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The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?

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Abstract

The Kadi judgment of the European Court of Justice has provoked severe criticism. The Court's dualist approach was described as unfaithful to its traditional fidelity to public international law and inserting itself in the tradition of nationalism. However, we argue that the Court indicated a possible opening to allow for precedence of Security Council measures, if sufficient safeguards for human rights are created. Moreover, it seems that the Security Council has risen to the challenge by introducing a strong review mechanism. Though this mechanism cannot exclude all possible conflicts between EU and UN law, it can significantly reduce the risk of divergent decisions.

1 Introduction

The *Kadi* case[1] is perhaps the most visible and interesting case of the European Court of Justice (CJEU) for external relations in recent years. The Court essentially had to decide whether a United Nations Security Council resolution should enjoy primacy over EU law. We all know that the Court did not allow for this primacy.

This judgment and the Court's reasoning have provoked severe criticism. The Court's dualist approach was described as unfaithful to its traditional fidelity to public international law[2] and inserting itself in the tradition of nationalism.[3] However, we

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1 Case C–402/05 P and C–415/05, P. *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I–6351.

2 De Búrca, 'The European Court of Justice and the International Legal Order After *Kadi*', [2010] 51 *Harvard Int'l LJ* 1, at 44 ff.

3 Fassbender, 'Triepel in Luxemburg. Die dualistische Sicht des Verhältnisses zwischen Europa- und Völkerrecht in der "Kadi-Rechtsprechung" des EuGH als Problem des Selbstverständnisses der Europäischen Union', [2010] *Die Öffentliche Verwaltung* 333, at 340. See also Tomuschat, 'The Kadi Case:

would underline the opening that the Court indicated which would allow for precedence of Security Council measures, if sufficient safeguards for human rights were created. Most interestingly, it seems that the Security Council has recently risen to the challenge by introducing a strong review mechanism. Though this mechanism cannot exclude all possible conflicts between EU and UN law it can significantly reduce the risk of divergent decisions.

After a short overview of the General Court's (GC's) reasoning in the first instance judgment and of the judgment on appeal, we will show how far the Court's approach should be characterized as dualist, or rather as a variation of the so-called 'Solange' concept. This concept was developed by the German Constitutional Court and also applied by the European Court of Human Rights. Against this background, we will address the review mechanism introduced by the Security Council after *Kadi*.

2 The *Kadi* Judgment

The basic facts of the *Kadi* case are as follows: In the UN Security Council Kadi was identified as a possible supporter of Al-Qaida. Therefore, he was singled out for sanctions, in particular for an assets freeze. The EU transposed this UN sanction by a regulation which Kadi then attacked before the EU Courts. At first instance, the GC refused to review the EU regulation because this would amount to a review of the measure of the Security Council. Nevertheless, the GC examined whether the Security Council had respected *ius cogens*, in particular certain fundamental rights. But the General Court did not find an infringement of this standard.

In its judgment on appeal, the CJEU pursued a different path. It reviewed the lawfulness of the EU regulation transposing the resolution.[4] Its central argument was that the protection of fundamental rights forms part of the very foundations of the Union legal order.[5] Accordingly, *all* Union measures must be compatible with fundamental rights.[6] The Court reasoned that this does not amount to a review of the lawfulness of the Security Council measures. The review of lawfulness would apply only to the Union act that gives effect to the international agreement at issue and not to the latter as such.[7]

Having established that, the review for compliance with fundamental rights was a relatively simple task. The claimant had not been informed of the grounds for his inclusion in the list of individuals and entities subject to the sanctions. Therefore he had not been able to seek judicial review of these grounds, and consequently his right

What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?', [2009] *Yrbk European L* 654, at 658 ff. and 663; Cannizzaro, 'Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi Case', [2009] *Yrbk European L* 593, at 597 ff.

4 *Kadi and Al Barakaat*, *supra* note 1, at paras 290 ff.

5 *Ibid.*, at paras 303 ff.

6 *Ibid.*, at paras 281 ff.

