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

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

Gráinne de Búrca *

Abstract

This Article examines the response of European courts—and in particular of the European Court of Justice (“ECJ”)—to the dramatic challenges to the U.N. Security Council’s anti-terrorist sanctions regime recently brought before the courts. The ECJ in *Kadi* annulled the European Community’s implementation of the Security Council’s asset-freezing resolutions on the ground that they violated European Union (“EU”) norms of fair procedure and of property protection. Although *Kadi* has been warmly greeted by most observers, I argue that the robustly pluralist approach of the ECJ to the relationship between EU law and international law in *Kadi* represents a sharp departure from the traditional embrace of international law by the European Union. Paralleling in certain striking ways the language of the U.S. Supreme Court in *Medellin v. Texas*, the approach of the ECJ in *Kadi* carries risks for the EU and for the international legal order in the message it sends to the courts of other states and organizations contemplating the enforcement of Security Council resolutions. More importantly, the ECJ’s approach risks undermining the image the EU has sought to create for itself as a virtuous international actor maintaining a distinctive commitment to international law and institutions.

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INTRODUCTION

In September 2008, the European Court of Justice (“ECJ”) delivered its judgment in *Kadi & Al Barakaat International Foundation v. Council and Commission*,¹ arguably its most important judgment to date on the subject of the relationship between the European Community (“EC”) and the international legal order. This high-profile case involved a challenge by an individual to the EC’s implementation of a U.N. Security Council resolution, which had identified him as being involved with terrorism and mandated that his assets be frozen. The ECJ delivered a powerful judgment annulling the relevant implementing measures and declaring that they violated fundamental rights protected by the EC legal order. Human rights advocates hailed this judgment,² those concerned about the Security Council’s accountability were largely delighted, and European Union (“EU”) scholars and actors interested in strengthening the autonomy of the EU legal order felt reassured.³ However, this Article argues that despite the welcome reception the judgment received on these grounds, its nature and reasoning should give serious pause for thought on other grounds. In particular, the judgment represents a significant departure from the conventional presentation and widespread understanding of the EU as an actor maintaining a distinctive commitment to international law and institutions.

In adopting a sharply dualist⁴ tone in its approach to the international legal order and to the relationship between EC law and international law, the ECJ identified itself in certain striking

¹ Joined Cases C-402 & 415/05P, *Kadi & Al Barakaat Int’l Found. v. Council & Comm’n*, 2008 E.C.R. I-6351 [hereinafter *Kadi*]. For an extensive commentary on the judgment and other related European Court of Justice rulings on anti-terrorist sanctions, see P. Takis Tridimas & Jose A. Gutierrez-Fons, *EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?*, 32 *FORDHAM INT’L L.J.* 660 (2009).

² See, e.g., Katja S. Ziegler, *Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights*, 9 *HUM. RTS. L. REV.* 288 (2009). See also EU Court Delivers Landmark ‘Kadi’ Judgment on Fundamental Rights, Sept. 3, 2008, http://www.sarahludford.libdems.org.uk/news/001091/eu_court_delivers_landmark_kadi_judgment_on_fundamental_rights.html (providing comments of a British Member of the European Parliament on this aspect of the case).

³ See, e.g., Piet Eeckhout, *Kadi and Al Barakaat: Luxembourg is Not Texas—or Washington DC*, *EJIL TALK!*, Feb. 25, 2009, <http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/>; Guy Harpaz, *Judicial Review by the European Court of Justice of UN ‘Smart Sanctions’ Against Terror in the Kadi Dispute*, 14 *EUR. FOREIGN AFF. REV.* 65 (2009); Bjorn Kunoy & Anthony Dawes, *Plate Tectonics in Luxembourg: The Ménage a Trois Between EC Law, International Law and the European Convention on Human Rights Following the UN Sanctions Cases*, 46 *COMMON MKT. L. REV.* 73 (2009).

⁴ The term “dualist,” like the term “monist,” is a complicated and contested one. It is used in this paper to refer to a conception that views international law and domestic law as distinct and separate legal spheres, with the latter setting the conditions under which international law enters the domestic system, and dictating the legal consequences of such domestication of international law. In more technical legal parlance, however, the term dualist is generally used to refer to a legal system in which international law requires transposition before it becomes part of that domestic legal order. For further discussion of dualist discourse in international law, see Gráinne de Búrca & Oliver Gerstenberg, *The Denationalization of Constitutional Law*, 47 *HARV. INT’L. L.J.* 243 (2005).

ways with the reasoning and approach of the U.S. Supreme Court in recent cases such as *Medellin v. Texas*,⁵ in which it asserted the separateness of international law from the domestic constitutional order and the absence of any domestic judicial role in shaping the relationship between the two. And although the two cases are quite different in many respects,⁶ the most striking feature of the ECJ's approach in *Kadi* is precisely its similarity to that of the U.S. Supreme Court in *Medellin* in addressing the larger question of the relationship between international law and the "domestic" legal order,⁷ as well as the way the ECJ's expression of that relationship abandons the reasoning and tone of some of its leading earlier judgments on the

⁵ *Medellin v. Texas*, 552 U.S. 491 (2008) [hereinafter *Medellin*]. This case, of course, dealt not with Security Council resolutions but with a judgment of the International Court of Justice ("ICJ"), which the Supreme Court found not to be enforceable in the United States without prior congressional action. See also *Sanchez Llamas v. Oregon*, 548 U.S. 331 (2006) (holding that Article 36 of the Vienna Convention on Consular Relations did not bestow a right to suppress evidence that was obtained after failing to inform a detainee of his Article 36 rights in a national court, because the Convention provides no remedies for violations of its provisions and leaves implementation to the domestic judgment of the state in conformity with its national laws and regulations); T. Alexander Aleinikoff, *Transnational Spaces: Norms and Legitimacy*, 33 YALE J. INT'L L. 479 (2008) (asserting that a "sensible approach" to the doctrine of "respectful consideration" of ICJ opinions, evinced by Justice Breyer's dissent in *Sanchez-Llamas*, would require the Supreme Court to reach the same decision as the ICJ on the use of the exclusionary rule, even though the ICJ opinion was not binding); Steven A. Koh, "Respectful Consideration" After *Sanchez-Llamas v. Oregon: Why the Supreme Court Owes More to the International Court of Justice*, 93 CORNELL L. REV. 243, 246 (2007) (arguing that a meaningful interpretation of the doctrine of "respectful consideration" requires the Supreme Court to accord greater deference to ICJ opinions, as Breyer's dissent urged).

⁶ The two cases involve very different kinds of international obligation—an international judgment upholding the procedural rights of defendants in *Medellin* and an international resolution which ignored any procedural rights for individuals in *Kadi*—and the reasons for refusing to give judicial effect to them were in that sense quite different. Nonetheless, the *Kadi* ruling goes further than *Medellin* in that, while the U.S. Supreme Court in *Medellin* made clear that congressional action could be taken to enforce the international obligation in question, the nature of the ECJ ruling in *Kadi* means that the EU Council cannot override the Court's judgment that the U.N. Security Council resolution may not be implemented as it stands. This is because the ECJ's ruling specified that the implementing measure violated the general principles of EC law, which are akin to unwritten constitutional rights and at the top of the EC's normative hierarchy. However, the Security Council has shown itself willing to resist the rulings of the Court of First Instance ("CFI") on other kinds of anti-terrorist sanctions. Despite the CFI's judgment in Case T-228/02, *Organisation des Modjahedines du Peuple d'Iran v. Council*, 2006 E.C.R. II-4665, ruling that the listing of the People's Mojahedin of Iran Organization was not justified, the Council refused to de-list the organization. Five senior international lawyers recently challenged the Council's non-compliance with the CFI ruling as a serious misuse of powers and a breach of the Treaty Establishing the European Community ("EC Treaty"). Lord Slynn of Hadley et al., *Summary of Legal Opinions* (Sept. 18, 2008), available at <http://www.scribd.com/doc/6156443/Summary-of-Legal-Opinions-about-the-maintaining-of-the-PMOI-on-the-EU-asset-freeze-list>.

