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## Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities. The Incompatibility of the United Nations Security Council's 1267 Sanctions Regime with European Due Process Guarantees

Christopher Michaelsen\*

\*University of New South Wales

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# Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities. The Incompatibility of the United Nations Security Council's 1267 Sanctions Regime with European Due Process Guarantees

Christopher Michaelsen

## **Abstract**

This article analyses the landmark decision by the European Court of Justice (ECJ) in the cases of Kadi and Al Barakaat. These cases concern the implementation of the UN Security Council's 1267 sanctions regime within the European Union. The article examines the key findings of the ECJ's decision and discusses the judgment's significance both as far as legal and political implications are concerned. It suggests that the case marked the first time that the ECJ has confirmed its jurisdiction to review the lawfulness of a measure giving effect to UN Security Council resolutions. It also notes that the case constitutes the first time that the ECJ has annulled an EC measure giving effect to a UN Security Council resolution for violating fundamental principles of Community law. The article concludes that the issues that lie at the heart of Kadi and Al Barakaat showcase a range of fundamental questions concerning the role of the Security Council in strengthening a rules-based international system and maintaining international peace and security under the rule of law.

# KADI AND AL BARAKAAT v COUNCIL OF THE EUROPEAN UNION AND COMMISSION OF THE EUROPEAN COMMUNITIES\*

## THE INCOMPATIBILITY OF THE UNITED NATIONS SECURITY COUNCIL'S 1267 SANCTIONS REGIME WITH EUROPEAN DUE PROCESS GUARANTEES

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### I INTRODUCTION

The European Court of Justice ('ECJ') handed down its decision of *Kadi and Al Barakaat* on 3 September 2008. The case dealt with the implementation of the United Nations Security Council's *Resolution 1267*<sup>1</sup> sanctions regime ('1267 sanctions regime') in the European Union. In its judgment, the Court reviewed the treatment of the case by the Court of First Instance ('CFI') with considerable attention, and then divided its conclusions into three separate but interdependent parts:

- 1 the competence of the Council of the EU to adopt the regulation (*Regulation 881/2002*<sup>2</sup> and others that have followed to amend it)<sup>3</sup>

\* (C-402/05 P; C-415/05 P) [2008] ECR I-0000 ('*Kadi and Al Barakaat*').

<sup>1</sup> SC Res 1267, UN SCOR, 54<sup>th</sup> sess, 4051<sup>st</sup> mtg, UN Doc S/RES/1267 (15 October 1999) [4].

<sup>2</sup> *Council Regulation (EC) No 881/2002 of 27 May 2002 Imposing Certain Specific Restrictive Measures Directed against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida Network and the Taliban, and Repealing Council Regulation (EC) No 467/2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan*, [2002] OJ L 139/9 ('*Regulation 881/2002*').

<sup>3</sup> See, eg, *Commission Regulation (EC) No 1272/2000 of 16 June 2000 Amending Council Regulation (EC) No 337/2000 concerning a Flight Ban and a Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan*, [2000] OJ L 144/16; *Council Regulation (EC) No 467/2001 of 6 March 2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan, and Repealing Regulation (EC) No 337/2000*, [2001] OJ L 67/1 ('*Regulation 467/2001*').

for the freezing of financial resources by states of persons related directly or indirectly to organisations considered to engage in international terrorist activities;

- 2 the compatibility of the regulation with art 249 of the *Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community*;<sup>4</sup> and
- 3 the compliance of the regulation and its provisions with certain fundamental rights.

With regard to the first part, the ECJ found that the Council was competent to adopt *Regulation 881/2001*. The Court also confirmed the findings of the CFI that the contested regulation was compatible with art 249 of the *Consolidated Treaties* and accordingly dismissed as unfounded the appeal of Al Barakaat International Foundation ('Al Barakaat') on the second part. However, the Court rejected the findings of the CFI that the courts of the European Communities had, in principle, no jurisdiction to review EU regulations implementing UN Security Council resolutions. Instead, it held that regulations by the Council implementing international legal instruments must comply with the fundamental principles of European Community law including human rights law as endorsed by the ECJ and developed in the European context. The Court concluded that the regulations by the EU Council implementing the UN Security Council's 1267 sanctions regime violated fundamental rights as protected under Community law, including: the right to a hearing; the right to an effective judicial review and remedy; and the right to property.

This case note first introduces the UN Security Council's 1267 sanctions regime, which lies at the heart of the case in question. It draws particular attention to the 1267 sanctions regime's listing and delisting procedure and its inherent due process problems. The case note then focuses on the implementation of the 1267 sanctions regime within the EU and discuss challenges to this implementation before the CFI. The CFI handed down its decisions in *Kadi*<sup>5</sup> and *Yusuf*<sup>6</sup> in September 2005. These decisions were appealed to the ECJ.<sup>7</sup> During the appeal process the EU Advocate General issued two (nearly identical) opinions in January 2008, which critically reviewed the CFI judgments. These will be the subject of examination in a following section. Finally, the case note will address the key findings of the ECJ's decision and briefly discuss the judgment's significance, both as far as legal and political implications are concerned.

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<sup>4</sup> [2002] OJ C 325/7 (entered into force 1 February 2003) ('*Consolidated Treaties*').

<sup>5</sup> *Kadi v Council of the EU and Commission of the EC* (T-315/01) [2005] ECR II-3649 ('*Kadi*').

<sup>6</sup> *Yusuf and Al Barakaat v Council of the EU and Commission of the EC* (T-306/01) [2005] ECR II-3533 ('*Yusuf*').

<sup>7</sup> The CFI has jurisdiction in actions for annulment under art 230 of the *Consolidated Treaties*, above n 4. In these actions, applicants (individuals) may seek the annulment of a measure (regulation, directive or decision) pursuant to art 230. Decisions by the CFI can then be appealed to the European Court of Justice pursuant to art 225.

