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KADI: KING-SLAYER OR KING-MAKER?

THE SHIFTING ALLOCATION OF DECISION-MAKING POWER BETWEEN THE UN SECURITY COUNCIL AND COURTS

Devika Hovell*

'A King is not legally obliged to lay down general rules and obey them, but if he has an iota of political sense, he will do so.'

- Jean Bodin, IV, 4, 486

This note analyses the twelve-year span of the Kadi litigation in the European courts. The litigation raises the textbook question of the relationship between international and municipal legal orders, yet demonstrates that it is high time to move the description of this relationship beyond the orthodox yet outdated monist/dualist dichotomy that was seen to provide the answer in less complicated times. This note examines the different approaches taken at the three key phases of the litigation: the 'supremacy' position adopted by the Court of First Instance in 2005, the 'subversive' approach of the European Court of Justice in 2008 and the 'subsidiarity' position of the Court of Justice of the European Union in 2013. Ultimately, the note invites attention to the 'Solange equivalence' approach taken by the Advocates-General and argues that this strikes the best balance in normative terms for an enduring approach to power-sharing between legal orders.

Keywords: Kadi; Security Council; Sanctions; United Nations; European Union; international law

The question of power-sharing is a familiar battleground in the United Kingdom. The scope of devolution has rarely been so contested and the extent of the future transfer of sovereignty to the European Union hangs in the balance. A power-sharing arrangement that has received less attention is the allocation of decision-making power between the UK and the increasing array of international institutions assuming decision-making power in relation to UK nationals and interests. Prominent among these institutions is the UN Security Council. The Security Council is not accustomed to sharing power. Throughout its short history, the Security Council has staunchly resisted limitations to its power and flaunted its unchecked discretion as necessary for the maintenance of international peace and security. This note analyses the twelve-year span of the *Kadi* litigation,¹ which has posed the greatest challenge to date to the Security Council's assessment of sanctions decision-making as its exclusive bailiwick. For both the UK and the Security Council, the *Kadi* case law signals a loss of

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¹ The litigation comprises four court decisions and two opinions of Advocates General: *Kadi v Council and Commission* [2005] ECR II-0000 ('CFI Kadi'); Opinion of Advocate General Maduro, *Kadi v Council of the European Union*, 16 January 2008; *Kadi v Council of the European Union* [2008] ECR I-0000 ('ECJ Kadi'); *Kadi v European Commission* [2010] EUECJ; Opinion of Advocate General Bot. *European Commission and Council v Kadi*, 19 March 2013; *European Commission & Council v Yassin Abdullah Kadi* [2013] ECR not yet reported ('CJEU Kadi').

monopoly over decision-making authority over individuals and international security respectively, and confirms the plurality of the modern concept of law.²

When the Security Council decided on a revolutionary shift in sanctions policy – targeting sanctions directly against individuals rather than in blanket fashion against states – it elected against building in any due process ‘limitations’ on its decision-making power. A decade of criticism about due process deficiencies in sanctions decision-making followed, though made little impact on Council policy, notwithstanding its source in a variety of influential institutions including the General Assembly,³ the UN Secretary-General,⁴ the UN Special Rapporteur on human rights and counter-terrorism⁵ and the UN Human Rights Committee.⁶ In this respect, the *Kadi* litigation was a game-changer. Possessing the capacity to open an EU-sized hole in the sanctions net, the European courts were able to force the Council to engage in a consideration of power-sharing in a way that other bodies could not. In practical terms, the *Kadi* case was undoubtedly the single most important factor in persuading the Security Council finally to undertake meaningful procedural reform, with the establishment of the Office of the UN Ombudsperson.⁷ In theoretical terms, the principal effect of the judgments and opinions was to propose a *range* of solutions to the tangle between legal orders in an increasingly complex global environment. It is not that the *Kadi* litigation provides a definitive answer.⁸ Rather, considered as a whole, the *Kadi* litigation is an excellent case study through which to examine various approaches to the relationship between legal orders, in particular the role of municipal courts in Security Council decision-making, and one that merits continuing reflection. Ultimately, the litigation tackles the textbook question of

² Matej Avbelj, ‘The case of Mr Kadi and the modern concept of law’ in Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2014), 49.

³ World Summit Outcome document, UN General Assembly Resolution 60(1) (24 October 2005) UN Doc A/RES/60/1.

⁴ ‘Non-paper of the Secretary General’ referred to in debate on ‘Strengthening international law: rule of law and maintenance of peace and security’ (22 June 2006) UN doc S/PV.5474.

⁵ M. Scheinin, ‘Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism’ (16 August 2006) UN doc A/61/267.

⁶ UN Human Rights Committee, *Sayadi and Vinck v Belgium* (Communication No 1472/2006, 29 December 2008) UN Doc CCPR/C/94/D/1472/2006.

⁷ UN Security Council resolution 1904 (17 December 2009) UN doc S/RES/1904. See also ‘Statement of French representative on the adoption of SC Resolutions 1988 and 1989’, UN doc S/PV.6557 (2011).

⁸ For other judicial and quasi-judicial bodies that have considered the issue of the relationship between Security Council and municipal legal orders, see [European Court of Human Rights] *Al-Jedda v United Kingdom* (2011) 53 EHRR 789; *Nada v. Switzerland* (2013) 56 EHRR 18; *Al-Dulimi and Montana v Switzerland* (App No 5809/08), ECHR, 26 November 2013; [UK Supreme Court] *Her Majesty’s Treasury v Ahmed* [2010] UKSC 2; *Al Jedda v Secretary of State for Defence* [2007] UKHL 58; [UN Human Rights Committee] *Sayadi and Vinck v Belgium* (Communication No 1472/2006, 29 December 2008) UN Doc CCPR/C/94/D/1472/2006, [10.8]. See in particular Individual opinion (partly dissenting) by Sir Nigel Rodley, Ivan Shearer and Iulia Antoanella Motoc, 27; Individual (dissenting) opinion of Ruth Wedgewood, 30; Individual opinion of Ivan Shearer, 32.

the relationship between international and municipal law (here the relationship between Security Council resolutions and EU law), yet demonstrates that it is high time to move the description of this relationship beyond the orthodox yet outdated monist/dualist dichotomy that was seen to provide the answer in less complicated times.⁹

In the following note, I set out the background to the litigation, then identify the different approaches taken at the three key phases of the litigation: the ‘supremacy’ position adopted by the Court of First Instance in 2005 (CFI Kadi);¹⁰ the ‘subversive’ approach of the European Court of Justice in 2008 (ECJ Kadi)¹¹ and the ‘subsidiarity’ approach of the Court of Justice of the European Union in 2013 (CJEU Kadi).¹² I then assess the impact of each approach on the legitimacy and effectiveness of sanctions decision-making and conclude that none of the approaches taken by the European courts form the foundation of an enduring normative approach to the relationship between legal orders. Instead, I invite attention to the ‘Solange equivalence’ approach taken by the Advocates General in Kadi,¹³ and argue that this strikes the best balance in normative terms.