⁷ There are also some relevant similarities with the judgment of the U.S. Supreme Court in *Munaf v. Geren*, 129 S.Ct. 2207 (2008), in which the Court ruled that its jurisdiction and the habeas statute extended to U.S. citizens held by U.S. forces acting as part of a multinational coalition force under U.N. mandate. *Id.* at 2213. Although the case does not directly address the authority of the U.N. Security Council or Security Council resolutions in relation to the U.S. Constitution, the willingness of the Supreme Court to assert jurisdiction over the actions of the U.S. component of what was presented as a multinational force suggests a non-deferential approach. On the other hand, the fact that the case concerned what was effectively unilateral U.S. action despite the formally multilateral status of the force in question weakens the comparability of the cases.

position of international law.⁸ Despite the praise *Kadi* has drawn from various quarters, the decision sits uncomfortably with the traditional self-presentation of the EU as a virtuous international actor in contradistinction to the exceptionalism of the United States, as well as with the broader political ambition of the EU to carve out a distinctive international role for itself as a “normative power” committed to effective multilateralism under international law.⁹ It is all the more remarkable that a major judgment about the role of international law, which expressed important parts of its reasoning in chauvinist and parochial tones, was delivered not by a powerful nation-state, but by an international organization, which is itself a creature of international law. This article argues that instead of the adopting a strongly pluralist approach to international law,¹⁰ the ECJ could and should have followed the soft-constitutionalist approach which it and other European courts have used on different occasions to mediate the relationship between the norms of the different legal orders.¹¹

The *Kadi* case is but one of a series of recent human rights challenges before Europe’s main regional courts which addressed U.N.-authorized activity that had caused significant harm to individuals.¹² The legal, jurisprudential, and, of course, human dilemmas which the cases

⁸ See cases cited *infra* note 20.

⁹ The President of the European Commission, José Manuel Barroso, recently outlined a vision of the EU’s foreign policy in the following terms:

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[W]e certainly welcome pluralism in international relations but let us not forget that multipolar systems are based on rivalry and competition. . . . In international relations, partnerships and a multilateral approach can achieve so much more. . . . We need a renewed politics of global engagement, particularly with international institutions . . . because that is the only way we can consolidate and strengthen a stable, multilateral world, governed by internationally-agreed rules.

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José M. Barroso, President, Eur. Comm’n, A Letter from Brussels to the Next President of the United States of America, 2008 Paul-Henri Spaak Lecture at Harvard University (Sept. 24, 2008), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/455&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹⁰ As will be explained further below, pluralist approaches to the international legal order are those that emphasize the existence of a multiplicity of distinct and diverse normative systems, and the likelihood of clashes of authority-claims and competition for primacy amongst these. Strong pluralist approaches deny the possibility of a shared, universally-oriented system of values and question the meaningfulness of the idea of an international community. They advocate agonistic, ad hoc, pragmatic, and political processes of interaction rather than coordination between legal systems. See *infra* Part IV.

¹¹ As will be elaborated below, strong constitutionalist approaches to the international order advocate some form of systemic unity, with an agreed set of basic rules and principles to govern the global realm. Soft constitutionalist approaches, on the other hand, assume the existence of an international community, posit the need for common norms and principles for addressing conflict, and emphasize universalizability. They do not insist on a clear hierarchy of rules, but rather on commonly negotiated and shared principles for addressing conflict. See *infra* Part IV.

¹² In addition to the *Behrami* case of the European Court of Human Rights (“ECtHR”) which is discussed in Part II of this Article, a large number of cases have come before the ECJ and CFI challenging sanctions imposed on

reveal are instances of a more general phenomenon, namely the increasing complexity and density of the international political and legal environment, and the growing multiplicity of governance regimes with the capacity to affect human welfare in significant ways. On one level, therefore, the *Kadi* case is simply another instance of an increasingly common occurrence, namely a specific conflict between the norms of different regimes or sub-systems within the global legal arena. But in reality, it is a particularly compelling instance insofar as the conflict involves some of the most fundamental norms of the modern international law system, namely Article 103 of the U.N. Charter,¹³ peremptory or *jus cogens* norms,¹⁴ and Chapter VII Resolutions of the Security Council.¹⁵ The range of traditional international law rules which aim at systemic coherence, such as the *lex specialis* rule or the later-in-time rule, provided no easy answers in this case.¹⁶ Instead, the case presented a direct confrontation between the U.N. system of international security and peace, with its aspirations to general applicability and universal normative force, and the EU system, situated somewhere between an international organization and a constitutional polity. All this occurred in the context of an individual's claim that a significant violation of his rights had been committed at the interplay between the two. The broader picture of this Article therefore concerns the upward drift of international authority—the proliferation of international governance forms—and its decoupling from national or regional mechanisms of accountability and control. However, the Article's specific focus is the response of Europe's regional courts, and in particular that of the ECJ, to the question of the relationship

individuals pursuant to U.N. Security Council resolutions. For a listing of some of these cases, see cases cited *infra* note 76.

¹³ Article 103 provides: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” U.N. Charter art. 103.

¹⁴ See, e.g., T. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (2006). For a critical reflection on the category, see Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 CONN. J. INT'L L. 1 (1990).

¹⁵ Under Chapter VII of the U.N. Charter, the Security Council is empowered to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to “decide what measures shall be taken . . . to maintain or restore international peace and security” including “measures not involving the use of armed force” such as economic sanctions. U.N. Charter arts. 39, 41. In Chapter V, Article 25 of the Charter stipulates that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” U.N. Charter art. 25.

¹⁶ *Lex specialis derogat legi generali* is a principle of international law, albeit of uncertain status, which suggests that in the event of conflict between two rules or bodies of law, the more specialized should prevail over the more general. The later-in-time rule is a principle of domestic statutory interpretation, used in several legal systems, and states that a later law should prevail over an earlier law of the same status in the event of conflict. The mandatory terms and the context of Article 103 of the U.N. Charter make it unlikely that either of these principles offers courts an answer to the problem of conflict between a binding U.N. Security Council resolution and a later rule of a domestic law or of a regional legal system.

between the EC legal order and the international legal order. Some may view the *Kadi* judgment mainly as a reaction to the particular context of the case, namely the widespread concern about the U.N. Security Council's regime of targeted sanctions, and about the strong influence of the United States in the process of listing and de-listing suspects. Close scrutiny of the judgment, however, suggests that its significance goes well beyond the context of U.N. smart sanctions. In fact, the broad language, carefully-chosen reasoning, and uncompromising approach of this eagerly-awaited judgment by the plenary Court suggests that the ECJ seized this high-profile moment to send out a strong and clear message about the relationship of EC law to international law, and, most fundamentally, about the autonomy of the European legal order.¹⁷

The aim of the Article is to analyze the striking response of the ECJ in *Kadi* to a vivid instance of the accountability dilemmas in international governance, and to situate this judicial response in the context of the growing emphasis on the role of the EU as an international actor. The Article argues that the Court's reasoning exposes a significant ambivalence in the EU's approach to international law and governance. Much of the political and legal discourse of the EU sets out to distinguish the EU and its international activity from the kind of self-interested selectivity and ad hoc exceptionalism¹⁸ of which the United States is generally accused.¹⁹ Instead, as will be outlined below, the EU has generally asserted an approach to international relations—in political terms a multilateralist approach and in juridical terms a constitutionalist approach—which emphasizes Europe's distinctive fidelity to international law and institutions. The approach of the ECJ in *Kadi*, however, sits uncomfortably with this conventional understanding and with official discourse, and departs from a previously dominant stream in the Court's case law on the EC's relationship with international law, which had emphasized the EC's respect for international law and the essential place of international agreements within the EC

¹⁷ The question regarding the target audience for the *Kadi* judgment is an interesting one. Some may view the case as a message from the ECJ to the EU Member States and their respective constitutional courts that the EU is a constitutional order founded on a genuine commitment to fundamental rights, in response to the challenges posed by many national constitutional courts to the unconditional supremacy of EC law. Others may view it as a message from the ECJ to the U.N. Security Council about the need for reform of the sanctions regime. The argument of this Article, however, is that in an era of much greater legal and judicial interpenetration and borrowing, there are many possible audiences for a judgment such as that of the ECJ in *Kadi*.

¹⁸ See *infra* note 225.

¹⁹ For discussion of the EU's emphasis on its character as a "normative power" based on respect for international law, in comparison with the characterization of the United States as a "hard power," see *infra* notes 240–243.

legal order.²⁰ The *Kadi* judgment takes its place instead within a different strand in the Court's jurisprudence,²¹ revealing a Court that increasingly²² adopts what will be explained below as a robustly pluralist approach to international law and governance, emphasizing the separateness, autonomy, and constitutional priority of the EC legal order over international law.