7 *Ibid.*, at para. 286.

to be heard as well as his right to effective judicial review[8] and the right to property[9] had been infringed.

3 Dualist but Ready to Compromise?

In contrast to the judgment of the GC,[10] the judgment of the CJEU in *Kadi* has been associated with a dualist conception of the interplay between the international and the Union legal order. It is seen as underscoring and defending the autonomy of EU law.[11] On this point, the Court followed Advocate General Poiares Maduro's Opinion[12] holding that 'obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty'.[13] However, deriving from this a general hostility towards public international law would be unjust. It would disregard the complex argument the Court developed and ignore the nuanced signals it sent.

In particular, it should be recalled that at the outset it was not clear whether the EU, not being a member of the UN, was bound at all by UN SC measures. Although the EU did not assume the powers of its Member States in the UN system, as it did with regard to the GATT,[14] the Court nevertheless considered that the EU must respect the undertakings given in the context of the UN and take due account of the resolution.[15]

8 *Ibid.*, at paras 384 ff.

9 *Ibid.*, at paras 368 ff, referring to the judgment of the ECtHR in App. No. 28856/95 *Jokela/Finland* of 21 May 2002, Reports of Judgments and Decisions 2002-IV, para. 45 and the cited case law as well as para. 55.

10 See Tomuschat, *supra* note 3, at 657.

11 See, e.g., de Búrca, *supra* note 2, at 2; Fassbender, *supra* note 3, at 333; and Pavoni, 'Freedom to Choose the Legal Means for Implementing UN Security Council Resolutions and the ECJ *Kadi* Judgement: A Misplaced Argument Hindering the Enforcement of International Law in the EC', *Yrbk European L* (2009) 627, at 630. Critical of still using this terminology are von Bogdandy, 'Let's Hunt Zombies', *ESIL Newsletter* 2, Guest Editorial (Sept. 2009) and Krenzler and Landwehr, '"A New Legal Order of International Law": On the Relationship Between Public International Law and European Union Law After *Kadi*', in U. Fastenrath (ed.), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (2011), at 1004, 1022.

12 AG Poiares Maduro stated, 'The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community': Opinion in *Kadi and Al Barakaat*, *supra* note 1, at para. 24.

13 *Kadi and Al Barakaat*, *supra* note 1, at para. 285; for further evidence of the Court's rather dualistic approach cf. de Búrca, *supra* note 2, at 24.

14 The GATT has been the only instance where the Court has accepted a legal succession (see Cases 21–24/72 *International Fruit Company et al.* [1972] ECR 1219, at paras 10–18) though it might have been possible to apply this concept to the ECHR as well: see for this point Ress, 'Die EMRK und das Europäische Gemeinschaftsrecht. Überlegungen zu den Beziehungen zwischen den Europäischen Gemeinschaften und der Europäischen Menschenrechtskonvention', [1999] *ZeuS* 471; Sobotta, 'Sources of Fundamental Rights', in A. Weber (ed.), *Fundamental Rights in Europe and North America* (2000), at 83, 88 ff; see also Kokott, 'Die Institution des Generalanwalts im Wandel: Auswirkungen der Rechtsprechung des EGMR zu ähnlichen Organen der Rechtspflege in den Mitgliedstaaten', in J. Bröhmer (ed.), *Internationale Gemeinschaft und Menschenrechte. Festschrift für Georg Ress* (2005), at 577, 593 ff.

15 *Kadi and Al Barakaat*, *supra* note 1, at paras 292 ff.

The choice of a somewhat dualist approach in this particular context has to be understood as a reaction to a specific situation that may occur in multilevel systems. In such systems it is possible that the level of protection of fundamental rights guaranteed by a higher level does not attain the level of protection the lower level has developed and considers indispensable. Refusing to accept the primacy of the higher level can be a proper means of responding to this deficiency. The insufficient protection of fundamental rights at UN level[16] therefore required the adoption of a dualist conception of the interplay of EU law and international law.[17]