I. BACKGROUND TO THE KADI LITIGATION

Mr Kadi is a Saudi Arabian businessman and former architect. He was placed on the UN sanctions list in 1999 and 2000 as a suspected associate of Osama bin Laden’s terror network Al Qaeda. He was 47 at the time, at the height of his career. According to Mr Kadi, his listing by the Security Council turned his life upside down and consumed his life for the next decade (he was eventually delisted at the age of 59 following a successful application to the UN Ombudsperson). Mr Kadi has remarked that the idea that the Security Council listing had a profound impact on his life is an understatement. Yet though the impact of the sanctions was intensely personal, Mr Kadi accuses a very public institution for his misfortune. In the course of a presentation at a sanctions conference in 2013, Mr Kadi identified ‘denial of the rule of law’ as the source of the injustice he faced.¹⁴

The key problem in rule-of-law terms is that there was no adequate mechanism put in place by the UN Security Council through which Mr Kadi could challenge

⁹ P. Sales and J. Clement, ‘International Law in Domestic Courts: The Developing Framework’ (2008) 124 *Law Quarterly Review* 388 citing R. Jennings and A. Watts, *Oppenheim’s International Law* (9th ed, 1992).

¹⁰ *Kadi v Council and Commission* [2005] ECR II-0000.

¹¹ *Kadi v Council of the European Union* [2008] ECR I-0000. In 2010, the General Court handed down a decision following the 2008 decision of the European Court of Justice: Case T-85/09 *Kadi v European Commission* [2010] EUECJ. Detailed reference will not be made to this decision.

¹² *European Commission & Council v Yassin Abdullah Kadi* [2013] ECR not yet reported.

¹³ Opinion of Advocate General Maduro, *Kadi v Council of the European Union*, 16 January 2008; Opinion of Advocate General Bot. *European Commission and Council v Kadi*, 19 March 2013.

¹⁴ UCL Workshop, ‘Smarter EU Sanctions?’, University College London, 8 November 2013, Presentation by Sheikh Yassin Abdullah Kadi (conference notes with author).

his listing by the UN Sanctions Committee. When the Security Council chose to adopt its targeted sanctions policy, it rebuffed the UN Office of Legal Counsel's request for assistance, declaring there were 'no legal issues' involved in the listing or delisting of individuals on sanctions blacklists.¹⁵ Indeed, at the time of Mr Kadi's listing, there was no review mechanism at the UN level, with individuals forced to rely on their state of nationality to engage in diplomatic lobbying of relevant Security Council members on their behalf. As a Saudi Arabian national, Mr Kadi had little chance of being de-listed via this route. Consequently, Mr Kadi sought to challenge his listing in a number of different domestic and regional jurisdictions, including domestic courts in Switzerland, the United Kingdom, the United States and the EU. It is the case law resulting from the litigation before EU courts that has attracted the greatest attention.

II. KADI IN THE CFI: SUPREMACY AND THE EMPTINESS OF HIERARCHY

On 18 November 2001, Mr Kadi submitted an application to the Court of First Instance (CFI) seeking an annulment of the EU regulation implementing the Security Council assets freeze against him in the EU. He put forward three grounds of annulment alleging a breach of the right to a fair hearing, breach of the right to property and breach of the right to effective judicial review.¹⁶ As their principal argument against these claims, the European Council and Commission submitted that they were bound under international law, referring in particular to Articles 25 and 103 of the UN Charter, to give effect to Security Council resolutions. Moreover, they claimed that European courts were precluded from engaging in judicial review of the relevant regulation as this 'would be tantamount to indirect and selective judicial review of the mandatory measures decided upon by the Security Council...and would be liable to undermine one of the foundations of the international order of States established after 1945'.¹⁷

(a) The Findings

One of the initial questions considered by the CFI was 'the relationship between the legal order under the United Nations and the domestic or Community legal order'.¹⁸ The CFI identified a 'rule of primacy' under customary international law of international law over municipal law. More specifically, in the case of Security Council resolutions, the CFI recognised that the combined operation of Article 25

15 Confidential communication, 24 January 2006, cited in S. Chesterman, 'The Spy Who Came In From The Cold War: Intelligence and International Law' (2006) 27 Michigan Journal of International Law 1071, 1117; Remarks by H. Corell, 'Is the Security Council Bound by Human Rights Law' (103rd Annual Meeting of the American Society of International Law, Washington DC, 27 March 2009).

¹⁶ CFI Kadi, [59].

¹⁷ CFI Kadi, [162].

¹⁸ CFI Kadi, [178].

and Article 103 of the UN Charter¹⁹ operated to ensure that the obligations of UN Member States under Security Council resolutions prevailed over their obligations under any other international agreement, including the EC Treaty.²⁰ It followed that, according to the CFI, 'Member States may, and indeed must, leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations'.²¹

The CFI then turned to the question of judicial review, namely whether European courts had the power to review the legality of regulations implementing Security Council resolutions. The CFI held that, as a corollary of the principles discussed in the previous paragraph, the jurisdiction of European Courts was necessarily limited. Citing incompatibility with both international and Community law, the CFI held that '[t]he resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and...the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law'.²²

Yet this did not put an end to the matter. While European courts had no power to review Security Council resolutions against Community law, this did not stop the CFI reviewing the compatibility of resolutions with international law. The CFI effectively re-styled itself as an agent of the international community and held that '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 the 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'.²³ In a statement that most international lawyers would agree with, the CFI recognised that there was one limit to the binding effect of Security Council resolutions, namely that the Council 'must observe fundamental peremptory provisions of *jus cogens*'.²⁴ The Court's next steps were more controversial. Examples of *jus cogens* norms are widely recognised to be 'very, very few in number'.²⁵ There is a notorious level of disagreement as to their scope, and significant indeterminacy as to their content. Ian Brownlie famously described *jus cogens* as the Bentley that never leaves the

¹⁹ Under Article 25 of the UN Charter, 'Members of the United Nations agree to accept and carry out the decisions of the Security Council'. Under Article 103, '[i]n 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'.