This Article is structured as follows. Part I introduces the general background to the challenge the ECJ faced in the *Kadi* case, namely the growing accountability dilemmas of international governance, which manifest themselves increasingly in challenges brought before national, regional and international tribunals. Part II introduces the *Kadi* targeted-sanctions cases

²⁰ See Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, 1998 E.C.R. I-3655, ¶ 46 (holding that “the rules of customary international law concerning the termination and suspension of treaty relations by reason of a fundamental change of circumstances are binding on the EC institutions and form part of the Community legal order.”); Case C-286/90, *Anklagemyndigheden v. Peter Michael Poulsen & Diva Navigation Corp.*, 1992 E.C.R. I-6019, ¶ 9 (ruling that the EC “must respect international law in the exercise of its powers” and that, consequently, a provision of an EC Regulation “must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea”); Case 181/73, *R. & V. Haegeman v. Belgian State*, 1974 E.C.R. 449 [hereinafter *Haegeman*] (ruling that an international agreement concluded by the EC under the EC Treaty forms an “integral part of Community law”); Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, 1982 E.C.R. 3641 (ruling that since international agreements concluded by the EC “form an integral part of the EC legal system,” the EC member states as well as the EC institutions are bound by their provisions and individual litigants may rely on the provisions of such international agreements before national courts in the Community).

²¹ I refer here to the ECJ's case law on the legal effect of the General Agreement on Tariffs and Trade (“GATT”) and World Trade Organization (“WTO”) agreements. This case law had previously been considered an outlier, explicable by reference to the specific economic and political circumstances of the multilateral trade system. See also Case C-469/93, *Amministrazione delle Finanze dello Stato Chiquita Italia SpA*, 1995 E.C.R. I-4533 (holding that the GATT does not contain provisions capable of conferring rights on individuals, which they could invoke before national courts to challenge the application of conflicting national provisions; the great flexibility of the GATT provisions, in particular those concerning the possibility of derogation, safeguard measures and dispute-settlement, precludes the creation of such rights); Case C-280/93, *Germany v. Comm'n*, 1994 E.C.R. I-4873 (holding that the spirit, terms and general scheme of the GATT are such that they cannot be considered to be directly applicable, and the ECJ cannot review the lawfulness of a Community act from the point of view of GATT rules unless the EC intended to implement a particular GATT obligation or if the Community act expressly refers to specific provisions of the GATT); Case 9/73, *Schlüter v. Hauptzollamt Lörrach*, 1973 E.C.R. 1135 (ruling that the validity of acts of the EC institutions could not be tested against a rule of international law unless that rule is binding on the community and capable of creating rights which interested parties could invoke in court, and that Article II of the GATT could not confer on parties within the EC a right to invoke it in court). See generally Case C-149/96, *Portugal v. Council*, 1999 E.C.R. I-8395.

²² For another recent judgment which fits with the WTO line of cases, see Case C-308/06, *Int'l Ass'n of Indep. Tanker Owners v. Sec'y of State for Transport*, 2008 ECR I-4057 (2008), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:183:0002:0002:EN:PDF>, in which the ECJ revived a technique it had abandoned in most other cases involving the invocability of international agreements—namely by insisting that an agreement must “confer individual rights” before it could be invoked as a standard to review Community legislation. The ECJ used this formalist technique to avoid discussing the relationship between the international standard on liability for maritime pollution and the EC Directive 2005/35/EC on ship-source pollution, and to avoid considering the nature and extent of the EC's obligations under the U.N. Convention on the Law of the Sea.

before the EU courts,²³ and the related, though distinct, *Behrami* cases before the European Court of Human Rights (ECtHR), concerning the U.N. administration of Kosovo.²⁴ The analysis in the second part outlines the different approaches adopted by the various European judicial instances—the CFI, the ECJ, and the ECtHR—to the question of whether or not they could engage in judicial review of the U.N. Security Council’s actions for conformity with human rights standards. Part III analyzes the premises underlying each of these judicial approaches and their views of the international legal order, as well as the place of the European legal system within the international legal order which the respective judicial approaches reflect. Part IV examines these judicial responses in the context of an ongoing scholarly debate over the respective merits of constitutionalist versus pluralist approaches to the international legal order, with the CFI and the ECtHR adopting strong (albeit varying) constitutionalist approaches, and the ECJ adopting a robustly pluralist approach. Part V situates the response of the ECJ and its approach to the relationship between EC and international law in the context of the EU’s broader relationship to international law. It argues that there is a significant dissonance between the pluralist, autonomy-driven approach of the ECJ on the one hand, and the official discourse of the political and institutional branches on the international role of the EU. The Article suggests that the approach of the ECJ not only offers potential encouragement and support to other states and polities to assert the primacy of their autochthonous values over the common goals of the international community, but also that it risks undermining the ambition of the EU to carve out a particular identity for itself as an international actor.

I. THE ROLE OF THE U.N. SECURITY COUNCIL AND THE DILEMMAS OF ACCOUNTABILITY IN INTERNATIONAL GOVERNANCE

The challenges brought in the *Kadi* and *Behrami* cases vividly highlight the ways in which the international legal environment is growing ever more complex. There are an increasing number of international organizations, ranging from functionally or regionally specific entities created to address specialized transnational needs or goals, to broad multilateral

²³ *Kadi*, *supra* note 1; Case T-315/01, *Kadi v. Council & Comm’n*, 2005 E.C.R. II-3649 [hereinafter *Kadi II*]; Case T-306/01, *Yusuf & Al Barakaat Int’l Found. v. Council & Comm’n*, 2005 E.C.R. II-3533.

²⁴ *Behrami v. France, Saramati v. France, Germany & Norway*, Apps. No. 71412 & 78166/01 (May 2, 2007) (admissibility decision) [hereinafter *Behrami*], available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=818144&portal=hbkm&source=externalbydo number&table=F69A27FD8FB86142BF01C1166DEA398649>.

organizations created to address more general or fundamental common tasks, with many variants in between. Accompanying these developments is a growing literature on the issues of legal pluralism²⁵ and of international fragmentation,²⁶ raised by the increasing density of the international juridical environment. There are significant overlaps in the jurisdiction that different actors and entities purport to exercise, and their powers are often not delineated so as to avoid conflict with others' jurisdiction or to prescribe how such conflict should be approached.²⁷ Many international organizations concentrate and enhance executive and bureaucratic power by empowering national executive actors as well as the new bureaucracies established within these organizations.²⁸ At the same time, they tend not to provide for the accountability and the oversight mechanisms characteristic of the state context. The traditional "club" model of international governance is unresponsive to many potential constituencies,²⁹ and the significant

²⁵ Julio Baquero, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 EUR. L.J. 389 (2008); Paul Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Paul Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301 (2007); William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963 (2004); Daniel Halberstam, *Constitutionalism and Pluralism in Marbury and Van Gend*, in *THE PAST AND FUTURE OF EU LAW: REVISITING THE CLASSICS ON THE 50TH ANNIVERSARY OF THE ROME TREATY* (Miguel Maduro & Loiz Azoulay eds., 2008) (forthcoming Oct. 2009), available at <http://ssrn.com/abstract=1103253>; Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247 (2006); Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002). See also Brian Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375 (2008); Günther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE 3* (Günther Teubner ed., 1997). See generally BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE* 92 (William Twining & Christopher McCrudden eds., 2002) (identifying a "third period" of legal pluralism focusing in particular on the global context "whereas before the debate was on local, infrastate legal orders coexisting within the same national time-space, now it is on suprastate, global legal orders coexisting in the world system with both state and infrastate legal orders").

²⁶ The literature on fragmentation in international law is extensive. See, e.g., Andreas Fischer-Lescano & Günther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2003); INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: FESTSCHRIFT IN HONOUR OF GERHARD HAFNER (Isabelle Buffard et al. eds., 2008); Martii Koskeniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. OF INT'L L. 553 (2002). In 2002, the International Law Commission established a study group, and in 2006 the group presented a report to the U.N. General Assembly. U.N. Int'l L. Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.702.

²⁷ For a summary of the conventional legal techniques provided under the Vienna Convention on the Law Treaties for addressing such conflict, see U.N. Int'l L. Comm'n, *supra* note 26.

²⁸ See, e.g., Kim L. Scheppele, *The International State of Emergency: Challenges to Constitutionalism after September 11* (Sept. 21, 2006) (unpublished manuscript), available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1048&context=schmooze_papers.