## II THE UN SECURITY COUNCIL'S 1267 LISTING AND DELISTING PROCEDURE AND DUE PROCESS

### A *The UN Security Council's 1267 Sanctions Regime*

On 15 October 1999 the UN Security Council, acting under Chapter VII of the *Charter of the United Nations* ('UN Charter'), adopted *Resolution 1267*, which requires all states to freeze the assets of, prevent the entry into or transit through their territories by, and prevent the direct or indirect supply, sale and transfer of arms and military equipment to, any individual or entity associated with al Qaeda, Osama bin Laden and/or the Taliban as designated by the Al-Qaida and Taliban Sanctions Committee ('1267 Committee').<sup>8</sup> The sanctions regime has since been modified and strengthened by subsequent resolutions, including *Resolution 1333*,<sup>9</sup> *Resolution 1390*,<sup>10</sup> *Resolution 1455*,<sup>11</sup> *Resolution 1526*,<sup>12</sup> *Resolution 1617*<sup>13</sup> and *Resolution 1735*,<sup>14</sup> so that the sanctions now cover individuals and entities associated with al Qaeda, Osama bin Laden and/or the Taliban wherever located. In addition to overseeing the implementation of *Resolution 1267* and subsequent resolutions, the 1267 Committee also maintains a list of individuals and entities with respect to al Qaeda, Osama bin Laden, the Taliban and other individuals, groups, undertakings and entities associated with them (the 'Consolidated List').<sup>15</sup> States may request the 1267 Committee to add names to this list and the 1267 Committee also considers submissions by states to delete names from it. As of 20 April 2009, 508 individuals or entities were listed on the Consolidated List, which consists of the following four sections:

- 1 Individuals associated with the Taliban (142 individuals);
- 2 Entities and other groups and undertakings associated with the Taliban (none);
- 3 Individuals associated with the al Qaeda organisation (255 individuals); and
- 4 Entities and other groups and undertakings associated with al Qaeda (111 entities).

### B *The Listing and Delisting Procedure and Due Process Concerns*

The listing and delisting procedure, as established by the 1267 sanctions regime, has been controversial from the beginning.<sup>16</sup> Due process concerns

<sup>8</sup> SC Res 1267, UN SCOR, 54<sup>th</sup> sess, 4051<sup>st</sup> mtg, UN Doc S/RES/1267 (15 October 1999) [4].

<sup>9</sup> SC Res 1333, UN SCOR, 55<sup>th</sup> sess, 4251<sup>st</sup> mtg, UN Doc S/RES/1333 (19 December 2000).

<sup>10</sup> SC Res 1390, UN SCOR, 57<sup>th</sup> sess, 4452<sup>nd</sup> mtg, UN Doc S/RES/1390 (16 January 2002).

<sup>11</sup> SC Res 1455, UN SCOR, 58<sup>th</sup> sess, 4686<sup>th</sup> mtg, UN Doc S/RES/1455 (17 January 2003).

<sup>12</sup> SC Res 1526, UN SCOR, 59<sup>th</sup> sess, 4908<sup>th</sup> mtg, UN Doc S/RES/1526 (30 January 2004).

<sup>13</sup> SC Res 1617, UN SCOR, 60<sup>th</sup> sess, 5244<sup>th</sup> mtg, UN Doc S/RES/1617 (29 July 2005).

<sup>14</sup> SC Res 1735, UN SCOR, 61<sup>st</sup> sess, 5609<sup>th</sup> mtg, UN Doc S/RES/1735 (22 December 2006).

<sup>15</sup> 1267 Committee, *The Consolidated List Established and Maintained by the 1267 Committee with Respect to Al-Qaida, Usama bin Laden, and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with Them* <<http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf>>.

<sup>16</sup> Recent articles and reports examining the due process concerns of the 1267 sanctions regime

stemmed particularly from the fact that individuals and entities were initially not allowed to petition the 1267 Committee for delisting, nor were they granted a hearing. Petitions for delisting could only be submitted to governments, which in turn could bring the issue to the attention of the 1267 Committee. However, any decision concerning delisting was still being left to the 1267 Committee or the Security Council.<sup>17</sup> In November 2002, the 1267 Committee then adopted guidelines for inclusion in and removal from the list. These guidelines provided, inter alia, that the submission of names should, to the extent possible, include a statement of the basis for the designation, generally focusing on the connection between the individual or entity and al Qaeda, the Taliban or Osama bin Laden, together with identifying information for use by the national authorities implementing the sanctions.<sup>18</sup>

In late 2002, the Security Council adopted *Resolution 1452*,<sup>19</sup> which provided for a number of derogations from, and exceptions to, the freezing of funds and economic resources imposed by its previous resolutions. Such derogations and exceptions were to be decided by member states on humanitarian grounds and with the 1267 Committee's consent.<sup>20</sup> The guidelines were subsequently updated in April 2003, December 2005, November 2006, February 2007 and December 2008, and now also provide for a review mechanism for names that have not been reviewed for three years.<sup>21</sup> Accordingly, in March 2007, the UN Secretariat circulated to the 1267 Committee a list of 115 names that had not been updated in four or more years. However, very few were selected for review and the review ended without any changes to the Consolidated List.<sup>22</sup>

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include: Torbjörn Andersson, Iain Cameron and Kenneth Nordback, 'EU Blacklisting: The Renaissance of Imperial Power, But on a Global Scale' (2003) 14 *European Business Law Review* 111; Iain Cameron, 'European Union Anti-Terrorist Blacklisting' (2003) 3 *Human Rights Law Review* 225; Iain Cameron, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions* (Council of Europe Report, 6 February 2006), available from <<http://www.coe.int/>>; Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc A/61/267 (16 August 2006); Jessica Almqvist, 'A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions' (2008) 57 *International and Comparative Law Quarterly* 303; Ian Johnstone, 'The UN Security Council, Counterterrorism and Human Rights' in Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge* (2008) 335.

<sup>17</sup> Decisions of listing and delisting are guided by the 1267 Committee Guidelines: The Al-Qaida and Taliban Sanctions Committee, UN, *Guidelines of the Committee for the Conduct of Its Work* (2008) <[http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf)> ('Guidelines').

<sup>18</sup> Ibid.

<sup>19</sup> SC Res 1452, UN SCOR, 57<sup>th</sup> sess, 4678<sup>th</sup> mtg, UN Doc S/RES/1452 (20 December 2002).

<sup>20</sup> These humanitarian grounds are encapsulated in the 'humanitarian exceptions' mentioned in the *Guidelines*, above n 17, 4(h).

<sup>21</sup> Ibid.

<sup>22</sup> UN Security Council, Analytical Support and Sanctions Monitoring Team, *Seventh Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Security Council Resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaeda and the Taliban and Associated Individuals and Entities*, UN Doc S/2007/677 (29 November 2007) [40].