The Court found itself in a comparable situation in the 1970s, its counterpart at that time being the German Bundesverfassungsgericht. The latter considered the level of fundamental rights protection available at EU level to be lower than at national level. This was only natural in view of the historical stage of development of the European Economic Community and of the CJEU at the time. The Bundesverfassungsgericht therefore decided to reserve to itself the right to review Union action for its conformity with national fundamental rights as long as there was insufficient protection at EU level.[18] This is the so-called *Solange I* decision, derived from the German for 'as long as'. Twelve years later, taking account of the positive development of EU fundamental rights protection, the Bundesverfassungsgericht declared that it no longer needed to perform this review, as long as the EU kept to its elevated standard of protection. This is referred to as its *Solange II* decision.[19]

The European Court of Human Rights (ECtHR) followed comparable reasoning in its *Bosphorus* decision where it chose to abstain from exercising control with regard to EU acts.[20] Quite remarkably, it chose to pursue a different path when it declared itself incompetent to review UN SC measures. There that Court decided to deny its competence without keeping the safety net of a 'Solange caveat'.[21] Some commentators criticized this decision severely.[22]

In his opinion on *Kadi* Advocate General Maduro had pointed out the possibility of adopting a *Solange*-type solution.[23] The Court was more prudent but has left the door

[16] But see Scheinin, 'Is the ECJ Ruling in Kadi Incompatible with International Law?', [2009] *Yrbk European L* 637 who argues that the targeted sanctions regime of the SC infringes the human rights guaranteed at the level of the UN.

[17] In that sense see also Tomuschat, *supra* note 3, at 660.

[18] BVerfGE 37, 271 [1974] *(Solange I)*.

[19] BVerfGE 73, 339 [1986] (*Solange II*).

[20] App. No. 45036/98, *Bosphorus/Ireland*, judgment of 30 June 2005, ECHR 2005-VI; see on that aspect of this case Haratsch, 'Die Solange-Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte', [2006] *ZaöRV*, 927.

[21] App. Nos. 71412/01 & 78166/01, *Behrami and Behrami v. France; Saramati v. France, Germany and Norway*, decision of 2 May 2007. But see also App. No. 27021/08 *Al-Jedda/United Kingdom*, judgment of 7 July 2011, ECHR 2011, at para. 102, and App. No. 10593/08, *Nada/Switzerland*, judgment of 12 Sept. 2012, at paras 171, 176, and 212.

[22] See, e.g., Milanović and Papić, 'As Bad as It Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law', 58 *ICLQ* (2009) 267.

[23] Opinion of AG Poiares Maduro in *Kadi and Al Barakaat*, *supra* note 1, at para. 54.

open for such an approach.[24] It examined fairly extensively the argument presented by the Commission that the Court must not intervene since Mr Kadi had had, through the re-examination procedure before the Sanctions Committee, an acceptable opportunity to be heard within the UN legal system. The Court responded that such an immunity from EU jurisdiction 'appears unjustified, for clearly *that* re-examination procedure does not offer the guarantees of judicial protection'.[25] By referring solely to the procedure in question in the proceedings, the Court implied that the position could be different with regard to procedures that do offer the guarantees of judicial protection.[26]

This proves that the Court did not follow a strictly dualist approach in its judgment. In that case there would have been no reason to discuss the argument as to an alleged *Solange II* situation in substance. Pointing to the autonomy of the Union legal order and the competence of the CJEU within that legal order to review the validity of EU acts would have sufficed to exclude, as a matter of principle, the mere possibility of a *Solange II* approach.[27]

The Court's decision not, at least for the time being, to accord precedence to SC measures is understandable, if not indispensable in regard to another *Solange* relationship; that between EU Member States' legal orders and the Union legal order. Should the EU convey the impression of sacrificing basic constitutional guarantees by accepting the general primacy of Security Council measures, Member States, in particular their constitutional courts, would probably feel tempted to take safeguarding these guarantees into their own hands. From an international perspective this would be even worse: It would not only question the primacy of public international law within the EU legal order but also call into question the primacy of EU law over national law.[28] This would undermine the whole concept of integration through law. Also from this perspective *Kadi* could hardly have been decided differently.