²⁹ Robert O. Keohane & Joseph S. Nye, Jr., *Democracy, Accountability and International Governance* (June 27, 2001) (unpublished manuscript, on file with the Harvard Kennedy School of Government).

problems of accountability in the complex transnational environment have generated a large literature.³⁰

A powerful example of this expansion of authority without concomitant accountability is evident in the way the U.N. Security Council has over the last decade begun to exercise legislative-type powers under Chapter VII of the U.N. Charter, in its adoption of resolutions requiring states to freeze the assets of individuals suspected of supporting terrorism, and its establishment of the Counter-Terrorism Committee and the Sanctions Committee.³¹ Such resolutions obviously require states or regional organizations such as the EU to implement them before they actually succeed (other than in reputational and related terms) in limiting the property rights of individuals. However, it seems inaccurate to say that the primary responsibility for harm caused when a wrongly-listed person's property is sequestered lies with the state that implements a mandatory Security Council resolution, rather than with the Security Council that wrongly named the person as a terrorist and mandated the sequestration. A second example of the potentially direct and harmful impact of U.N.-authorized measures concerns the actions of U.N. territorial administrators. In an evolution parallel to that of the Security Council's lawmaking powers, the United Nations has in recent years played an increased governing role in the administration of territories in specific conflict or post-conflict situations.³² We witnessed U.N. territorial administration of this nature in East Timor, Bosnia, and Kosovo, and it is clear that such direct governing power also carries potential for significant harm. Yet, despite the apparent potential for U.N.-generated harm, there remains the difficult question concerning the

³⁰ See New York University Institute for International Law and Justice Global Administrative Law, <http://www.iilj.org/GAL/> (last visited Oct. 14, 2009) (comprising a large and growing body of literature on the accountability and legitimacy of proliferating forms of global governance).

³¹ See, e.g., Jean Cohen, *A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach*, 15 CONSTELLATIONS 456 (2008); Michael Fremuth & Jörn Griebel, *On the Security Council as a Legislator: A Blessing or a Curse for the International Community?*, 76 NORDIC J. INT'L L. 339 (2007); Luis M. H. Martínez, *The Legislative Role of the Security Council in its fight against Terrorism: Legal, Political and Practical Limits*, 57 INT'L & COMP. L.Q. 333 (2008).

³² The administration of territory under the auspices of the United Nations is, of course, not without precedent, as the post-WWII system of international trust territories, provided for under Chapter XII of the U.N. Charter, indicates. See RALPH WILDE, *INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY* (2008). However, under the international trust territories system, territories emerging from colonial status into independence were generally administered for a transitional period by the former colonial power under the supervision and auspices of the United Nations, but not by the United Nations itself, as has been the case in the more recent experiments in Kosovo and East Timor.

legal accountability and responsibility of such territorial administration,³³ and the attempts at internal mechanisms of accountability have not yielded satisfactory results.³⁴

Various accounts of the international legal environment indeed emphasize the existence of overlapping, multi-tiered and intersecting levels of authority. This literature partly conveys the impression that the main problems in this area concern the questions of how to manage the multiple jurisdictional claims which may arise,³⁵ how to deal with the potential conflicts concerning applicable authority, and how to encourage deference by one site of accountability to a more appropriate site through principles like comity or complementarity.³⁶ Yet a different and no less pressing facet of the problem is that the proliferation of international organizations and institutions leaves a vacuum of legal responsibility where an international organization itself envisages no legal mechanism for review, and where the national or intermediate levels of authority consider themselves to lack responsibility for the act in question, and also to lack jurisdiction to question the accountability of the other or “higher” level of authority.

These were precisely the problems of international accountability raised in the *Kadi/Al Barakaat*³⁷ and the *Behrami/Saramati*³⁸ cases, in which the complex character of the international organizations in question further sharpened the dilemma confronting the European courts. The U.N. Security Council has expanded its role and powers well beyond those the Charter originally envisaged so as now to include the kind of legislative measures used in the

³³ Lindsay Cameron, Accountability of International Organizations Engaged in the Administration of Territory (Feb. 13, 2006) (unpublished manuscript, on file with the University Centre for International Humanitarian Law) See also European Commission for Democracy Through Law, Opinion on Human Rights in Kosovo, Opinion No. 280/2004, CDL-AD (2004)033 (Oct. 8–9, 2004) available at [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)033-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.asp) [hereinafter *Venice Commission*]; The Secretary-General, *Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo*, ¶ 42, U.N. Doc. S/1999/779 (July 12, 1999) (interpreting U.N. Security Council Resolution 1244, establishing the Kosovo administration, and requiring the administration to be guided by international human rights law in the exercise of its authority).

³⁴ See, e.g., Amnesty International, *The Balkans: Summary of Amnesty International’s Concerns in the Region January–June 2007*, AIIIndex EUR 05/003/2007 (Sept. 5, 2007) (criticizing the failure to convene the successor to the institution of Ombudsperson in Kosovo, i.e., the Human Rights Advisory Panel that had been provided for by U.N. Security Council Resolution in 2006 but was not set up until two years later); Bernard Knoll, *The Human Rights Advisory Panel in Kosovo: Too Little Too Late*, 7 EUR. HUM. RTS. L. REV. 534 (2007); *Venice Commission*, supra note 33; U.N. Human Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, U.N. Doc. CCPR/C/UNK/CO/1 (Aug. 14, 2006).

³⁵ See cited Berman texts, supra note 25 (referring in this context to Robert Cover’s famous idea of “jurisdictional redundancy”); Robert Cover, *The Uses of Jurisdictional Redundancy: Interests, Ideology and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

³⁶ See, e.g., cited Berman texts, supra note 25.

³⁷ See *Kadi*, supra note 1.

³⁸ See *Behrami*, supra note 24.

anti-terrorism context and the significant governing powers exercised in Kosovo and elsewhere. Moreover, its anomalous and historically-contingent composition, and the deep ideological divisions and political battles that cripple its functioning, have weakened its legitimacy as the main body governing international peace and security.³⁹ Similarly the EU, in a different but no less significant way, suffers from a deficit in legitimacy.⁴⁰ From one perspective the EU is the most successful contemporary example of regional integration, having built a strong economic union initially comprised of six member states but now including twenty-seven, with candidates lining up to join. From another perspective, however, it is an internally divided and externally weak global actor whose latest failed foray into constitution-making has further undermined its attempt to bootstrap its popular and political legitimacy.

II. THE CASES

An apparent collision between the norms of these two contested international organizations—the U.N. Security Council and the EU—provides the context in which the *Kadi/Al Barakaat* cases arose before the CFI and the ECJ. The *Behrami/Saramati* cases arose before the ECtHR, and involved not the EU but rather the human rights branch of the geographically larger and juridically influential but politically marginal Council of Europe.⁴¹ This part outlines the strikingly different responses of the ECtHR in *Behrami/Saramati* and of the ECJ and the CFI in *Kadi/Al Barakaat* to the indirect challenge to Security Council action. While the main thesis of the Article turns on the ECJ's ruling in *Kadi*, the Article first discusses the ECtHR's approach in the rather different circumstances of the *Behrami/Saramati* cases, since these cases present a stark and revealing contrast in their approach to a range of similar questions

³⁹ U.N. Gen. Assem., *Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council*, U.N. Doc. A/AC.247/2008/L.1 (Aug. 26, 2008) (recommending intergovernmental negotiations be opened); *Special Research Report on Security Council Transparency, Legitimacy and Effectiveness*, 2007 U.N. Sec. Council Rep. (No. 3), available at http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Research%20Report_Working%20Methods%2018%20Oct%2007.pdf (internal Security Council discussion on the need for self-reform). See also Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325 (1995) (critical comment on the troubling limits of Security Council accountability).

⁴⁰ See, e.g., Erik O. Eriksen & John E. Fossum, *Europe in Search of Legitimacy: Strategies of Legitimation Assessed*, 25 INT'L POL. SCI. REV. 435 (2004); Lene Hansen & Michael C. Williams, *The Myths of Europe: Legitimacy, Community and the 'Crisis' of the EU*, 37 J. COMMON MKT. STUD. 233 (2002); Marcus Höreth, *No Way Out for the Beast: The Unsolved Legitimacy Problem of European Governance*, 6 J. EUR. PUB. POL'Y 249 (1999).

⁴¹ *Behrami*, *supra* note 24.

concerning the accountability of the Security Council, the authority of the U.N. Charter, and the position of the regional European human rights system within the international legal order.

We will see that both sets of cases, although factually very different, involve challenges to the legality of action mandated or authorized by the U.N. Security Council. Both also involve an alleged conflict between the legal norms of the European system (the European Convention of Human Rights (“ECHR”) and the EU respectively) and a Security Council Resolution. This challenge required the courts—the ECtHR, the CFI, and the ECJ respectively—to face not only the question whether they had any power of review over action authorized by the Security Council under Chapter VII of the U.N. Charter, but also how to address and resolve conflicts between the fundamental norms of their legal systems and fundamental norms of the U.N. system. The judgments present striking examples of the constitutionalist and the pluralist approaches to the international legal order, with the CFI and the ECtHR exemplifying variants of the strong constitutionalist approach and the ECJ exemplifying a strongly pluralist approach.⁴² As discussed further below, strong constitutionalist approaches to the international order advocate some form of systemic unity, with an agreed set of basic rules and principles to govern the global realm. The strongest versions of constitutionalism propose an agreed hierarchy among such rules to resolve conflicts of authority between levels and sites.⁴³ Soft constitutionalist approaches assume the existence of an international community, posit the need for common norms and principles for addressing conflict, and emphasize the possibility of universalization. Pluralist approaches, on the other hand, emphasize the existence of a multiplicity of distinct and diverse normative systems, and the likelihood of clashes of authority-claims and competition for primacy amongst these. The strongest versions of pluralism deny the possibility of a shared, universally-oriented system of values and question the meaningfulness of an international community.