Subsequent to the proposals made by France, the United States, other countries and the Analytical Support and Sanctions Monitoring Team,<sup>23</sup> *Resolution 1730*<sup>24</sup> established a 'focal point' within the UN Secretariat's Security Council Subsidiary Organs Branch, which is responsible for processing submissions by listed persons and entities requesting delisting. Affected persons and entities may submit their requests directly and independently of their governments' diplomatic protection.<sup>25</sup> The focal point, however, denies them the right to participate or to be heard in the review process, and does not operate as an independent review mechanism.<sup>26</sup> No legal or quasi-legal rules exist that would oblige the 1267 Committee to grant a request if specific conditions are met. On the contrary, removal from the list is still possible only with the consent of all 1267 Committee members.<sup>27</sup> The impact of the establishment of the focal point has thus been relatively limited both as far as due process guarantees and actual number of petitions are concerned. Since the focal point became operative in March 2007, the 1267 Committee has received a mere 11 delisting requests (as of 2 April 2009).<sup>28</sup> It appears that two individuals and 12 associated entities have so far been delisted after petitioning the 1267 Committee through the focal point.<sup>29</sup>

However, targeted individuals or entities are still not informed prior to their being listed and thus do not have any opportunity to prevent the listing by demonstrating that their inclusion in the list is unjustified. Even after an individual or entity is listed, member states do not have an obligation to provide detailed information to the person or entity concerned about reasons for their inclusion:

Following a new listing, the Committee, with the assistance of the Monitoring Team and in coordination with the relevant designating State(s), shall make accessible on the Committee's website a narrative summary of reasons for listing for the corresponding entry or entries on the Consolidated List.<sup>30</sup>

Listed individuals and entities have very limited possibilities to challenge a listing before national courts and tribunals. This is mainly due to the obligations of UN member states as stipulated by arts 25, 103 and 105 of the *UN Charter*. Article 25 obliges member states to comply with Chapter VII resolutions by the

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<sup>23</sup> See, eg, Spokesperson for the French Ministry of Foreign Affairs (Press Briefing, 24 January 2008) <<http://ambafrance-us.org/IMG/html/briefing/2008/us240108.htm>>; Thomas J Biersteker and Sue E Eckert, *Strengthening Targeted Sanctions through Fair and Clear Procedures* (Watson Institute for International Studies, Brown University White Paper, 30 March 2006).

<sup>24</sup> SC Res 1730, UN SCOR, 61<sup>st</sup> sess, 5599<sup>th</sup> mtg, UN Doc S/Res/1730 (19 December 2006).

<sup>25</sup> Chia Lehnardt, 'European Court Rules on UN and EU Terrorist Suspect Blacklists', *ASIL Insights*, January 2007 <<http://www.asil.org/insights070131.cfm>>.

<sup>26</sup> *Ibid.*

<sup>27</sup> 1267 Committee, *Fact Sheet on Listing* (2008) [11] <[http://www.un.org/sc/committees/1267/fact\\_sheet\\_listing.shtml](http://www.un.org/sc/committees/1267/fact_sheet_listing.shtml)>.

<sup>28</sup> The Al-Qaida and Taliban Sanctions Committee, *Focal Point for De-Listing Established Pursuant to Security Council Resolution 1730* (2006) <<http://www.un.org/sc/committees/dfp.shtml>>.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Guidelines*, above n 17, 5.

Security Council (such as *Resolution 1267* and subsequent resolutions).<sup>31</sup> Article 103 clarifies that obligations under the *UN Charter* — including binding obligations under art 25 — prevail over ‘any other international agreement’ unless obligations contained therein constitute general principles of international law.<sup>32</sup> This also includes national law implementing international obligations under international human rights treaties such as the *International Covenant on Civil and Political Rights* (‘*ICCPR*’)<sup>33</sup> or the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (‘*ECHR*’).<sup>34</sup> In addition, even in the event that recourse to national courts is available, the UN enjoys absolute immunity from every form of domestic legal proceedings as stipulated by art 105(1) of the *UN Charter*, the *Convention on the Privileges and Immunities of the United Nations*<sup>35</sup> and other agreements.<sup>36</sup>

In spite of the improvements made to the listing and delisting mechanism over the years, the procedure continues to raise serious concerns in relation to fundamental human rights. These include in particular the right to judicial review, the right to procedural fairness, the right to be heard and the right to judicial remedy.<sup>37</sup> These rights form the very basis of due process of law and are guaranteed, inter alia, by the leading international human rights instruments such as the *Universal Declaration on Human Rights*,<sup>38</sup> the *ICCPR*, the *ECHR*, the *American Convention on Human Rights*<sup>39</sup> and the *African Charter*.<sup>40</sup>

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<sup>31</sup> Article 25 of the *UN Charter* reads: ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’.

<sup>32</sup> Article 103 of the *UN Charter* reads: ‘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’.

<sup>33</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>34</sup> Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

<sup>35</sup> Opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946).

<sup>36</sup> See, eg, Bardo Fassbender, *Targeted Sanctions and Due Process* (Commissioned by UN Office of Legal Affairs, 20 March 2006) 5, <[http://www.un.org/law/counsel/Fassbender\\_study.pdf](http://www.un.org/law/counsel/Fassbender_study.pdf)>. This point has also been made by Dick Marty of the Parliamentary Assembly of the Council of Europe, who cited a Swiss case in which an individual was acquitted of terrorism-related charges in a domestic criminal proceeding and the Swiss state ordered to pay compensation. Nonetheless, the person in question still remained on the 1267 List with his assets frozen: Dick Marty, *UN Security Council Black Lists: Introductory Memorandum* (Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly, 19 March 2007) 1 <[http://assembly.coe.int/CommitteeDocs/2007/20070319\\_ajdoc14.pdf](http://assembly.coe.int/CommitteeDocs/2007/20070319_ajdoc14.pdf)>.

<sup>37</sup> For an in-depth legal analysis of these rights as they are engaged by the 1267 Listing and De-Listing Procedure, see especially Larissa van den Herik and Nico Schrijver, ‘Human Rights Concerns in Current Targeted Sanctions Regimes from the Perspective of International and European Law’ in Thomas J Biersteker and Sue E Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (Watson Institute for International Studies, Brown University White Paper, 30 March 2006) 9.

<sup>38</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (10 December 1948).

<sup>39</sup> Opened for signature 22 November 1969, 1144 UNTS 143 (entered into force 18 July 1978).

<sup>40</sup> *African Charter on Human and Peoples’ Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) (‘*African Charter*’).

