The European Court of Justice and the International Legal Order after *Kadi*

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Introduction

Late in 2008 the European Court of Justice delivered what is arguably its most important judgment to date on the subject of the relationship between the European Community and the international legal order.[1] The case was a high-profile one involving a challenge by an individual to the EC's implementation of a UN Security Council Resolution which had identified him as being involved with terrorism and had mandated that his assets be frozen. The Court of Justice delivered a powerful judgment annulling the relevant implementing measures, and declaring that they violated fundamental rights protected by the EC legal order. The judgment has been hailed by human rights activists, it has delighted many of those concerned about Security Council accountability, and it has reassured EU scholars and actors interested in strengthening the autonomy of the EU legal order. This article argues however that despite the welcome it has received on these grounds, the nature and reasoning of the judgment should give serious pause for thought on other grounds. In particular, the judgment represents a significant departure from the conventional presentation and widespread understanding of the EU as an actor which maintains a distinctive commitment to international law and institutions.

In adopting a sharply dualist tone in its approach to the international legal order,[2] and to the relationship between EC law and international law, the ECJ identifies itself in certain striking ways with the reasoning and approach of the US Supreme Court in recent cases

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[1] Cases C-402/05P and C-415/05P, Kadi and Al Barakaat, judgment of the Court (Grand Chamber) of 3 September 2008. For an extensive commentary on the judgment and on other related European Court of Justice rulings on anti-terrorist sanctions see P.T.Tridimas and J.A. Gutierrez-Fons "EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?" Fordham International Law Journal, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1271302

[2] The term 'dualist', like the term 'monist', is a complicated and contested one. It is used in this paper to refer to a conception of international law and domestic law as distinct and separate legal spheres, with the latter setting the conditions under which international law enters the domestic system and dictating the legal consequences of such domestication of international law. In more technical legal parlance, however, the term dualist is generally used to refer to a legal system in which international law requires transposition before it becomes part of that domestic legal order. For further discussion of dualist discourse in international law see G. de Búrca and O.Gerstenberg "The Denationalization of Constitutional Law" 47 Harv.Int'l.L.J pp 243-262 (2005)

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such as *Medellin*,[3] which assert the separateness of international law from the domestic constitutional order and the absence of any domestic judicial role in shaping the relationship between the two. And although the two cases are quite different in many respects,[4] it is precisely the similarity of the ECJ's approach in *Kadi* to the larger question of the relationship between international law and the 'domestic' legal order to that of the Supreme Court in *Medellin*[5] and the way the ECJ's expression of that relationship abandons the reasoning and tone of some of its leading earlier judgments on the position of international law, which is its most striking feature. Despite the praise which *Kadi* has drawn from various quarters, it sits uncomfortably with the traditional self-presentation of the EU as a virtuous international actor in contradistinction to the exceptionalism of the US, as well as with the broader political ambition of the EU to carve out a distinctive international role for itself as a 'normative power' committed to effective multilateralism under international law.[6] Finally the fact that a major judgment about the role,

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[3] Medellin v Texas 552 U.S. ___ (2008). This case of course dealt not with Security Council resolutions but with a judgment of the International Court of Justice, which the Supreme Court found not to be enforceable in the US without prior congressional action. See also the earlier Supreme Court ruling on a closely related set of issues in Sanchez Llamas v Oregon 548 U.S. 331 (2006),. And see S. Koh ""Respectful Consideration" After Sanchez-Llamas V. Oregon: Why the Supreme Court Owes More to the International Court of Justice" Cornell LR Vol 93 243-273 (2007) Also A. Aleinikoff "Transnational Spaces: Norms and Legitimacy" (2008) 33 Yale J. Int'l L 479

[4] The two cases involve very different kinds of international obligation – an international judgment upholding the procedural rights of defendants in *Medellin*, and an international resolution which ignored any procedural rights for individuals in *Kadi* - and the reasons for refusing to give judicial effect to them were in that sense quite different. Nonetheless, the *Kadi* ruling goes further than *Medellin* in certain respects in that while the Supreme Court in *Medellin* made clear that Congressional action could be taken to enforce the international obligation in question, the nature of the ECJ ruling in *Kadi* means that the EU Council cannot override the judgment of the Court that the SC Resolution may not be implemented as it stands. This is because the ECJ's ruling specified that the implementing measure violated the 'general principles of EC law', which are akin to unwritten constitutional rights and at the top of the EC's normative hierarchy. However, the EU Council has shown itself to be willing to resist the rulings of the ECJ's lower court, the CFI, on other kinds of anti-terrorist sanction. Following the CFI's judgment in T-228/02, *PMOI v Council* judgment of 12 December 2006, the Council refused to de-list the People's Mojahedin of Iran Organization despite the Court's ruling that the listing was not justified. A legal opinion was recently signed by five senior international lawyers (September 18, 2008) challenging the Council's non-compliance with the CFI ruling as a serious misuse of powers and a breach of the EC Treaty. See http://www.scribd.com/doc/6156443/Summary-of-Legal-Opions-about-the-maintaining-of-the-PMOI-on-the-EU-asset-freeze-list

[5] There are perhaps also some relevant similarities with the judgment of the US Supreme Court in *Munaf v Green* 553 U. S. ____ (2008) in which it ruled that the Court's jurisdiction and the habeas statute extended to US citizens held by multinational coalition forces acting under UN mandate. Although the case does not directly address the authority of the UN Security Council or UNSC Resolutions in relation to the US constitution, the willingness of the Supreme Court to assert jurisdiction over the actions of the US component of what was presented as a multinational force suggests a non-deferential approach. On the other hand, the fact that the case concerned what was effectively unilateral US action despite the formally multilateral status of the force in question weakens the comparability of the cases.

[6] The President of the European Commission, José Manuel Barroso recently outlined a vision of the EU's foreign policy in the following terms: "We certainly welcome pluralism in international relations but let us not forget that multipolar systems are based on rivalry and competition... In international relations, partnerships and a multilateral approach can achieve so much more…. We need a renewed politics of global engagement, particularly with international institutions…because that is the only way we can consolidate and strengthen a stable, multilateral world, governed by internationally-agreed rules." (Speech at Harvard Law School, 24 September 2008, see

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relationship and authority of international law which chooses to express important parts of its reasoning in rather chauvinist and parochial tones was delivered not by a powerful nation-state but by an international organization which is itself a creature of international law, renders it all the more remarkable to the outside world.

The *Kadi* case is just one of a series of recent instances involving UN-authorized activity which caused significant harm to individuals and led them to bring human rights-based challenges before Europe's main regional courts. The legal and jurisprudential, not to mention the human, dilemmas which the cases reveal are merely instances of a more general phenomenon, namely the increasing complexity and density of the international political and legal environment, and the growing multiplicity of governance regimes with the capacity to affect human welfare in significant ways. At one level, therefore, the *Kadi* case is simply another instance of an increasingly common occurrence, namely a specific conflict between the norms of different regimes or sub-systems within the global legal arena. But in reality it is a particularly compelling instance in so far as the conflict involves some of the most fundamental norms of the modern international law system, namely Article 103 of the UN Charter,[7] peremptory or *ius cogens* norms,[8] and Chapter VII Resolutions of the Security Council.[9] The range of traditional international law rules which aim at systemic coherence such as the *lex specialis* rule or the later-in-time rule provided no easy answers in this case. Instead the case presented a direct confrontation between the UN system of international security and peace with its aspirations to general applicability and universal normative force, and the EU system situated somewhere between an international organization and a constitutional polity, in the context of an individual's claim that a significant violation of his rights had been committed in the interplay between the two. The broader picture of this article therefore concerns the upward drift of international authority and its decoupling from national or regional mechanisms of accountability and control. But its specific focus is the response of Europe's main regional courts, and in particular that of the European Court of Justice, to the question of the relationship between the EC legal order and the international legal order. Some may view the *Kadi* judgment mainly as a reaction to the particular context of the case, namely the widespread concern about the UN Security Council's regime of targeted sanctions and about the strong influence exercised by the United States in the process of listing and de-listing suspects. A close scrutiny of the judgment however suggests that its significance goes well beyond the context of UN smart sanctions. On the

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http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/455&format=HTML&aged=0&language=EN&guiLanguage=en

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

[8] See e.g. A. Orakeshevili , Peremptory Norms in International Law (Oxford, 2006) . For a critical reflection on the category, see A. D'Amato "It's a Bird, It's a Plane, It's Ius Cogens!" 6 Connecticut Journal of International Law 1-5 (1990)

[9] Under Chapter VII of the Charter, the Security Council is empowered to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to "decide what measures shall be taken …to maintain or restore international peace and security" including measures not involving the use of armed force such as economic sanctions. Article 25 of the Charter stipulates that "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"

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contrary, the broad language, carefully-chosen reasoning, and uncompromising approach of this eagerly-awaited judgment by the plenary Court suggests that the ECJ seized this high-profile moment to send out a strong and clear message about the relationship of EC law to international law, and about the autonomy of the European legal order.[10]

The aim of the paper is to analyze the striking response of the ECJ in *Kadi* to a vivid instance of the accountability dilemmas of international governance, and to situate this judicial response in the context of the growing emphasis on the role of the EU as an international actor. The paper argues that the Court's reasoning exposes a significant ambivalence in the EU's approach to international law and governance. Much of the political and legal discourse of the EU sets out to distinguish the EU and its international activity from the kind of self-interested selectivity and *ad hoc* exceptionalism of which the United States is generally accused. Instead, as will be outlined below, the EU has generally asserted an approach to international relations - in political terms a multilateralist approach and in juridical terms a constitutionalist approach - which emphasizes Europe's distinctive fidelity to international law and institutions. The approach of the ECJ in *Kadi* however sits uncomfortably with this conventional understanding and with official discourse, and departs from a previously dominant stream of the Court's case law on the EC's relationship with international law.[11] This line of case-law had emphasized the EC's respect for international law and the 'integral' place of international agreements as part of the EC legal order. The *Kadi* judgment however takes its place instead within a different strand of the Court's jurisprudence on the legal effect of the GATT/World Trade Organization agreements.[12] This strand of case law had previously been considered as an outlier – as an exceptional line of case law and, for many, a problematic line[13] - which was explicable by reference to the specific political and economic circumstances of the multilateral trade agreements.[14] Situating *Kadi* alongside this case-law on the legal effect of WTO agreements, however, reveals a court

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[10] The question of who the target audience for the *Kadi* judgment may have been is an interesting one. Some may view the case as a message from the ECJ to the EU Member States and its constitutional courts that the EU is a constitutional order founded on a genuine commitment to fundamental rights, in response to the challenges posed by many national constitutional courts to the unconditional supremacy of EC law. Others may view it as a message from the ECJ to the UN Security Council about the need for reform of the sanctions regime. The argument of this article however is that in an era of much greater legal and judicial interpenetration and borrowing, there are many possible audiences for a judgment such as that of the ECJ in *Kadi*

[11] See in particular cases 181/73, *Haegeman v Belgium* [1974] ECR 449, and 104/81 *Kupferberg* [1982] ECR 3641 on the effect of treaties within the EC legal order, and C-286/90 *Anklagemyndigheden* v *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 9 and C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655 para. 46 on the place of customary international law in EC law.

[12] See in particular Case C–149/96*, Portugal v Council* [1999] ECR I–8395, and earlier cases such as 9/73 *Schluter* v *Hauptzollamt Lörrach* [1973] ECR 1135, C-280/93 *Germany* v *Commission* [1994] ECR I–4873 and C–469/93 *Amministrazione delle Finanze dello Stato Chiquita Italia* [1995] ECR I–4533

[13] See e.g. Stefan Griller, 'Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96, Portugal v. Council' (2000) 3 Journal of International Economic Law 441 and Piet Eeckhout, 'Judicial Enforcement of WTO Law in the European Union – Some Further Reflections ' (2002) 5 Journal of International Economic Law 91

[14] See e.g. S. Peers, 'Fundamental Right or Political Whim? WTO Law and the ECJ', in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Hart, 2001) 111; and A. Rosas *Portugal* v *Council* (2000) 37 *CMLRev* 797.

which increasingly adopts what will be explained below as a robustly pluralist approach to international law and governance, emphasizing the separateness, autonomy, and constitutional priority of the EC legal order over international law.

The paper is structured as follows. The first part introduces the general background to the challenge faced by the ECJ in the *Kadi* case, namely the growing accountability dilemmas of international governance, which are increasingly manifesting themselves in challenges brought before national, regional and international tribunals. The second part then introduces the *Kadi/Al-Barakaat* targeted-sanctions cases before the European Union courts,[15] and the related though quite distinct *Behrami/Saramati* cases concerning the UN administration of Kosovo before the European Court of Human Rights.[16] The analysis in this second part outlines the rather different approaches adopted by the various European judicial instances - the European Court of First Instance, the European Court of Justice, and the European Court of Human Rights - to the question of whether or not they can engage in judicial review of the UN Security Council's actions for conformity with human rights standards. The third part then analyzes the premises underlying each of these different judicial approaches, and the vision of the international legal order, as well as of the situation of the European legal system within that international order, which they reflect. The fourth part situates the different judicial responses in the context of an ongoing scholarly debate over the respective merits of *constitutionalist* versus *pluralist* approaches to the international legal order.[17] The final part situates the response of the European Court of Justice and its approach to the relationship between EC and international law in the context of the European Union's broader relationship to international law. The conclusion argues that there is a significant dissonance between the pluralist, autonomy-driven approach of the European Court on the one hand, and the official discourse of the political and institutional branches on the international role of the EU. The paper suggests that the approach of the ECJ not only offers potential encouragement and support to other states and polities to assert the primacy of their autochthonous values over the common goals of the international community, but also that it risks undermining the ambition of the EU to carve out a particular identity for itself as an international actor.

Part 1: The role of the UN Security Council and the dilemmas of accountability in international governance

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[15] Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat*, judgment of the European Court of Justice (Grand Chamber) of 3 September 2008 and T-315/01, *Kadi* and T-306/01, *Yusuf and Al Barakaat,* judgments of the European Court of First Instance of 21 September 2005.

[16] Apps no. 71412/01&. 78166/01*Behrami v France*, and *Saramati v France, Germany and Norway*, admissibility decision of the European Court of Human Rights, 2 May 2007 (Grand Chamber).

[17] As will be outlined in more detail below, constitutionalist approaches to international law and governance presume the existence of a community of interest amongst states, based on some shared basic values and emphasizing the importance of universality and universalizability, and they are oriented towards the establishment of collective norms of communication, coordination and conflict-resolution. Pluralist approaches, by comparison, do not presume any such community but emphasize the separate nature and divergent interests and values of different political, social and geographic entities, and they assume the optimality of individual, voluntarist and political mechanisms for coordination and conflict-avoidance.

The challenges brought in the *Kadi* and *Behrami* cases highlight vividly the ways in which the international legal environment is growing ever more complex. There is an increasing number of international organizations, ranging from functionally or regionally specific entities created to address specialized transnational needs or goals, to broad multilateral organizations created to address more general or fundamental common tasks, with many variants in between. Accompanying these developments is a growing literature on the issues of legal pluralism[18] and international fragmentation[19] raised by the increasing density of the international juridical environment. Absent an orderly world legal system to define roles and assign jurisdiction, the relationship between these various entities *inter se* as well as the relationships between nation states, international organizations and other relevant international actors remain complicated and unresolved in many respects. There are significant overlaps in the jurisdiction which the different actors and entities purport to exercise, and their powers are often not delineated in such a way as to avoid conflict with others or in such a way as to prescribe how such conflict should be approached.[20] From one perspective, the interest in the legal puzzles and complications generated by the expanding and fragmenting international order is misplaced and fetishistic, and represents a kind of formalistic, Kelsenian wish for order, hierarchy and clarity, or an internationalist utopian's desire to see the liberal legal framework of the state comprehensively transposed onto the international domain.[21]

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[18] Paul Berman, "Global Legal Pluralism" Southern California Review, Vol. 80, p. 1155, 2007 and "A Pluralist Approach to International Law" Yale Journal of International Law Vol. 32, p. 301, 2007, William Burke-White "International Legal Pluralism" (2004) Michigan Int'l law journal 963 , Nico Krisch, "The Pluralism of Global Administrative Law" European Journal of International Law, Vol. 17, No. 1, pp. 247-278 (2006) Yuval Shany, Neil Walker "The Idea of Constitutional Pluralism" Modern Law Review, Vol. 65, pp. 317-359, (2002), Julio Baquero "The Legacy of the Maastricht-Urteil and the Pluralist Movement" European Law Journal, Vol. 14, pp. 389-422, (2008), D. Halberstam "Constitutionalism and Pluralism in Marbury and Van Gend" in M. Maduro and L. Azoulay, *The Past and Future of EU Law* (2008), http://ssrn.com/abstract=1103253. More generally, Boaventura de Sousa Santos in Toward a New Legal Common Sense (2nd ed, 2002) identified a 'third phase' of legal pluralism focusing in particular on the global context "Whereas before the debate was on local, infrastate legal orders coexisting within the same national time-space, now it is on suprastate, global legal orders coexisting in the world system with both state and infrastate legal orders" . See also Brian Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008), Günther Teubner, Global Bukowina: Legal Pluralism in the World Society (in *Global Law Without a State*, Dartmouth, Aldershot 3-28, (1997)

[19] The 'fragmentation' literature in international law is very extensive. For a small sample of the academic debate see Martii Koskenniemi and Paivi Leino "Fragmentation of International Law.: Postmodern Anxieties?" 2002 (15) Leiden Journal of International Law 553-79, Andreas Fischer-Lescano and Günther Teubner "Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" 29 Michigan Journal of International Law 999-1045 (2003), and the collection of essays International Law Between Universalism and Fragmentation: Essays in Honour of Gerhard Hafner, edited by Isabelle Buffard, James Crawford, Alain Pellet and Stephan Wittich (Brill, forthcoming 2009).
The International Law Commission in 2002 established a Study Group on "Fragmentation of international Law: Difficulties arising from the Diversification and Expansion of International Law", and presented a Report to the UN General Assembly in 2006: GE.06-62863, U.N. Doc.A/CN.4/L.702. For the various related documents of the International Law Commission, see http://untreaty.un.org/ilc/guide/1_9.htm

[20] For a summary of the conventional legal techniques provided under the Vienna Convention on the Law Treaties for addressing such conflict, see the ILC Study Group Report, ibid.

[21] See e.g. D. Kennedy "One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream" (2007) 31 NYU Review of Law and Social Change 641, arguing that the issue of 'legal pluralism' is a much less interesting one to explore than the pluralism of professional perspectives.