4 Subsequent Developments at the Security Council – is it Time for Solange II?

To envisage a *Solange II* relationship between the EU and the SC, the judicial protection at the UN level has to improve substantially in comparison to the situation examined

[24] See in this regard also Rosas, 'Counter-Terrorism and the Rule of Law: Issues of Judicial Control', in A.M. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism, International Law and Practice* (2012), at 83, 109 ff; Cannizzaro, *supra* note 3, at 596.

[25] *Kadi and Al Barakaat*, *supra* note 1, at para. 322 (emphasis added).

[26] See in that sense also Eeckhout, 'Kadi and Al Barakaat: Luxembourg is not Texas – or Washington DC', *EJIL: Talk!*, 25 Feb. 2009, available at; www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/(last accessed 31 May 2012); De Sena and Vitucci, 'The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values', 20 *EJIL* (2009) 193, at 224; for a different opinion see de Búrca, *supra* note 2, at 25 and 44; Halberstam and Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual rights in a Plural World Order', 46 *CMLRev* (2009) 13, at 60 ff.

[27] See in this sense Ziegler, 'Strengthening the Rule of Law but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights', 9 *Human Rts L Rev* (2009) 288, at 300 ff.

[28] See van Rossem, 'Interaction between EU Law and International Law in the Light of Intertanko and Kadi: the Dilemma of Norms Binding the Member States but not the Community', 40 *Netherlands Yrbk Int'l L* (2009) 183, at 197; Halberstam and Stein, *supra* note 26, at 63.

by the Court in *Kadi*. As there have been improvements, the question is whether they could be sufficient.

The SC began, in 2008, by introducing the narrative summary. It is provided and published for every listing, summarizing the main reasons for an inclusion in the list.[29]

This mechanism was applied in the second *Kadi* case. Before the Commission again froze the assets of Mr Kadi he was given the opportunity to comment on the narrative summary provided by the SC.[30] However, the General Court was not satisfied. Regarding the rights of defence, the GC took the view that they 'have been "observed" only in the most formal and superficial sense',[31] since the Commission did not foresee any possibility of departing from the Sanctions Committee's findings in light of Mr Kadi's observations. Moreover, he did not have access to the evidence against him concerning his alleged relationship to Al-Qaida.[32] Given that he could access only a summary of reasons, he was not in a position effectively to challenge any of the allegations against him.[33] This breach of the rights of defence also affected Mr Kadi's rights to effective judicial review[34] and property.[35] The appeal against this judgment is currently pending.[36]

Meanwhile, in 2009, the SC created the office of an independent Ombudsperson. In 2010 Kimberly Prost, a former judge at the International Criminal Tribunal for the former Yugoslavia, was appointed to this position. Her task is to process the requests of individuals or entities to be deleted from the list. The Ombudsperson does not decide on her own; rather she collects data, communicates with petitioners, and drafts reports to the Sanctions Committee. If the request is refused, the Ombudsperson informs the petitioner of the reasons for refusal, provided that they are not confidential.[37]

Initially, only the Sanctions Committee was competent to decide on a possible removal from the list. During this stage, the Committee had to decide unanimously to delist a petitioner. Consequently, any individual state could prevent a removal from the list in spite of the position of the Ombudsperson.

It should be noted that the GC, in an *obiter dictum* to the second *Kadi* case, did not consider these improvements sufficient.[38]

[29] Point 13 of SC Res. 1822 (2008) of 30 June 2008; the narrative summaries are published at: www.un.org/sc/committees/1267/narrative.shtml (last accessed 31 May 2012).

[30] Case T–85/09, *Kadi v. Commission,* [2010] ECR II–5177, at paras 49 ff.

[31] *Kadi v. Commission*, *supra* note 30, at para. 171.

[32] *Ibid.*, at para. 173.

[33] *Ibid.*, at para. 177.

[34] *Ibid.*, at para. 181.

[35] *Ibid.*, at paras 192 ff.

[36] Joined Cases C–584/10 P, C–593/10 P & C–595/10 P, *Commission et al. v. Kadi*, OJ (2011) C72/9.