### III THE IMPLEMENTATION OF THE UN SECURITY COUNCIL'S 1267 REGIME WITHIN THE EU AND CHALLENGES BEFORE THE COURT OF FIRST INSTANCE

#### A Regulations by the EU Council

The EU Council adopted implementing acts as early as November 1999, and then regularly adopted updates in order to follow the 1267 Committee's updates.<sup>41</sup> The European measures included the freezing of funds and of other financial assets of Osama bin Laden and individuals and entities associated with him, as designated by the 1267 Committee.<sup>42</sup> UN sanctions were further implemented by the EU Council with *Regulation 467/2001*, which 'prohibit[ed] the export of certain goods and services to Afghanistan, strengthen[ed] the flight ban and extend[ed] the freezing of funds and other financial resources in respect of the Taliban in Afghanistan'.<sup>43</sup> On 27 May 2002, in order to implement *Resolution 1390*,<sup>44</sup> the EU Council adopted *Common Position 2002/402/CFSP*, concerning restrictive measures against Osama bin Laden, members of the al Qaeda, the Taliban and other individuals, groups, undertakings and entities associated with them.<sup>45</sup>

Since 2001, the legality of the counter-terrorism sanctions adopted under the different EU pillars has, on several occasions, been challenged before the CFI.<sup>46</sup> The plaintiffs were individuals resident, or entities incorporated, in both EU and non-EU states — such as Sweden, the United Kingdom and Saudi Arabia — and whose names were included in Annex 1 of *Regulation 881/2002*.<sup>47</sup> In all the cases considered, the applicants challenged the Community's competence to adopt the contested regulations and asked the court to declare these acts invalid, alleging violations of fundamental human rights as protected by Community law. In particular, the applicants claimed that the EU decisions to freeze their funds, and all related subsequent decisions, were not communicated to them in advance. Also, the decisions did not mention the specific information allegedly provided

<sup>41</sup> In order to impose the sanctions established under *Resolution 1267*, the Council *Common Position 1999/727/CFSP of 15 November 1999 concerning Restrictive Measures against the Taliban*, [1999] OJ L 294/1. The measures were subsequently defined by *Council Regulation (EC) No 337/2000 of 14 February 2000 concerning a Flight Ban and a Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan*, EC [2000] OJ L 43/1 ('*Regulation 337/2000*'). In February 2001, the Council adopted *Council Common Position 2001/154/CFSP of 26 February 2001 concerning Additional Restrictive Measures against the Taliban and Amending Common Position 96/746/CFSP*, [2001] OJ L 57/1, which implemented SC Res 1333 (UN SCOR, 55<sup>th</sup> sess, 4251<sup>st</sup> mtg, UN Doc S/RES/1333 (19 December 2000)).

<sup>42</sup> *Regulation 337/2000*, above n 41, art 3.

<sup>43</sup> *Regulation 467/2001*, above n 3.

<sup>44</sup> *Resolution 1390*, above n 10, laid down new measures to be directed against Osama bin Laden, members of the al Qaeda network and the Taliban and other associated individuals, groups, undertakings and entities.

<sup>45</sup> *Council Common Position 2002/402/CFSP of 27 May 2002 concerning Restrictive Measures against Usama bin Laden, Members of the Al-Qaida Organisation and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with Them and Repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP*, [2002] OJ L 139/4.

<sup>46</sup> See, eg, *Kadi* (T-315/01) [2005] ECR II-3649; *Yusuf* (T-306/01) [2005] ECR II-3533; *Ayadi v Council of the EU* (T-253/02) [2006] ECR II-2139; *Hassan v Council of the EU and Commission of the EC* (T-49/04) [2006] ECR II-52.

<sup>47</sup> *Regulation 881/2002*, above n 2, annex 1.

by a competent national authority in order to justify the inclusion of individuals and organisations in the disputed list, therefore the right to a fair hearing was not guaranteed. Persons affected by decisions of public authorities had to be given the right to put their case, in particular with respect to the correctness and the relevance of the facts and the circumstances alleged as well as to the evidence adduced.<sup>48</sup> The principle of ‘due process of law’, which encompasses both the right to be heard and the right to effective judicial protection, presupposes the existence of courts and tribunals which are impartial and independent of executive power.

### B *The Kadi and Yusuf Cases before the Court of First Instance*

On 21 September 2001, the CFI delivered two almost indistinguishable judgments, holding that it did not have jurisdiction to review Community sanctions that implemented *Resolution 1267*.<sup>49</sup> The CFI lacked jurisdiction to review due to the non-justiciability of the legality of *Resolution 1267*. This led the CFI to reject all of each plaintiff’s pleas.<sup>50</sup> The Court addressed several issues of EU law and international law, including: the legal basis for counterterrorism measures in EU and EC law; the obligations of the EU and of member states resulting from the *UN Charter* and Security Council resolutions; the court’s power to review the lawfulness of UN sanctions; and the scope of the applicants’ right to a hearing and of the right to judicial review.<sup>51</sup> The challenges to the EU sanctions were rejected in light of the Court’s interpretation of the relationship between the *UN Charter* and Community law.<sup>52</sup> According to the CFI, although it was undisputed that the Community is based on the rule of law and that all acts of its institutions may be reviewed by courts, art 103 of the *UN Charter* stipulates that member states’ obligations under the *UN Charter* and Security Council resolutions prevail over all other conventional obligations, including obligations under the *Consolidated Treaties* and under the *ECHR*.<sup>53</sup>

The Court’s line of reasoning implied, firstly, that the Community itself, although not a UN member, is bound by obligations stemming from UN Security Council’s resolutions, to the extent that the Community’s member states are bound by such resolutions and must comply with them also in their dealings with the Community. This means that the Community, in exercising its powers, is

<sup>48</sup> *Kadi* (T-315/01) [2005] ECR II-3649, [142].

<sup>49</sup> *Ibid*; *Yusuf* (T-306/01) [2005] ECR II-3533.

<sup>50</sup> For comments on various aspects of the two judgments, see, eg, Christian Tomuschat, ‘*Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission: Case Note*’ (2006) 43 *Common Market Law Review* 537; Laurent Pech, ‘Trying to Have It Both Ways — In the First Judgments of the Court of First Instance concerning EC Acts Adopted in the Fight against International Terrorism’ (2007) 1 *Irish Human Rights Law Review* 15 (forthcoming); Gabriele Porretto, ‘The European Union, Counter-Terrorism Sanctions against Individuals and Human Rights Protection’ in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the ‘War on Terror’* (2008) 235, 247–58; Piet Eeckhout, ‘Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions: In Search of the Right Fit’ (2007) 3 *European Constitutional Law Review* 183.

<sup>51</sup> *Kadi* (T-315/01) [2005] ECR II-3649, [2], [4], [32], [161], [183]–[201], [209]–[232], [277]–[291]; *Yusuf* (T-306/01) [2005] ECR II-3533, [3], [6]–[7], [10], [125]–[170], [178].

<sup>52</sup> *Kadi* (T-315/01) [2005] ECR II-3649, [178], [181]–[208]; *Yusuf* (T-306/01) [2005] ECR II-3533, [228], [231]–[233].