A. *Behrami before the European Court of Human Rights*

The *Behrami/Saramati* judgment brings together two different factual scenarios involving the United Nations Interim Administration Mission in Kosovo (“UNMIK”) and the U.N.-authorized security presence in Kosovo (“KFOR”), following the forced withdrawal of Federal Republic of Yugoslavia (“FRY”) forces and the conflict between Serbian and Albanian forces in

⁴² For discussion of the meaning of the terms “pluralist” and “constitutionalist,” see *infra* Part IV.

⁴³ The CFI in *Kadi II* adopts a strong constitutionalist approach of this kind. See *Kadi II*, *supra* note 23.

Kosovo in 1999.⁴⁴ The U.N. Security Council by resolution had provided for the establishment of KFOR, composed of troops “under UN auspices,” with “substantial North Atlantic Treaty Organization participation” but under “unified command and control.”⁴⁵ By the same resolution, the Security Council decided on the establishment of UNMIK, which would coordinate closely with KFOR, and provided for the appointment of a Special Representative to control its implementation.⁴⁶

The *Behrami* complaint was brought before the ECtHR by the father of two children, all of Albanian origin. One child was killed and the other severely injured and disfigured by unexploded cluster bombs in the area where they were playing, of which KFOR had been aware. The ECtHR relied on an UNMIK Police report from March 2000, concluding “that the incident amounted to ‘unintentional homicide committed by imprudence.’”⁴⁷ Before the ECtHR, Behrami claimed an Article 2 violation of the ECHR of the right to life.⁴⁸

The *Saramati* complaint involved a Kosovar national of Albanian origin who was arrested by UNMIK police on April 24, 2001 on “suspicion of attempted murder and illegal possession of a weapon.”⁴⁹ He was arrested and detained for various periods, and was told that KFOR had authority under Resolution 1244 to detain him since his detention was necessary “to maintain a safe and secure environment” and to protect KFOR troops, as they had information about his “alleged involvement with armed groups” operating between Kosovo and the FRY.⁵⁰ His ultimate conviction for attempted murder was quashed by the Supreme Court and no retrial had been set by the time the ECtHR gave judgment in 2007. Saramati complained to the ECHR that his detention by KFOR breached Articles 5 and 13 of the ECHR concerning liberty, security and the right to an effective remedy.⁵¹

Both applicants claimed that responsibility for the violations lay with KFOR: in Behrami’s case that it lay with France, and in Saramati’s case that it lay with Norway. Given that the events at issue took place outside the territory of the states involved and outside the “legal

⁴⁴ *Behrami*, *supra* note 24.

⁴⁵ S.C. Res. 1244, U.N. Doc S/RES/1244 (June 10, 1999).

⁴⁶ *Id.*

⁴⁷ *Behrami*, *supra* note 24, ¶ 6.

⁴⁸ *Id.* ¶ 61.

⁴⁹ *Id.* ¶ 8.

⁵⁰ *Id.* ¶ 11.

⁵¹ *Id.* ¶ 62.

space” of the ECHR at the time,⁵² this raised the question of the extra-territorial application of the Convention⁵³ and of the jurisdiction of the Court over the impugned actions. The judgment focused primarily on the question of whether the acts complained of were attributable to the respondent states, and hence on the question of those states’ international responsibility under the ECHR for the alleged human rights violations. Ultimately, in a chain of reasoning that has already attracted significant criticism,⁵⁴ the Court ruled that since the acts of both KFOR and UNMIK were under the “ultimate authority and control” of the United Nations,⁵⁵ they were attributable to the United Nations and not to the individual states involved in the actual operations.⁵⁶

Having concluded that the acts challenged were attributable to the United Nations, the Court faced the question of whether it had jurisdiction to examine the alleged violations of the Convention. The first and most obvious point noted by the Court was that the United Nations was not a contracting party to the ECHR. On the other hand, the ECtHR has faced an analogous situation in cases brought before it by applicants challenging acts adopted by different international organizations: the EC and the EU. Like the United Nations, neither the EC nor the EU is a party to the ECHR, and yet the ECtHR agreed to rule on human rights challenges brought against states that were implementing mandatory EC and EU legislation.⁵⁷ In such cases

⁵² *Id.* ¶ 68.

⁵³ The Federal Republic of Yugoslavia at the time was not a member of the Council of Europe, and hence not a signatory to the European Convention of Human Rights. Serbia and Montenegro, the two successor states to the FRY have since become signatories to the ECHR, but the status of Kosovo is not yet settled.

⁵⁴ See, e.g., Marco Milanović & Tatjana Papić, *As Bad as it Gets: The European Court of Human Rights’ Behrami and Saramati Decision and General International Law*, 57 INT’L & COMP. L.Q. 267 (2008) (arguing that the ECtHR’s analysis in *Behrami* contradicts established rules of international legal culpability, and creates questionable policy); Kjetil Mujezinović Larsen, *Attribution of Conduct in Peace Operations: The “Ultimate Control and Authority” Test*, 19 EUR. J. INT’L L. 509 (2008) (arguing that the ECtHR’s approach to the “ultimate authority and control” test in *Behrami* cannot be reconciled with the Court’s own jurisprudence, U.N. practice, or with the work of the International Law Commission on this issue, and that it ultimately threatens the ECHR’s relevance to peace operations); Aurel Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, 8 HUM. RTS. L. REV. 151 (2008) (arguing that although the ECtHR reached the correct outcome in *Behrami*, its legal reasoning established dangerous precedent by precluding its ability to review the conduct of national contingents operating under Security Council authorization, as well as complicating the functioning of other organs in the international legal order, such as the International Law Commission).

⁵⁵ *Behrami*, *supra* note 24, ¶ 134.

⁵⁶ *Id.* ¶ 141.

⁵⁷ See, e.g., *Bosphorus Airways v. Ireland*, App. No. 45036/98, 2005-VI Eur. Ct. H.R. [hereinafter *Bosphorus*]. *But see* *Emesa Sugar v. Netherlands*, App. No. 62023/00, 2005 Eur. Ct. H.R.; *Senator Lines GmbH v. Fifteen Member States of the Eur. Union*, App. No. 56672/00, 2004-IV Eur. Ct. H.R. (decision on admissibility); *SEGI v. Fifteen Member States of the Eur. Union*, App. No. 6422/02 2002-V Eur. Ct. H.R. See also *Cantoni v. France*, App. No. 17862/91, 1996-V Eur. Ct. H.R.; *Matthews v. United Kingdom*, App. No. 24833/94, 1999-I Eur. Ct. H.R. (judgment

the ECtHR developed an approach, albeit awkward and unsatisfactory,⁵⁸ to enable it to hear indirect challenges against an international organization that is not a party to the ECHR and that otherwise has no formal relationship with the ECHR. In short, the approach adopted by the ECtHR to deal with such challenges to EU measures in its *Bosphorus* judgment is to say that insofar as the EU maintains a functioning system of human rights protection that is at least equivalent to that provided by the ECHR, the ECtHR will presume that the EU measures are compatible with the ECHR, unless there is evidence of some dysfunction in the control mechanisms or a manifest deficiency in the protection of human rights.⁵⁹

In *Behrami*, however, the ECtHR rejected the possibility of adopting such an approach toward organs of the United Nations, and declined to exercise jurisdiction over acts of states that were carried out on behalf of the United Nations. The ECtHR began by recognizing that all contracting parties to the ECHR are also members of the United Nations, and that one of the Convention's aims is precisely the "collective enforcement of rights in the Universal Declaration of Human Rights."⁶⁰ This meant that the ECHR had to be interpreted in the light of the relevant provisions of the U.N. Charter, including Articles 25 and 103 as interpreted by the International Court of Justice.⁶¹ In other words, the ECtHR emphasized both the commonality of objectives and shared values underpinning both the ECHR and the U.N. Charter, as well its own fidelity to the provisions of the Charter as interpreted by the ICJ.⁶² The ECtHR, however, drew a sharp distinction between the legal order of the United Nations and that of the EU for these purposes. For the ECtHR, the commonality in values underpinning the ECHR and the U.N. Charter, in terms of protection for human rights, provided one of the reasons for deference on the part of the ECtHR to the actions and decisions of the United Nations and of its organs. The other reason, however, emphasized the distinctive mission of the United Nations and its unique powers to pursue it: "While it is equally clear that ensuring respect for human rights represents an

for different kinds of challenges where there was arguably discretion on the part of the Member State whether or not to enter into or concerning how to implement the EC measures).