²⁰ CFI Kadi, [184].

²¹ CFI Kadi, [191].

²² CFI Kadi, [225].

²³ CFI Kadi, [226].

²⁴ CFI Kadi, [229].

²⁵ R. Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *International and Comparative Law Quarterly* 791, 801.

garage.²⁶ Contrary to this accepted narrow view and citing minimal authority, the CFI took an expansive reading of *jus cogens*, essentially putting all human rights within that category, including the right to a fair hearing, the right not to be arbitrarily deprived of property and the right to an effective remedy.²⁷ Perhaps unseated by the enormity of this first step, the CFI then took a second extraordinary step, holding that there had been no breach of these norms in the case in question, despite the fact it had previously been widely accepted that the UN sanctions regime fell foul of these due process norms.

(b) Reaction and Analysis: Article 103 as Anachronism

It is perhaps no surprise that the CFI judgment was roundly criticised.²⁸ In terms of its approach to the interpretation of applicable international legal and human rights norms, it was criticised on the one hand for artificially inflating the set of *jus cogens* norms by which the Security Council could be held to account. (Indeed the approach brings to mind the title to Anthony D'Amato's 2010 article, 'It's a bird, it's a plane, it's jus cogens!'.²⁹) On the other hand it was criticised for its anaemic approach to human rights protections, initially in declining jurisdiction over individuals caught up in the UN sanctions net and, then, by narrowly interpreting the application of international human rights principles to the relevant facts. The Court's approach to the relationship between legal orders can be characterised as both monist and hierarchical. The judgment rests on the claim that the relevant law derives its validity and authority from its source in a Security Council resolution, and that obligations under Security Council resolutions prevail over all other legal obligations according to the terms

²⁶ I. Brownlie, 'Comment' in J. Weiler and A. Cassese (eds), *Change and Stability in International Law-Making* (Berlin 1988), 108, 110.

²⁷ CFI Kadi, [226-229].

²⁸ M. Milanović, 'Norm Conflict in International Law: Whither International Law?' (2009) 20 *Duke Journal of Comparative and International Law* 69, 91, 93; J. Klabbers, 'Setting the Scene' in J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009), 1; C. Eckes, 'Judicial Review of European Anti-Terrorism Measures – the Yusuf and Kadi Judgments of the Court of First Instance' (2008) 14 *European Law Journal* 74; 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, 195; M. Nettesheim, 'UN Sanctions against Individuals – A Challenge to the Architecture of European Union Governance' (2007) *CML Review* 567; M. Bulterman, 'Fundamental Rights and the United Nations Financial Sanctions Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities' (2006) 19 *Leiden Journal of International Law* 753; A. Vandepoorter, 'L'application communautaire des décisions du Conseil de Sécurité' (2006) 52 *Annuaire français de droit international* 102, 122; E. Cannizzaro, 'A Machiavellian Moment? The UN Security Council and the Rule of Law' (2006) 3 *International Organizations Law Review* 189, 202; B. Conforti, 'Decisioni del Consiglio disicurezza e diritti fondamentali in una bizzarre sentenze del Tribunale comunitario di primo grado' (2006) 11 *Diritto dell'Unione europea* 333, 342; E. Defeis, 'Targeted sanctions, human rights, and the Court of First Instance of the European Community' (2006) *Fordham International Law Journal* 1449, 1454.

²⁹ A. D'Amato, 'It's a bird, it's a plane, it's jus cogens!' (1990) 6(1) *Connecticut Journal of International Law* 1.

of the EU treaty framework and UN Charter. The mooted *jus cogens* qualification is discarded as a fig-leaf with the CFI's rather unfortunate interpretation of this category both as unusually broad yet seemingly impossible to violate.

Beyond its interpretation of the treaty texts, the CFI's approach to the relationship between legal orders can also be criticised in normative terms. Whether deliberately or not, the CFI adopts a command theory of law that is, at best, misplaced and, at worst, an abdication of judicial responsibility against the backdrop of the broader negotiation of the architecture for global governance of which the judgment forms part. The critical reaction to the judgment coupled with its lack of influence indicates that continuing attachment to the power of Security Council 'command' and traditional notions of hierarchy is regarded as increasingly misplaced. The only institution that stands to benefit from this attachment is the Security Council itself. However, even this can be questioned. Despite the dearth of formal legal limitations on the Council, it has become clear that the Council's law-making capacity is not self-sufficient. The Council must share power with others and accept limits, if only to secure obedience to its commands. There is a growing sense that 'pillars' of Security Council supremacy such as Articles 25 and 103 are no longer adequate (if they ever were) to secure the effective implementation of Security Council resolutions. The view that international institutions are manifestly a good thing that can do no wrong, whose functions could contribute only to the 'salvation of mankind', is the perspective of a bygone era.³⁰ It is increasingly recognised that international institutions are capable of all manner of missteps, omissions, and sins, including in some cases human rights violations.³¹ The Security Council can no longer afford to rely on formal hierarchy, but must ensure that the decision-making takes account of widely-held interests and values if it wishes its decisions to achieve widespread acceptance and compliance.

The issue is not merely one of legitimacy, but also (linked to this) of effectiveness. The Security Council's decisions will only be effective to the extent they gain acceptance among the range of interests affected by its decision-making. In the sanctions setting, the Security Council is becoming increasingly reliant on non-state actors for co-operation, implementation and enforcement of its decision-making. If these actors feel sidelined or are otherwise dissatisfied with Security Council decision-making, they may seek to undermine the Council's decisions.³² Representatives of private industry, including banks, airlines and other representatives of private industry, have the capacity to undermine the effectiveness of the sanctions regime if they facilitate offers of employment, educational or travel opportunities, decline to freeze funds or actively contribute funds to those on sanctions blacklists. Indeed, experience has shown that, even where states have formally complied with sanctions measures, elements of civil

³⁰ N. Singh, *Termination of Membership of International Organisations* (1958), vii.

³¹ F. Mégret and F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', (2003) 25 *Human Rights Quarterly* 314.

³² M Zürn, 'Global Governance and Legitimacy Problems' (2004) 39 *Government and Opposition* 260, 283-4.

society have engaged in deliberate violations of sanctions decision-making where they do not agree with the Council's decision to list certain individuals.³³ There is a wide perception that sanctions decision-making is unfair and that there is a need to recognise a broader system of legal principles by which to check their conduct.³⁴ In power-sharing terms, it will strengthen rather than weaken Security Council authority if domestic courts are granted a degree of authority in checking Security Council decision-making.