<sup>53</sup> *Yusuf* (T-306/01) [2005] ECR II-3533, [231]–[234]; *Kadi* (T-315/01) [2005] ECR II-3649, [181]–[184].

required to adopt all necessary provisions to allow its member states to fulfil their obligations, including the obligation to implement UN counterterrorism sanctions.<sup>54</sup> In addition, the CFI found that the EU Council, when adopting the contested EC regulation, was acting ‘under circumscribed powers [and] had no autonomous discretion’.<sup>55</sup> Thus, the Court considered that:

Any review of the internal lawfulness of the contested regulation, ... would ... imply that the Court is to consider, indirectly, the lawfulness of [Security Council] resolutions [given that] the origin of the illegality alleged by the applicant would have to be sought, not in the adoption of the contested regulation but in the resolutions of the Security Council which imposed the sanctions.<sup>56</sup>

As a consequence, the Court saw no other option than to refrain from exercising any judicial review of the Community measures, as it lacked power to judicially review the underlying Security Council resolutions,<sup>57</sup> and thus rejected the applicants’ claims.<sup>58</sup> However, the Court noted that the (indirect) exercise of judicial review of Security Council’s resolution was still possible in cases of alleged violations of fundamental rights guaranteed by peremptory norms of international law (*jus cogens*) since these rules had a higher status, were non-derogable, and binding on all subjects of international law including UN organs.<sup>59</sup> Thus the key question was whether the rights in question — the right to property, the right to a fair hearing and the right to an effective remedy — had the status of *jus cogens*. As far as the right to a fair hearing and the right to an effective remedy were concerned, the Court held that even though there was no other judicial remedy available to the applicants, ‘any such lacuna in judicial protection [was] not in itself contrary to *jus cogens*’<sup>60</sup> as the limitation was justified by the nature and the objective of Security Council decisions.<sup>61</sup> In relation to the right to property, the Court found that it may be regarded as protected by *jus cogens* when arbitrary deprivations are involved.<sup>62</sup> In relation to the case at hand, however, the CFI concluded that ‘it is clear that the applicants have not been arbitrarily deprived of that right’.<sup>63</sup>

The CFI’s application of the *jus cogens* test received considerable criticism for being relatively vague and problematic.<sup>64</sup> First, it was not entirely clear why the CFI chose to apply the *jus cogens* test, a fact that contributed to Kadi and Yusuf’s decision to appeal against the judgment of the CFI to the ECJ. Second, the application of the *jus cogens* test was itself flawed. For instance, the CFI

<sup>54</sup> *Yusuf* (T-306/01) [2005] ECR II-3533, [254]; *Kadi* (T-315/01) [2005] ECR II-3649, [204].

<sup>55</sup> *Yusuf* (T-306/01) [2005] ECR II-3533, [265]; *Kadi* (T-315/01) [2005] ECR II-3649, [214].

<sup>56</sup> *Yusuf* (T-306/01) [2005] ECR II-3533, [266]; *Kadi* (T-315/01) [2005] ECR II-3649, [215].

<sup>57</sup> *Yusuf* (T-306/01) [2005] ECR II-3533, [276]; *Kadi* (T-315/01) [2005] ECR II-3649, [225].

<sup>58</sup> *Yusuf* (T-306/01) [2005] ECR II-3533, [346]; *Kadi* (T-315/01) [2005] ECR II-3649, [291].

<sup>59</sup> *Yusuf* (T-306/01) [2005] ECR II-3533, [277]; *Kadi* (T-315/01) [2005] ECR II-3649, [226].

<sup>60</sup> *Yusuf* (T-306/01) [2005] ECR II-3533, [340]–[341].

<sup>61</sup> *Ibid* [270].

<sup>62</sup> *Ibid* [293].

<sup>63</sup> *Ibid* [294].

<sup>64</sup> See, eg, Michael Wood, ‘The UN Security Council and International Law: The Security Council’s Powers and Their Limits’ (Lecture delivered at Hersch Lauterpacht Memorial Lectures, Cambridge, UK, 8 November 2006) 13–14 <[http://www.lcil.cam.ac.uk/Media/lectures/pdf/2006\\_hersch\\_lecture\\_2.pdf](http://www.lcil.cam.ac.uk/Media/lectures/pdf/2006_hersch_lecture_2.pdf)>; Porretto, above n 50, 252–8; van den Herik and Schrijver, above n 37, 19.

simply determined that in some circumstances the right to property may form part of *jus cogens*. The Court thereby broadened the scope of peremptory norms, which do not traditionally seem to cover the right to property.<sup>65</sup> Third, the CFI defined *jus cogens* 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’.<sup>66</sup> It thereby introduced an element of uncertainty because the standard of *jus cogens* is not a well-established feature of the case law of the ECJ in the field of human rights protection.<sup>67</sup> Not all fundamental rights are the subject of protection by peremptory rules of international law, and the jurisprudence of the International Court of Justice, for instance, does not offer clear guidance on this point either.<sup>68</sup> The CFI also failed to make clear how applicants may prove whether *jus cogens* norms are at stake or not in a given case.<sup>69</sup>

#### IV OPINIONS OF THE ADVOCATE-GENERAL

The *Kadi* and *Yusuf* cases were both appealed to the ECJ.<sup>70</sup> During the appeal process, the cases were assigned to Advocate-General Miguel Poiares Maduro.<sup>71</sup> The Advocate-General issued two (nearly identical) opinions in January 2008

<sup>65</sup> See, eg, Porretto, above n 50, 252.

<sup>66</sup> *Yusuf* (T-306/01) [2005] ECR II-3533, [277]; *Kadi* (T-315/01) [2005] ECR II-3649, [226].

<sup>67</sup> See generally Steve Peers, *First EU Court Ruling on Terrorist Lists* (2005) <<http://www.statewatch.org/news/2005/sep/10terrorlists.htm>>: ‘This is believed to be the first time that an EU Court has even referred to the principle of “jus cogens”, never mind applied it to a specific case’.

<sup>68</sup> With the exception of the judgment handed down on 3 February 2006 in the dispute between the Democratic Republic of the Congo and Rwanda — *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction)* [2006] ICJ [73] <<http://www.icj-cij.org>> — the ICJ has never expressly mentioned *jus cogens* in its case law. The exact scope of *jus cogens* norms at international law cannot be determined precisely, although there is a general consensus that the notion encompasses norms protecting fundamental interests of the international community, such as the norms prohibiting aggression, slavery, genocide, apartheid, torture, the use or threat of force, as well as most norms of international humanitarian law, in particular those prohibiting war crimes and crimes against humanity: see, eg, Antonio Cassese, *International Law* (2<sup>nd</sup> ed, 2005) 202–3.

<sup>69</sup> See also Nikolaos Lavranos, ‘Judicial Review of UN Sanctions by the Court of First Instance’ (2006) 11 *European Foreign Affairs Review* 471, arguing that such an element would be impossible to prove before the ECJ.

<sup>70</sup> Mr Yusuf was subsequently delisted by the 1267 Committee; the appeal thus continued with Al Barakaat alone: see, eg, Security Council Department of Public Information, ‘Security Council Committee Removes One Individual from Consolidated List; Approves Change of Information regarding Five Individuals in Al-Qaida Section’ (Press Release, 24 August 2006) <<http://www.un.org/News/Press/docs/2006/sc8815.doc.htm>>.