From another perspective however, there is more at stake than a fastidious desire for order, competition for expertise, or the hegemonic hopes of international legal liberalism. Many of these international organizations have been expanding their powers since their creation, exercising increasingly governmental-type functions, augmenting their autonomy and their authority in a range of ways. And at the same time, they generally exhibit two related and mutually exacerbating tendencies. First, they tend to concentrate and to enhance executive and bureaucratic power. They do this by empowering national executive actors who allegedly represent the state's interests in the international forum, and by empowering the new bureaucracies established within the secretariats and institutional structures of these organizations.[22] Secondly, they tend not to provide for the accountability and oversight mechanisms which are characteristic of the state context. The traditional 'club' model of international governance is unresponsive to many potential constituencies,[23] and the significant problems of accountability in the complex transnational environment have begun to generate a large literature.[24]

When undue harm is caused by the policies and acts of international organizations, there is often no obvious avenue of redress for those injured.[25] Even when national courts are willing in principle to hear actions brought against international organizations (IOs), there are often immunity rules and other jurisdictional barriers limiting the extent to which the organizations can be held legally responsible for their actions.[26] One possible response to the dearth of legal accountability mechanisms governing international organizations is to suggest that there is, in practical terms, no *need* for direct legal accountability to individuals, given the structure and nature of IOs. In other words, the logic of the institutional design of most international organizations assumes that they are not capable of affecting individuals directly. Being organizations established between states, they do

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[22] See e.g. Kim Lane Scheppele "The International State of Emergency: Challenges to Constitutionalism after September 11" http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1048&context=schmooze_papers

[23] R. Keohane and J. Nye Democracy, Accountability and International Governance (Manuscript, Kennedy School of Government, 2001

[24] See e.g. the NYU Global Administrative Law project, www.iilj.org/GAL.

[25] The International Law Commission's draft articles on the Responsibility of International Organizations, which are still being discussed by the Commission, but some of which were provisionally adopted in 2003 and 2004, are modeled on the ILC's draft articles on State Responsibility, thus treating their responsibility for breaches of international law as being owed to states and not to individuals.

[26] August Reinisch, International Organizations Before National Courts, and 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', 95 *AJIL* (2001) 851; Karel Wellens, Remedies Against International Organizations (2002) and "Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap" 25 Michigan Journal of International Law 1159 (2003-4). Michael Singer "Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns" 36 Va. J. Int'l Law 53 (1995). On the problem of accountability of international organizations to individuals in relation to UN sanctions, see M. Bothe "Security Council's Targeted Sanctions against Presumed Terrorists: The Need to Comply with Human Rights Standards" (2008) 6 Journal of International Criminal Justice 541-555, and J. Reich "Due Process and Sanctions Targeted Against Individuals Pursuant to Resolution 1267 (1999)" Yale Journal of International Law Vol. 33 (2008). Available at SSRN: http://ssrn.com/abstract=1268163

not have legal or operational powers governing individuals.[27] Instead there are intermediate, national and sub-national levels of authority which implement and apply the norms or policies set at intergovernmental level, and it is at these latter and lower levels of authority that the relevant accountability mechanisms should exist. From this perspective, there should be no expectation that an organization such as the UN, or even the European Union when it acts as an intergovernmental organization in an area of foreign policy, would be held to account for the ultimate harm caused to individuals for acts which originate from the authority of those organizations. While states may be held accountable to one another within international organizations; and the executive actors who represent the states within these organizations may be accountable to their governments or parliaments; and the officials within the bureaucratic structure of the organization may be accountable to other institutions within the organization, there is no additional need for a framework of accountability providing for the direct answerability of such organizations to those who are ultimately harmed by the policies they adopt.

This argument however is inadequate. Such a conventional depiction of the sphere of influence and impact of international organizations ignores the way in which they have evolved and the fact that many such organizations have acquired increasingly significant administrative and law-like powers. Even if the eventual impact of their acts is conditioned through a chain of intermediate norms and actions, it is often the case that the intermediate acts are not themselves reviewable (e.g. because they are considered to be legally compelled to implement the norms of the superior organization, and the relevant tribunal is unwilling to impugn such norms) and the ultimate responsibility for the harmful impact lies with the organization itself. To give the example discussed in this paper, the UN Security Council has begun to exercise legislative-type powers under Chapter VII of the Charter, as in its adoption of resolutions requiring states to freeze the assets of individuals suspected of supporting terrorism, and its establishment of the Counter-Terrorism Committee and the Sanctions Committee.[28] Such resolutions obviously require implementation by states or by regional organizations such as the EU before they actually bite (other than in reputational and related terms) to limit the property rights of individuals. However, it seems inaccurate to say that the primary responsibility for harm caused where a wrongly-listed person's property is sequestered lies with the state which implements a mandatory Security Council resolution, rather than with the Security Council which wrongly named the person as a terrorist and required the sequestration. Even if it were meaningful to say that the state is legally responsible for

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[27] One prominent exception is the European Community which, under the founding Treaties in 1952 and 1957, was originally granted legal powers with direct applicability to individuals, which were accompanied by certain limited mechanisms for legal accountability to affected individuals. Having said this, judges of the European Court of Human Rights have recently questioned whether even these mechanisms of individual accountability are sufficient to satisfy human rights requirements: see the separate opinions of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, and of Judge Ress, in *Bosphorus v Ireland,* Appl. 45036/98 (2005).

[28] See e.g. Michael Fremuth and Jörn Griebel, "On the Security Council as a Legislator: A Blessing or a Curse for the International Community?" 76 Nordic Journal of International Law 339-361 (2007), and Luis Miguel Hinojosa Martínez "The Legislative Role of the Security Council in its fight against Terrorism: Legal, Political and Practical Limits" 57 ICLQ 333-359 (2008). See also Jean Cohen "A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach" 15 Constellations 456-484 (2008)

the harm done, Article 103 of the Charter may provide the state with a possible shield akin to a superior-orders defence, subordinating the protection of the individual and the answerability of the state for harm caused to its overriding obligations under the Charter. A second example of the potentially direct and harmful impact of UN-authorized measures concerns the actions of UN territorial administrators. Like the evolution of lawmaking powers on the part of the Security Council, recent years have also seen the growth of another significant governing role on the part of the UN, namely the actual administration of territories in specific conflict or post-conflict situations.[29] UN territorial administration of this kind has been seen in East Timor, Bosnia and Kosovo, and it is clear that such direct governing power also carries with it the potential for causing significant harm. Yet even in this situation in which the potential for direct UN-created harm is much more apparent, the question of the legal accountability and responsibility of such territorial administration is not easily answered,[30] and the moves which have been made to set up internal mechanisms of accountability have not yielded satisfactory results.[31]

A second possible response to the dearth of legal accountability mechanisms governing international organizations is to argue that direct legal accountability to affected persons would damage the functioning of the organization. This response is premised not on the argument that the organizations are incapable of causing harm in a way that would merit the imposition of direct legal accountability, but instead on the argument that to insist on such accountability would hinder the functioning of the organization. This functional argument obviously varies depending on the goals and purposes of the organization, but at its broadest it can be stated as a claim that international cooperation is in itself a good which should be furthered and protected,[32] and that collateral damage resulting from such

[29] The administration of territory under the auspices of the UN is of course not without precedent, as the post-WWII system of international trust territories provided for under Chapter XII of the UN Charter indicates. See Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission never Went Away* (OUP, 2008). However, under the international trust territories system, territories which were emerging from colonial status into independence were generally administered for a transitional period by the former colonial power under the supervision and auspices of the UN, but were not administered directly by the UN itself, as is the case for the more recent experiments in Kosovo and East Timor.

[30] Lindsay Cameron "Accountability of International Organizations engaged in the administration of Territory" (2006). See European Commission for Democracy Through Law ("Venice Commission") Opinion on Human Rights in Kosovo, CDL-AD(2004)033. See also the Report of the UN Secretary General of 12 July 1999 interpreting Resolution 1244 , which established the Kosovo administration, as requiring the administration to be guided by international human rights law in the exercise of its authority.

[31] See e.g. the criticisms leveled by Amnesty International about the failure to convene the successor to the institution of Ombudsperson in Kosovo, i.e. the Human Rights Advisory Panel which had been provided for by UNSC resolution in 2006 but was not ultimately set up until two years later : "Summary of Amnesty International's Concerns in the Balkans Region January – June 2007" AI Index: EUR 05/003/2007. See also Bernard Knoll "The Human Rights Advisory Panel in Kosovo: Too Little Too Late" (2007) 7 European Human Rights Law Review 534-549, and the Opinion of the Venice Commission at n. 31 above; and see the Report of the Human Rights Committee of the ICCPR on UNMIK, CCPR/C/UNK/CO/1 of 14 August 2006

[32] See the reasoning of the European Court of Human Rights in *Bosphorus*, ibid, para 150: "The Court has also long recognized the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organizations". See also on this point *Waite* v *UK*, App

cooperation should not lead to the imposition of legal responsibility. Otherwise there is a risk that the organization would inhibit itself excessively and would avoid pursuing important policies because they carry some risk of harm. This kind of functional argument underlies most immunity rules – i.e. it reflects a calculation that the harm caused by the imposition of legal accountability to those who are injured outweighs the harm which would be occasioned by the lack of legal redress for the latter. But the functional argument for excluding legal accountability is overstated. While it is clear that the routine imposition of legal responsibility for any harm caused is likely to be a significant deterrent to an organization which is seeking to pursue goals which necessarily entail risks to the interests and rights of others, a rule of absolute immunity or of freedom from accountability carries the opposite risk of guaranteeing impunity for arbitrariness and abuse. Further, the suggestion that the mere existence of legal accountability would hinder the functioning of an organization seems exaggerated. While it seems reasonable to suggest that the imposition of an excessively high standard of liability could impair the ordinary workings of an international organization, there are many other options between this and a rule of immunity.[33] There is no reason why a carefully tailored set of accountability principles should not be capable of navigating successfully between the risk of defensive practices arising from too high a standard of responsibility and the risk of abuse arising from impunity. Finally, a related but more institutional than functional argument for excluding legal accountability on the part of international organizations to other levels of authority is that this would entail overreaching – a kind of exercise of extraterritorial jurisdiction – on the part of the relevant regional or national tribunals.[34]

Various accounts of the international legal environment indeed emphasize the existence of overlapping, multi-tiered and intersecting levels of authority. This gives the impression that the main problems are how to manage the multiple jurisdictional claims which may arise, how to deal with the potential conflict of applicable authority, and how to encourage deference by one site of accountability to a more appropriate one through principles like comity or complementarity.[35] Yet the problem may also be that the proliferation of international organizations and institutions, rather than multiplying the potential sites and mechanisms of accountability and jurisdictional oversight,[36] in fact leave a vacuum of legal responsibility where the international organization itself envisages no legal mechanism for review, and the national or intermediate levels of

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26083/94 (1999), paras 63 & 72, *Al-Asdani* App 35763/97 (2001) para 54, and in *Behrami* itself, on international cooperation in general and within the UN in particular, see paras 145-152

[33] See e.g. R. Grant and R. Keohane "Accountability and Abuses of Power in World Politics" American Political Science Review, Vol 99 pp 29-43 (2005), R. Keohane and J. Nye "Redefining Accountability for Global Governance." In *Governance in a Global Economy: Political Authority in Transition*, ed. Miles Kahler and David Lake. Princeton, NJ: Princeton University Press (2003).

[34] See the argument to this effect made by the UK in *Kadi*, which was rejected by the Advocate General at para 38 of his opinion, n. 129 below.

[35] See e.g.. Paul Berman, Global Legal Pluralism (2007) n.18 above.

[36] Paul Berman in "A Pluralist Approach to International Law" Yale Journal of International Law Vol. 32, p. 301, 2007 refers in this context to Robert Cover's famous idea of "jurisdictional redundancy". See R. Cover "The Uses of Jurisdictional Redundancy: Interests, Ideology and Innovation" William & Mary Law Review Vol. 22 pp 639 (1981)

authority consider that they are not themselves responsible for the act in question and that they lack jurisdiction to question the accountability of the other or 'higher' level of authority.

It was precisely these dilemmas of international accountability that were raised in the *Kadi/Al-Barakaat*[37] and the *Behrami/Saramati*[38] cases, where the complex character of the international organizations in question sharpened further the accountability dilemma confronted by the European courts. Not only has the UN Security Council expanded its role and its powers well beyond those originally envisaged in the Charter to include the kind of legislative measures being used in the anti-terrorism context, and the significant governing powers exercised in Kosovo and elsewhere, but its anomalous and historically-contingent composition and the deep ideological divisions and political battles which have crippled its functioning have also weakened its legitimacy as the main governing body for international peace and security.[39] Yet if the UN in general and the Security Council in particular suffer from a legitimacy deficit, so in a different but no less significant way does the European Union.[40] While from one perspective it is the most successful contemporary example of regional integration, having built a strong economic union initially of six member states but now including twenty-seven, with other candidates still lining up to join, from another perspective it is an internally divided and externally weak global actor whose latest failed foray into constitution-making has further undermined its attempt to bootstrap its popular and political legitimacy.

An apparent collision between the norms of these two contested international organizations provides the context in which the *Kadi/Al-Barakaat* cases before the European Court of First Instance (CFI) and the European Court of Justice (ECJ), where the EU was effectively asked by the litigants to position itself as a legal and symbolic barrier between the exercise of power by the Security Council and its impact on the individual. The *Behrami/Saramati* cases arose before the European Court of Human Rights (ECtHR), thus involving not the European Union but the human rights branch of the geographically larger and juridically influential but politically marginal Council of

[37] N.15 above.
[38] N.16
[39] For a taste of the political debates over Security Council reform, see the work of the Open-ended Working Group on Security Council Reform, most recently in A/AC.247/2008/L.1, recommending intergovernmental negotiations to be opened.
For some of the internal UNSC discussion of the need for its own reform see http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.3506555/k.DA5E/Special_Research_ReportbrSecurity_Council_Transparency_Legitimacy_and_Effectivenessbr18_October_2007_No_3.htm
For a critical comment on the troubling limits of Security Council accountability, see M. Koskenniemi, "The Police in the Temple: Order, Justice and the UN: A Dialectical View" (1995) 6 EJIL 1-25
[40] For some examples from a vast literature see. Erik Odvar and John Erik Fossum "Europe in Search of Legitimacy: Strategies of Legitimation Assessed" International Political Science Review, Vol. 25, 435-459 (2004), Lene Hansen and Michael Williams "The Myths of Europe: Legitimacy, Community and the 'Crisis' of the EU" Journal of Common Market Studies Vol 37, pp 233-249 (2002), and Marcus Horeth "No way out for the Beast: The Unsolved Legitimacy Problem of European Governance" Journal of European Public Policy Vol 6 pp. 249-268 (1999).

Europe.[41] In the following part, the strikingly different responses of the European Court of Human Rights in *Behrami/Saramati*, and of the two European Union courts (the ECJ and CFI) in K*adi/Al-Barakaat*, to the indirect challenges brought before them against Security Council action are outlined. Although the main thesis of the article turns on the ruling of the European Court of Justice in *Kadi*, the approach of the ECtHR in the rather different circumstances of the *Behrami/Saramati* cases is discussed first. This is because of the stark and revealing contrast it presents in its approach to a range of similar questions concerning the accountability of the UN Security Council, the authority of the UN Charter and the position of the regional European human rights system within the international legal order.

Part 2 – The cases

Behrami/Saramati before the European Court of Human Rights

The *Behrami/Saramati* judgment brings together two different factual scenarios involving the United Nations Interim Administration Mission in Kosovo, (UNMIK) and the UN-authorised security presence in Kosovo (K-FOR), following the forced withdrawal of Federal Republic of Yugoslavia (FRY) forces and the conflict between Serbian and Albanian forces in Kosovo in 1999.[42] The UN Security Council by Resolution[43] had provided for the establishment of K-FOR, composed of troops "under UN auspices", with "substantial NATO participation" but under "unified command and control".[44] By the same Resolution, the Security Council decided on the establishment of UNMIK, which would coordinate closely with KFOR, and provided for the appointment of a Special Representative to control its implementation.

The *Behrami* complaint was brought before the European Court of Human Rights by the father of two children, one of whom was killed and the other severely injured and disfigured by unexploded cluster bombs in the area where they were playing. The Behrami family was of Albanian origin. KFOR had apparently been aware of the unexploded CBUs for months but decided that they were not a high priority, and an UNMIK Police report in March 2000 concluded that the incident amounted to "unintentional homicide committed by imprudence".[45] The exact division of responsibility as between the military wing (KFOR) which had originally been responsible for de-mining in the area and the civilian wing (UNMACC, the UN Mine Action Coordination Centre in Kosovo) which formally took over responsibility in August 1999 was disputed, but it seemed that both authorities were required to cooperate and to work closely together.[46] Behrami complained to the EtCHR of violation of Article 2 of the Convention concerning the right to life.

[41] Apps no. 71412/01&. 78166/01*Behrami v France*, and *Saramati v France, Germany and Norway*, ECtHR admissibility decision, 2 May 2007 (Grand Chamber).
[42] Behrami and Saramati v France, Norway and Germany; judgment of the European Court of Human Rights of 2 May 2007 (Appl 71412/01, 71412/01&. 78166/01)
[43] UNSC Resolution 1244 of 10 June 1999.
[44] Behrami, n. 42 para 3.
[45] Ibid., para 6.
[46] Paras 52-60.

The *Saramati* complaint involved a Kosovar national of Albanian origin who was arrested by UNMIK police on April 24 2001 on suspicion of attempted murder and illegal possession of a weapon. After being brought before an investigating judge, he was detained until 4 June 2001 when his appeal was allowed and his release ordered by the Supreme Court. In mid July 2001 he was again arrested by UNMIK police and detained for a month. When his legal advisors questioned the legality of the detention they were told that KFOR had authority under Resolution 1244 to detain him since it was necessary "to maintain a safe and secure environment" and to protect KFOR troops, as they had information about his alleged involvement with armed groups operating between Kosovo and the FRY.[47] Following several further extensions of his detention and appearances for trial, and despite the Supreme Court having ordered his release in June 2001, he was convicted in January 2002 of attempted murder. This conviction was subsequently quashed by the Supreme Court in October 2002 and his release from detention was ordered. No retrial had been set by the time the ECtHR gave judgment in July 2007. Saramati complained to the ECHR that his detention by KFOR breached Articles 5 and 13 of the ECHR concerning liberty, security and the right to an effective remedy.

Both applicants claimed that responsibility for the violation lay with KFOR, and that in Behrami's case the responsibility for the de-mining operation lay with France, whereas in Saramati's case responsibility for the prolonged detention lay with Norway. Given that the events at issue took place outside the territory of the States involved and outside the 'legal space' of the Convention on Human Rights at the time, and under the auspices of the UN, this raised the question of the extra-territorial application of the Convention[48] and of the jurisdiction of the Court over the actions impugned. The judgment focused primarily on the question of the attributability of the acts complained of to the respondent states, and hence on the question of the international responsibility under the ECHR of those states for the human rights violations alleged. Ultimately, in a chain of reasoning that has already attracted significant criticism,[49] the Court ruled that since the acts of both KFOR and UNMIK were under the 'ultimate control' of the UN, they were attributable to the UN and not to the individual states involved in the actual operations. The Court concluded that even though there was no direct operational command from the UN Security Council, there was ultimate control sufficient for the 'delegated model' of missions under Chapter VII of the UN Charter,[50] and the level of operational control by contributing country forces was not such as to affect the unity of NATO command or to

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[47] Para 11.