III. KADI IN THE ECJ: AN ACT OF JUDICIAL SUBVERSION

In 2008, the European Court of Justice handed down its decision on appeal in the *Kadi* case. As is well known, the ECJ took a directly contrasting approach to the CFI, declining to defer to the Security Council and ultimately invalidating the regulation giving effect to the relevant Security Council resolution on the basis it violated fundamental rights of the European legal order. In terms of its approach to the relationship between the European and UN legal orders, the reasoning of the ECJ was also directly opposed to that of the CFI. In its findings, it did not so much as mention Articles 25 or 103 of the UN Charter. With a vague reference to the 'alleged absolute primacy of the resolutions of the Security Council', the ECJ determined that such a characterization of Security Council resolutions had nothing to say about the 'hierarchy of norms within the Community legal order' and that any such claim to 'primacy' could only apply to 'acts of secondary Community law' and could never authorise any derogation from respect for human rights and fundamental freedoms that form part of the very foundations of the Community legal order.³⁵

(a) The Findings

The Court's reasoning is a difficult one to pin down in terms of its broader approach to the allocation of authority between international and European legal orders. At the heart of the decision is the Court's determination that the EC Treaty establishes an 'autonomous legal system which is not to be prejudiced by an international agreement'.³⁶ In contrast to the CFI's deference to the source of the initial decision-making power, namely the Security Council, the Security Council attempts to separate the regulation from its source and imagines that it is deciding the dispute 'in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls'.³⁷ By amputating the international roots of the regulation, the ECJ emphasises it is not

³³ See, for example, S. Schmemmann, 'A Nation Challenged: Sanctions and Fallout' *New York Times* (New York 26 January 2002); P. Koring, 'Federal lawyers argue they have no obligation to bring Abdelrazik home' *Globe and Mail* (8 May 2009).

³⁴ J.E. Alvarez, *International Organizations as Law-Makers* (2005), at 585.

³⁵ ECJ *Kadi*, [305], [307].

³⁶ ECJ *Kadi*, [316]. See also at [282]: 'an international agreement cannot affect the allocation of powers fixed by the [European] Treaties or, consequently, the autonomy of the Community legal system'.

³⁷ ECJ *Kadi*, [317].

engaging in the review of the lawfulness of ‘a resolution adopted by an international body’, but rather of ‘the *Community act* intended to give effect to that resolution’.³⁸ It follows that ‘any judgment given by the Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law’.³⁹ The ECJ then takes the seemingly straightforward step of determining that the regulation violates Mr Kadi’s rights of defence (including his right to be heard and right to effective judicial protection) and his right to respect for property, and holds the regulation must be annulled.

Of course, no legal order is an island, particularly in an era of multi-level governance. There is a sense even in the judgment that the ECJ is aware that it is pedaling in fiction by drawing this hermetic separation between international and EU legal orders. Though it insists that it is merely reviewing the implementation of Security Council measures by EU institutions, it does engage in a brief review of the structures and procedures at the UN level to ascertain whether they satisfy EU standards. The ECJ finds that, with respect to the ‘system of restrictive measures set up by the United Nations with regard both to entry in the summary list and to removal from it’, namely the focal point, ‘the fact remains that the procedure before [the Sanctions Committee]’ is still in essence diplomatic and inter-governmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto’.⁴⁰

Moreover, the ECJ acknowledges that any judgment it hands down will have effect beyond the EU legal order. As the ECJ could not help but be aware, the effect of the annulment of the EU regulation would be to place EU members in breach of their obligations under the UN Charter, and moreover to open an EU-sized hole in the sanctions net. The UN Security Council regime is particularly sensitive to state violations as funds that would otherwise be frozen can be channeled into the breach. Accordingly, we find the ECJ building in qualifications to its claims to legal autonomy. Somewhat undermining its insistence that review of the regulation would not entail any challenge to the primacy of the Security Council resolution, the ECJ acknowledges that the annulment will have the effect of ‘seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by the regulation. As such, the ECJ builds in a three-month suspension of the effects of the judgment to give the relevant European institutions time to remedy the infringements.’⁴¹

³⁸ ECJ Kadi, [278] (my emphasis).

³⁹ ECJ Kadi, [288].

⁴⁰ ECJ Kadi, [320], [323].

⁴¹ ECJ Kadi, [373]-[376].

(b) Reaction and Analysis: Between Dualism, Dialogue and Dissent

In terms of its approach to the relationship between European and international legal orders, the judgment has attracted mixed reviews and has been the subject of a range of different interpretations. In her seminal and influential article, Gráinne de Búrca was critical of the ECJ's approach to the relationship between legal orders on the basis it '[eschews] engagement in the kind of international dialogue that has generally been presented as one of the EU's strengths as a global actor' and determines the relationship between the EU and 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'.⁴² The judgment has been said to insert itself in a tradition of nationalism, taking the path of 'European particularism'.⁴³ Kunoy and Dawes invoke criticism of the ECJ perspective as 'solipsistic', 'imperialistic' and smacking of 'European self-centredness'.⁴⁴ From a practical perspective, the Security Council's Monitoring Team expressed concern that decisions such as *Kadi* have placed the sanctions regime 'at a crossroads' and could have a 'significant impact on the regime' jeopardizing the implementation of sanctions by member states with the 'potential to damage the regime or to distract it from looking forward'.⁴⁵

Other scholars argue that the judgment was not as starkly exceptionalist or isolationist as has been made out. Certain scholars have argued that the judgment in ECJ *Kadi* should be interpreted as the 'global governance' equivalent of the celebrated *Solange* decision by the German *Bundesverfassungsgericht*.⁴⁶ Parallels between the set of circumstances leading to the adoption of the *Solange*

⁴² G. de Búrca, 'The ECJ and the International Legal Order after *Kadi*' (2009) 51 *Harvard Journal of International Law*.

⁴³ D. Halberstam and E. Stein, 'The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order' (2009) 46 *Common Market Law Review* 13, 72.

⁴⁴ B. Kunoy and A. Dawes, 'Plate Tectonics in Luxembourg: the ménage à trois between EC law, International Law and the European Convention on Human rights following the UN Sanctions Cases' (2009) 46 *Common Market Law Review* 73, citing M. Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 *European Journal of Legal Studies*.