<sup>71</sup> The ECJ is assisted by eight Advocates-General who are responsible for presenting a legal opinion on the cases assigned to them. They can question the parties involved and then give their opinion on a legal solution to the case before the judges deliberate and deliver their judgment. The intention behind having Advocates-General attached is to provide independent and impartial opinions concerning the Court’s cases. The opinions of Advocates-General are advisory only and do not bind the Court, but they are nonetheless very influential and are followed in the majority of cases. See generally Court of Justice of the European Communities, *Presentation — The Court of Justice of the European Communities* <[http://curia.europa.eu/jcms/jcms/Jo2\\_9089/presentation?hiText=Advocate+General](http://curia.europa.eu/jcms/jcms/Jo2_9089/presentation?hiText=Advocate+General)>.

critically reviewing the CFI decisions.<sup>72</sup> He proposed that the ECJ set aside the judgments of the CFI and annul *Regulation 881/2002* insofar as it concerned Mr Kadi and Al Barakaat.

The Advocate-General found that the CFI erred in finding that the Community courts had only limited jurisdiction to review the regulation.<sup>73</sup> He argued that it is ‘the Community Courts that determine the effect of international obligations within the Community legal order by reference to conditions set by Community law’.<sup>74</sup> He further stressed that the relationship between international law and the Community legal order is governed by the Community legal order itself and that international law can only take effect under the conditions prescribed by the constitutional principles of the Community.<sup>75</sup> Foremost of these principles was that the Community was based on respect for fundamental rights and the rule of law.<sup>76</sup> This included both the right to a hearing and the right to effective judicial review.<sup>77</sup>

Furthermore, the Advocate-General rejected the CFI’s proposition that measures intended to suppress international terrorism should inhibit the Court from fulfilling its duty to preserve the rule of law.<sup>78</sup> On the contrary, he pointed out that when the risks to public security are believed to be extraordinarily high and the pressure to take measures that disregard individual rights is particularly strong, it is the duty of the courts to uphold the rule of law with increased vigilance.<sup>79</sup> The Advocate-General also dismissed the argument that if courts were to accept jurisdiction over such a matter, it would be acting beyond the boundaries of the Community legal order.<sup>80</sup> In this respect, he argued that the legal effects of a ruling by the court would be confined to the legal order of the Community.<sup>81</sup> Consequently, in his opinion, the Community courts have jurisdiction to review whether the contested regulation complies with fundamental rights as recognised by Community law.<sup>82</sup>

As to the specific cases, the Advocate-General concluded that the regulation in question infringed Mr Kadi’s and Al Barakaat’s right to property, their right to be heard and their right to effective judicial review. He argued that the indefinite freezing of a person’s assets constituted a far-reaching interference with that person’s and/or entity’s right to property where there were no procedural safeguards requiring the authorities to justify such measures, such as review before an independent tribunal.<sup>83</sup> Both Mr Kadi and Al Barakaat had been subject to ‘severe sanctions’ on the basis of serious allegations, yet were denied

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<sup>72</sup> *Kadi v Council of the EU and Commission of the EC (Advisory Opinion of Advocate-General Maduro)* (C-402/05 P) [2008] ECR I-0000; *Al Barakaat v Council of the EU and Commission of the EC (Advisory Opinion of Advocate-General Maduro)* (C-415/05 P) [2008] ECR I-0000 (*‘Al Barakaat Advisory Opinion’*).

<sup>73</sup> *Al Barakaat Advisory Opinion* (C-415/05 P) [2008] ECR I-0000, [40].

<sup>74</sup> *Ibid* [23].

<sup>75</sup> *Ibid* [24].

<sup>76</sup> *Ibid* [40].

<sup>77</sup> *Ibid* [49], [52].

<sup>78</sup> *Ibid* [34], [45].

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid* [38].

<sup>81</sup> *Ibid* [39].

<sup>82</sup> *Ibid* [40].

<sup>83</sup> *Ibid* [47].

any possibility to have the fairness of the allegations or the reasonableness of the sanctions reviewed by an independent tribunal.<sup>84</sup> The Advocate-General pointed out that:

had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order.<sup>85</sup>

However, in the absence of any such mechanism, the Community institutions could not dispense with proper judicial review proceedings when implementing Security Council resolutions within the Community legal order.<sup>86</sup>

With regard to the substance of *Regulation 881/2002* itself, the Advocate-General found that the regulation infringed the appellants' fundamental rights and could not be permitted in a Community based on the rule of law. Consequently the regulation needed to be annulled insofar as it concerned both Mr Kadi and Al Barakaat.<sup>87</sup>

#### V THE EUROPEAN COURT OF JUSTICE DECISION IN *KADI AND AL BARAKAAT*

The ECJ essentially followed the opinion of Advocate-General Maduro. It confirmed that the EU Council was competent to adopt the regulation on the basis of the articles of the *Consolidated Treaties* that it chose. Even if the CFI made certain errors in its reasoning, its final conclusion that the Council was competent to adopt that regulation was not incorrect.<sup>88</sup> However, the ECJ found that the CFI erred in law in ruling that the Community courts had, in principle, no jurisdiction to review the internal lawfulness of the contested regulation.<sup>89</sup> It held that

the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the *EC Treaty* as an autonomous legal system which is not to be prejudiced by an international agreement.<sup>90</sup>

The ECJ clarified that the review of lawfulness ensured by the Community courts applied to the Community act intended to give effect to the international agreement at issue, and not to the international agreement itself. A judgment given by the Community courts deciding that a Community measure intended to give effect to a resolution of the Security Council is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.<sup>91</sup> As a consequence, the ECJ also concluded that there was no need to examine the contested regulation in light of

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<sup>84</sup> Ibid [53].

<sup>85</sup> Ibid [84].

<sup>86</sup> Ibid.

<sup>87</sup> Ibid [55], [56].

<sup>88</sup> *Kadi and Al Barakaat* (C-402/05 P; C-415/05 P) [2008] ECR I-0000, [234]–[236].

<sup>89</sup> Ibid [327]–[328].

<sup>90</sup> Ibid [316].