[48] The Federal Republic of Yugoslavia at the time was not a member of the Council of Europe, and hence not a signatory to the European Convention on Human Rights. Serbia and Montenegro, the two successor states to the FRY have since become signatories to the ECHR, but the status of Kosovo itself is not yet settled.

[49] See e.g Kjetil Larsen "Attribution of Conduct in Peace Operations: the "Ultimate Control and Authority" Test" Vol 19 European Journal of International Law (2008), Aurel Sari "Jurisdiction and International responsibility in Peace Support Operations: The Behrami and Saramati Cases" Vol 8 Human Rights Law Review 151-170 (2008) and Marco Milanovic and Tatjana Papic "As Bad as it Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law" International and Comparative Law Quarterly Vol 57 (2008)

[50] *Behrami*, paras 133-136

detach them from the international mandate.[51] As far as UNMIK was concerned, the Court ruled that UNMIK was a subsidiary organ of the UN created under Chapter VII of the Charter so that its impugned inaction was, in principle, "attributable" to the UN in the same sense as KFOR.[52].

Having concluded that the acts challenged were attributable to the UN, the question for the Court was whether it had jurisdiction to examine the alleged violations of the Convention. The first and most obvious point noted by the Court was that the UN is not a contracting party to the ECHR. On the other hand, the Court of Human Rights has been faced with an analogous situation in cases which were brought before it by applicants challenging acts adopted by a different international organization - the European Community and the European Union. Like the UN, neither the EC nor the EU is a party to the ECHR, and yet the Court of Human Rights agreed to rule on human rights challenges brought against states which were implementing mandatory EC and EU legislation.[53] In such cases the ECtHR developed an approach, even if a somewhat awkward and unsatisfactory one,[54] to enable it to hear indirect challenges against an international organization which is not a party to the Convention and which otherwise has no formal relationship with the ECHR. In short, the approach adopted by the Court of Human Rights to deal with such challenges to EU measures is to say that insofar as the EU maintains a functioning system of human rights protection which is at least equivalent to that provided by the ECHR, the Court of Human Rights will presume that the EU measures are compatible with the Convention, unless there is evidence of some dysfunction in the control mechanisms or a manifest deficiency in the protection of human rights.[55]

In *Behrami*, however, the ECtHR rejected the possibility of adopting such an approach towards organs of the UN, and rejected any possibility of exercising jurisdiction over acts of states which were carried out on behalf of the UN. The Court began by recognizing that all contracting parties to the ECHR are also members of the UN, and that one of the Convention's aims is precisely the 'collective enforcement of rights in the Universal Declaration of Human Rights". This meant that the ECHR had to be interpreted in the light of the relevant provisions of the UN Charter, including Articles 25 and 103 as interpreted by the ICJ.[56] In other words, the Court of Human Rights emphasized both the

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[51] Id, paras 137-140.
[52] Id. para 143.
[53] Most importantly *Bosphorus Airways v Ireland*, Appl 45036/98, judgment of the ECtHR 7 July 2005, but see also *Senator Lines GmbH v the 15 Member States of the European Union* (Appl. no. 56672/00), decision on admissibility of 10 March, 2004, *Emesa Sugar v the Netherlands,* Application no. 62023/00, judgment of 13 January 2005; and *SEGI v the 15 member states of the European Union*, Appl no. 6422/02, (2002). For different kinds of challenges where there was arguably discretion on the part of the Member State whether or not to enter into or concerning how to implement the EC measures, see *Cantoni v France, Appl.* 17862/91 (decision of the Commission of 29 May 2005) and *Matthews v UK*, Appl. no. 24833/94, judgment of the ECtHR of 18 February 1999.
[54] For critical comment on *Bosphorus* see Sionaidh Douglas-Scott, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Acquis*" Common Market Law Review, Vol. 43, pages 629-665 (2006)
[55] *Bosphorus Airways v Ireland*, Appl 45036/98, judgment of the ECtHR 7 July 2005, paras 18-21
[56] *Behrami*, para 147. For the content of Articles 25 and 103 of the UN Charter see n.9 above.

commonality of objectives and shared values underpinning both the ECHR and the UN Charter, as well as emphasizing its own fidelity to the provisions of the Charter as interpreted by the ICJ.[57] The ECtHR however drew a sharp distinction between the legal orders of the UN and that of the EU for these purposes. For the Court of Human Rights, the commonality in values underpinning the ECHR and the UN Charter – in terms of protection for human rights - provided one of the reasons for deference on the part of the ECtHR to the actions and decisions of the UN and its organs. The other reason, however, emphasized the distinctive mission of the UN and its unique powers to pursue this: "While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace.., the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force"[58]

Since the acts by UNMIK and KFOR which were challenged arose from coercive measures authorized by UN Security Council Resolution 1244, and adopted under Chapter VII of the Charter, they were according to the Court necessarily "fundamental to the mission of the UN to secure international peace and security".[59] Reasoning in a broadly instrumental manner, the Court ruled that if it were to interpret the ECHR in such as way as to exercise jurisdiction over acts or omissions of the state contracting parties which were carried out in the course of missions authorized by UNSC resolutions, this would interfere with the fulfillment of the UN's key mission and with the effective conduct of its operations.[60] Deferring further to the political authority of the Security Council, the Court argued that if it were to exercise such review, it would effectively be imposing conditions on the implementation of a SC Resolution which were not provided for within the resolution itself. The fact that member states chose to vote for the resolution and were not acting under any prior UNC obligation at the time of voting was deemed irrelevant by the Court, because the states' action was crucial to the effective fulfillment by the UNSC of its Chapter VII mandate and the imperative aim of collective peace and security.[61]

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[57] We will see that in the *Kadi* case discussed below, the Advocate General there also referred to shared fundamental values, but in rather a different vein. His opinion suggested the possibility of a kind of rebuttable presumption (similar to that invoked by the ECtHR in *Bosphorus*, n. 55 above, in relation to acts of the EU) that another international order is premised on a shared commitment to the same set of values, and that respect should be shown for the decisions of that other order only where the shared commitment is evident. See n. 133 below.
[58] *Behrami*, para 148.
[59] Id, para 149
[60] Ibid. Compare the reasoning of the UK Court of Appeal and House of Lords in the case of *Al-Jedda* concerning jurisdiction over apparent human rights violations by British forces in Iraq: *R (on the application of Al-Jedda) v. Secretary of State for Defence*, Court of Appeal, Civil Division, Judgment of 29 March 2006, House of Lords December 2007.
[61] Para 149.

The reasons given by the ECtHR for its unwillingness to extend its *Bosphorus* approach[62] to the context of the UN were surprisingly formal, given the non-textual and deeply instrumental arguments for deference to the UN which the Court had already provided. Towards the end of its judgment, the ECtHR suddenly introduced the question of territoriality which it had not otherwise discussed in the judgment, declaring that the reason the *Bosphorus* approach was not appropriate to the UN was that the acts in *Bosphorus*[63] had been undertaken by a contracting state to the ECHR (i.e. Ireland) within the territory of that same state, together with the fact that the acts in *Behrami* were ultimately attributable to the UN.[64] This return to its unconvincing reasoning on attributability and international responsibility[65] was followed by a final sentence which more openly articulated and reiterated the animating rationale of the judgment as a whole: "There exists, in any event, a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was there concerned and those in the present cases". As far as the acts of UNMIK and KFOR were concerned, the Court ruled: "their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective". [66] In other words, while the *ratio decidendi* (to borrow a common law term) of *Behrami* was that (1) the Court of Human Rights lacks jurisdiction over actions which are ultimately attributable to the UN Security Council, and (2) it would be inappropriate to extend the *Bosphorus* approach to acts of an international organization which occurred outside the territorial space of the Convention, neither of these conclusions is particularly convincing. The attributability reasoning has been widely criticized already as unconvincing,[67] and the territoriality conclusion against using a *Bosphorus* approach is weak because the point was not argued or discussed at any length in the judgment. Instead, the real heart of the judgment and the reason underlying the adoption of these conclusions seems to be the Court's desire to avoid an open conflict with the UN Security Council and to defer to the 'organization of universal jurisdiction fulfilling its imperative collective security objective'.[68]

The Kadi / Al-Barakaat cases

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[62] The *Bosphorus* approach, described above n. 55, adopts a rebuttable presumption that the international organization in question protects the same shared, basic fundamental rights in an equivalent way, subject to ECtHR review being triggered where there is evidence of a manifest deficiency or dysfunction of control.
[63] In *Bosphorus* the impugned act involved the seizure of an aircraft by Irish authorities acting in order to implement an EC Regulation which in turn was adopted to implement a UNSC resolution.
[64] *Behrami*, para 151
[65] See e.g. the analyses of Larsen, Sari, Milanovic and Papic n 49 above.
[66] *Behrami,* para 151.
[67] See n. 49 above.
[68] N. 66 above.

In the case of *Kadi*,[69] a Saudi Arabian national with substantial assets in the EU, brought an action for the annulment of a European Community Regulation in so far as it affected him. Kadi had been listed in the annex to EC Regulation No 467/2001 as a person suspected of supporting terrorism. The effect of this Regulation, which had direct legal effect in the national legal systems of all EU Member States, was that all his funds and financial assets in the EU would be frozen. The 2001 Regulation was replaced a year later by Council Regulation No 881/2002, and Kadi's name was again included in the annex to that measure. The EC Regulation was adopted to implement an EU 'Common Position' – a foreign affairs measure which binds the EU member states but which lacks the direct legal enforceability of an EC Regulation. This Common Position in turn was adopted to implement a series of UN Security Council (UNSC) Resolutions concerning the suppression of international terrorism and adopted under Chapter VII of the UN Charter.[70] The UNSC resolutions required all States to take measures to freeze the funds and other financial assets of individuals and entities which were associated with Osama bin Laden, the Al-Qaeda network and the Taliban, as designated by the Sanctions Committee of the Security Council. The list, which was prepared by the Sanctions Committee in March 2001 and subsequently amended many times, contained the names of the persons and entities whose funds were to be frozen. Kadi's name was added to the list in October 2001. A later UNSC Resolution allowed for states to permit certain humanitarian exceptions to the freezing of funds imposed by the three earlier Resolutions, subject to the notification and consent of the Sanction Committee.[71] The EU in turn modified the Common Position and the Regulation to provide for the permitted humanitarian exceptions in relation to food, medical expenses and reasonable legal fees.[72]

Kadi argued that he was the victim of a serious miscarriage of justice and that he had never been involved in terrorism or in any form of financial support for such activity.[73]

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[69] I discuss here only the facts of the Kadi case, although it was subsequently joined together with the Al-Barakaat case on appeal to the ECJ, since the legal analysis was essentially identical. C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi v Council of the EU and Commission of the EC*, and *Al-Barakaat International Foundation v Council of the EU and Commission of the EC*, judgment of 3 September, 2008. The judgments of the Court of First Instance in the two cases, T-315/01, *Kadi* and T-306/01, *Yusuf and Al Barakaat* were given 21 September 2005; and the opinion of Advocate General Maduro was given on 16 January 2008. For some of the other EU cases involving terrorist-listing measures emanating from UN Security Council resolutions see cases T-253/02 *Ayadi v* Council, judgment of 12 July 2006; T-49/04 *Hassan v Council and Commission,* judgment of 12 July 2006; T-362/04 *Minin v Council,* judgment of 31 January 2007; and on 'autonomous' EU sanctions see e.g. cases T-228/02 *Organisation des Modjahedines du people d'Iran (OMPI) v Council*, [2006] ECR II-4665 followed by T-256/07, *People's Mojahedin Organization of Iran v Council*, judgment of 23 October 2008, T-253/04 *KONGRA-GEL*, judgment of 3 April 2008, T-229/02 *Osman Ocalan on behalf of PKK v Council*, judgment on 3 April 2008, T-327/03 *Stichting Al-Aqsa v Council*, judgment of 11 July 2007 and T-47/03 *Sison v Council*, judgment of 11 July 2007. See also Case C-117/06 Gerda Möllendorf and Christiane Möllendorf-Niehuus, judgment of 11 October 2007.

[70] The relevant UN SC Resolutions were 1267(1999), 1333(2000) and 1390(2002).

[71] UN SC Resolution 1452(2002). The Security Council also adopted Resolution 1455(2003) in January 2003 to improve the implementation of the measures for the freezing of funds.

[72] Common Position 2003/140/CFSP and Council Regulation 561/2003.

[73] For an account of the weakness of the cases against several of the applicants who brought the applications before the ECJ, but in particular Al-Barakaat, see the conclusions of the 9/11 Commission in

He argued to the CFI that the European Community had lacked legal competence under the EC Treaties to adopt the Regulation, and also that the Regulation violated his fundamental rights to property, to a fair hearing, and to judicial redress. Both the CFI, and subsequently also the ECJ although on different grounds involving rather complicated legal reasoning, rejected the argument that the EC lacked the power to adopt the Regulation, and held that the treaties provided a sufficient legal basis for the measure. The more important argument for current purposes, however, was the claim that the measure unjustifiably interfered with Kadi's fundamental rights. The applicant made this argument on the basis of the European Court of Justice's well-established case-law to the effect that 'fundamental rights recognised and guaranteed by the constitutions of the Member States, especially those enshrined in the European Convention on Human Rights, form an integral part of the Community legal order'.[74] In particular he pleaded infringement of the right to property in article 1 of Protocol 1 to the ECHR, the right to a fair hearing in accordance with earlier case law of the ECJ, and the right to judicial process under Article 6 ECHR and ECJ case law.

Kadi argued that there had been no failure on his own part to exhaust any available remedies, since he had already sought to make use of whatever means existed to have his assets un-frozen and his name removed from the list. He had approached the Sanctions Committee directly and had been told that representations made by individuals would not be accepted and that complaints concerning sanctions imposed at the national level must be addressed to the competent courts. He had then sought the assistance of the Saudi Arabian Ministry of Foreign Affairs in asserting his rights before the Sanctions Committee, and had also taken steps in the US to make representations to the Office of Foreign Assets Control, all apparently without redress.

In response, the EU Council and Commission relied on the UN Charter[75] and argued that the European Community, just like the EU Member States, was itself bound by international law to give effect, within its spheres of power and competence, to resolutions of the Security Council, especially those adopted under Chapter VII of the UN Charter of the United Nations. The Council argued that any claim of jurisdiction on the part of the Court "which would be tantamount to indirect and selective judicial review of the mandatory measures decided upon by the Security Council in carrying out its function of maintaining international peace and security, would cause serious disruption to the international relations of the Community".[76] In other words the Council's argument consisted not only of the instrumental claim that any indirect review by the CFI of the UN measures would disrupt the functioning of the UN system, but also of the separate

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its Monograph on Terrorist Financing appended to its final report, and especially Chap 5. See www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf
See also William Vlcek "Hitting the Right Target: EU and Security Council Pursuit of Terrorist Financing" http://www.unc.edu/euce/eusa2007/papers/vlcek-w-09h.pdf.

[74] CFI *Kadi* judgment, para 138, citing Case 4/73 *Nold v Commission* [1974] ECR 491, paragraph 13

[75] In particular Articles 24(1), 25, 41, 48(2) and 103 of the UN Charter.

[76] CFI *Kadi* judgment, para 162

claim that it would also seriously disrupt the functioning of the international relations of the EC.[77]

The CFI's analysis

The CFI took the view that in order to consider the applicant's substantive claim of violation of fundamental rights by the application of the Regulation, it would have to first respond to the various arguments concerning the relationship between the international legal order under the UN and the 'domestic or Community legal order', and concerning the extent to which the EC was bound by Security Council resolutions under Chapter VII.[78]

The Court went on to rule that in accordance with customary international law and with Article 103 of the UN Charter, the obligations of EU member states under the Charter prevailed over every other obligation of domestic or international law, including those under the European Convention on Human Rights and under the EC Treaties. UN Charter obligations included obligations arising under binding decisions of the Security Council.[79] The CFI stated that the EC Treaty recognized such overriding obligations on its Member States,[80] and that even though the EC itself is not directly bound by the UN Charter and is not a party to the Charter, it is indirectly bound by those obligations in the same way as its Member States are, by virtue of the provisions of the EC Treaty.[81] Ultimately, the Court concluded that not only may the EC not infringe the obligations imposed on its Member States by the UNC or impede their performance, but the EC is actually *bound*, within the exercise of its powers, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil

[77] See at para 174 "the Council submits that where the Community acts without exercising any discretion, on the basis of a decision adopted by the body on which the international community has conferred sweeping powers for the sake of preserving international peace and security, full judicial review would run the risk of undermining the United Nations system as established in 1945, might seriously damage the international relations of the Community and its Member States and would fall foul of the Community's duty to observe international law".

[78] Para 178.

[79] Para 184

[80] Paras 185-191 The CFI cited Articles 307 and 297 of the EC Treaty in support of this argument. The relevant parts of Article 307 provide "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".

The relevant parts of Article 297 provide that "Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security "

[81] Paras 192-204

those obligations.[82] This obligation explained the EU's adoption of the Common Position and the EC's adoption of the Regulation freezing Kadi's assets.

To this extent, the CFI expressly rejected the dualist argument advanced by Kadi to the effect that "the Community legal order is a legal order independent of the United Nations, governed by its own rules of law",[83] and held instead that it was bound – albeit by virtue of the EC treaty rather than directly under the UNC itself – by the obligations imposed by the Charter on member states. At this point, it might seem that the applicant's case could go no further. The CFI had accepted the subordination of EC law to binding Resolutions of the Security Council, which would suggest that the Court of First Instance could hardly then proceed to review the Resolution in question for conformity with principles of EC law, even principles concerning protection for fundamental human rights. And indeed the Court expressly confirmed this point, ruling in a detailed series of steps that it would be unjustified under international law or under EC law for the Court to assert jurisdiction to review a binding decision of the Security Council according to the standards of human rights protection recognized by the EC legal order.[84] The CFI concluded this section of its judgment with the emphatic ruling that: "the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law."