⁵⁸ See Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 43 COMMON MKT. L. REV. 629–65 (2006), for critical commentary on *Bosphorus*.

⁵⁹ *Bosphorus*, *supra* note 57, ¶¶ 155–57.

⁶⁰ *Behrami*, *supra* note 24, ¶ 147.

⁶¹ *Id.* ¶ 147.

⁶² We will see that in the *Kadi* case, discussed *infra* Part II, the Advocate General ("AG") referred to shared fundamental values, but in a rather different way. His opinion suggested the possibility of a kind of rebuttable presumption (similar to that invoked by the ECtHR in *Bosphorus*, *supra* note 57, in relation to acts of the EU) that another international order is premised on a shared commitment to the same set of values, and that respect should be shown for the decisions of the other order only where the shared commitment is evident.

important contribution to achieving international peace . . . the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures. The responsibility of the UNSC in this respect is unique and has evolved as a counterpart to the prohibition, now customary international law, on the unilateral use of force.”⁶³

Since the acts challenged in *Behrami* arose from coercive measures authorized by U.N. Security Council Resolution 1244, and adopted under Chapter VII of the Charter, they were, according to the Court, necessarily “fundamental to the mission of the United Nations to secure international peace and security.”⁶⁴ Reasoning in a broadly instrumental manner, the ECtHR ruled that if it were to interpret the ECHR in such a way as to exercise jurisdiction over acts or omissions of the state contracting parties which were carried out in the course of missions authorized by Security Council resolutions, this would interfere with the fulfillment of the United Nations’ key mission and with the effective conduct of its operations.⁶⁵ Deferring further to the political authority of the Security Council, the ECtHR argued that if it were to exercise such review, it would effectively be imposing conditions on the implementation of a resolution, which were not provided for within the resolution itself. The fact that member states chose to vote for the resolution and were not acting under any prior Charter obligation at the time of voting was deemed irrelevant by the ECtHR because the states’ action was crucial to the effective fulfillment by the Security Council of its Chapter VII mandate and the imperative aim of collective peace and security.⁶⁶

The reasons given by the ECtHR for its unwillingness to extend its *Bosphorus* approach⁶⁷ to the context of the United Nations were surprisingly formal, given the non-textual and deeply instrumental arguments for deference to the United Nations that the ECtHR had already

⁶³ *Behrami*, *supra* note 24, ¶ 148.

⁶⁴ *Id.* ¶ 149.

⁶⁵ *Id.* Cf. *R (Al-Jedda) v. Sec’y of State for the Home Dep’t*, [2007] UKHL 58, [2008] 1 A.C. 332, ¶¶ 35–39. This case concerned jurisdiction over apparent human rights violations by British forces in Iraq. A dual British-Iraqi national brought this complaint against the United Kingdom for unlawful detention under the ECHR. The House of Lords rejected the United Kingdom’s argument that actions of U.K. forces in Iraq were attributable to the United Nations and found the facts distinguishable from *Behrami*, because, *inter alia*, the British forces were not established by the United Nations, were not operating under U.N. auspices, and were not a subsidiary organ of the United Nations.

⁶⁶ *Behrami*, *supra* note 24, ¶ 149.

⁶⁷ The *Bosphorus* approach, adopts a rebuttable presumption that the international organization in question protects the same shared, basic, fundamental rights in an equivalent way, subject to ECtHR review where there is evidence of a manifest deficiency or dysfunction of control. *Bosphorus*, *supra* note 57.

provided. Toward the end of its judgment, the ECtHR suddenly introduced the question of territoriality, which it had not otherwise discussed in the judgment, declaring that the *Bosphorus* approach was not appropriate to the United Nations because the acts in *Bosphorus*⁶⁸ had been undertaken by a contracting state to the ECHR (namely, Ireland) within its territory, while the acts in *Behrami* were ultimately attributable to the United Nations.⁶⁹ This return to its unconvincing reasoning on attributability and international responsibility⁷⁰ was followed by a final sentence which more openly articulated and reiterated the animating rationale of the judgment as a whole: “There exists, in any event, a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was there concerned and those in the present cases.”⁷¹ As far as the acts of UNMIK and KFOR were concerned, the ECtHR ruled: “their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective.”⁷² In other words, while the *ratio decidendi* (to borrow a common law term) of *Behrami* was that (1) the ECtHR lacks jurisdiction over actions which are ultimately attributable to the U.N. Security Council, and (2) it would be inappropriate to extend the *Bosphorus* approach to acts of an international organization that occurred outside the territorial space of the ECHR, neither of these conclusions is particularly convincing. The attributability reasoning has been widely criticized as unconvincing,⁷³ and the territoriality conclusion against using a *Bosphorus* approach is weak because the point was not argued or discussed at any length in the judgment. Instead, the heart of the judgment and the reason underlying the adoption of these conclusions seems to be the ECtHR’s desire to avoid an open conflict with the Security Council and to defer to the “organization of universal jurisdiction fulfilling its imperative collective security objective.”⁷⁴

⁶⁸ In *Bosphorus*, the impugned act involved the seizure of an aircraft by Irish authorities acting in order to implement an EC Regulation, which in turn was adopted to implement a U.N. Security Council resolution. *See id.*

⁶⁹ *Behrami*, *supra* note 24, ¶ 151.

⁷⁰ *See, e.g.*, Larsen, *supra* note 54; Milanović & Papić, *supra* note 54; Sari, *supra* note 54.

⁷¹ *Behrami*, *supra* note 24, ¶ 151.

⁷² *Id.*

⁷³ *See* Larsen, *supra* note 54.

⁷⁴ *Behrami*, *supra* note 24, ¶ 151.

B. *The Kadi/Al Barakaat Cases*⁷⁵

Facts and Background

In the case of *Kadi*,⁷⁶ a Saudi Arabian national with substantial assets in the EU brought an action for the annulment of an EC regulation insofar as it affected him. Kadi had been listed in the annex to an EC regulation as a person suspected of supporting terrorism.⁷⁷ The effect of this regulation, which directly affected the national legal systems of all EU Member States, was that all his funds and financial assets in the EU would be frozen. The EC regulation was adopted to implement an EU Common Position,⁷⁸ which in turn was adopted to implement a series of Security Council Resolutions concerning the suppression of international terrorism, which were

⁷⁵ The academic literature on this case is enormous and growing. See, e.g., Jean d'Aspremont & Frédéric Dopagne, *Kadi: The ECJ's Reminder of the Elementary Divide Between Legal Orders*, 5 INT'L ORG. L. REV. 371 (2008); Eeckhout, *supra* note 3; Piet Eeckhout, *Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions: In Search of the Right Fit*, 3 EUR. CONST. L. REV. 183 (2007) [hereinafter Eeckhout, *Community Terrorism Listings*] (analysis of the reasoning of the CFI). See also J. Craig Barker et al., *Kadi and Al Barakaat*, 58 INT'L & COMP. L.Q. 229 (2009); Giacinto Della Cananea, *Global Security and Procedural Due Process of Law Between the United Nations and the European Union*, 15 COLUM. J. EUR. L. 511 (2009); Pasquale De Sena & Maria C. Vitucci, *The European Courts and the Security Council: Between Dédoublément Fonctionnel and Balancing of Values*, 20 EUR. J. INT'L L. 193 (2009); Andrea Gattini, *Case-note on Kadi*, 46 COMMON MKT. L. REV. 213 (2009); Stefan Griller, *International Law, Human Rights and the Community's Autonomous Legal Order*, 4 EUR. CONST. L. REV. 528 (2008); Daniel Halberstam & Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 COMMON MKT. L. REV. 13 (2009); Harpaz, *supra* note 3; Kunoy & Dawes, *supra* note 3; Tridimas & Gutierrez-Fons, *supra* note 1; Ramses A. Wessel, *The Kadi Case: Towards a More Substantive Hierarchy in International Law*, 5 INT'L ORG. L. REV. 323 (2008).