⁴⁵ See also Tzanakopoulos' description of the decision as 'hugely de-stabilizing': A. Tzanakopoulos, 'The Solange Argument as a Justification for Disobeying the Security Council in the *Kadi* judgments' in M. Avbelj, F. Fontanelli and G. Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment* (Routledge 2014).

⁴⁶ P. Eeckhout, 'Community Terrorism Listing, Fundamental Rights and the UN Security Council Resolution. In Search of the Right Fit' (2007) 3 *European Constitutional Law Review* 183; A. Nollkaemper, 'The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci' (2009) 20(3) *European Journal of International Law* 862; K. Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights' (2009) 9(2) *Human Rights Law Review* 288; N. Türküler Isiksel, 'Fundamental Rights in the EU after *Kadi* and *Al Barakaat*' (2010) 16(5) *European Law Journal* 551; A. Tzanakopoulos, 'The Solange Argument as a Justification for Disobeying the Security Council in the *Kadi* judgments' in M. Avbelj, F. Fontanelli and G. Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment* (Routledge 2014).

decision and the present power negotiation in the global context are not difficult to draw. As will be recalled, in the 1960s and 1970s, the ever-expanding remit of EC law and the ECJ's claim to be its supreme interpreter of the law made Member States' constitutional courts particularly uneasy about what they perceived to be the lack of effective protection for basic rights at the EC level. In the absence of provisions of basic rights in the European Treaties, the Community's sphere of operation increasingly resembled a 'gaping fundamental rights loophole'.⁴⁷ In response, in a 1974 decision which has come to be known as *Solange I*, the German *Bundesverfassungsgericht* reserved for German courts the right to review EC acts for their conformity with German Constitution 'as long as the integration process has not progressed so far that Community law [recognises] a catalogue of fundamental rights..., which is adequate in comparison with the catalogue of fundamental rights contained in the German constitution'.⁴⁸ In the 1986 decision that has become known as *Solange II*, the *Bundesverfassungsgericht* satisfied itself with the EC's general standard of rights protection and declared that it would refrain from reviewing Community measures as long as that general standard was kept up.⁴⁹

As noted above, the ECJ does give a nod to the *Solange* line of reasoning, measuring UN procedures against EU standards.⁵⁰ However, it requires some distortion of the reasoning of the ECJ to argue that it goes so far as adopting the *Solange* approach. Problematically, the ECJ jettisons an important element of the *Solange* method: it is important to recall that the dissociative logic of the *Solange* decisions was counterbalanced by a crucial dialogic element.⁵¹ In ECJ *Kadi*, the Court made no attempt to enter into a dialogue with the Security Council. Unlike the *Bundesverfassungsgericht* in the *Solange* judgments, the Court in ECJ *Kadi* was not interested in exploring a 'mutually disciplining logic' between the two legal systems in question. It declined to enter into any consideration as to whether the conflict between the legal orders could be resolved by reference to a basic set of rights standards common to both the Community and the UN Charter. Rather, it rebukes the CFI for measuring the sanctions regime against *jus cogens* norms⁵² and emphasises that it is concerned with the compatibility of the regulation with 'principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union'.⁵³

⁴⁷ N. Türküler Isiksel, 'Fundamental Rights in the EU after *Kadi* and *Al Barakaat*' (2010) 16(5) *European Law Journal* 551, 553.

⁴⁸ Case 2 BVL 52/71, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel* (Decision of 29 May 1974) 37 BVerfGE 271, [1974] CMLR 540.

⁴⁹ See *Wünsche Handelsgesellschaft Bundesverfassungsgericht* 2, 197/83; [1986] 1987 3 CMLR 225.

⁵⁰ See above, text accompanying note [x].

⁵¹ W.T. Eijsbouts and L. Besselink, "'The Law of Laws' Overcoming Pluralism' (2008) 4 *Constitutional Law Review* 395.

⁵² ECJ *Kadi*, [287].

⁵³ ECJ *Kadi*, [303].

My own view is that it is unwise to try to draw an enduring normative test from ECJ *Kadi* judgment. Insofar as the judgment reflects ‘dualist’ reasoning, it would be a retrograde step to accept ECJ *Kadi* as a precedent for this disassociation of domestic implementing measures from international measures. At the same time, to interpret the ECJ as promoting a *Solange* equivalence approach requires too much distortion of the language of the judgment. Instead, my view is that we need to appreciate the judgment in its political context as more in the nature of an act of open judicial revolt against years of fruitless political dialogue. Türküler Isiksel invites us to see the ECJ’s judgment in ECJ *Kadi* in its broader political context as ‘an act of civil disobedience’ rendered necessary by the UN Security Council’s misapplication of foundational principles of the international order.⁵⁴ She argues (and I agree) that the ECJ’s evasiveness towards international law in *Kadi* should not be regarded as lawless unilateralism, but as the fulfillment of its role to uphold the rule of law both within the EU *and* within the international legal order.⁵⁵ I have argued elsewhere that the judicial role needs to be recalibrated where courts are engaged in the review of international decision-making.⁵⁶ In this respect, there should be greater acceptance and acknowledgement by courts that, when asked to review international decision-making, they are providing legal counsel, though in a wider political forum.

In conclusion, from a pragmatic perspective, the effect of the ‘disruptive’ ECJ *Kadi* decision was to strengthen the role and relevance of the ECJ,⁵⁷ and also paradoxically to heighten the power and influence of the Security Council. By giving voice to its sharpest critics, here the ECJ, the Security Council did not in fact threaten compliance with its decision-making but arguably enhanced its reach and relevance. The Security Council’s measured response to the decision, chiefly the introduction of the Office of the UN Ombudsperson, served to strengthen the intelligence and legitimacy of decisions made. Yet, from a normative perspective, I argue that the approach adopted in ECJ *Kadi* is best interpreted as an *exceptionally* interventionist approach. The ECJ’s failure to engage in any form of dialogue or negotiation of standards by reference to the broader decision-making context is justifiable only if this judgment is seen as an ‘act of civil disobedience’ responding to the fact that the gap between what was legal and what was legitimate had become too wide, as perceived by those bound by the UN sanctions regime. The problem is that, in *Kadi II*, to be discussed in the next section, the CJEU made the mistake of transforming the exception, a justifiable act of rebellion, into the rule.

⁵⁴ N. Türküler Isiksel, ‘Fundamental Rights in the EU after *Kadi and Al Barakaat*’ (2010) 16(5) *European Law Journal* 551.

⁵⁵ *Ibid*, 552.