At this stage, however, the judgment made a surprising leap, in the light of what had gone before. Suddenly, and without any explanation as to the source of its jurisdiction in this regard, in particular by comparison with the elaborate reasoning which preceded the earlier conclusions in the judgment, the CFI declared:
"None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible."[85]
Given the cautious approach in its earlier analysis, this bold move was unexpected, to say the least. While the assertion that the Security Council must be bound by *ius cogens* norms finds support in arguments and assumptions made by many others,[86] and the CFI devoted several paragraphs of its judgment to making this argument,[87] the Court's

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[82] Para 204.
[83] See para 208.
[84] Paras 218-225
[85] Para 226.
[86] See e.g. Andrea Bianchi "Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion" Vol 19 European Journal of International Law (2008), at fn. 27, and part 5. See also Florian Hoffman and Frédric Mégret, "The UN as a Human Rights Violator: Some Reflections on The United Nations Changing Human Rights Responsibilities" Vol 25 Human Rights Quarterly 314 (2003) and August Reinisch, "Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions" Vol 95 American Journal of International Law 851-872 (2001). Compare Gabriël Oosthuizen "Playing the Devil's Advocate: The UN Security Council is Unbound by Law" Vol 12 Leiden Journal of International Law 549-563 (1999).
[87] Paras 227-230 of the judgment.

assertion of its own jurisdiction to review Security Council action for conformity with *ius cogens* norms was less predictable, given the lively scholarly debate over whether the actions of the Security Council are subject to judicial review and if so by whom.[88] The Court simply deduced from the argument that Security Council Resolutions must comply with the peremptory norms of international law that the CFI is empowered "highly exceptionally" to review such resolutions for compatibility with *ius cogens*.[89]

Having engaged in this unexpected and circumlocutory chain of reasoning to reach the conclusion that it could exercise such exceptional judicial review, the remainder of the judgment in which the Court actually considered the claims that the applicant's rights to property, to a fair hearing and to judicial process had been violated is rather more predictable, apart from the Court's surprising assumption that the right to property was part of *ius cogens*.[90] On the right to property, the CFI followed the trend of earlier ECJ rulings including that of *Bosphorus.*[91] The ECJ in *Bosphorus* had upheld the confiscation, pursuant to a Security Council Resolution implemented by the EC, of an aircraft leased by an innocent third party from the Yugoslav government before the Balkans war broke out.[92] The ECJ in that case had also concluded that despite the absence of compensation for the seizure of the aircraft, the deprivation of property was not arbitrary. The CFI in *Kadi* ruled that since the measures impugned were adopted as part of the international campaign against terrorism, and given the humanitarian exceptions, the provisional nature of the measure and the possibility for state appeal to the Sanctions Committee, the freezing of Kadi's assets did not violate *ius cogens* norms.[93] Only arbitration deprivation of property would violate *ius cogens*, according to the Court.

In similar vein the CFI ruled that neither the right to a fair hearing nor the right to judicial process – in so far as these are protected as part of *ius cogens* – had been violated. The Court emphasized the possibility of the applicant petitioning his government to approach the Sanctions Committee with a view to requesting his de-listing,[94] and concluded that

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[88] Much of the debate has focused on the question of the possible jurisdiction of the International Court of Justice to review Security Council action. For an excellent overview see José Alvarez "Judging the Security Council" in the American Journal of International Law, (1996) Vol 90, pp 1-39 , Also L. Caflisch, 'Is the International Court Entitled to Review Security Council Resolutions Adopted under Chapter VII of the United Nations Charter?', in N. Al-Nauimi and R. Meese (eds) *International Legal Issues Arising under the United Nations Decade of International Law* (The Hague, Kluwer Law International, 1995) 633-662; D. Akande, "The ICJ and the Security Council: Is There Room for Judicial Control of the Decisions of the Political Organs of the UN?", (1997) 46 *International and Comparative Law Quarterly* 309-343; Erica de Wet, "Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice" (2000) 47 *Netherlands International Law Review* 181-210. In any case, since individuals have no standing before the ICJ it seems an unlikely forum for significant adjudication concerning the Security Council on the question of targeted sanctions.

[89] CFI Kadi, para 231.

[90] For criticism of the novel and rather creative approach of the CFI to the content of these *ius cogens* norms, see Christian Tomuschat, "Note on Kadi", Vol 43 Common Market Law Review pp.537-551 (2005), and Piet Eeckhout "Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit" Vol. 3 European Constitutional Law Review, 183-206 (2007)

[91] Case C–84/95 *Bosphorus* v *Minister for Transport* [1996] ECR I–3953

[92] Ibid, paras 242-252

[93] CFI *Kadi* judgment, para 242.

[94] Ibid, paras 261-268

even though he had no opportunity to make his views known on the correctness and relevance of any of the facts (which were classified as secret and never made known to him) on the basis of which his funds were frozen, this would not violate any right to a fair hearing once the Security Council considered there were international security grounds which militate against granting such.[95] On access to a judicial remedy, the CFI ruled that limits on the principle of access to court e.g. in times of public emergency or in the context of state immunity, were clearly compatible with *ius cogens*,[96] and in any case that the procedure set up by the Sanctions Committee - in the absence of any international judicial process - to allow for a petitioned government to apply to it to re-examine a case was a reasonable method of protecting the applicant's rights.[97]

This unusual judgment by the CFI attracted a good deal of attention, much of it critical. Some critics focused on the quality of the reasoning on the competence of the EC to adopt the Regulation, others on the complex argument about the relationship between the European Community and the Security Council,[98] others on the bold claim of jurisdiction to review the Security Council, while virtually all commentators have been critical of the curious reasoning of the Court on the content of ius cogens,[99] which is a famously amorphous yet narrow and contested category of international law. What is striking for present purposes, however, is the following. First, the CFI rejected a dualist conception of the place of the EC in the international legal order, and clearly subordinated EC action to that of the Security Council (and obligations imposed by the UN more generally) insofar as the scope of their powers overlap. Secondly, and despite this subordination, the CFI claimed jurisdiction to review resolutions of the Security Council for compatibility not with human rights protected under EC law, but with peremptory norms of international law. In the end, while none of its complicated reasoning provided any relief to *Kadi*, the judgment presents a provocative picture of a regional organization 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.

The analysis of the Advocate General in Kadi

The case was appealed from the Court of First instance to the European Court of Justice (ECJ),[100] and the Advocate General of the ECJ delivered his Opinion on 16 January 2008.[101] The Advocate General is a judicial officer of the ECJ who provides an opinion

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[95] Ibid, para 274
[96] Paras 285-289
[97] Para 290.
[98] J. Almquist , "A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions" (2008) 57 ICLQ 303-331. at 318-19.
[99] N. 90 above
[100] The European Court of Justice has jurisdiction to hear appeals on points of law from the judgments of the Court of First Instance under Article 225 of the EC Treaty.
[101] C-402/05P, *Kadi v Council and Commission*, Opinion of Advocate General Miguel Poaires Maduro of 16 January 2008, available online at www.curia.europa.eu/

for the court as to how a case should be decided.[102] Opinions of the Advocate General are highly influential but not binding on the Court, although in practice they are followed by the Court in the large majority of cases.[103]

In this case Advocate General Maduro, like the CFI but on different grounds, rejected the argument that the EC lacked legal power under the EC Treaty to adopt the contested Regulation.[104] He then proceeded to consider Kadi's appeal against the reasoning of the CFI concerning the scope of the Court's jurisdiction to review the compatibility of the EC Regulation with EU guarantees of fundamental human rights. Kadi had argued in his appeal that the CFI's reasoning was flawed and that "so long as the UN did not provide a mechanism of independent judicial review that guarantees compliance with fundamental rights of decisions taken by the Security Council and the Sanctions Committee" the EU Courts should review any EU implementing measures for conformity with human rights protected by EU law. [105]

The Advocate General began by articulating what he characterized as the CFI's identification of "a rule of primacy, flowing from the EC Treaty, according to which Security Council resolutions adopted under Chapter VII of the UN Charter prevail over rules of Community law", and which would exclude any review by the CFI of the conformity of SC resolutions with fundamental rights protected within the EU legal order.[106] Departing sharply from this approach, AG Maduro drew on the rhetoric of the ECJ's landmark *Van Gend en Loos* ruling[107] – the EU's equivalent of *Marbury vs Madison* – and on some of its later well-known case law[108] to emphasize the distinctiveness, separateness and autonomy of the EC legal order. In AG Maduro's words, the EC Treaty "created a municipal order of transnational dimensions" with the Treaty functioning as a constitutional charter for this municipal order.[109] He denied that this implied any radical separateness of the EC legal order from the international legal order, arguing broadly and non-specifically that "the Community has traditionally played an active and constructive part on the international stage".[110] In language that echoes the *Charming Betsy* approach of the US courts,[111] he argued that "the application and

[102] See Art 222 of the EC Treaty. There are currently eight Advocates General of the Court of Justice, five from the traditionally 'larger' EU Member States (UK, France, Germany, Italy, Spain), and three who are appointed on a rotating basis from the other Member states. This number is likely soon to be raised to 11, at the insistence of Poland which as one of the newer and larger Member States, considers itself entitled to institutional privileges similar to that of comparably large (and some smaller) states. The Court itself is composed of twenty-seven judges, one nominated by each Member State.

[103] A figure often cited, in particular by the media, is that the Court follows the Advocate General in 80% of cases, though it is not clear whether this is an impressionistic estimate or an empirically verified figure. See e.g. M. Gelter and M. Siems "Judicial Federalism in the ECJ's Berlusconi Case: Towards More Credible Corporate Governance and Financial Reporting?". Vol 46 Harvard International Law Journal, pp. 487-506, (2005), at footnote 9.

[104] AG Maduro's Opinion, paras 11-15. .

[105] Ibid, para 19.

[106] Ibid, para 18

[107] Case 26/62 *Van Gend en Loos* [1963] ECR 1.

[108] Case 294/83 *Les Verts* [1986] ECR 1339,

[109] AG Maduro's Opinion, para 21.

[110] Ibid, para 22

[111] *Murray* v *The Schooner Charming Betsy*, 6 U.S**.** (2 Cranch) 64, (1804).

interpretation of Community law is accordingly guided by the presumption that the Community wants to honour its international commitments"[112] but that ultimately it was for the EC Courts to determine the effect that international obligations are to have within the EC legal order and to determine the conditions under which they take effect.[113] The ECJ's responsibility "first and foremost" was to preserve the constitutional framework established by the EC Treaty and not to "bow…with complete acquiescence" to binding rules of international law.[114] The only mention made of the fact that the international obligation at issue in this case was an obligation covered by Article 103 of the Charter, was in a passage where the AG stated that the restrictions imposed on the EC by the need to observe its general principles of law and fundamental rights were "without prejudice to Article 103 of the UN Charter" and he acknowledged that the EC would remain responsible at the international level for the violation of international law.[115]

Having set out a strongly dualist understanding of the relationship of EC law to international law – one which the CFI had expressly rejected[116] - AG Maduro rephrased the question for the ECJ as the following: does the Community legal order accord supra-constitutional status to measures that are necessary for the implementation of resolutions adopted by the Security Council?[117] Relying in part on an earlier relevant judgment of the ECJ which did not expressly address the point,[118] he argued that there was nothing in the EC Treaty or in other rules of EC law which could be read as granting such immunity from review to Security Council resolutions. Compliance with the fundamental rights protected within the EC legal order was a condition for the legality of EC acts, in his view, including EC regulations which implement a binding Security Council resolution.[119] Citing US Supreme Court Justice Murphy's dissent in *Korematsu*,[120] he was equally dismissive of the argument that a kind of 'political question' doctrine should be applied to the issue of review of Security Council decisions, responding that "the claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights".[121] Even the argument advanced by the UK, which intervened in the case, that a less exacting standard of review should be applied given 'extraordinary circumstances' was quickly dismissed: "On the contrary, when the risks

[112] AG's Opinion, para 22..
[113] In classically dualist language he stated that "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."
[114] AG's Opinion, para 24.
[115] Ibid, para 39
[116] N.83 above.
[117] AG's Opinion, para 25.
[118] Case C–84/95 *Bosphorus* v *Minister for Transport* [1996] ECR I–3953
[119] AG Maduro also made an interesting suggestion in paragraph 32 of his Opinion that those EU member states which are members of the Security Council carry with them their obligations under EC law to ensure that the general principles of EC law are not infringed, thus perhaps hinting that France and the UK should have insisted on due process guarantees being included in the relevant UNSC Resolutions or even vetoed them. The ECJ however chose to make no comment on this.
[120] United States Supreme Court, *Korematsu* v. *United States*, 323 U.S. 214, 233-234 (1944) (Murphy, J., dissenting)
[121] AG Maduro's Opinion, para 34.

to public security are believed to be extraordinarily high, the pressure is particularly strong to take measures that disregard individual rights, especially in respect of individuals who have little or no access to the political process. Therefore, in those instances, the courts should fulfil their duty to uphold the rule of law with increased vigilance".[122]

The Advocate General rejected the claim that the European Court of Human Rights in its *Behrami*[123] ruling had effectively relinquished its powers of review where a measure implementing a resolution of the Security Council was concerned, and argued that that analysis was based on a misreading of *Behrami*.[124] Further, he suggested that even if this claim were based on a correct reading of the case, it would not be relevant to the ECJ because of the fundamental differences between the role and responsibilities of the European Court of Human Rights and the European Court of Justice.[125] Here the Advocate General again emphasized his conception of the EC legal order as a distinctive constitutional order which departs sharply from a traditional international law conception, and he contrasted this with the European Convention on Human Rights (ECHR) which he described as "primarily as an interstate agreement which creates obligations between the Contracting Parties at the international level".[126] This stylized contrast between a novel, constitutionalized European Union order and an intergovernmental European Convention order surprisingly overlooks the extent to which the Court of Human Rights itself,[127] not to mention a significant body of academic commentary,[128] conceives of the ECHR system in constitutional rather than traditional international law terms.

Advocate General Maduro also dismissed the argument that if the ECJ were to exercise jurisdiction to review the implementation of Security Council Resolutions, this would exceed the function of the Court and would "purport to speak on behalf of the international community".[129] Reasoning instrumentally, he suggested that a refusal by the ECJ to implement a Security Council Resolution which it considered to violate basic

[122] AG's Opinion, para 35.
[123] N.42 above and text.
[124] Footnote 42 of the AG's Opinion. AG Maduro sought to confine the significance of the *Behrami* ruling to the specific circumstances of the case and to what might be called the 'ratio decidendi' of the judgment: i.e. that the ECHR declined jurisdiction on the basis that the acts in question were attributable only to the UN and not to the participating states, and that the acts took place outside the territorial application of the ECHR. This, in AG Maduro's view, meant that the case was not a relevant precedent for the ECJ in *Kadi* where the act being challenged was adopted by the EC rather than by the Security Council.
[125] Para 37.
[126] Ibid.
[127] *Loizidou v Turkey*, Appl 15318/89, (1996) para 77; *Bosphorus v Ireland* Appl. 45036/98 (2005), para 155-156, *Behrami v France & Germany*, Apps no. 71412/01&. 78166/01 (2007) para 145.
[128] See e.g. Luzius Wildhaber, "A Constitutional Future for the European Court of Human Rights", Vol 23 Human Rights. L.J. 161 (2002), Iain Cameron, "Protocol 11 to the European Convention on Human Rights: The European Court of Human Rights as a Constitutional Court?" Vol 15 YBEL 219 (1995), Steven Greer "Constitutionalizing Adjudication under the European Convention on Human Rights" Vol 23 OJLS 405 (2003) and Lawrence Helfer "Redesigning the ECHR: Embeddedness as a Deep Structural principle of the European Human Rights Regime" Vol 28 EJIL (2008). Helfer states that "the Court itself has fueled these claims by interpreting the Convention not as set of reciprocal promises among nations, but, far more momentously, as a 'constitutional instrument of European public order'".
[129] AG's Opinion, para 38

rights protected by EC law could have salutary effects on the UN system, and he noted that the possibility of this kind of review being exercised had been expressly contemplated by the Sanctions Committee monitoring team.[130] This is obviously an important observation, and it suggests that the Advocate General's approach – and perhaps also the ECJ's - may have been animated in part by the anticipation that a challenge to the implementation of a SC Resolution based on the constitutional values of the EU would prompt the Security Council to revise its procedures. He denied that such incidentally salutary effects would amount to the exercise of any kind of extra-territorial or extra-systemic jurisdiction on the part of the ECJ, since "the legal effects of a ruling by this Court remain confined to the municipal legal order of the Community".[131]

Having established in robust terms the jurisdiction of the ECJ to review the implementation of the Security Council Resolution, the Advocate General went on to consider the substantive claims of violation of fundamental rights protected by EC law. In his view, this adoption of a less than stringent standard of review would be essentially the same as the *ius cogens* approach adopted by the CFI, and this was unjustified. He argued that even though the international anti-terrorism context required a court to be mindful of its limitations, and in appropriate circumstances to recognize the authority of institutions within other legal orders (such as the Security Council) which might be better placed to weigh particular interests, 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 has the duty to protect".[132] While his opinion advocates an idea of respect for other legal orders, including that of the UN, AG Maduro argued that respect for other institutions is only meaningful "if it can be built on a shared understanding of these values and on a mutual commitment to protect them".[133]

Ultimately, given the length and severity of the interference with the applicant's property rights in this case – all of his assets in the EU having been frozen indefinitely – together with the complete absence of any opportunity to be heard, and the absence at either UN or EU level of any independent tribunal to assess whether the sanctions were properly imposed,[134] the Advocate General concluded that Kadi's claims were well-founded and that the EC Regulation should be annulled in so far as it affected him.[135]

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[130] Ibid.

[131] Ibid. para 39. Indeed the ECJ had previously annulled an EC measure which concluded an international agreement, as in the case of the "Bananas" agreement within the WTO context: see C-122/95, Germany v Council [1998] ECR I-973

[132] Ibid, para 44.

[133] Ibid.

[134] AG Maduro drew support from the ECtHR judgment in the case of *Klass v Germany*, judgment of 6 September 1978, Series A no. 28, to reject the argument that a diplomatic process involving governments and the UN Sanctions Committee – even after the reform introduced in 2006 in SC Resolution 1730 to allow individuals themselves to contact a 'focal point' within the UN to request delisting - could be any substitute for an independent and impartial procedure to review the necessity of the sanctions. For further discussion of the internal reform process of the UNSC sanctions system, see n.213 below.

[135] For a sample of AG Maduro's extra-judicial writing which sheds some light on the approach he adopted in *Kadi*, see M. Maduro "Interpreting European Law: Adjudication in a Context of Constitutional Pluralism" (2008) 1 European Journal of Legal Studies, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134503

The judgment of the European Court of Justice

The Court of Justice effectively followed the advice of Advocate General Maduro, and annulled the EC Regulations insofar as they imposed sanctions on Kadi (and Al-Barakaat, in the case which by now had been joined[136]), finding that they constituted an unjustified restriction of his right to be heard, the right to an effective legal remedy, and the right to property. The Court's approach was, however, slightly different to that of the Advocate General in a number of relevant ways.