<sup>91</sup> Ibid [327].



the rules of international law falling within the ambit of *jus cogens*.<sup>92</sup> On the contrary, it found that the Community courts needed to ensure the review of the lawfulness of all Community actions in light of the fundamental rights forming an integral part of the general principles of Community law.<sup>93</sup> This included review of Community measures which, like the contested regulation, were designed to give effect to resolutions adopted by the Security Council.<sup>94</sup>

The ECJ then undertook this analysis and examined whether the regulation(s) of the Council implementing the UN Security Council's 1267 sanctions regime violated Mr Kadi's and Al Barakaat's fundamental rights as protected by Community law. It found that the rights of defence, in particular the right to be heard, and the right to effective judicial review of those rights, were 'patently not respected'.<sup>95</sup> The Court pointed out that the effectiveness of judicial review meant that the Community authority in question was required to communicate to the person or entity concerned the grounds on which the measure at issue was based, so far as possible, either when that measure was decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action. However, the regulation at issue provided no procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in the 1267 List, either during or after that inclusion. At no time did the Council inform Mr Kadi and Al Barakaat of the evidence adduced against them in order to justify the initial inclusion of their names in the list.<sup>96</sup>

In this context, the ECJ also took into account the improvements made to the listing and delisting procedure at the UN level. It acknowledged that any person or entity may now approach the 1267 Committee directly through the focal point. However, the Court found that the procedure before the 1267 Committee continues to be essentially diplomatic and intergovernmental, with the persons or

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<sup>92</sup> Ibid [329].

<sup>93</sup> In the absence of any general provision in the (original) *Treaty Establishing the European Community*, [1992] OJ C 224, 6 ('*EC Treaty*') on the protection of fundamental rights, the ECJ, through its case law, has gradually built up a framework for human rights protection: see, eg, the landmark cases of *Stauder v City of Ulm* [1969] ECR 419 and *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125. Not until the *Maastricht Treaty* have the constitutional traditions and the international human rights obligations of member states been formally integrated into the legal order of the EU itself: *Treaty on European Union*, opened for signature 7 February 1992 [1992] OJ C 224, 1 (entered into force 1 November 1993) ('*Maastricht Treaty*'); *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, [2008] OJ C 115, 13 ('*EU Treaty*'). According to art 2 of the *EU Treaty*, the EU is 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'. Under arts 6(2) and 6(3) of the *EU Treaty*, the EU is bound to respect fundamental rights as guaranteed by the *ECHR* and as they derive from the constitutional traditions common to the member states, as general principles of community law. Although no human rights treaty is directly binding upon the EU and its institutions, the CFI and the ECJ normally rely on the *ECHR* when reconstructing general principles in the field: see, eg, Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 *European Journal of International Law* 771.

<sup>94</sup> *Kadi and Al Barakaat* (C-402/05 P; C-415/05 P) [2008] ECR I-0000, [326].

<sup>95</sup> Ibid [334].

<sup>96</sup> Ibid [345]–[348].



entities concerned having no real opportunity of asserting their rights.<sup>97</sup> According to the Court, the

Guidelines of the Sanctions Committee, as last amended on 12 February 2007, make it plain that an applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request.<sup>98</sup>

Also, the Court pointed out that these *Guidelines* do not require the Sanctions Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even if restricted, to that information.<sup>99</sup>

In addition, the ECJ held that the infringement of Mr Kadi and Al Barakaat's rights of defence also gave rise to a breach of the right to a legal remedy, inasmuch as the appellants were also unable to defend their rights in satisfactory conditions before the Community courts.<sup>100</sup> Furthermore, the Court found that the freezing of funds constituted an unjustified restriction of Mr Kadi's right to property.<sup>101</sup> According to the Court, the restrictive measures imposed by the regulation(s) of the EU Council amounted to restrictions of that right which could, in principle, be justified.<sup>102</sup> However, the regulation in question was adopted without furnishing any guarantee enabling Mr Kadi to put his case to the competent authorities.<sup>103</sup> Such a guarantee would have been necessary in order to ensure respect for his right to property, having regard to the general application and continuation of the freezing measures affecting him.

The ECJ thus set aside the judgments of the CFI in the 2005 *Kadi* and *Yusuf* cases. It also annulled *Regulation 881/2002* of 27 May 2002 insofar as it concerned Mr Kadi and Al Barakaat. However, the Court ordered its effects to be maintained, insofar as it concerned Mr Kadi and Al Barakaat for a period until 3 December 2008; that is, a period not exceeding three months from the date of delivery of the judgment. In order to comply with the judgment of the ECJ, the Commission subsequently communicated the narrative summaries of reasons provided by the 1267 Committee to Mr Kadi and to Al Barakaat and gave them the opportunity to comment. Both applicants sent comments to the Commission, which then, on 28 November 2008, adopted *Regulation 1190/2008* amending Annex I to *Regulation 881/2002*.<sup>104</sup>

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<sup>97</sup> Ibid [323].

<sup>98</sup> Ibid [324].

<sup>99</sup> Ibid [325].

<sup>100</sup> Ibid [349]–[352].

<sup>101</sup> Ibid [354]–[371].

<sup>102</sup> Ibid [354], [366].

<sup>103</sup> Ibid [369].

<sup>104</sup> *Commission Regulation (EC) No 1190/2008 of 28 November 2008 Amending for the 101<sup>st</sup> Time Council Regulation (EC) No 881/2002 Imposing Certain Specific Restrictive Measures Directed against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida Network and the Taliban*, [2008] OJ L 322/25.

## VI SIGNIFICANCE OF THE DECISION

The ECJ's decision is highly significant and has major implications on both legal and political levels. The case marks the first time that the ECJ has confirmed its jurisdiction to review the lawfulness of a measure giving effect to UN Security Council resolutions. Furthermore, the case constitutes the first time that the ECJ has annulled an EC measure giving effect to a UN Security Council resolution for violating fundamental principles of Community law.<sup>105</sup> As such, the judgment has implications for various cases concerning asset freezing currently stayed before the CFI. More generally, the decision is remarkable in that it is the first time that a court has (indirectly) found that UN Security Council resolutions on counter-terrorism violate fundamental rights. To this date no other international or regional court has held that sanctions imposed by the UN Security Council in the context of fighting terrorism infringe human rights.<sup>106</sup>

At the academic level, the decision has already re-energised the debate over the respective merits of constitutionalist–monist versus pluralist–dualist approaches to the international legal order.<sup>107</sup> According to Gráinne de Búrca, for instance, the ECJ's judgment must 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 pluralist reading.<sup>108</sup> Describing the ECJ's approach to the relationship between EU law and international law as 'robustly pluralist', he argues that the *Kadi and Al Barakaat* decision represents 'a sharp departure from the traditional embrace of international law by the European Union'.<sup>109</sup> For de Búrca, the judgment resembles the US Supreme Court's decision in the *Medellin* case, in which the US Supreme Court found a judgment of the ICJ not to be enforceable in the US without prior congressional action.<sup>110</sup> He argues that the ECJ chose the *Kadi and Al Barakaat* case as an 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'.<sup>111</sup> This approach, however, carried 'risks for the EU and for the international legal order in the message it sends to the courts of other states and organizations contemplating the enforcement of Security Council resolutions'.<sup>112</sup> It also risked 'undermining the image the EU has sought to create for itself as a virtuous international actor

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<sup>105</sup> Joseph Weiler, 'Editorial, Kadi — Europe's Medellin?' (2008) 19 *European Journal of International Law* 895, 895.