⁵⁶ D. Hovell, ‘A Dialogue Model: The Role of the Domestic Judge in Security Council Decision-making’ (2013) 26 *Leiden Journal of International Law* 579.

⁵⁷ The constitutional ambition of the decision has been widely remarked on.

IV. KADI IN THE CJEU: SUBSIDIARITY AND THE STUMBLING BLOCK OF EFFECTIVENESS

In *Kadi II*, the CJEU heard an appeal from a decision of the CFI (by then known as the General Court) in which the General Court applied the reasoning of the 2008 ECJ decision to annul the regulation enacted to replace the regulation annulled in ECJ *Kadi*.⁵⁸ In the General Court's decision, sharp notes of reluctance throughout the judgment indicate that the General Court's application of ECJ *Kadi* should not be mistaken for harmony between the courts on the issue. With clear regret, the General Court states that 'it falls not to [the General Court], but to the Court of Justice to reverse the precedent',⁵⁹ and professes a compulsion (rather than a willingness) to accept the task the ECJ had spelled out for it, namely to ensure 'in principle the full review of the lawfulness of the contested regulation in the light of fundamental rights, without affording the regulation any immunity from jurisdiction on the ground that it gives effect to resolutions adopted by the Security Council under Chapter VII'.⁶⁰ It is interesting that, in the following paragraph, the General Court expressly implants the *Solange* qualification that was not express in the ECJ judgment, adding that this review was appropriate 'at the very least so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer the guarantees of effective judicial protection', citing the Opinion of Advocate General Maduro.⁶¹

(a) The Findings

The European Council, Commission and the United Kingdom put forward various grounds in support of their respective appeals. The two most relevant grounds of appeal were that the Court had committed errors of law in that (1) the contested regulation was not recognised as having immunity from jurisdiction and (2) with regard to the level of intensity of judicial review. The first ground of appeal is a direct challenge to the ECJ judgment in ECJ *Kadi*. This ground of appeal received short shrift. The CJEU once again declined to accept the European Council's invitation to restore respect for the supremacy of Security Council decision-making. Instead, it reinforced the separation between legal orders that was the hallmark of the ECJ 2008 decision. The CJEU determined that 'without the primacy of a Security Council resolution at the international level thereby being called into question', the Court was required to implement the 'constitutional guarantee' of judicial review of the lawfulness of all EU measures, including those which, as in the present case, implement an international law measure, in light of the fundamental rights guaranteed by the EU.⁶²

⁵⁸ The General Court agreed there was a 'foundation' to the criticisms of the *ECJ Kadi* judgment: *Kadi v European Commission* [2010] EUECJ, [121], [123].

⁵⁹ *Kadi v European Commission* [2010] EUECJ, [123].

⁶⁰ *Kadi v European Commission* [2010] EUECJ, [126].

⁶¹ *Kadi v European Commission* [2010] EUECJ, [127].

⁶² CJEU *Kadi*, [67].

The key issue on appeal was the 'level of intensity' of judicial review by the European courts. Here, the European Commission and Council, supported by all Member States intervening in the appeals, cautioned the CJEU against taking the 'excessively interventionist' approach followed by the General Court. Yet the CJEU was not for turning. In a move that is difficult to reconcile with the disassociation between legal orders at the heart of its response to the first ground of appeal, the CJEU assumed a power, not merely to review, but to second-guess Security Council decision-making. Where an individual challenges the lawfulness of a listing decision in the Courts of the EU, the Court held that the courts had an obligation to review whether 'rules as to procedure and rules as to competence, including whether or not the legal basis is adequate' had been observed.⁶³ As interpreted by the CJEU, this meant that European courts were not merely entitled but obliged to enter into a review of the initial decision to list by the Security Council Sanctions Committee. As interpreted by the CJEU, this meant that European courts were not merely entitled but obliged to enter into a review of the initial decision to list by the Security Council Sanctions Committee 'to ensure that that decision, which affects that person individually...is taken on a sufficiently solid factual basis'.⁶⁴

In such circumstances, the relevant EU authority was under an obligation 'to produce information or evidence, confidential or not, relevant to such an examination'.⁶⁵ The Court here gives little quarter to concerns about international security or confidentiality, stating that 'the secrecy or confidentiality of that information or evidence is no valid objection' before the Courts of the EU. The CJEU does recognise that courts have the task to apply 'techniques which accommodate, on the one hand, legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process'.⁶⁶ However, in circumstances where the relevant authorities declined to disclose information, it was for the courts to determine 'whether the reasons relied on by that authority as grounds to preclude that disclosure are well founded'.⁶⁷ If it is impossible for the Court to find the reasons are well founded, including presumably where it cannot get its hands on the relevant information, those reasons cannot be relied upon as the basis for the contested listing decision. Ultimately, the CJEU found that none of the allegations presented against Mr Kadi in the narrative summary provided by the Sanctions Committee justified the adoption of sanctions measures. In those circumstances, it confirmed the annulment of the regulation.

⁶³ CJEU Kadi, [117].

⁶⁴ CJEU Kadi, [119].

⁶⁵ CJEU Kadi, [120].

⁶⁶ CJEU Kadi, [125].

⁶⁷ CJEU Kadi, [126].

(b) Reaction and Analysis: Subsidiarity – a leap too far

In *Kadi II*, the CJEU made the mistake of transforming the justifiable act of rebellion by the ECJ in ECJ *Kadi* into an enduring normative approach. The problem is not so much with the idea that Security Council decisions should be subject to judicial review as with the *parochialism* of this move. At paragraph 131, the CJEU suggests it is seeking to ensure ‘a fair balance between the maintenance of international peace and security and the protection of fundamental rights and freedoms of the person concerned..., those being shared values of the UN and the European Union’. Yet, though the CJEU purports to apply fundamental rights, it is clear that it makes no attempt to understand those rights in the global context. The values it applies are not ‘shared values’, but ‘fundamental rights guaranteed by the European Union’.