The Court's reasoning was robustly dualist, emphasizing repeatedly and in various ways the separateness and autonomy of the EC from other legal systems and from the international legal order more generally, and the priority to be given to the EC's own fundamental rules. A related feature is the lack of direct engagement by the Court with the nature and significance of the international rules at issue in the case, or with other relevant sources of international law. The judgment is striking for its treatment of the UN Charter, at least insofar as its relationship to EC law in general is concerned, as no more than any other international treaty, and for the perfunctory nature of its nod to the traditional idea of the EC's openness to international law. The Court denied that its review of the EC regulation implementing the UN Resolution would amount to any kind of review of the Resolution itself,[137] or of the Charter,[138] and suggested that its annulment of the EC instrument implementing the Resolution would not necessarily call into question the primacy of the Resolution in international law. Given the legal significance of binding Security Council Resolutions under Chapter VII of the Charter, and given the language of Article 103 of the Charter,[139] this underscores the Court's depiction of international law as a separate and parallel order whose normative demands do not penetrate the domestic (EC) legal order.

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Without specifically mentioning the UN Charter, the Court declared that "an international agreement cannot affect the allocation of powers fixed by the Treaties or… the autonomy of the Community legal system";[140] that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty";[141] and that the EC is an "internal"[142] and "autonomous legal system which is not to be prejudiced by an international agreement".[143]

On the relationship of the EC to international law more generally, the Court repeated earlier judgments which had declared that the EC "must respect international law in the

136 See n.69 above.

137 Compare the case in which the ECJ annulled the EC's implementation of the Framework Agreement on Bananas in the WTO context, without thereby affecting the WTO agreements themselves: C-122/95, *Germany v Council* [1998] ECR I-973

138 Judgment of 3 September 2008, para 286-8.

139 N.7 above.

140 ECJ judgment in Kadi, para 282

141 Ibid, para 285.

142 Ibid, para 317

143 Ibid, para 316.

exercise of its powers"[144] and that relevant EC measures should be interpreted in the light of relevant international law rules, and in light of undertakings given by the EC in the context of international organizations such as the UN.[145] In one of the few sentences in its judgment which acknowledges anything distinctive about the international law norms at issue in the case, the Court emphasized that particular importance should be attached by the EC to the adoption of Chapter VII resolutions by the UN, and that the reasons for and objectives of such resolutions should be taken into account in interpreting any EC measures implementing them.[146] The bottom line of the judgment, however, is that the UN Charter and UN SC Resolutions, just like any other international law, exist on a separate plane and cannot call into question or affect the nature, meaning or primacy of fundamental principles of EC law. In an interesting legal counterfactual, the Court asserted that even if the obligations imposed by the UN Charter *were* to be classified as part of the 'hierarchy of norms within the Community legal order' they would rank higher than legislation but lower than the EC Treaties and lower than the 'general principles of EC law' which have been held to include 'fundamental rights'. [147] It should be noted here that the category of 'general principles of EC law', including fundamental rights, is not a small one, but is an extensive and growing body of legal principles whose content – although 'inspired' by national constitutional traditions, international human rights agreements and especially by the European Convention on Human Rights - is determined almost entirely by the ECJ.[148] In *Kadi*, the ECJ does not expressly distinguish between certain core principles of EC law which take precedence over international law including the UN Charter, but appears to treat all EC-recognised 'fundamental rights' as belonging to the normatively superior category.[149]

The ECJ dismissed the relevance of *Behrami*, and the immunity from ECtHR review enjoyed by the acts impugned in that case, for reasons similar to those given by AG Maduro in his opinion.[150] Further, the Court did not give a direct answer to the question whether an EC regulation implementing a UNSC resolution might be given immunity from EC judicial review if the sanctions system set up by the resolution offered sufficient guarantees of judicial protection.[151] However, the language of paragraph 321 appears to suggest that general immunity from jurisdiction for Security Council measures would be inappropriate, since it declared that "the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction", before going on in the next paragraph to say that such immunity would anyhow be unjustified in the instance case because the Sanctions Committee procedure lacked sufficient guarantees of judicial protection. It is difficult to know whether the

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[144] Ibid, para 291, citing C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019
[145] Ibid, paras 291-294
[146] Para 294
[147] Paras 305-308
[148] For discussion of the category of general principles see T. Tridimas, *The General Principles of EC Law* (OUP, 1999), Ulf Bernitz, Joakim Nergelius and Cecelia Gardener, *The General Principles of EC Law in a Process of Development* (2nd ed, Kluwer, 2008)
[149] See paras 303-304 of the judgment.
[150] See n.124 above.
[151] ECJ judgment in *Kadi*, para 321-326.

Court intended by these paragraphs to hint that certain Security Council Resolutions might enjoy immunity from review if they did provide sufficient guarantees of protection, because the Court chose not to address the question with any clarity. This would in fact have been one obvious route for the ECJ to take in *Kadi*, i.e. to borrow from the *Bosphorus* approach of the European Court of Human Rights,[152] and to confer provisional immunity from review on UNSC measures where the levels of due process and basic rights protection provided by the Security Council could be considered sufficient. But the ECJ evidently decided not to adopt such an approach, and also chose not to engage in a more direct dialogue with the UN Security Council along the lines of the famous '*Solange'* jurisprudence of the German constitutional court.[153] Ultimately, the ECJ disposed of the case entirely in accordance with the internal legal priorities and values of the EC. It concluded by annulling the relevant EC regulations, albeit keeping them in effect for three months with a view to giving the EC Council a period of time during which to remedy the due process breaches.[154]

Part 3: Varying judicial conceptions of the international legal order

The reactions of these different judicial instances to a very similar question concerning the accountability of an international organization represent three very different points on a spectrum of possible responses to some of the core questions of international law and governance. It bears repeating too that the cases in question concerned not just any international organization but the primary organization of near-universal membership which was created to pursue fundamental goals of international security peace and security, and backed up by unequivocal legal rules (in Chapter VII and Article 103 of the Charter in particular[155]) which indicate the priority to be given to its decisions. These cases confronted core questions about the authority of international law and institutions, and about the proper relationship between international (and regional) obligations of different nature and origin. In each of the instances examined, a regional court was called on to review an act of the UN Security Council, and in each case the various courts gave a different answer to the question whether they had jurisdiction to do this, and if so by reference to which legal standards or values. And in each case, the answer given was premised on quite a different set of assumptions about the nature, source and structure of the legal authority enjoyed by the UN and the Security Council.

First, the European Court of Human Rights concluded that since the acts challenged before it were attributable to the UN Security Council rather than to the participating states, and given the scope and importance of the UN's mission, the Court lacked any

[152] N.55 above.
[153] For discussion of the *Solange* approach, see below nn. 218-221 and text.
[154] Since then, the EC Commission in Regulation 1190/2008 of 28 November 2008 declared that, having heard representations from Kadi and Al-Barakaat earlier that month, it considered that in view of their association with Al Qaida, it was justified to continue to list the two as entities or individuals whose assets and resources should be frozen. OJ L322/25 2008. It seems that the Security Council on October 21 2008 provided the EU presidency, on an 'exceptional' basis, with some information on Kadi and Al-Barakaat, which was relied on by the Commission to justify Regulation 1190/2008. CHECK November 12 Debate
[155] See n.7 above.

jurisdiction to rule on the claim of violation of human rights brought before it. Secondly, the EU Court of First Instance took the view that although the EU was indirectly bound by Security Council Resolutions, and although the CFI had no direct jurisdiction to review the Security Council, it should nevertheless indirectly review the Security Council's action for possible violation of minimum international standards of *ius cogens*. At the next level of appeal, the Advocate General of the European Court of Justice ruled that the EC was not internally bound by UN Security Council Resolutions and that the Court did have jurisdiction to review the compatibility of an EC Regulation implementing a SC Resolution for compliance with the human rights standards set by EU law. The EU Court of Justice, while referring in general terms to the respect owed by the EC to international treaties including the UN Charter and to Security Council resolutions, emphasized that *no* international treaty could affect the autonomy of the EC legal system, and that even if the UN Charter were to be ranked as part of EC law it would be ranked below the normative level of the EC treaties themselves, and lower than the general principles of EC law. In short, the Court of Human Rights demonstrated strong substantive deference towards the UN Security Council, the CFI demonstrated moderate jurisdictional deference, and the ECJ (and its Advocate General) demonstrated little or no deference.

Secondly, in relation to the assumptions on which the answers of the various courts are based, it is apparent that each response is implicitly or explicitly informed by a different conception of the role of that particular court within the international order –perhaps better described as the 'disorder of orders'.[156] The understanding of this role in turn is premised on different understandings of the nature, source and structure of normative authority within the international order. The European Court of Human Rights adopted the most cautious legal approach, positioning itself as a specialized regional tribunal established under international law. The ECtHR presented itself as part of an international landscape in which the UN is the ultimate global forum for transnational cooperation in pursuit of collective security, whose authority should not be open to question by a regional human rights tribunal, and whose acts should not be subjected to the conditions contained in the Convention on Human Rights. This understanding was derived not from a formal textual approach by the ECtHR which would limits its jurisdiction to what is expressly provided under the European Convention on Human Rights, but rather from a teleological (purposive) interpretation which rejects the dynamic gap-filling approach it has adopted in other contexts to broaden its jurisdiction,[157] as being inapposite to the context of UN action. This deferential approach is arguably an extreme one,[158] given that the Court did not suggest any exception, regardless of the

[156] Neil Walker, "Beyond Boundary Disputes and Basic Grids: The Global Disorder of Normative Orders" Vol 6 International Journal of Constitutional Law 373-396 (2008)

[157] See e.g *Issa* v *Turkey* Appl. No. 31821/96, decision of 16 November 2004 on extraterritorial jurisdiction.. Compare *Bankovich v Belgium and others,* Appl no. 52207/99, decision of 19 December 2001.

[158] Compare the approach of Lord Bingham (with whom Baroness Hale & Lords Carswell and Brown agree) in his judgment in the House of Lords case of R (Al Jedda) v Secretary of State for the Home Department, 12 December 2007, [2007] UKHL 58, paras 35-37, in a case which raised a similar question to that in *Behrami*, concerning whether Article 103 of the UN Charter as applied to a Resolution of the Security Council under Chapter VII should take precedence over core provisions of the European

nature of the human rights violation in question, nor did it allow itself to contemplate the possibility that some acts might not be authorized by the Security Council Resolution. The ECtHR understood its own authority to derive from the same ultimate source – i.e. from international law, albeit under a geographically and functionally limited international law instrument – as the institutions of the UN. On this understanding, the decisions of the UN Security Council adopted under Chapter VII constitute a singular, hierarchical source of authority which binds and overrides the Convention on Human Rights and constrains the ECtHR from exercising even indirect jurisdiction over the effects of such decisions.

The EU Court of First Instance adopted a more complicated approach. It concluded that EU Member States were, both as a matter of international law and as a matter of European Community law, bound by the overriding obligations established under the UN Charter, including those imposed by SC Resolutions. It ruled further that that the EC itself was indirectly bound via its Member States' obligations under the UN Charter, albeit (given that the EC is neither a member of the UN nor an addressee of Security Council resolutions) as a matter of EC treaty law rather than under 'general international law'. On this particular point, the conclusion of the CFI was not dissimilar to that of the European Court of Human Rights. It took the view that customary international law and treaty law determine that the international obligations created under the UN Charter are binding on the EC and that they override other conflicting obligations. However, the CFI ruling differed significantly from that of the ECtHR in two respects. In the first place, it reached its conclusion on the overriding binding force of the UNC through a process of reasoning based on the text of the Vienna Convention of the Law on Treaties, the provisions of the UN Charter, of customary international law, and the provisions of the EC Treaty. The substantive purposes and goals of the UN were not brought into the picture, nor were they placed on a higher level than the purposes and goals of the EU. Instead, the CFI's reasoning was largely formal and jurisdiction-based, following the legal hierarchy which it took to be established by an array of international and regional treaties of which the EC Treaty forms a part. A second difference between the reasoning

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Convention on Human Rights: "Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in Article 103 to "any other international agreement" leaves no room for any excepted category, and such appears to be the consensus of learned opinion. … it now seems to be generally recognized in practice that binding Security Council decisions taken under Chapter VII supersede all other treaty commitments. … I do not think that the European Court [of Human Rights], if the appellant's article 5(1) claim were before it as an application, would ignore the significance of article 103 of the Charter in international law". In response to the appellant's argument that it would be "anomalous and offensive to principle that the authority of the UN should itself serve as a defence of human rights abuses", L Bingham declared that the responsibility remains with the UK, when it exercises the authority to detain under the SC resolution, to ensure that the detainees rights under Article 5 "are not infringed to any greater extent that is inherent in such detention". L Rodgers on the other hand found the *Al-Jedda* case to be indistinguishable from *Behrami* in so far as attributability was concerned, so that the impugned acts would be attributable, according to the ECHR, to the UN rather than to the UK and so the ECHR would have no application. However he also considered that had he had to rule on the point about the conflict between Article 5 of the ECHR and Art 103 of the UNC, he would have found the obligations imposed on the UK forces to detain the appellant under the terms of the Security Council Resolution to prevail over the obligations of the UK under the ECHR. For criticism of the HL failure to consider the issues of the proper interpretation of the SC Resolution, or the impact of ius cogens, see A. Orakhelashvili Vol 102 AJIL 337 at 342 (2008)

of the CFI and that of the ECHR was that the CFI asserted its own power (even its duty under ius cogens?) despite the overriding binding force of the Security Council resolutions, to exercise a substantively minimal and residual judicial review over the UNSC. Up to a point the CFI appeared to be following the logic and even the conclusion of the ECtHR in declaring that "the claim that the Court of First Instance has jurisdiction to review indirectly the lawfulness of such a (Security Council) decision according to the standard of protection of fundamental rights as recognised by the (European) Community legal order, cannot be justified either on the basis of international law or on the basis of Community law"[159] However, the CFI went on to assert its jurisdiction as a matter of international law, in the sense that *ius cogens* norms recognized under customary law and under the Vienna Convention on the law of Treaties, and the purposes and principles of the UNSC itself, impose limits on the powers of the Security Council which must be respected. Thus even though its judgment presented the EC legal order as formally subordinate to that established by the UN Charter, there was no institutional reticence on the part of the CFI - unlike the ECtHR in *Behrami* - about taking on the job of reviewing the UN Security Council.

The ECJ, following much of the Advocate General's advice, adopted a very different approach to that of either the ECtHR in *Behrami* or the CFI in *Kadi*. While the AG treated the question of the obligations of the EC under international law, or the status of international law within the EC legal order as marginal to the case, the Court of Justice addressed it directly and made clear that if it were to adopt a unitary approach (which it did not, ruling instead that the EC legal order is an entirely separate and internal order from that of international law) it would rank international treaties, including the UN Charter and UNSC Resolutions, below the level of the EC Treaties. Both the Court and the AG took the view that the ECJ's primary obligation is to protect the values of the EU's 'municipal' constitutional legal order, including European human rights values, regardless of whether this entails an indirect rejection of the Security Council's actions. Given their dualist premises, they saw no particular relevance in the applicability of Article 103 of the Charter. Thus Maduro declared that his conclusion as to the primacy of EC norms over the SC resolution was 'without prejudice to the application of Article 103 of the Charter', and the ECJ ruled that annulment of the EC regulation implementing the UN Resolution for violation of EC legal principles "would not entail any challenge to the primacy of that resolution in international law".[160] The ECJ should take its cue from EU constitutional law, not from public international law, even if this meant that the EU or the Member States would be held responsible as a matter of international law for breaching UN Charter obligations. Both the Advocate General and the ECJ posit two distinct and separate sources of law – 'municipal' EC law on the one hand, and international law on the other, and for the purposes of Kadi's challenge to the EC Regulation implementing the UNSC Resolution, it was the former which was of interest to the Court. In other words, the judgment is premised on the view that there are different, distinct sources of legal authority, and that regardless of whether the EC could face international sanctions for non-compliance with a UN Security Council Resolution, this did not affect the

[159] Para 221 of CFI ruling in *Kadi*.
[160] Ibid, para 288.

Court's duty to review of the implementation of the Security Council's decision by reference to European standards of fundamental rights.

None of the three regional European courts hearing these cases could plausibly claim jurisdiction to review the conduct of the UN Security Council. Yet when confronted with the challenge of changing international methods of governance – given the exercise of increasingly law-like powers by the Security Council in particular- and more significantly, given the attempts of affected individuals to force a degree of accountability through regional-level litigation, the three courts chose to adopt fundamentally different approaches to the dilemma. The CFI's approach is a kind of deferential engagement, in the sense of being unwilling to subject the Security Council to review for compliance with the full expanse of EU standards, but insisting nonetheless on considering the legality of its action under minimum norms of non-derogable international law. These *ius cogens* norms are at best a very small and somewhat contested category, which are not open to the kind of fluid development of other categories of international law such as 'general principles' or even customary international law. The CFI's vision of the international legal space is a vertical, integrated one in which the EU is below the UN, but in which even lower courts like the CFI are nonetheless empowered or even required by international law itself to apply peremptory norms of international law to the organs of the UN. The ECtHR approach is one of full deference to the UN Security Council, denying its own jurisdiction on both formal and substantive grounds. Like the CFI, the ECtHR suggests a vertical, integrated vision of the international legal order although unlike the CFI's vision this vertical order does not permit the exercise of review by a specialized regional actor of the universally-oriented global security actor. The ECJ does not purport to engage directly with the Security Council or with UN governance at all, other than by referring to the general 'respect' owed by the EC to 'the relevant rules of international law', and it insists that the Court's jurisdiction to review the implementation of UN resolutions by reference to EU-established standards of protection does not imply any review of the Resolution itself.[161] The Court's vision of the international legal space is a horizontal and segregated one, with the EU existing alongside other constitutional systems as an independent and separate municipal legal order, and with no role envisaged for the Court in articulating the relationship or developing principles of communication between international norms (such as UNSC resolutions) and EC legal norms. The apparently opposite approaches of the CFI and the ECtHR therefore have more in common with one another at a fundamental level than they have with the ECJ's approach, in that they presuppose and are premised upon the existence of a common international system and an international community of which they – as different kinds of regional court - are a part, and in which they have a role to play in articulating the relationship between their sub-system and other parts of the international system.