<sup>106</sup> Ibid 895.

<sup>107</sup> Ibid 895–6; Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after Kadi' (Working Paper No 01/09, Jean Monnet Program, New York University School of Law, 2009).

<sup>108</sup> de Búrca, above n 107, 45–55.

<sup>109</sup> Ibid 1.

<sup>110</sup> *Medellin v Texas* 552 US \_\_\_\_ (2008). See also the earlier Supreme Court ruling on a closely related set of issues in *Sanchez Llamas v Oregon*, 548 US 331 (2006) and the commentary by Steven Arrigg Koh, "'Respectful Consideration" after *Sanchez-Llamas v Oregon*: Why the Supreme Court Owes More to the International Court of Justice' (2007) 93 *Cornell Law Review* 243.

<sup>111</sup> de Búrca, above n 107, 66.

<sup>112</sup> Ibid 1.

which maintains a distinctive commitment to international law and institutions'.<sup>113</sup>

Piet Eeckhout, a member of the legal team for Mr Kadi, is less dramatic in his appraisal of the decision and finds the notion of dualism unhelpful for the purpose of characterising the Court's reasoning.<sup>114</sup> He argues that 'the interactions between international law and municipal law in today's world have too many different dimensions for blunt concepts such as monism and dualism to be helpful'.<sup>115</sup> Eeckhout calls for the *Kadi and Al Barakaat* case to be put in perspective and recommends a 'dispassionate reading' of the Court's decision.<sup>116</sup> The decision simply confirmed established rules and principles concerning judicial review, the importance of fundamental rights, and the relationship between international law and Community law. For Eeckhout, the only point that the *Kadi and Al Barakaat* judgment added is that those rules and principles extend to UN law, notwithstanding the primacy of the *UN Charter* under international law as stipulated by art 103 of the *UN Charter*.<sup>117</sup> He maintains that the ECJ was correct in rejecting the CFI's assessment of the relevance of art 103 as this provision only addresses the obligations of the members of the UN under the *UN Charter* (and the EU or the EC as autonomous international legal persons are not such members).

Notwithstanding these (largely academic) controversies, it is clear that the ECJ judgment will influence legal challenges to the 1267 sanctions regime at a national level, both within and outside the EU. Interestingly, the High Court of England and Wales, in the case of *A v HM Treasury* concerning a challenge to the national implementation of the 1267 sanctions regime in the UK, had already given regard to the opinions of the Advocate-General Maduro before the ECJ handed down its decision.<sup>118</sup> In this case, the High Court quashed the *Terrorism Order (United Nations Measures) Order 2006*<sup>119</sup> and the *Al-Qaida and Taliban (United Nations Measures) Order 2006*,<sup>120</sup> which gave domestic effect to UN asset-freezing obligations in relation to terrorism, al Qaeda and the Taliban.

In addition to its legal ramifications, the *Kadi and Al Barakaat* decision has significant political implications. First, although the immediate impact is that the ECJ judgment only affects the implementation of sanctions against the applicants, it will require the EU Council to repeal — for political reasons — the contested regulation implementing the 1267 sanctions regime, which in turn would affect all 27 states of the EU.

Second, the judgment has implications for the operation and future of the 1267 sanctions regime itself. The decision compellingly demonstrates the need for a comprehensive revision of the existing listing and delisting mechanism with a view to ensuring fair and clear procedures. It also provides an opportunity for

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<sup>113</sup> Ibid.

<sup>114</sup> Piet Eeckhout, 'Kadi and Al Barakaat: Luxembourg Is Not Texas — Or Washington DC' in *EJIL:Talk!* (Blog, 25 February 2009) <<http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc>>.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid. See also the discussion above at Part IIIB.

<sup>118</sup> *A v HM Treasury* [2008] 3 All ER 361 [30]–[33].

<sup>119</sup> *Terrorism Order (United Nations Measures) Order 2006* (UK).

<sup>120</sup> *Al-Qaida and Taliban (United Nations Measures) Order 2006* (UK).

the international community as a whole, and the permanent members of the Security Council in particular, to address the need for, and effectiveness of, the 1267 sanctions regime more broadly. In particular, the Security Council will need to consider what it is prepared to give up in order to maintain the 1267 sanctions regime as an effective UN sanctions regime, or whether it is prepared to give up the sanctions regime in order to maintain the authority that it interprets to have under the *UN Charter*.

The issues that lie at the heart of *Kadi and Al Barakaat* thus showcase a range of fundamental questions concerning the role of the Security Council in strengthening a rules-based international system and maintaining international peace and security under the rule of law. These questions include, but are not limited to, those about the legal context within which the Security Council operates, and the extent to which the Security Council itself must adhere to the rule of law and international human rights law.<sup>121</sup> As such, the controversies surrounding the 1267 sanctions regime, including the *Kadi and Al Barakaat* decision, should be seen against the backdrop of the debate about tools and mechanisms that can be used by the Council to address threats to international peace and security in the future, and more broadly, as part of the discourse on reform of the Security Council and the *UN Charter* itself.<sup>122</sup>

CHRISTOPHER MICHAELSEN\*

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<sup>121</sup> On this topic, see, eg, Simon Chesterman, *The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System: Final Report and Recommendations from the Austrian Initiative, 2004–2008* as annexed to *Letter Dated 18 April 2008 from the Permanent Representative of Austria to the United Nations Addressed to the Secretary-General*, UN GAOR, 63<sup>rd</sup> sess, UN Doc A/63/69 (7 May 2008).

<sup>122</sup> On sanctions and the rule of law, see generally Jeremy M Farrall, *United Nations Sanctions and the Rule of Law* (2007); David Cortright and George A Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (2000); Andrea Bianchi, 'Security Council's Anti-Terror Resolutions and Their Implementation by Member States' (2006) 4 *Journal of International Criminal Justice* 1044. On Security Council reform, see generally Nico Schrijver, 'Reforming the UN Security Council in Pursuance of Collective Security' (2007) 12 *Journal of Conflict and Security Law* 127; Thomas G Weiss, 'The Illusion of UN Security Council Reform' (2003) 26 *Washington Quarterly* 147; Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998); Security Council Report, 'Update Report No 3: Strengthening International Law: Rule of Law and the Maintenance of International Peace and Security', *Security Council Report* (New York, US) 16 June 2006.

\* Dipl. Iur. (Hamburg); LL.M. (UQ); Research Fellow and Co-Director, International Law and Policy Group, Faculty of Law, The University of New South Wales.