[37] Points 20 ff of SC Res. 1904 (2009) of 17 Dec. 2009 and its Annex II.

[38] *Kadi v. Commission*, *supra* note 30, at para. 128. Kirschner, 'Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al-Qaida and Taliban Sanctions Regime?', [2010] *ZaöRV* 585, at 604 ff is also critical in that respect. Rosas, *supra* note 24, agrees with this assessment; at 109 he characterizes this stage of the mechanism as half-hearted.

However, in June 2011 the Security Council strengthened the Ombudsperson's powers significantly.[39] Since then, a recommendation to delist in principle becomes effective if it is not rejected by *consensus* in the Sanctions Committee within 60 days. In the absence of consensus, this outcome can be avoided only if a Committee member requests referral to the SC. This means that delisting will require the votes of nine out of the 15 members of the SC and can be blocked by the veto of any of the five permanent members.[40] As the SC usually publishes its deliberations, opposition to a recommendation of the Ombudsperson could engage the political responsibility of the state in question. It might even open the way to judicial remedies before the courts of that state.

This amended procedure responds to some extent to a number of concerns voiced by the Court, especially regarding the grounds for listing. Though a listing may still in part be based on confidential information, why a person is or stays listed no longer remains completely secret.[41] Additionally, petitioners now can themselves or through their chosen representatives assert their rights before the Ombudsperson.[42]

Moreover, the Ombudsperson seeks to guarantee fair proceedings and transparent standards to analyse information on the individuals concerned consistently and objectively.[43] The yardstick for the examination is 'whether there is sufficient information to provide a reasonable and credible basis for the listing'.[44]

Her track record for the first 27 cases is impressive: Until 31 May 2012, in 13 cases the applicants were delisted, in one case the delisting was denied, in another case the request for delisting was withdrawn. 12 more cases are currently under investigation or already with the Committee.[45]

It is not inconceivable that the independent recommendations of the Ombudsperson may amount to a quasi-judicial role that could provide a counter-balance to the diplomatic nature of the proceedings within the Sanctions Committee.[46] Already her recommendations have politically and practically acquired some binding effect on the Sanctions Committee, making derogation difficult.

However, her role has not attained the quality of a court of law,[47] in particular because the Committee or the SC can reserve the final decision for itself. In the latter

[39] Points 22 and 23 of SC Res. 1989 (2011) of 17 June 2012. Nevertheless, it should also be noted that sanctioned persons related to the Taliban were at the same time completely removed from the remit of the Ombudsperson.

[40] The former Special Rapporteur of the Human Rights Council on human rights and counter terrorism, Martin Scheinin, considered this an important weakness of the new rules: see www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11191&LangID=E (last accessed 31 May 2012).

[41] Cf. *Kadi and Al Barakaat*, *supra* note 1, at para. 325.

[42] Cf. *ibid.*, at para. 324.

[43] Points 23 and 25 of the Report of the Office of the Ombudsperson pursuant to SC Res. 1904 (2009), UN Doc. S/2011/29 of 24 Jan. 2011.

[44] See www.un.org/en/sc/ombudsperson/approach.shtml (last accessed 31 May 2012).

[45] See www.un.org/en/sc/ombudsperson/status.shtml (last accessed 31 May 2012).

[46] See in this regard also Tomuschat, *supra* note 3, at 661 ff, who believes that an essentially diplomatic procedure can still be tailored in a way to provide sufficient legal protection.

[47] On the necessary attributes of a Court see *Kadi and Al Barakaat*, *supra* note 1, at paras 323–325, and also App. No. 22414/93, *Chahal v. UK*, judgment of 15 Nov. 1996, Reports 1996-V, at 131.

case any of the permanent members can prevent a delisting without having to provide reasons.