The different approaches of the various courts and the different premises underpinning their responses are depicted graphically below:

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[161] Ibid, paras 286-7

Regional Judicial Instance	Basis for the court's recognition of the legal authority of another international entity (here the UN & UNSC)	Court's conception of the source(s) of legal authority in the global regime	Court's vision of the global legal regime	Court's jurisdiction to review the decisions of the other legal Authority (here the UN & UNSC)
ECtHR Behrami	Substantive values and role	Singular	Vertical, hierarchical, integrated	None
CFI/ Kadi	Formal jurisdiction granted under EC or international law	Singular	Vertical, hierarchical integrated	Review for compliance with *ius cogens* only
AG /Kadi	Substantive values, role and formal jurisdiction under EC law	Plural	Horizontal, heterarchical segregated	Full power of indirect review
ECJ/Kadi	Formal jurisdiction under EC law	Plural	Horizontal, heterarchical segregated	None, but no impediment to reviewing measures implementing such decisions

Each of the three judicial approaches has so far met with a mixed response. Some commentators have been critical of the CFI's unexpected move in taking upon itself to review - even if only indirectly - the supreme political body of the United Nations,[162] particularly when it is unclear that the International Court of Justice would be willing to engage in such review of the Security Council;[163] while others criticized the CFI for

[162] Matteo Winkler, "When Legal Systems Collide: Judicial Review of Freezing Measures in the Context of International Terrorism" 2007 Yale Law Student Scholarship Series 10/07.

[163] Different interpretations of the Libya/Lockerbie provisional measures ruling of the International Court of Justice in *Libya v USA* 1992 ICJ 114, on this question have been expressed. See however also the appellate level of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case

abdicating a strong judicial role and for subordinating EC law to UN Security Council Decisions.[164] Others have been critical of the European Court of Human Rights for its blanket denial of jurisdiction in *Behrami*, for abandoning its "dynamic and evolutionary" approach to human rights protection under the ECHR, and for tolerating a significant vacuum in legal accountability for human rights violations in Europe.[165] And while some have commended Advocate General Maduro's approach,[166] exempting the EC as a matter of EC law from the requirement of compliance with UN obligations under Article 103 of the UN Charter, but also reviewing EC laws which implement the Security Council's for compliance with the full panoply of human rights standards set by the EU for itself, the initial responses to the ECJ's ruling also seem to be largely positive.

If the different judicial approaches are evaluated from the perspective of the extent to which they seem to strengthen human rights protection in Europe at least, the ECJ's approach appears to have much to commend it. It clearly does not bow to the authority of the UN Security Council as a supreme political body with expertise on matters of anti-terrorism which cannot be questioned, but indirectly challenges that authority by annulling the EC's implementation of the relevant SC resolutions. From the same perspective, the approach of the European Court of Human Rights – paradoxically the Court from which the strongest human-rights-protective approach might have been expected – seems disappointing, as it abdicated any role in monitoring compliance with human rights, and even appeared to place human rights protection categorically below the imperative of promoting international peace and security on a notional global hierarchy of values. The CFI, from a human rights perspective, adopted a diluted intermediate approach which expressed concern for the protection of rights, but applied a very thin 'global' standard derived from the minimal peremptory norms of international law.

Part 4: Pluralist vs Constitutionalist approaches to the international legal order

In this part it will be argued that the different responses of these various European courts can best be understood in the context of an ongoing debate between scholars who advocate a constitutionalist reading of the international order and those who advocate a

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(Decision of the ICTY of 10 August 1995) which purported to examine whether the UN Security Council had jurisdiction to establish the tribunal by means of a Chapter VII resolution. For a full discussion, see J. Alvarez, "Judging the Security Council", n.38 above.

[164] Piet Eeckhout "Does the EU Constitution Stop at the Waters Edge?" Fifth Walter Van Gerven Lecture (Leuven Center for a Common Law of Europe, 2005) and "Community Terrorism Listings, Fundamental rights and UN Security Council Resolutions: In Search of the Right Fit" (2007) 3 European Constitutional Law Review 183-206. For a broader human-rights based critique of the CFI in Kadi and of the CFI's and the ECJ's numerous other rulings on anti-terrorist sanctions , see J. Almquist "A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions" (2008) 57 ICLQ 303-331

[165] Kjetil Larsen "Attribution of Conduct in Peace Operations: the "Ultimate Control and Authority" Test" Vol 19 European Journal of International Law (2008), and Marco Milanovic and Tatjana Papic "As Bad as it Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law" International and Comparative Law Quarterly Vol 57 (2008).

[166] Nicolas Lavranos "The Interface between European and National Procedural Law: UN Sanctions and Judicial Review" in The Interface between European and National Law, (N. Lavranos and D. Obradovic, editors) 2007, pp 349-365

pluralist reading. More specifically, the different visions underpinning the Court of Human Rights and Court of First Instance approaches on the one hand, and the European Court of Justice approach on the other, reflect these two prevalent and broadly contrasting intellectual approaches to the problem of the multiplication, overlap and conflict of normative orders in the global realm. The ECJ, following the opinion of AG Maduro, adopted a robustly pluralist approach to the relationship between the EU and the international order, while the CFI and ECtHR judgments in their different ways adopted strongly constitutionalist approaches. Pluralist approaches share with dualism the emphasis on separate and distinct legal orders, but while pluralism emphasizes the plurality of diverse normative systems, the traditional focus of dualism has been only on the relationship between national and international law. Similarly, strong constitutionalist approaches to the international order overlap significantly with monist approaches in their assumption of a single integrated legal system, but the category of constitutional approaches to the international legal order is wide and includes some which do not necessarily assume such systemic integration and which cannot comfortably be described in the traditional language of monism. Contrary to common assumptions, the main difference between constitutionalist and pluralist approaches is not that one is normatively oriented and the other descriptively oriented, although many proponents of a pluralist approach have the advantage of greater descriptive plausibility of their accounts, and some variants of the constitutionalist approach may seem both unrealistic and unattractive in view of the deep diversity of the international realm. Nonetheless, contemporary constitutionalist and pluralist approaches to the international legal order alike make both descriptive and normative claims which will be discussed further in the following sections.

Pluralist approaches to international law and governance

There is a growing body of literature which describes and advocates a pluralist approach to international law and governance.[167] Although some of the earlier literature on legal pluralism was more sociological than normative in nature,[168] the recent scholarship on international and global legal pluralism in particular is notable for its advocacy of the merits of legal pluralism. It emphasizes the value of diversity and difference amongst and between different national and international normative systems and levels of governance, and the undesirability and implausibility of constitutional approaches which seek coherence between these. There are, however, different strands of argument within the growing body of contemporary scholarship on global legal pluralism, some of which advocate what I call strong pluralism, while others favor a softer variant.

Amongst the strong pluralists is Nico Krisch, who has written about the problem of accountability at the level of global governance, and has argued that the pragmatic accommodations of pluralism are normatively preferable to constitutionalist approaches

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[167] N. 18 above.

[168] E.g. John Griffiths "What is Legal Pluralism" Vol 24 Journal of Legal Pluralism 1 (1986), Sally Engle Merry "Legal Pluralism" Vol 22 Law and Society Review. 869 (1988) Marc Galanter "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law" Vol 19 Journal of Legal Pluralism 1 (1981).

premised on ideals of coherence and unity.[169] Krisch suggests that pluralist approaches, by comparison with constitutionalist approaches, could lead to stronger transnational accountability. He defends the "disorderly" and disconnected landscape of global administrative accountability, arguing that it allows for mutual influence and gradual approximation, while preventing any one level or site of governance from exercising control over the others.[170] Pluralist approaches, on his account, are contrasted favorably with constitutionalist approaches which 'adopt unity as a regulative ideal' and force the political order into a coherent unified framework by downplaying the extent of legitimate diversity in the global polity. Understanding the international order in pluralist terms presents the relationships between different systems as being governed by politics rather than by law, with different actors and rules competing for authority through politics rather than legal argument.[171] Pluralism's *ad hoc* mutual accommodation between different legal regimes is preferred over the imposition of what are viewed as sovereigntist or universal-harmonization schemes.[172]

Pluralist approaches to the international legal order claim to preserve space for contestation, resistance and innovation, and to encourage tolerance and mutual accommodation.[173] Thus David Kennedy argues for "a more vigorous but fragmented public capacity, .for a normative order that embraces legal pluralism", and challenges the idea that there is such a thing as an 'international community'.[174] Even within the growing body of scholarship on *constitutional* pluralism, which presents the global order as a plurality not just of legal but of national and transnational *constitutional* sites, the emphasis is on the proliferation of separate systems which engage primarily through 'agonistic processes of negotiation'.[175] And despite the normative emphasis on tolerance, accommodation and the possibility of mutual learning, there is an acknowledgment that the proliferation of separate and self-contained constitutional systems seeking to establish their own authority may well "exacerbate conflict and pathologize communication", or "encourage a strident fundamentalism, a refusal of dialogue with other sites and processes".[176]

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[169] Nico Krisch "The Pluralism of Global Administrative Law" Vol. 17 EJIL (2006) 247–278. The version of pluralism Krisch advocates in the regional context (ie within Europe, within the EU and the ECHR, and in the interaction between these two) is a softer form of pluralism than that which he advocates in the global context. In the European context he points to the importance of mutual persuasion, even while emphasizing the autonomy and authority of each unit. See N. Krisch "The Open Architecture of European Human Rights Law". Modern Law Review, Vol. 71, pp. 183-216, (2008)

[170] Ibid

[171] "The Open Architecture of European Human Rights Law" n.169 above.

[172] See Paul Schiff Berman "Global Legal Pluralism" Southern California Review, Vol. 80, p. 1155, at 1163 and 2007

[173] P. Berman, ibid, at 1237. See also Jean Cohen "A global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach" Vol 15 Constellations 456-484 (2008)

[174] D. Kennedy "One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream" (2007) 31 NYU Review of Law and Social Change 641. See also "The Mystery of Global Governance" 34 Ohio Northern University Law Review, 827-860 (2008)

[175] Neil Walker "The Idea of Constitutional Pluralism" Vol. 65, pp. 317-359 Modern Law Review (2002)

[176] Ibid.

In sum, what unites pluralist approaches to the international legal order is their emphasis on, and their interpretation of the significance of the existence of a multiplicity of distinct and diverse normative systems, and the likelihood of clashes of authority-claims and competition for primacy in specific contexts. From the perspective of its advocates, the multiple pressure points of global legal pluralism, and the constant risk of mutual rejection of the authority-claims of different functional or territorial sites, provide a more promising model for promoting responsible and responsive global governance than constitutional or cosmopolitan approaches which emphasize coherence or unity. Robust pluralist approaches deny the possibility of a shared, universally-oriented system of values and question the meaningfulness of the idea of an international community. They do not seek the development of a shared communicative framework for addressing the different authority-claims of different polities or legal orders. Rather than advocating coordination between legal systems, they promote agonistic, ad hoc, pragmatic and political processes of interaction. Pluralist approaches applaud this diversity, competition and lack of coordination as being more likely to lead to a healthy degree of global accountability. And for the most part, pluralist approaches to the international realm have been consciously advocated as a corrective to or in opposition to constitutional 'monist' or 'sovereign' approaches, which are presented as being naïvely, misleadingly and even dangerously focused on unity, universalism and consensus.[177] Constitutional approaches are presented in the pluralist literature as misconceived or even dangerous attempts to transpose the model of domestic government, the solutions designed for domestic political constituencies, and the political imaginary of domestic constitutionalism onto the transnational stage.

Constitutionalist approaches to international law and governance

Unlike the literature on international legal pluralism, which, although growing, is not vast and is relatively recent in origin, there is a genuinely enormous literature on constitutionalist approaches to international law.[178] An influential part of this is to be

[177] E.g. N. Krisch, n.169 above, P. Berman, n.172 above, D. Kennedy, n.174 above, and J. Cohen, n.173 above.

[178] The literature is too large to cite comprehensively or even representatively, but below are a few of the canonical texts, as well as some of the recent collections of essays dedicated to the subject. Bruno Simma, *From Bilateralism to Community Interest in International law* (Hague Academy Course, 1994, volume 250, issue VI , p. 217-384) Christian Tomuschat, *Obligations Arising for States Without or Against their Will* 241 Rec des Cours 195 (1993-IV), Bardo Fassbender, The UN Charter as Constitution of the International Community (1998) 36 Col J Trans.L 529, Erica de Wet "The International Constitutional Order" Vol. 55 International and Comparative Law Quarterly pp. 51-76, 2006, Anne Peters "Compensatory Constitutionalism:" Leiden Journal of International Law Vol 19 (2006), Armin von Bogdandy in "Constitutionalism in International Law: Comments on a Proposal from Germany" Vol 47 Harvard International Law Journal 223-242 (2006) provides a useful review of the extensive German literature on the subject.

In the field of international trade law there is a wide 'constitutionalist' literature, see in particular the work of E U Petersmann, n188 below; also Deborah Cass, *The Constitutionalization of the World Trade Organization* (OUP, 2005) and Marcus Krajewski "Democratic Legitimacy and Constitutional Perspectives of WTO Law" Journal of World Trade (2001).

Some of the recent collections of essays include Ronald. St J Macdonald and Douglas M. Johnston, eds, *Towards World Constitutionalism*, (Brill 2005), Christian Joerges and Ernst-Ulrich Petersmann *Constitutionalism, Multilevel Trade Governance And Social Regulation* (Oxford: Hart, 2006), Jeffrey

found in German legal scholarship throughout the 20th Century,[179] and its intellectual roots are often traced to Kant's cosmopolitanism.[180] And as might be expected from such an extensive literature on a rich and elusive concept like constitutionalism, there are a great many different kinds of argument and approach to be found.

One obvious risk with a concept like constitutionalism is that it is eroded through overuse and over-extension, such that it becomes no longer meaningful to describe a particular approach to international law and governance as constitutionalist.[181] Fassbender in this vein has criticized the inflationary use of the word constitution by equating it with an increase in regulation, or with the evolution of a hierarchical system of rules.[182] Nonetheless there are a great many varieties of international constitutionalist approaches which can properly be so called.[183] These include the influential German school

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Dunoff and Joel Trachtmann, eds., *Ruling the World* (forthcoming, 2009). See also more generally the Leiden Journal of International Law, Vol 19 Symposium Issue (2006).

[179] For an account of three distinct strands of this constitutionalist literature on international law, see B. Fassbender, The UN Charter as the Constitution of the International Community, (1998) 36 Col J Trans L 529

[180] In particular I. Kant, "Idea for a Universal history with a Cosmopolitan Intent" in *Perpetual Peace and Other Essays* (1883 Translation, Ted Humphrey) and I.Kant *Perpetual Peace: A Philosophical Essay* (1795, 1903 Translation by Mary Campbell Smith). Kant's second definitive article of Perpetual Peace was that the law of nations 'shall be founded on a federation of free states'. To quote one of his more colorful statements of support for international constitutionalism from "Perpetual Peace: A Philosophical Essay": "On the conclusion of peace at the end of a war, it might not be unseemly for a nation to appoint a day of humiliation, after the festival of Thanksgiving, on which to invoke the mercy of Heaven for the terrible sin of which the human race are guilty of, in their continued unwillingness to submit (in their relations with other states) to a law-governed constitution; preferring rather in the pride of their independence to use the barbarous method of war, which after all does not settle what is wanted, which is the right of each state in a quarrel".

[181] Neil Walker, in "Making a World of Difference: Habermas, Cosmopolitanism and the Constitutionalization of International Law" (2005) European University Institute Working Paper Law No. 2005/17, available at SSRN: http://ssrn.com/abstract=891036, draws attention to the risks of the rhetorical use of constitutionalism which the application of the term to the international legal order entails: "what is the added value of the invocation of the term 'constitutional' to endorse the favoured narrative of progress? The common rhetorical purpose seems to be to lend additional gravitas to the particular trend or trends in question. In a circular or boot-strapping logic, it is the documentation of the supposedly progressive trend or trends which justifies a 'constitutional' attribution, and it is the constitutional attribution which then both dignifies the existing state of affairs and authorizes further progress. Such a discursive move carries with it both dangers and opportunities, and it is on how these dangers are approached and opportunities negotiated that the prospects of a cosmopolitan-inspired constitutionalization of international law depends" The strategy of political constitutionalism, as we have seen, is to take what is already there as materials towards the self-constitution of a particular political society and through a work of imagination and reform transform it into a more inclusive system of self-government".

[182] Bardo Fassbender "The Meaning of International Constitutional Law" (Ronald. St J Macdonald and Douglas M. Johnston, eds, *Towards World Constitutionalism*, Brill 2005, 837-851). Elsewhere he has made his own strong constitutionalist claim, arguing the UN Charter should be considered as the constitution of the international legal order: B. Fassbender "The UN Charter as Constitution of the International Community" (1998) 36 Col J Trans.L 529

[183] For an unusual adaptation of international constitutionalist thought, see the systems-theoretic argument for 'societal constitutionalism made by Günther Teuber "Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory" In C. Joerges, I.J. Sand and G. Teubner (eds) Transnational Governance and Constitutionalism (Oxford: Hart, 2004) 3-28. See also G Teubner and A Fischer-Lescano, "Regime

represented by Verdross,[184] Simma[185] and Tomuschat,[186] which emphasizes the idea of an international legal system premised on an 'international community' and international solidarity as opposed to one premised on the separate interests of individual nation states.[187] Another is the Hayek-inspired, political power-limiting version of international constitutionalism which posits the need for an internationally judicially enforceable and directly effective 'global integration law' protecting economic freedoms and rights.[188] A further important branch of international constitutionalist thought is the 'law of lawmaking'[189] approach which posits the need for a law 'through which transnational decision-making can be structured in a way which ensures its legitimacy and the rule of law'.[190] The concern animating such approaches is that forms of transnational governance which would otherwise escape domestic constitutional control should be confined by law. More specifically, such approaches argue for an appropriate translation, to the transnational context, of a set of constitutional principles analogous to those developed in the national constitutional context such as rule of law, checks and balances, human rights protection and democracy.[191] Many advocates of an international constitutionalist understanding have drawn on the development of the European Union with its unusually dense legal order in support of an argument that a constitutionalist approach beyond the state is possible and plausible.[192]

Collisions: The Vain Search for Unity in the Fragmentation of Global Law" Michigan Journal of International Law, Vol. 25 (2004)

[184] His classic text is A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926)

[185] N.178 above.

186 C Tomuschat "International Law: Ensuring the Survival of Mankind on the Eve of a new century" (Hague Academy of International Law, General Course on Public International Law) Rec des Cours Vol. 281 (1999) pp 9-438. Also Tomuschat n.178 above.

[187] See Brun-Otto Bryde: 'the main object of international constitutionalism has been to bind states to the constitutional principles of the international community' in Ronald St J Macdonald and D M Johnston, eds, *Towards World Constitutionalism*, (Brill 2005) 103-125 at 115. See also A. Von Bogdandy's discussion of the German school, n.178 above.