In *Kadi II*, the CJEU opts for something akin to a principle of subsidiarity, with the presumption that regional constitutional values prevail over international ones, even in the context of international decision-making. The effect is not to dissolve, but to invert the hierarchy established in the heavily-disputed 2005 CFI *Kadi* decision. Between 2005 and 2013, the arc swung 180 degrees from a recognition of Security Council supremacy by the CFI to a claim to judicial supremacy by the CJEU. There is no attempt to reconcile the two orders. The CJEU held that, while Security Council resolutions had primacy at the international level, they became subject to the primacy of constitutional guarantees of the EU when implemented at the European level. As such, the ‘right to effective judicial protection’ is interpreted as a ‘declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order’.⁶⁸ Here the CJEU applies, seemingly without reflection, a peculiarly domestic interpretation of due process, developed in international treaties and across domestic legal systems to apply to the typical domestic governmental context.⁶⁹ Yet, as any public lawyer will readily identify, it is well established that due process is *contextual*: different legal contexts legitimately require different procedural standards and operate according to different principles and values.⁷⁰ While judicial review may be appropriate in a domestic legal setting, this is not to say it is necessary or even appropriate in the Security Council setting where other methods of recourse may be more appropriate. Yet there is no attempt by the CJEU to evaluate the Ombudsperson procedure established as a review process in the Security Council sanctions context. The UN Ombudsperson is not even mentioned in the Court’s findings. Instead, the Court merely alludes to the

⁶⁸ CJEU *Kadi*, [134].

⁶⁹ Thomas Scanlon has recognized that this form of ‘due process’ is not readily exportable to regimes outside the domestic context on the ground that it depends on a minimal commitment to certain institutional tenets: T.M. Scanlon, ‘Human Rights as a Neutral Concern’ in TM Scanlon (ed), *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge University Press 2003), 116.

⁷⁰ D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996), 315. See also *Lloyd v McMahon* (1987), per Lord Bridge; *R v Home Secretary; ex p Doody* (1993), per Lord Mustill; *Morrissey v Brewer*, 408 US 471, 481 (1972); *Joint Anti-Fascist Refugee Committee v McGrath*, 341 US 123 (1951); L. Tribe, *American Constitutional Law* (2nd edn, 1988), 666.

‘improvements added’ with a fairly abrupt conclusion that ‘they do not provide to the person...listed...the guarantee of judicial protection’.⁷¹

The danger in interpreting ‘fundamental rights’ by reference to standards developed for the domestic context can be appreciated if we follow through the Court’s reasoning in terms of effectiveness. Paradoxically, application of the right to ‘effective judicial protection’ in the Security Council sanctions context is rendered inappropriate precisely because it is *ineffective*. The consequence of the decision is to implement a system of judicial supremacy mandating judicial review of Security Council decision-making. In doing so, the CJEU arrogates to itself the duty to perform a role that it cannot effectively exercise. States, in particular members of the P5, will be extremely reluctant to give up information to a foreign court. Yet the CJEU acknowledges that, if it cannot get its hands on any information that supports the listing, it will be forced to annul the relevant sanctions measures.

To appreciate the overly narrow and parochial nature of the CJEU’s reasoning, one need only compare review by the CJEU to review by the UN Ombudsperson. The Ombudsperson framework offers a number of advantages over judicial review, which merit detailed attention and not a cursory dismissal by the CJEU.⁷² For example, the Ombudsperson has the power to engage in *de novo* review of the fairness of sanctions listings by reference to present circumstances, in contrast to judicial review which is frozen in time at the point of the initial listing. Secondly, the Ombudsperson carries out review by reference to contextually-appropriate and consistent standard, namely, ‘whether there is sufficient information to provide a reasonable and credible basis for the listing’.⁷³ Third, the Ombudsperson has expertise in processing the intelligence information at issue, and is clearly in a far better position than international or domestic courts to interpret and assess the weight of information than domestic or international courts.⁷⁴ Finally and perhaps most significantly, the Ombudsperson is in a unique position to place pressure on states to gain access to relevant information. Certainly the limitations that exist for domestic or regional courts where information is not held by their municipal authorities do not exist for the UN Ombudsperson. Moreover, there are several factors that combine to give strength to requests by the Ombudsperson for access to confidential information upon which decisions have been based, including (1) her Security Council mandate;⁷⁵ (2) the burden of proof where ‘any lack of detail

⁷¹ CJEU Kadi, [133].

⁷² For a detailed illustration of the operation of due process in the Security Council context, see D. Hovell, *The Power of Process* (OUP 2015).

⁷³ Office of the Ombudsperson, ‘Approach to and Standard for Analysis, Observations, Principal Arguments and Recommendation’ (August 2011), available at www.un.org/en/sc/ombudsperson/approach.shtml (last accessed March 2015).

⁷⁴ ‘Third Report of the International Ombudsperson’ (20 January 2012) UN doc S/2012/49, [7], [30].

⁷⁵ Security Council resolution 1989 (17 June 2011) UN Doc S/RES/1989, [25]. See also ‘Third Report of the International Ombudsperson’ (20 January 2012) UN doc S/2012/49, para 41.

does not work to the prejudice of the petitioner’;⁷⁶ (3) the triggering effect of her report which binds the sanctions committee unless reversed unanimously;⁷⁷ and (4) her capacity to enter into specific arrangements with individual states to obtain access to confidential information.⁷⁸

V. THE ADVOCATES-GENERAL: SOLANGE EQUIVALENCE IN THE GLOBAL GOVERNANCE CONTEXT

In conclusion, none of the decisions by the European courts in the *Kadi* litigation produce a satisfactory normative outcome. Far from unifying a complex web of legal regimes in the sanctions context, this pendulum of hierarchies between supremacy and subsidiarity merely encourages the clash of regimes. The choice of frame, domestic, regional or international, determines the decision, where the danger is that each will seek to make its law govern the whole and to transform its preference into the general preference. Law and courts become part of the problem, not of the solution. In these circumstances, the focus of courts should be on mechanisms by which to achieve the accommodation between conflicting values and interests in international society, and not on the triumph of one set of institutions or norms over another.

In this respect, it is worth contrasting the decisions of the European courts with the opinions of the Advocates General delivered to assist the judges in this litigation.⁷⁹ Writing to assist the ECJ in ECJ *Kadi*, Advocate General Maduro notes the autonomy of the European Community legal order,⁸⁰ but immediately qualifies this with the statement that ‘this does not mean...that the Community’s municipal legal order and the international legal order pass by each other like ships in the night’.⁸¹ The core of his approach is to encourage a form of continuing dialogue between legal orders, stating that ‘[i]n an increasingly interdependent world, different legal orders will have to endeavour to accommodate each other’s jurisdictional claims’.⁸² He was firm that ‘courts ought not to be institutionally blind’, could not always claim a monopoly on determining how certain fundamental interests should be reconciled and should, where possible, recognise the authority of institutions, such as the Security Council, that were sometimes better placed to weigh those fundamental

⁷⁶ *ibid.*, [42].

⁷⁷ *ibid.*, [23].