⁷⁶ I discuss here only the facts of the *Kadi* case (subsequently joined with Case T-45/09, *Al Barakaat Int'l Found. v. Comm'n of the Eur. Cmty.*, 2008 E.C.R. I-6351, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:153:0039:0040:EN:PDF>) (legal analysis essentially identical). The judgments of the CFI in *Kadi II* were given on September 21, 2005, see *Kadi II*, *supra* note 23, and the opinion of AG Maduro was given on January 16, 2008, see *infra* note 119. For some of the earlier and important EU cases involving terrorist-listing measures emanating from U.N. Security Council resolutions, see Case T-362/04, *Minin v. Comm'n*, 2007 E.C.R. II-2003; Case T-253/02, *Ayadi v. Council*, 2006 E.C.R. II-2139; Case T-49/04, *Hassan v. Council*, 2006 E.C.R. II-52. For cases dealing with "autonomous" EU sanctions, see Case T-256/07, *People's Mojahedin Org. of Iran v. Council*, 2008 O.J. (C 313) 31, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:313:0031:0032:EN:PDF>; Case T-253/04, *KONGRA-GEL v. Council*, 2008 O.J. (C 142) 23, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:142:0023:0024:EN:PDF>; Case T-229/02, *Kurdistan Workers' Party v. Council*, 2008 E.C.R. II-539; Case T-327/03, *Stichting Al-Aqsa v. Council*, 2007 E.C.R. II-79; Case T-47/03, *Sison v. Council*, 2007 E.C.R. II-1429; *Organisation des Modjahedines du Peuple d'Iran v. Council*, *supra* note 6. See also Case C-117/06, *Möllendorf*, 2007 E.C.R. I-8361. For discussion of EU cases involving terrorist-listing measures, including those mandated by U.N. Security Council resolutions, as well as "autonomous" EU measures, see Tridimas & Gutierrez-Fons, *supra* note 1. After the *Kadi* judgment, the CFI in *Othman* followed the ECJ's *Kadi* ruling by annulling a regulation which froze the assets of the applicant for lack of due process guarantees. See Case T-318/01, *Othman v. Council*, 2009 O.J. (C 180) 37, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:180:0037:0037:EN:PDF>.

⁷⁷ Council Regulation 881/2002, Annex 1, 2002 O.J. (L 139/9) (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:139:0009:0022:EN:PDF>.

⁷⁸ *Id.* at 1.

adopted under Chapter VII of the U.N. Charter.⁷⁹ The Resolutions required all States to take measures to freeze the funds and other financial assets of individuals and entities that were associated with Osama bin Laden, the Al Qaeda network, and the Taliban, as designated by the Sanctions Committee of the Security Council.⁸⁰ The list, which was prepared by the Sanctions Committee in March 2001 and subsequently amended many times, contained the names of the persons and entities whose funds were to be frozen. A later Security Council resolution allowed for states to permit certain humanitarian exceptions to the freezing of funds imposed by the three earlier Resolutions, subject to the notification and consent of the Sanctions Committee.⁸¹ The EU in turn modified its laws to provide for the permitted humanitarian exceptions in relation to food, medical expenses and reasonable legal fees.⁸²

Kadi argued that he was the victim of a serious miscarriage of justice and that he had never been involved in terrorism or in any form of financial support for such activity.⁸³ He argued to the CFI that the EC had lacked legal competence under the EC Treaties to adopt the Regulation, and also that the Regulation violated his fundamental rights to property, to a fair hearing, and to judicial redress.⁸⁴ The CFI, and subsequently the ECJ, although on different grounds involving rather complicated legal reasoning, both rejected the argument that the EC lacked the power to adopt the Regulation and held that the treaties provided a sufficient legal basis for the measure.⁸⁵ The more important argument for current purposes, however, was the claim that the measure unjustifiably interfered with Kadi's fundamental rights. The applicant made this argument on the basis of the ECJ's well-established case law to the effect that "fundamental rights recognised and guaranteed by the constitutions of the Member States, especially those enshrined in the ECHR, form an integral part of the Community legal order."⁸⁶ In particular, he pleaded infringement of the right to property in Article 1 of Protocol 1 to the

⁷⁹ See S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 16, 2002); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

⁸⁰ See *id.*

⁸¹ See S.C. Res. 1452, U.N. Doc. S/RES/1452 (Dec. 20, 2002). The Security Council also adopted Resolution 1455 to improve the implementation of the measures for the freezing of funds. See S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003).

⁸² See Council Common Position (EC) No. 140/2003 of 27 Feb. 2003, art. 15, 2003 O.J. (L 139) 4; Council Regulation 561/2003, 2003 O.J. (L 82) 1, 2 (EC).

⁸³ See *Kadi II*, *supra* note 23.

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ *Id.* ¶ 138 (citing Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491, ¶ 13).

ECHR, the right to a fair hearing in accordance with earlier case law of the ECJ, and the right to judicial process under Article 6 of the ECHR and ECJ case law.⁸⁷

In response, the EU Council and Commission relied on the U.N. Charter⁸⁸ and argued that the EC, just like the EU Member States, was itself bound by international law to give effect, within its spheres of power and competence, to resolutions of the Security Council, especially those adopted under Chapter VII of the U.N. Charter.⁸⁹ The Council argued that any claim of jurisdiction on the part of the CFI “which would be tantamount to indirect and selective judicial review of the mandatory measures decided upon by the Security Council in carrying out its function of maintaining international peace and security, would cause serious disruption to the international relations of the Community.”⁹⁰

The CFI’s Analysis

The CFI took the view that in order to consider the applicant’s substantive claim of violation of fundamental rights by the application of the Regulation, it would have to respond first to the various arguments concerning the relationship between the international legal order under the United Nations and the “domestic or Community legal order,”⁹¹ and the extent to which the EC was bound by Security Council resolutions under Chapter VII.⁹²

The CFI ruled that, in accordance with customary international law and Article 103 of the U.N. Charter, the obligations of EU member states under the Charter prevailed over every other obligation of domestic or international law, including those under the ECHR and under the EC Treaties.⁹³ U.N. Charter obligations included obligations arising under binding decisions of the Security Council.⁹⁴ The CFI stated that the Treaty Establishing the European Community recognized such overriding obligations on its Member States,⁹⁵ and that even though the EC

⁸⁷ See *id.* ¶ 139.

⁸⁸ See U.N. Charter art. 24, para. 1. See also U.N. Charter arts. 25, 41, 48, para. 2 & art. 103.

⁸⁹ See *Kadi II*, *supra* note 23, ¶ 153.

⁹⁰ *Id.* ¶ 162.

⁹¹ *Id.* ¶ 178.

⁹² See *id.*

⁹³ See *id.* ¶ 184.

⁹⁴ See *id.*

⁹⁵ *Id.* ¶¶ 185–91. The CFI cited Articles 307 and 297 of the EC Treaty in support of this argument. The relevant part of Article 307 provides:

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The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member

itself is not directly bound by the U.N. Charter and is not a party to the Charter, it is indirectly bound by those obligations by virtue of the provisions of the EC Treaty.⁹⁶ Ultimately, the CFI concluded not only that the EC may not infringe on the obligations imposed by the U.N. Charter on its member states or impede their performance, but that the EC is actually *bound*, within the exercise of its powers, “by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfill those obligations.”⁹⁷

To this extent, the CFI expressly rejected the dualist argument advanced by Kadi to the effect that “the Community legal order is a legal order independent of the United Nations, governed by its own rules of law,”⁹⁸ and held instead that it was bound—albeit by virtue of the EC treaty rather than directly under the U.N. Charter itself—by the obligations imposed by the Charter on member states.⁹⁹ The CFI went on to rule, in a detailed series of steps, that it would be unjustified under international law or EC law for the CFI to assert jurisdiction to review a binding decision of the Security Council according to the standards of human rights protection recognized by the EC legal order.¹⁰⁰ It concluded emphatically that “the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law.”¹⁰¹

At this stage, however, the CFI’s judgment made a surprising leap, in light of what it had indicated before, and declared: “None the less, the Court is empowered to check, indirectly, the

State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

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Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3, art. 307.

The relevant part of Article 297 provides:

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

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Id. art. 297.

⁹⁶ See *Kadi II*, *supra* note 23, ¶¶ 192–204.

⁹⁷ *Id.* ¶ 204.

⁹⁸ *Id.* ¶ 208.

⁹⁹ See *id.*

¹⁰⁰ See *id.* ¶¶ 218–25.