Moreover, as her recommendations to the Sanctions Committee are not accessible, it cannot be assessed whether the Ombudsperson applies clear legal standards, equivalent to the fundamental rights guaranteed within the EU. Therefore, it is unclear whether the CJEU would consider this review sufficient to refrain from controlling implementing acts of the EU.[48]

5 Exhaustion of 'Local' Remedies

Nevertheless, this procedure could be employed to reduce significantly the risk of conflict between UN sanctions and EU judicial protection. This could be achieved if the action in the EU Courts was necessarily preceded by an unsuccessful petition to the Ombudsperson.[49] A petition would enable the UN Ombudsperson, being closer to the case, to work towards a resolution of the problem at the source.[50] Cases without sufficient grounds for a listing should be resolved by her review. And they should be resolved much faster than in the EU Courts: The completed reviews took between six and 13 months. Mr Kadi, on the other hand, has already spent 10 years before the EU Courts.

Even if such a review does not result in a delisting it generates information on the reasons for the listing. The Ombudsperson will collect all the available information and allow the petitioner to comment, at least on the non-confidential parts. She and the Committee will evaluate this information and provide the petitioner with a reasoned decision. In the context of subsequent judicial proceedings the EU Courts could require the applicant to produce the communication he had with the Ombudsperson, in particular any reasons provided for maintaining the listing. They could use this information to examine the case. If the decision to maintain the listing at UN level is taken rationally, it should be possible to confirm it most of the time in the EU Courts.

Problems are likely to arise if the listing cannot be justified exclusively on the basis of non-classified information but also depends on confidential information. In this regard, the ECtHR considers that the requirements of a fair trial are not satisfied if detention is based solely or to a decisive degree on secret material.[51] It remains to be seen whether the EU Courts will develop a similar standard by which to assess targeted sanctions.[52]

[48] Fremuth, 'Ein Prozess … : Zum Ausgleich zwischen der effektiven Bekämpfung des Terrorismus und der Beachtung der Menschenrechte in der Sanktionspraxis des Sicherheitsrates', [2012] *Die öffentliche Verwaltung* 81, at 87 ff. is sceptical in this regard.

[49] Scheinin, *supra* note 40, demands additional measures to strengthen the Ombudsperson before this can be expected.

[50] Such reasoning also underlies the local remedies rule in international human rights law and the law of diplomatic protection.

[51] App. No. 3455/05, *A v. UK*, judgment of 19 Feb. 2009, ECHR 2009, at 220.

[52] The US standard can be seen in the decision of the US District Court for the District of Columbia of 19 Mar. 2012 in *Kadi v. Geithner,* available at: https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2009cv0108-56 (last accessed 31 May 2012).

The question remains how a requirement for a preliminary review by the Ombudsperson can be introduced into the judicial procedure of the EU Courts. At first view a requirement to exhaust remedies provided by another legal system, in this case the UN, is counterintuitive under EU law. The right to bring an action before the EU Courts is provided for in the Treaty and it is also an expression of the fundamental right to effective judicial protection, enshrined in Article 47 of the EU Charter of Fundamental Rights. Therefore, it is doubtful whether even the legislator could require applicants to exhaust the UN review procedure before addressing the EU Courts.

Nevertheless, some inspiration may be found in the case law of the GC on similar sanctions that the EU imposes because competent Member State authorities have identified the persons or associations in question. In these cases it must be assessed whether the EU decision to introduce or maintain a sanction is justified. In this regard, the GC restricts the scope of substantial judicial review until Member States' remedies are exhausted. Because the sanctions are based on Member States' decisions the EU institutions should afford precedence to matters of internal procedure when assessing the need to maintain a sanction.[53] This case law is based on the principle of loyal cooperation between EU institutions and Member States.[54]

UN sanctions could be treated similarly. It could be considered that the EU acts appropriately, if it waits for the result of a review by the Ombudsperson before re-examining whether sanctions should be maintained. Although the EU principle of loyal cooperation as such does not apply to relations with the SC, the Court has already recognized similar obligations in the first *Kadi* case. There, it found that the EU must respect the undertakings given in the context of the UN and take due account of the resolution.[55] This finding is based on the Treaties: According to Articles 3(5) and 21(1) TEU the EU respects the principles of the UN Charter. Additionally, Article 220 TFEU requires that the Union establish all appropriate forms of cooperation with the organs of the UN.