[188] Ernst-Ulrich Petersmann is the leading exponent of this view. For some of his most recent writings on the topic see "Constitutionalism and the Regulation of International Markets: How to Define the 'Development Objectives' of the World Trading System?" EUI Working Paper LAW No. 2007/23. Available at SSRN: http://ssrn.com/abstract=1024105, "Why Rational Choice Theory Requires a Multilevel Constitutional Approach to International Economic Law - The Case for Reforming the WTO's Enforcement Mechanism", University of Illinois Law Review, 2008. Available at SSRN: http://ssrn.com/abstract=1001166, "Justice in International Economic Law? From the 'International Law among States' to 'International Integration law' and 'Constitutional Law' European University Institute Working Paper LAW No. 2006/46. Available at SSRN: http://ssrn.com/abstract=964165, "State Sovereignty, Popular Sovereignty and Individual Sovereignty: from Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?" EUI LAW Working Paper No. 2006/45. Available at SSRN: http://ssrn.com/abstract=964147 .

[189] This approach is inspired by Frank Michelman's work on domestic constitutionalism. See *Brennan and Democracy*, (Princeton UP, 2005) Chap 1

[190] Christian Joerges "Constitutionalism in postnational constellations: contrasting social regulation in the EU and the WTO" in C. Joerges and E.U.Petersmann (eds) , *Constitutionalism, Multilevel Trade Governance, and Social Regulation* (Oxford: Hart, 2006), 491-527

[191] See e.g. Anne Peters "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures" Vol 19 Leiden Journal of International Law 579-610 (2006)

[192] See for example Erica De Wet in "The International Constitutional Order" Vol 55, International and Compraative Law Quarterly pp 51-76 at 52-3, (2006) who argues that "European constitutionalists have illustrated the significance of constitutionalism as a frame of reference for a viable and legitimate

What strong constitutionalist approaches to the international order have in common is their advocacy of some kind of systemic unity, with an agreed set of basic rules and principles to govern the global realm. The strongest versions of constitutionalism propose an agreed hierarchy amongst such rules to resolve conflicts of authority between levels and sites.

Constitutionalist approaches to the international regime have however generated their fair share of criticism even from within the community of international lawyers.[193]. Von Bogdandy, writing of the German school, has argued that, as a legal project "international constitutionalism might simply be overly ambitious and might lead to normative over-extension."[194] A range of other objections have been summarized as follows: "the goal of world constitutionalism may be perceived to be threatening for a variety of reasons: jurisprudential, ethical, cultural social and political. Jurisprudential resistance is offered mostly by legal realists…who fear that an excess of constitutionalist ideology in international law will raise the level of textualism within the professional community… and is reinforced by ethical concerns about the unrepresentative status of international judges who would be called upon to adjudicate disputes over the interpretation of constitutional text… Cultural and ethical opponents to world constitutionalism are likely to find allies in the cognate sector of social activities, who champion the cause of local communities seen to be vulnerable to the exploitative or insensitive practices of central state authority and large-scale corporate power".[195] To the extent that the EU is used as a prototype, there are obvious problems in extrapolating from this example, and even the meaningfulness of the idea of constitutionalism in the EU context has been questioned.[196]

Yet despite the range of critiques, some formerly skeptical voices[197] have recently joined the advocates of a constitutionalist approach. Most notably Jürgen Habermas and Martii Koskenniemi, drawing in different ways on Kant's writings, have expounded the merits of a cosmopolitan constitutionalist approach to international law. For Habermas, the crucial underpinning of Kant's cosmopolitan project is the "cognitive procedure of universalization and mutual perspective-taking" which Kant associates with practical

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regulatory framework for any political community, including… those that are formed beyond the state, which can be of a regional, international or supranational nature"

[193] See e.g. T. Schilling "Constitutionalization of General International Law — An Answer to Globalization?: Some Structural Aspects" Jean Monnet Working paper no. 6/2005, http://www.jeanmonnetprogram.org/papers/05/050601.html; J. Dunoff "Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law" Vol 17 European Journal of International Law:647-675, (2006).

[194] A. Von Bogdandy, "Constitutionalism in International Law: Comment on a Proposal from Germany" Harv.Intl.L.J. Vol 47 pp 223-242 (2006).

[195] D. Johnston "World Constitutionalism in the Theory of International Law" (in D. Johnston and R. St John Macdonald, eds, *Towards World Constitutionalism*, Brill, 2006, 3-29 at 19.

[196] Dieter Grimm "The Constitution in the process of Denationalization" Constellations Vol 12. (2005) 447-463 at 458-9. See also D Grimm, Integration by Constitution ICON Vol 3., pp 193-208 (2005).

[197] Compare M. Koskenniemi, "Global Legal Pluralism: Multiple Legal Regimes and Multiple Modes of Thought" (2005) http://www.helsinki.fi/eci/Publications/MKPluralism-Harvard-05d%5B1%5D.pdf

reason.[198] Habermas opens the final chapter of his recent book by asking "Does the constitutionalization of international law still have a chance?" when confronted with the traditional objections of realists who affirm "the quasi-ontological primacy of brute power over law".[199] Habermas seeks to reclaim and re-present Kant's cosmopolitanism as the basis for the international legal order, in the place of either Schmittian realism or hegemonic unilateralism. While drawing on Kant's peace-making and freedom-securing goals of constitutionalism, he rejects the idea of a 'world republic'[200] and argues for a different path to the constitutionalization of international law. Describing the constitutionalization process in the development of modern nation states as 'the reversal of the initial situation in which law serves as an instrument of power",[201] he argues that major powers are more likely to fulfill expectations of fairness and cooperation the more they have learned to view themselves at the supranational level as members of a global community, and "are so perceived by their own national constituencies from which they must derive their legitimation".[202]

Koskenniemi, drawing similarly on a renewed reading of Kant, has also recently defended the 'constitutionalist mindset' in relation to the international legal order.[203] While criticizing the resort by international lawyers "to a vocabulary of institutional hierarchies" he argues that Kant's constitutionalism was less an institutional or architectural project, and more "a programme of moral and political regeneration". Koskenniemi argues that Kant sought to institutionalize a constitutional mindset "from which to judge the world in a manner that aims for universality, impartiality, with all the virtues of [Fuller's] inner morality of law". And he concludes that since constitutional vocabularies not only frame the internal world of moral politicians, but also inform political struggles, such vocabularies as self-determination, fundamental rights, division of power, and accountability are "historically thick and contest the structural biases of present institutions".[204]

I argue that these Kantian re-readings of cosmopolitan constitutionalism offer the ECJ an attractive alternative to strong constitutional approaches and to strong pluralist approaches alike. The crucial components of what I will call the *soft constitutionalist approach* inspired by these Kantian re-readings are the following. The first is the assumption of an international community of some kind, the second is an emphasis on universalizability (the Kantian notion of decision-making which seeks validity beyond the preferences of the decision-maker), and the third is an emphasis on common norms or

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[198] Commenting on Habermas's turn to constitutionalism, Neil Walker suggests that for Habermas "the constitutionalism of international law seems to inhere partly in the substantive quality of the norms generated, partly in their institutional efficacy, and partly in their universalizability – as a matter of both process and outcomes." See N. Walker ""Making a World of Difference: Habermas, Cosmopolitanism and the Constitutionalization of International Law" European University Institute Working Paper Law No. 2005/17. Available at SSRN: http://ssrn.com/abstract=891036
[199] J. Habermas, The Divided West (Polity 2006), Chapter 8, pp 116
[200] Ibid. p 123.
[201] Ibid.,p 142
[202] Ibid, p 142
[203] M. Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization," *Theoretical Inquiries in Law*: Vol. 8 : No. 1, Article 2. (2007)
[204] Ibid.

principles of communication for addressing conflict. These three features distinguish the soft-constitutionalist approach sharply from pluralist approaches, since the latter assume the existence of a plurality of distinct and separate entities without any overall community, they emphasize the autonomous, authoritative decision-making processes and autochthonous values of each, and they envisage communication and conflict-resolution through agonistic political processes, ad-hoc negotiation and pragmatic adjustment. Soft constitutionalist approaches are also distinct from strong constitutionalist approaches in that they do not insist on a clear hierarchy of rules, but rather on commonly negotiated and shared principles for addressing conflict.

Some variations on what I call the soft constitutionalist approach can be found in the literature, often proposed by scholars who seek to distinguish themselves from the strongly monist or hierarchical elements of international constitutionalist thought, but who identify with both the descriptive plurality and the comity-oriented strands of international pluralist thought.[205] Examples are in the work of Armin Von Bogdandy, who uses the notion of judicial 'coupling' - – such as the notion of 'direct effect' of international law (as developed in particular within EC law) on the one hand, or the *Charming Betsy* 'consistent interpretation' approach on the other - to suggest how the different legal systems might interact with one another in a way that is informed by the values and principles of domestic constitutional law.[206] Other such proponents are William Burke-White, whose approach blends the descriptive component of pluralism with the constitutional aspirations of universalist standards, positive comity,[207] overall coherence and commitment to a 'common enterprise of international law',[208] as well as Mattias Kumm,[209] Daniel Halberstam,[210] and Jean Cohen.[211]

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[205] See e.g. Elements of a soft constitutional approach can also be found in Neil Walker's work on constitutional pluralism, where he writes of "the increasing significance of the relational dimension within the post-Westphalian configuration… the units are no longer isolated, self-sufficient monads, .. their very identity and raison d'etre as polities or putative polities rests at least in some measure on their orientation towards other sites." See "the Idea of Constitutional Pluralism" n.18 above.

[206] A. Von Bogdandy "Pluralism, Direct Effect and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law" Vol 6 International Constitutional Law Journal (2008).

[207] Burke White in "International Legal Pluralism" 25 Mich J. Int'l L. 963 (2005) refers to Anne Marie Slaughter's notion of 'positive comity', developed in her book *A New World Order* (Princeton University Press, 2004), which would require judges to develop a set of shared understandings and principles regarding when to defer to the adjudicatory mechanisms of other states and institutions, and he suggests that four trends together may counteract some of the risks of strong pluralism – first, the recognition of a common body of applicable law, secondly robust interjudicial dialogue, thirdly a blending of national legal traditions, and fourthly, the development of hybrid tribunals which bring together national and international law, judges and procedures.

[208] W. Burke White, ibid. He argues in constructivist vein that the way in which the relevant actors conceive of the global system is likely to be at least partly self-fulfilling. In other words, advocacy of robust pluralist terms is likely to mean that particular legal obligations will be created and enforced without reference to or without consideration of the impact on other normative systems and priorities. See at p 979

[209] M. Kumm "Constitutional Democracy Encounters International Law: Terms of Engagement" NYU Public Law and Legal Theory Working Papers no. 47 (2006).

[210] D. Halberstam "Constitutionalism and Pluralism in Marbury vs Madison" (2008) Halberstam, in M.P. Maduro and L. Azoulai (eds) The Past and the Future of EU Law: Revisiting the Classics on the 50th Anniversary of the Rome Treaty (forthcoming). Available at SSRN: http://ssrn.com/abstract=1103253

[211] Jean Cohen "A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach" 15 Constellations 456-484 (2008)

As we have seen, however, the CFI in *Kadi*, like the ECHR in *Behrami*, adopted a strong constitutionalist approach which was premised on the systemic unity of the international legal order and the regional European order, and on a hierarchy of legal authority within this integrated system. The rulings of the Advocate General and the ECJ on the other hand rejected a strong constitutionalist approach, opting instead for a strong pluralist approach which presented the European Community as a separate and self-contained system which determines its relationship to the international order in accordance with its own internal values and priorities rather than in accordance with any common principles or norms of international law. I argue, for reasons which are elaborated in the next section, that a soft constitutionalist approach to the international legal order would have provided a better framework for the ECJ to address the dilemma which arose in *Kadi* than either the strong constitutionalist approach of the CFI or the pluralist approach of the Advocate General and the Court. A soft constitutional approach would fit better with the aspirations of the EU as an international actor and with its professed identity as a good international citizen, yet would not give up on the concerns of international accountability and rights-protection which may have animated the AG's Opinion or the ECJ's ruling. Had the ECJ, as the judicial branch of this important regional organization, invoked international law norms rather than only internal European standards in refusing to implement the SC Resolution without further due process guarantees, it would not only have provided a better example for other states and organizations contemplating the implementation of the UN sanctions regime, but it would also have added some substance to the rhetoric of 'normative power Europe'.

Part 4: The EU as a 'good international citizen'[212] after *Kadi*?

The ruling given by the ECJ in *Kadi* seems at first glance to be a vindication for advocates of a pluralist conception of the international legal order. Not only did the Court adopt a pluralist approach to the question of the relationship between EU law and international law, but more significantly, the Court in so doing - and by comparison with the approach of the CFI - annulled the EC regulation implementing the Security Council Resolutions because of their non-compliance with individual due process rights. The claim that a robustly pluralist approach is more likely to strengthen international accountability seems to be supported by the judgment and its outcome.[213] The Court of

[212] See Tim Dunne "Good Citizen Europe", International Affairs 84 (2008) 13-28 above

[213] Indeed the Security Council in Resolution 1822 (2008) of 30 June 2008 took certain steps, even if small steps, in response to the kind of challenges brought by litigants such as Kadi against UN sanctions, by deciding that at least some parts of the 'statements of case' which Member States now provide to the Sanctions committee when seeking the listing of an individual should be made public and placed on a SC website, or made available for qualified release on request by states. The Resolution also calls on the Sanctions Committee to make such brief 'statements of case' available in respect of past listings and to keep listings under review to make sure they are still warranted. It also requires Member States who have been notified (ie when one of their citizens or an individual who is located in that state has been listed) to inform individuals who have been listed (or delisted) of this fact and of whatever reasons have been made public. Nevertheless, in its 2008 Report, the Analytic Support and Sanctions Monitoring Team of the Santions Committee established by the Security Council , while evidently concerned by the possibility that the ECJ might follow the Opinion of AG Maduro, seemed unwilling to contemplate the establishment of any kind of review panel which would be competent to review the Security Council's decisions or

Justice effectively ignored the Security Council Resolution for the purposes of its judgment, treating the aims of the resolution and its purposes as a matter mainly for the EU's political branches when implementing it. Instead the Court focused judicial attention only on the question whether the EC implementing measure could be said to violate principles of the EC's internal constitutional order, without reference to any principles of international law and without reference to the UN or to any other entity.

Yet while the specific outcome of the *Kadi* case may be commendable from the short-term perspective of its insistence on minimum procedural-fairness requirements for those whose assets are to be indefinitely frozen pursuant to the implementation of a UNSC Resolution, the strong pluralist approach which underpins the judgment of the Court is at odds with the conventional self-presentation of the EU as an organization which maintains particular fidelity to international law and institutions, and it is an approach which carries certain costs and risks for the EU. The judicial strategy adopted by the ECJ in *Kadi* was an inward-looking one which eschewed engagement in the kind of international dialogue that has generally been presented as one of the EU's strengths as a global actor.

Other judicial strategies were clearly available to the Court. [214] In particular the ECJ itself pointed towards what I have called a 'soft constitutionalist' pathway but nevertheless chose not to take it. In paragraph 298 of its judgment in *Kadi*, the ECJ noted that the UN Charter leaves it to Member States to decide how to transpose UNSC resolutions into their legal order. This would have provided a doctrinal route by which the Court could have reached the same substantive result (viz. reviewing or striking down the EC's implementation of the UNSC freezing order) even while adopting an

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processes. See S/2008/324, paras 39-41. A proposal by Qatar to make the focal point process into more of an independent review panel was not taken up by the Security Council: see http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.2294423/

For further information on the pressure to reform the Security Council sanctions system see the "Targeting Terrorist Financing" project of the Watson Institute for International Studies at Brown University, http://www.watsoninstitute.org/project_detail.cfm?id=51, which also describes the various reform efforts of the so-called 'Interlaken', 'Bonn-Berlin' and 'Stockholm' processes spearheaded by different states; See also the report by Bardo Fassbender commissioned by the UN Secretary General's Office for legal Advice "Targeted Sanctions and Due Process" http://www.un.org/law/counsel/Fassbender_study.pdf . The Austrian Government also sponsored an initiative on the UNSC and the Rule of Law, whose final report is entitled "The Role of the Security Council in Strengthening a Rules-based International System: Final Report and Recommendations from the Austrian Initiative, 2004-2008" and published by both the Federal Ministry for European and International Affairs, and the Institute for International Law and Justice at NYU. See
http://www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/Vertretungsbehoerden/New_York/Kandidatur_SR/FINAL_Report_-_The_UN_Security_Council_and_the_Rule_of_Law.pdf.

[214] For an argument that there was no such other route for the ECJ to take, and that the only effective solution to the problems of targeted UN sanctions against individuals is the installation of an independent administrative mechanism to review the listing and de-listing decisions made by the Security Council, rather than 'decentralized' review by states and organizations like the EC which would jeopardize the authority of the SC and risk fragmenting the system of sanctions, see J. Reich "Due Process and Sanctions Targeted Against Individuals Pursuant to Resolution 1267 (1999) Vol. 33 Yale J. Int'l L. 505 (2008). See also M. Bothe "Security Council's Targeted Sanctions against Presumed Terrorists" Vol 6 Journal of International Criminal Justice 541-555 (2008)

internationally-engaged approach which drew directly on principles of international law instead of emphasizing the particularism of Europe's fundamental rights. In other words, the ECJ could have insisted on respect for basic principles of due process and human rights protection under international law, even where these were neglected within the existing UNSC listing and de-listing processes.[215] By failing to do so, the Court lost an important opportunity to contribute to a dialogue about due process as part of customary international law, which would be of relevance for the international community as a whole and not just the European Union. Argument could have been advanced not only about customary international law as a basis for due process protection, but also about the references to protection of human rights in the UN Charter itself, as well as in the general principles of international law and *ius cogens* principles which were invoked by the CFI. In doctrinal terms, the ECJ could have concluded that the Resolutions could not be implemented as they stood, without the interposition by the EU, within its freedom of transposition, of a layer of due process such as to protect the interests of affected individuals. This would have involved treating the EU's implementation of the SC Resolution as an opportunity to address that deficiency.[216] By focusing only on the EU's municipal guarantees of fundamental rights protection and ignoring international law, the ECJ not only failed to influence an important international debate on an issue which currently affects every member of the UN, but it also failed to avail of the opportunity to develop a channel for the mutual influence of the EU and the UN legal orders. The fact that the ECJ chose the pluralist language and the reasoning which it did has sent out a clear message to other players in the international system about the autonomy of the European legal order, and the priority which it gives to its internally determined values. If courts outside the European Union are inclined towards judicial borrowing, then the ECJ's ruling in *Kadi* seems to offer encouragement to them to assert their local understandings of human rights and their particular constitutional priorities over international norms, and in particular over Chapter VII resolutions of the Security Council.