⁷⁸ To date, the Ombudsperson has entered into arrangements for access to classified or confidential information with 15 states including the UK and France. The US has expressed willingness, and demonstrated an ability, to share confidential information on an ad hoc basis.

⁷⁹ Opinion of Advocate General Maduro, *Kadi v Council of the European Union*, 16 January 2008; Opinion of Advocate General Bot. *European Commission and Council v Kadi*, 19 March 2013.

⁸⁰ Opinion of Advocate General Maduro, *Kadi v Council of the European Union*, 16 January 2008, [21], [37].

⁸¹ *Ibid.* [22].

⁸² *Ibid.* [44].

interests.⁸³ It was Advocate General Maduro, rather than the ECJ itself, that proposed the application of an equivalence principle such as that applied in the famous *Solange* case,⁸⁴ promising respect for the primacy of Security Council resolutions on the condition that fundamental rights benefited from an equivalent degree of protection at the international level.⁸⁵ The flip-side was that, where the test of equivalence was not met, the Advocate General maintained the right to invalidate EU mechanisms giving effect to Security Council resolutions, and indeed resolved in his Opinion that the relevant regulation should be annulled in the case before the Court.⁸⁶

Advocate General Bot picked up where Advocate General Maduro left off in his Opinion delivered prior to the CJEU decision. In his opinion in *Kadi II* on the extent and intensity of review, Advocate General Bot emphasised the need to take account of the origin and context of the EU act it is reviewing. In particular, he noted the need to recognise ‘the fact that inclusion on the list is decided on the basis of a centralised, universal procedure at the level of the United Nations or that such a decision is based on a summary of reasons drawn up by the Sanctions Committee on the basis of information or evidence which is provided to it by the State(s) which made the listing request, in most cases in confidence, and which is not intended to be made available to the EU institutions’.⁸⁷ Advocate General Bot paid express attention to the improvements introduced following ECJ *Kadi*, in particular the establishment of the Office of the UN Ombudsperson. He recognised that ‘[t]his process reflects a realization within the United Nations that, despite confidentiality requirements, the listing and delisting procedures must now be implemented on the basis of a sufficient level of information, that the communication of that information to the person concerned must be encouraged, and that the statement of reasons must be adequately substantiated’.⁸⁸ He held that the Ombudsperson helped to guarantee that listings are based on sufficiently serious evidence and recognised that ‘excessively high regional or national requirements could, in truth, prove to be counterproductive’ if states were ‘less inclined in future to transmit confidential information to the Sanctions Committee’.⁸⁹ While emphasizing that the solution was not to give *carte blanche* to the Security Council, he advocated a position of ‘mutual confidence and effective collaboration’, arguing that ‘an effective global fight against terrorism requires confidence and collaboration between the participating international, regional and national institutions, rather than mistrust’.⁹⁰

⁸³ Ibid. [44].

⁸⁴ *Solange I* (1974) BVerfGE 37; *Solange II* (1986) BVerfGE 73.

⁸⁵ Opinion of Advocate General Maduro, *Kadi v Council of the European Union*, 16 January 2008; [44], [54].

⁸⁶ Ibid. [56].

⁸⁷ Ibid [75].

⁸⁸ Ibid [82].

⁸⁹ Ibid [84].

⁹⁰ Ibid [85].

VI. CONCLUSION

Both the Security Council and courts are faced with the difficult task of negotiating (albeit indirectly) principles to determine the extent to which they should claim and cede power. In this note, I have argued that the Security Council would be unwise to discount or rebuff the 'invitation' by the ECJ in *Kadi* to share decision-making authority. It is not enough for the Security Council to rely on formal legality and supremacy to achieve compliance with its commands. The general cloud of suspicion over international institutions and international law more generally based on a perceived lack of accountability or 'democratic deficit' can be attenuated where domestic or regional institutions with closer links to citizen participation and concerns are built into the decision-making process.⁹¹ Moreover, domestic and regional courts can play an important role in translating fundamental domestic or regional values to the international context.⁹² These hybrid national/international norms will serve to feed into a broader dialogue about applicable principles. This in turn will serve to lend greater legitimacy to decision-making in accordance with these principles both from an international and domestic perspective, through a process of 'particularization and justification' of fundamental values in the context of global governance.⁹³

In this respect, the Security Council should recognise the capacity to increase its power and influence by enlisting (or even merely tolerating) the involvement of domestic and regional institutions. The essence of power-sharing is that it does not simply dilute, but can strengthen the effectiveness and legitimacy of legal authority by permitting a more efficient distribution and organization of governmental functions, and increasing the acceptability of decision-making. Yet European courts also need to recognise that there are limits to this power-sharing arrangement. The standards of effectiveness and legitimacy provide both a rationale but also a *limitation* to power-sharing where it does not advance either of these goals. Domestic and regional institutions should be careful not to assume excessive authority in decision-making about matters of international peace and security. Such institutions have the potential to raise rather than reduce legitimacy concerns where they impose unreasonable burdens on the international legal order. Moreover, it is not sufficient for questions of international significance to be decided according to national or regional constitutional principles, which after all reflect values and interests of national or regional constituents. Questions of legal authority have to be discussed in a way that takes into account the structural connections between national and international law. Principles for the allocation of decision-making authority

⁹¹ M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in J. Dunoff and J. Trachtman, *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009).

⁹² M.P. Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism' in J. Dunoff and J. Trachtman, *Ruling the World? Constitutionalism, International Law and Global Governance* (2009), 368.

⁹³ K. Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *NYU Journal of International Law and Politics* 501, 535.

about international peace and security must be conceived within a cosmopolitan, not a national or regional frame.⁹⁴

In considering legal techniques for the allocation of authority, our focus should not be on formalistic or structural techniques such as supremacy (which provides disproportionate power to international institutions) or subsidiarity (which provides disproportionate power to domestic or regional institutions), but on the deeper normative goals of enhancing the community acceptability and efficacy of decision-making. In the context under discussion in this article, both Council and courts are walking a tightrope as to the extent to which they should claim and cede power. Over-claiming by the Security Council will reduce the legitimacy of its decision-making, while over-claiming by domestic or regional institutions has the capacity to reduce the effectiveness of decision-making about international peace and security. Appropriately configured principles for power-sharing should not be regarded as unwelcome constraints. Instead, they should be recognised as both balancing prop and safety net that will ultimately enhance the power, effectiveness and influence of Security Council and courts alike.

94 M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in J. Dunoff and J. Trachtman, *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009).