Moreover, this solution would be another expression of the well established local remedies rule in international human rights law and the law of diplomatic protection. This rule has already inspired the Court in another context, namely with regard to accession to the European Convention on Human Rights and Fundamental Freedoms. In a discussion paper, the CJEU stressed that the ECtHR should not decide on the conformity of an act of the Union with the Convention without the CJEU first having had an opportunity to give a definitive ruling on the point.[56] Accordingly, the draft accession agreement includes provisions that would allow such a ruling.[57]

[53] Case T–348/07, *Al-Aqsa v. Council II*, [2010] ECR II–4575, at para. 161, and the case law cited therein.

[54] *Ibid.*, at paras 80 and 163, and the case law cited therein.

[55] *Kadi and Al Barakaat*, *supra* note 1, at paras 292 ff.

[56] Discussion document of the CJEU on certain aspects of the accession of the EU to the ECHR Luxembourg, 5 May 2010, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf (last accessed 31 May 2012). See also the Joint communication from Presidents Costa and Skouris of 24 Jan. 2011, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf, point 2 (last accessed 31 May 2012).

[57] See Art. 3(6) of the Draft legal instruments on the accession of the EU to the ECHR of 19 July 2011, CDDH-UE(2011)16, and point 57 ff. of the report to the draft agreement, available at: www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_documents/CDDH-UE_2011_16_final_en.pdf (last

The local remedies rule activates the self-healing forces of the system concerned. It also helps to prepare the case for judicial review on another level because it promotes the assessment of the relevant facts and the development of legal reasoning before the judicial or, in this case, quasi-judicial institution near to the source of the controversy. This is a reasonable application of the principle of subsidiarity. Obviously, the analogous application advanced here would add a new aspect to this concept: exhaustion of international rather than local remedies!

6 Conclusions

It remains to be seen whether the CJEU will use the opportunity offered by the second *Kadi* case specifically to address the review procedure of the SC. Strictly speaking, such a comment would not be necessary for the Court's decision. After all, the review procedure was only introduced and refined while the case was already pending in Luxembourg. It should also be borne in mind that the Court has not yet taken a position on the case law of the GC with regard to Member States' remedies.

Nevertheless, a conciliatory move towards the SC would not only improve international relations and demonstrate that the CJEU gives proper consideration to the measures against terrorism. It could also help to strengthen the review mechanism. Regardless of possible substantial improvements, its most obvious weakness is that it is limited to Al-Qaida sanctions. None of the other individual sanctions regimes, e.g. of the Taliban,[58] Somalia,[59] Côte d'Ivoire,[60] or Congo,[61] come under the competence of the Ombudsperson. Actions against such sanctions can be introduced in the EU Courts.[62]

Finding a proper balance between constitutional core values and effective international measures against terrorism is not easy. However, the developments following the *Kadi* case demonstrate the intention of the relevant actors to find a workable balance. Already the current system is a huge improvement on the initial mechanism. Therefore, we are optimistic that the balance will be found.

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accessed 31 May 2012). On this provision see Ladenburger, 'FIDE 2012 – Session on "Protection of Fundamental Rights post-Lisbon – The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions"', available at: www.fide2012.eu/index.php?doc_id=88, at 48 ff (last accessed 31 May 2012).

58 Res. 1988 (2011). When the review mechanism was strengthened by Res. 1989 (2011) the Taliban sanctions were split off from the Al-Qaida sanctions and excluded from the remit of the Ombudsperson. However, even before this split the Ombudsperson received no petition from any person or organization on this part of the list.

59 Res. 1844 (2008).

60 Res. 1572 (2004).

61 Res. 1596 (2005).

62 Currently Case C–478/11 P., *Gbago and others*, OJ (2012) C6/2, concerning sanctions imposed in relation to Côte d'Ivoire is pending in the CJEU. However, this appeal only raises the question whether the GC was correct to consider the action out of time. It seems that most other individual sanctions cases currently pending in the GC do not concern sanctions mandated directly by the SC.