Another available strategy for addressing the conflict exposed by the facts of the *Kadi* case was the approach taken by the German Constitutional Court in its famous '*Solange*' judgments.[217] However, the ECJ eschewed the dialogic approach pioneered by the German constitutional court which engaged directly with the ostensibly conflicting

[215] For a similar suggestion see Andrea Bianchi "Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion" n.36 above, who argues that interpretative techniques should be perfectly adequate to ensure the conformity of Security Council resolutions with human rights guarantees which could then be provided by states. For an argument that the UN sanctions regime itself could be made compatible with international and European human rights standards see Iain Cameron " UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights" Nordic Journal of International Law, Volume 72, Number 2, (2003) pp. 159-214.

[216] Compare the views of Martin Nettesheim in "UN Sanctions against Individuals: A Challenge to the Architecture of European Union Governance" (2006) www.whi-berlin.de/documents/whi-paper0107.pdf who argues that the claims of the UN Charter for respect and implementation should have been "mediated via the Member States in their dichotomous role", and not by the EU; and that "it is not the responsibility of a constitutionally based jurisdiction to instruct the institutions of other entities whether or not they adhere to their own legal standards. It is certainly not its duty to create a global ordre public".

[217] See in particular *Solange I*, BVerfGE 37, 271 (1974), [1974] 2 CMLR 540 and *Solange II*, BVerfGE 73, 339 2 BvR 197/83 (1986), [1987] 3 CMLR 225.

international regime. Instead the Court in *Kadi* opted for an internally-oriented approach and a form of legal reasoning which emphasized the particular requirements of the EU's general principles of law and the importance of the autonomous authority of the EC legal order.

If we look back to the *Solange* jurisprudence of the German Constitutional Court, which was considered by many observers to provide a persuasive model for addressing the kind of conflict at issue in *Kadi*, we see that the German court's decision – especially but not only in *Solange II* - is expressed in a more directly dialogic and outward-looking terms which reflect the core elements of a soft constitutionalist approach.[218] The conflict at issue in the German case was between a provision of the German Basic law and an EC regulation, but in that sense also a conflict between the internal constitutional norms of one political entity and the legal requirements imposed by an international or supranational system of which the former entity is a part. In its *Solange I* judgment the Bundesverfassungsgericht (Federal Constitutional Court) declared that each of the two organs in question - which in that case were the Constitutional Court and the ECJ respectively – had a duty "to concern themselves in their decisions with the concordance of the two systems of law".[219] The relationship between the EC and Germany was not presented by the German Constitutional Court in hierarchical terms, but neither was it described in strongly pluralist or confrontational terms. Instead the judgment emphasized the mutually disciplining relationship between the two legal systems:

"The binding of the Federal Republic of Germany (and of all member states) by the Treaty is not, according to the meaning and spirit of the Treaties, one-sided, but also binds the Community which they establish to carry out its part in order to resolve the conflict here assumed, that is, to seek a system which is compatible with an entrenched precept of the constitutional law of the Federal Republic of Germany. Invoking such a conflict is, therefore, not in itself a violation of the Treaty, but sets in motion inside the European organs the Treaty mechanism which resolves the conflict on a political level".[220]

Underscoring further the dynamic nature of this mutual relationship, the Constitutional Court went on to articulate expressly what it considered to be deficient on the EC level with respect to the protection of fundamental rights, and it also declared that its review of the implementation of EC measures and their compatibility with fundamental rights for this purpose was not just in the interests of the German court but "also in the interests of the Community and of Community law".[221] Subsequently in its second *Solange* ruling in 1986, the Bundesverfassungsgericht adopted a more deferential approach (which may have inspired the European Court of Human Rights judgment later in *Bosphorus v Ireland*[222]) ruling that, given the improvements in the EU human rights regime since the first *Solange* judgment, the German Constitutional Court would no longer examine the

[218] Ibid.
[219] *Solange I*, n. 217 above.
[220] Ibid.
[221] Ibid.
[222] Above n. 54

compatibility of EC legislation with German fundamental rights as long as the ECJ continued to protect fundamental rights adequately.[223]

The choice of the ECJ in *Kadi* not to borrow from the *Solange* approach, but to reject any judicial role in the process of shaping of the relationship between the different legal systems, and to eschew any dialogue over the possible international law norms which the Security Council may be required to observe, seems to have been carefully chosen. More specifically, it seems to have been deliberately calculated by the Court as an opportunity instead to emphasize the autonomy, authority and separateness of the European Community from the international legal order. Rather than being a decision which can be understood only on its particular facts and in the context of the Security Council's growing anti-terrorist powers, the *Kadi* judgment seems to have been chosen by the ECJ as the dramatic moment in which to "emphatically make whole on its promise", [224] first delivered in its famous *Van Gend en Loos* case in 1964, of an "external dimension to European constitutionalism".[225] It is this which is the most striking feature of the *Kadi* case, and it one which may well surprise those who have assumed that the difference between US and EU approaches to international law lies in the much greater receptiveness and openness on the part of the EU – including its judiciary - to international law and institutions.

In the US, as is well known, an active debate continues not only over the status of customary international law and the duty of domestic courts to apply it,[226] but also, and in spite of the language of the supremacy clause of the Constitution, about the status of international treaties in domestic law.[227] The changing nature of the scholarly debate in the US in recent years on these fundamental doctrinal questions of the authority and status of international law to some extent mirrors changing approaches within the US political system towards international law and engagement. This approach is now regularly depicted as reflecting an attitude of exceptionalism, the pursuit of unilateralism, and a general distrust of international law and institutions.[228] The power of the US in the international realm, together with the conviction of many Americans about the merits of

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[223] *Solange II*, BVerfGE 73, 339 2 BvR 197/83 (1986), [1987] 3 CMLR 225. This stance was subsequently confirmed and even strengthened in the *Solange III* judgment of the Federal Constitutional Court,, BVerfGE 2 BvL 1/97 of 7 June 2000.

[224] Daniel Halberstam "Rethinking Constitutionalism in National, Supranational, and Global Governance" (2008), manuscript on file with author.

[225] Id.

[226] See the 'revisionist' school of foreign relations law spearheaded by Curtis Bradley and Jack Goldsmith, reflected most recently in debate over the meaning of the Supreme Court's ruling in *Sosa v Alvarez-Machain* 542 U.S. 692 (2004),:see Curtis Bradley, Jack Goldsmith and David Moore "Sosa, Customary International Law, and the Continuing Relevance of Erie" 120 Harv. L. Rev. 869 (2007); Also Jack Goldsmith and Eric Posner, *The Limits of International Law* (OUP, 2006).

[227] See most recently Carlos Vasquez "Treaties as the Law of the Land: The Supremacy Clause and Presumption of Self-execution" 121 Harv Law Review (2008)

[228] For a small sample from a vast literature see. Harold Koh "On American Exceptionalism" 55 Stanford Law Review 1479-1529 (2003), Peter Spiro "The New Sovereigntists: American Exceptionalism and its False Prophets" Foreign Affairs November/December (2000), See also the European Journal of International Law symposium issue on "Unilateralism in International Law: A US-European Symposium" Vol 11, No.s 1 and 2 (2000), and the collection of essays edited by Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005)

the form of government and the functioning of democracy in the US, explains in part the cautious or skeptical approach towards international law and institutions, for the reason that the latter are perceived to be undemocratic and that they may restrain or thwart US interests. In contrast, as indicated above, Europe in general and the European Union in particular have traditionally been associated with an attitude of respect for, and fidelity to international law and institutions.[229] This has indeed become an explicit part of the EU's self-image[230] and a cultivated aspect of its international identity.[231] It would have been enshrined in the EU's basic 'constitutional' document, the Treaty on European Union (TEU), had the recently signed Lisbon Treaty or its predecessor Constitutional Treaty come into force.[232] Art 2(5) as amended would have read:

"In its relations with the wider world, the Union shall uphold and promote its values and its interests and contribute to the protection of its citizens. It shall contribute to peace, security and the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights in particular the rights of the child, *as well as to the strict observance and the development of international law, including respect for the principles of the UN Charter.*" (emphasis added)

Apart from these high-level constitutional and political commitments and declarations, the European Court of Justice itself had also for several decades professed respect for

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[229] For a critical analysis of this tendency to contrast Europe favorably see Sabrina Safrin "The unexceptionalism of US exceptionalism" Vol. 41 Vanderbilt Journal of Transnational Law (2008). For a more nuanced account of Europe's version of exceptionalism, see Magdalena Licková "European Exceptionalism in International Law" 19 European Journal of International Law 463-490 (2008)

[230] For some recent examples see the 2003 European Security Strategy; also the speech by Javier Solana at the Stockholm Conference on preventing genocide, Brussels 28 January 2004 on the EU's commitment to 'effective multilateralism' : "International law is the guiding spirit and lifeblood of our multilateral system. That system is made strong through our commitment to upholding and developing international law. The stablishment of the International Criminal Court has shown that the multilateral system can be adapted and strengthened to meet new challenges. We have a responsibility now to ensure that it can do its job. We have a responsibility also to ensure that the UN can do its job; that it is made effective and equipped to fulfil its responsibilities. The United Nations cannot function unless we are prepared to act to uphold its rules when they are broken.". Available online at http://www.europa-eu-un.org/articles/en/article_3176_en.htm

Another e.g. in the recent speech of the EU Presidency on "The Rule of Law at National and International Levels" at the meeting of the 6th Committee of the UN at the 62nd General Assembly on the UN in NY on 25 October 2007: "The European Union is deeply committed to upholding and developing an international order based on international law, including human rights law and the rule of law with the United Nations at its core. We believe that international law and the rule of law are the foundations of the international system. Thus, the rule of law is among the core principles on which the EU builds its international relations and its efforts to promote peace, security and prosperity worldwide. " Available online at http://www.europa-eu-un.org/articles/en/article_7569_en.htm

[231] See also Ian Manners and R Whitman "The Difference Engine: Constructing and Representing the international identity of the European union" Journal of European Public Policy Volume 10, Number 3, June 2003 , pp. 380-404

[232] The fate of the Lisbon Treaty remains uncertain since it was rejected by popular referendum in Ireland, the only one of the 27 EU member states which held a referendum (on the basis that it was constitutionally obliged to do so). However, almost every other EU member state has ratified it, and the Irish government has proposed re-running the referendum in 2009 with a view to securing ratification of the Treaty. See http://www.euractiv.com/en/future-eu/ratifying-treaty-lisbon/article-170245

international law, at least in the relatively small number of significant 'foreign relations' cases which it decided. Article 300(7) of the EC Treaty provides that international agreements entered by the EC are binding on the EC and on the Member States. The Court supplemented this by ruling consistently that once an international treaty concluded by the European Community enters into force, its provisions form an 'integral part' of Community law.[233] As far as the effect of such international agreements which are an 'integral part' of the EC legal order is concerned, the Court had almost always declared, with the notable exception of the GATT and World Trade Organization Agreements,[234] that international agreements entered by the EC are directly enforceable before domestic courts.[235] In relation to international agreements to which the EC is not party but to which all member states are party, the ECJ took the view in relation to the GATT 1947 that the Community had succeeded to the obligations of the states and was bound by its provisions by virtue of the powers the EC had acquired in the sphere of the common commercial policy.[236] Like the GATT 1947, neither the EC nor the EU are parties to the UN Charter, but the Court of First Instance in *Kadi* had followed a similar approach to that taken in the GATT cases by ruling that the EC was nonetheless bound by its provisions.[237] As far as customary international law rather than treaties is concerned, the Court on a number of occasions explicitly ruled that the EC must respect the rules of customary international law in the exercise of its powers, that such rules bind the EC and form part of its internal legal order.[238] And in previous cases in which the reviewability of EC measures implementing Security Council resolutions arose, the ECJ, while not in any way questioning its own jurisdiction to review those implementing measures, nevertheless expressed itself in very different terms from those of the ECJ in *Kadi*. Thus in the *Bosphorus* and *Ebony Maritime* cases, the tone of the Court's judgment was considerably more internationalist than in *Kadi*, expressing concern about the 'purposes of the international community' and its fundamental interests, rather than about the separate and autonomous nature of the EC legal order.[239]

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[233] Case 181/73 *Haegeman* [1974] ECR 449, para. 5; *Opinion 1/91 (EEA Agreement I)* [1991] ECR 6079, para. 37.

[234] The ECJ's treatment of the multilateral trade agreements, and the decision to treat them as 'non-self-executing' by comparison with many other international treaties, has generated a vast literature. For a recent collection of essays on the subject see Geert A. Zonnekeyn , Direct Effect of WTO Law (Cameron May, 2008), http://works.bepress.com/geert_zonnekeyn/1

[235] See P. Craig & G. de Búrca, EU Law (4th ed), Chap. 6, section 8. See however Martin Nettesheim "UN Sanctions against Individuals: A Challenge to the Architecture of European Union Governance" (2006) www.whi-berlin.de/documents/whi-paper0107.pdf who has argued, following the CFI judgment in *Kadi*, that despite the fact that the ECJ has "repeatedly used the terminology rooted in a monist perception of the relationship between public international law and European Union law" and has "repeatedly stressed the openness and friendly attitude of EU Law towards public international law", these are primarily semantics and its case law on the direct effect of GATT/WTO agreements in particular demonstrates that "the ECJ clearly considers the Union as a closed system which opens itself to legal acts from the outside only after thorough controls" .

[236] Cases 21-24/72 *International Fruit Company NV* v *Produktschap voor Groenten en Fruit [*1972] ECR 1219

[237] See n.31 above and text.

[238] Cases C-286/90 *Anklagemyndigheden* v *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 9 and C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655, para. 46.

[239] C-84/95; *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and others*, judgment of 30 July 1996, para 26 and C-177/95; *Ebony Maritime SA*

Furthermore the general perception, fed by such legal, political and judicial pronouncements, of the EU as an organization which maintains a distinctive fidelity to international law has been bolstered by academic and popular commentary. Some of this commentary has focused on the phenomenon of Europe as a 'soft power'[240] which, lacking the military might of the US, considers that it can best wield a different form of influence through persuasion, negotiation, conciliation and incentives, and by demonstrating its bona fides as a cooperative international actor under international law.[241] Others have expressly drawn attention to the comparison between the EU and the US in this respect, praising the European approach precisely for offering an alternative, in international relations, to the exceptionalist and unilateral approach of the US.[242] The professed commitment within Europe and by the European Union to international law and international institutions has been the subject of more cynical commentary by US commentators,[243] but notably they tend to share the perception that the EU and European powers in general differ from the US in the extent to which they are prepared to trust in and to follow international law and institutions.[244]

Conclusion

The pressing problems of accountability in the international realm, and in particular the question of Security Council accountability for the impact of its actions, have been raised again in dramatic fashion by these recent cases before Europe's regional courts And the

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and Loten Navigation Co. Ltd v Prefetto della Provincia di Brindisi , judgment of 27 February 1997, para 38: "As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate."

[240] J. Nye, *Soft Power, The Means to Success in World Politics* (Public Affairs, 2004)

[241] For some of the extensive literature on Europe's aspirations as a so-called normative power see the recent special issue of the journal International Affairs (Vol 80 issue 1, 2008) on "Ethical Power Europe", in particular the introduction by Lisbeth Aggestam,and the essay on 'good international citizenship' by Tim Dunne "Good Citizen Europe" pp 13-28. For earlier contributions see I. Manners "Normative Power Europe: A Contradiction in Terms" 40 Journal of Common Market Studies, 235-258 (2002) Rob Howse and Kalypso Nicolaides "This is my EUtopia: Narrative as Power" 40 JCMS 767-792 (2002). Also Ivan Krastev and Mark Leonard "New World Order: The Balance of Soft Power and the Rise of Herbivorous Powers" (European council on Foreign Relations, 2007), Charlotte Bretherton and John Vogler *The European Union as a Global Actor,* (London: Routledge, 1999) , H. Sjursen 2006. The EU as 'normative' power: how can this be? *Journal of European Public Policy*. 13(2): 235-251m T Garton Ash, T (2007) 'Europe's True Stories', *Prospect*, Issue 131 February, 2007

[242] Juergen Habermas, *The Divided West* (Polity, 2006).

[243] E.g. Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (Knopf, 2003) Jed Rubenfeld, "Unilateralism and Constitutionalism" 79 NYU Law Review 1971-2028 (2004).

[244] For arguments which challenge the assertion that the European and American approaches to international law are so different from one another, see R. Delahunty "The Battle of Mars and Venus: Why do American and European Attitudes to International Law Differ?" St Thomas Law School Working Paper Series No 1744.. (2006) available at http://law.bepress.com/cgi/viewcontent.cgi?article=8181&context=expresso, and the Op-Ed published by Jack Goldsmith and Eric Posner in the Washington Post on 25 November 2008 entitled "Does Europe Believe in International Law?"

very different answers offered by the various European judicial instances – from the European Court of Human Rights to the EU's Court of First Instance and Court of Justice - exhibit a fascinating range of responses to the question of the authority of international law (and of Security Council Resolutions) within the regional legal order. Ultimately and perhaps surprisingly, it was the European Court of Human Rights which displayed greatest deference to the UN Security Council and an unwillingness to question Security Council measures by reference to European human rights norms, while the European Court of Justice robustly refused to implement any Security Council measures - even those adopted under Chapter VII – which did not comply with EU standards of rights-protection. The Court of Human Rights adopted what I have termed a strong constitutionalist approach to the international legal order, subordinating the ECHR to the exigencies of the UN collective security system, while the ECJ adopted a strongly pluralist approach, treating the UN system and the EU system as separate and parallel regimes, without any privileged status being accorded to UN Charter obligations or UNSC measures within EC law.

I have argued in this article that the ECJ's new-found judicial pluralism in *Kadi* has potentially significant implications for the image the EU has long cultivated of itself as an actor committed to 'effective multilateralism',[245] which professes a distinctive allegiance to international law and institutions, and which seeks to carve out a global role for itself as a normative power. The striking similarity between the reasoning and interpretative approaches of the US Supreme Court in *Medellin* and that of the ECJ in *Kadi* to the relationship between international law and the 'domestic constitutional order' at the very least calls into question the conventional wisdom of the US and the EU standing at opposite ends of the spectrum in their embrace of or resistance to international law and institutions. Even as Europe's political institutions assert the EU's distinctive role as a global actor committed to multilateralism under international law, and even as a future amendment to the EU Treaties would enshrine the 'strict' commitment to international law in its foundational texts, the European Court has chosen to use the much-anticipated *Kadi* ruling as the occasion to proclaim the internal and external autonomy and separateness of the EC's legal order from the international domain, and the primacy of its internal constitutional values over the norms of international law. Not only does the ECJ's approach provide a striking example for other states and legal systems which may be inclined to assert their local constitutional norms as a barrier to the enforcement of international law, but more importantly it suggests a significant paradox at the heart of the EU's relationship with the international legal order whose implications have not begun to be addressed.

[245] See the "European Security Strategy: A Secure Europe in a Better World", 2003, available online at http://consilium.europa.eu/uedocs/cmsUpload/78367.pdf