the General Court have already been widespread, revealing *Kadi* to be a truly landmark case in the development of the ECJ's rights-based jurisprudence<sup>23</sup>. The initial CFI decision can be read as an example of how the Court traditionally chooses to sidestep politicized issues by limiting its powers of judicial review in rights-based cases. The about-face of the 2010 judgment cannot be seen as a reversal of this approach, as the General Court was acquiescing to the hierarchy of the European judicial structure, rather than independently revising its own decision. However, the conclusion presented in *Kadi* (2008) does constitute an undeniably bold move for the European Court of Justice, as it formally redefines the relationship between EU law and international law.

The Court of Justice used its judgment in *Kadi* to declare the European judiciary's autonomy from the international legal order, as well as its prerogative to uphold TFEU principles against the wishes of an international body, such as the United Nations Security Council. Moreover, the context of its decision suggests that the ECJ's judgment was made at least partly to win the approbation of national courts, in order to preempt their encroachment onto the Court's jurisprudence by taking matters into their own hands. The strength of this national influence suggests that the ECJ may owe its allegiance more to the constitutional courts of Member States than to its fellow European institutions, a demonstrated responsiveness to national concerns which can only be beneficial to the European project.

*Kadi* is also one of the increasingly common instances in which the ECJ ruled in a manner which added to its own powers, while limiting those of the Commission. The development of the ECJ's rights-based jurisprudence is frequently seen as just another facet of European integration, with the Court's sphere of influence "spilling over" in the same way that the Commission's and the Council's authority has gradually expanded. However, *Kadi* is an example of a conflict between these two actors in which the judicial branch displays little to no deference to the executive; rather than functioning as yet another agent of overall integration, the ECJ reveals itself to be interested primarily in widening the scope of its own powers. In doing so, it hampers the power of a pan-European executive which had threatened to encroach on fundamental rights, as described in the Treaty of the European Union; in this sense, the ECJ acted as any national court would have, in response to a perceived threat to rights enshrined in its constitution.

This horizontal activism is heartening on two levels. First, it implies that the ECJ takes its newfound obligation to judicial review seriously in dealing with rights-based cases, which bodes well for the protection of fundamental rights on the European level. Second, its resistance to pressure from both the international community and European institutions demonstrates that the Court is capable of reigning in the power of the European executive, even on highly politicized issues in which it could be expected to back down, as the Court of First Instance initially did. Together, the three actions of the *Kadi* litigation demonstrate the ECJ's

23 See Tridimas, Takis. "Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-Kadi Developments" *Cambridge Yearbook of European Legal Studies*, 2009–2010, Volume 12. Hart Publishing Ltd: Oxford, England, 2010.



commitment to advancing its rights-based jurisprudence in a manner sanctioned by national constitutional courts, which is essential for the protection of fundamental rights in Europe.

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