¹⁰¹ *Id.* ¶ 225.

lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.”¹⁰² Given the cautious approach in its earlier analysis, this bold move was unexpected. While the assertion that the Security Council must be bound by *jus cogens* norms finds support in arguments and assumptions made by many others,¹⁰³ and the CFI devoted several paragraphs of its judgment to making this argument,¹⁰⁴ the CFI’s assertion of its own jurisdiction to review Security Council action for conformity with *jus cogens* norms was less predictable, given the lively scholarly debate over whether the actions of the Security Council are subject to judicial review and if so by whom.¹⁰⁵ The CFI simply deduced from the argument that Security Council resolutions must comply with the peremptory norms of international law that the CFI may “highly exceptionally” review such resolutions for compatibility with *jus cogens*.¹⁰⁶

Having engaged in this unexpected and ambulatory reasoning to conclude that it could exercise such exceptional judicial review, the remainder of the judgment in which the CFI actually considered the claims that the applicant’s rights to property, a fair hearing, and judicial process had been violated is rather more predictable, apart from the CFI’s surprising assumption that the right to property was part of *jus cogens*.¹⁰⁷ On the right to property, the CFI followed the

¹⁰² *Id.* ¶ 226.

¹⁰³ See, e.g., Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council’s Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 EUR. J. INT’L L. 881, 886–87 (2008). See also Florian Hoffman & Frédéric Mégret, *The UN as a Human Rights Violator: Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314, 317–18 (2003); August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT’L L. 851 (2001). But see Gabriël Oosthuizen, *Playing the Devil’s Advocate: The UN Security Council is Unbound by Law*, 12 LEIDEN J. INT’L L. 549 (1999).

¹⁰⁴ See *Kadi II*, *supra* note 23, ¶¶ 227–30.

¹⁰⁵ Much of the debate has focused on the possible jurisdiction of the ICJ to review Security Council action. See, e.g., Dapo Akande, *The ICJ and the Security Council: Is There Room for Judicial Control of the Decisions of the Political Organs of the UN?*, 46 INT’L & COMP. L.Q. 309 (1997); José Alvarez, *Judging the Security Council*, 90 AM. J. INT’L L. 1 (1996); Erica de Wet, *Judicial Review as an Emerging General Principle of Law and Its Implications for the International Court of Justice*, 47 NETHERLANDS INT’L L. R. 181 (2000); Lucius Caflisch, *Is the International Court Entitled to Review Security Council Resolutions Adopted under Chapter VII of the United Nations Charter?*, in INTERNATIONAL LEGAL ISSUES ARISING UNDER THE UNITED NATIONS DECADRE OF INTERNATIONAL LAW 633 (Najeeb Al-Nauimi & Richard Meese eds., 1995). In any case, because individuals have no standing before the ICJ, it seems an unlikely forum for significant adjudication concerning the Security Council on the question of targeted sanctions.

¹⁰⁶ See *Kadi II*, *supra* note 23, ¶ 231.

¹⁰⁷ For criticism of the novel and rather creative approach of the CFI to the content of these *jus cogens* norms, see Eeckhout, *Community Terrorism Listings*, *supra* note 75; Christian Tomuschat, *Note on Kadi*, 43 COMMON MKT L. REV. 537 (2005).

trend of earlier ECJ rulings including that of *Bosphorus*.¹⁰⁸ The ECJ in *Bosphorus* had upheld the confiscation, pursuant to a Security Council resolution implemented by the EC, of an aircraft leased by an innocent third party from the Yugoslav government before the Balkans war broke out.¹⁰⁹ The ECJ in that case had also concluded that despite the absence of compensation for the seizure of the aircraft, the deprivation of property was not arbitrary.¹¹⁰ Analogously, the CFI in *Kadi* ruled that since the measures impugned were adopted as part of the international campaign against terrorism, and given the humanitarian exceptions, the provisional nature of the measure, and the possibility for state appeal to the Sanctions Committee, the freezing of Kadi's assets did not violate *jus cogens* norms.¹¹¹ In a similar vein, the CFI ruled that neither the right to a fair hearing nor the right to judicial process – insofar as these are protected as part of *jus cogens* – had been violated.¹¹²

This unusual judgment by the CFI attracted a good deal of attention, much of it critical. Some critics focused on the quality of the reasoning on the competence of the EC to adopt the Regulation,¹¹³ others on the complex argument about the relationship between the EC and the Security Council,¹¹⁴ and still others on the bold claim of jurisdiction to review the Security Council.¹¹⁵ Virtually all commentators were critical of the curious reasoning of the CFI on the content of *jus cogens*,¹¹⁶ which is a famously amorphous yet narrow and contested category of international law. What is striking for present purposes, however, is the following. First, the CFI rejected a dualist conception of the place of the EC in the international legal order, and clearly subordinated EC action to that of the Security Council (and obligations imposed by the United

¹⁰⁸ Case C-84/95, *Bosphorus v. Minister for Transport*, 1996 E.C.R. I-3953.

¹⁰⁹ *See id.* ¶¶ 242–52.

¹¹⁰ *See id.*

¹¹¹ *See Kadi II*, *supra* note 23, ¶ 242.

¹¹² *See id.* ¶¶ 261–90.

¹¹³ *See, e.g.*, PIET EECKHOUT, DOES EUROPE'S CONSTITUTION STOP AT THE WATER'S EDGE? LAW AND POLICY IN THE EU'S EXTERNAL RELATIONS (2006) [hereinafter EECKHOUT, EUROPE'S CONSTITUTION]; Rory S. Brown, *Kadi v Council of the European Union and Commission of the European Communities: Executive Power and Judicial Supervision at European Level*, 11 EUR. HUM. RTS. L. REV. 456 (2006).

¹¹⁴ *See* Jessica Almqvist, *A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions*, 57 INT'L & COMP. L.Q. 303, 318 (2008).

¹¹⁵ *See, e.g.*, Ramses A. Wessel, *Editorial: The UN, EU, and Jus Cogens*, 3 INT'L. ORG. L.R. 1, 5 (2006) (“If a court could play a role in this field at all, it is the [ICJ]. It is therefore unclear on what basis the CFI considered itself competent to ‘check, indirectly, the lawfulness of resolutions of the Security Council.’”). Wessel does, however, acknowledge the lack of accountability of the Security Council and calls for it to reform its procedures, particularly those of the Sanctions Committee. *Id.* at 5–6.

¹¹⁶ *See, e.g.*, Eeckhout, *Community Terrorism Listings*, *supra* note 75; Tomuschat, *supra* note 107.

Nations more generally) insofar as the scope of their powers overlap.¹¹⁷ Secondly, and despite this subordination, the CFI claimed jurisdiction to review resolutions of the Security Council for compatibility not with human rights protected under EC law, but with peremptory norms of international law.¹¹⁸ In the end, while none of its complicated reasoning provided any relief to Kadi, the judgment presents a provocative picture of a regional organization at once faithful and subordinate to, yet simultaneously constituting itself as an independent check upon, the powers exercised in the name of the international community under the U.N. Charter.

The ECJ Judgment

The judgment of the ECJ, in reversing that of the CFI, was evidently strongly influenced by the Opinion of AG Maduro, although it differed in certain key respects.¹¹⁹ The AG is a judicial officer of the ECJ who provides an opinion for the court as to how a case should be decided.¹²⁰ Opinions of the AG are highly influential but not binding on the Court, although in practice they are followed by the Court in the large majority of cases.¹²¹ The ECJ in *Kadi* (and in the *Al Barakaat* case, which by now had been joined) followed the advice of the AG in annulling the EC Regulations insofar as they imposed sanctions on the applicant, finding that they constituted an unjustified restriction of his right to be heard, the right to an effective legal remedy, and the right to property.¹²²

¹¹⁷ See *Kadi II*, *supra* note 23.

¹¹⁸ See *id.*

¹¹⁹ While the AG's approach is fundamentally dualist in tone (for example, he specifies in paragraph 24 that "international law can permeate the legal order only under the conditions set by the constitutional principles of the Community"), there are notable differences between his opinion and the judgment of the Court. This includes his suggestion of the possibility of adopting something akin to a *Solange/Bosphorus*-type approach to Security Council measures (found in paragraphs 38 and 54 of his opinion), and the suggestion in paragraph 32 that those EU Member States which are members of the Security Council may be individually responsible for ensuring that they act in conformity with EU obligations. See Case C-402/05, Opinion of Advocate General Poiares Maduro, ¶¶ 32, 38, 54, available at http://blogeuropa.eu/wp-content/2008/02/cnc_c_402_05_kadi_def.pdf [hereinafter Maduro Opinion].

¹²⁰ See EC Treaty art. 222. There are currently eight Advocate Generals, five from the traditionally "larger" EU Member States (United Kingdom, France, Germany, Italy, Spain), and three who are appointed on a rotating basis from the other Member States. This number, likely, is soon to be raised to eleven at the insistence of Poland which, as one of the newer and larger Member States, considers itself entitled to institutional privileges similar to that of comparably large (and some smaller) states. The Court itself is composed of twenty-seven judges, one nominated by each Member State.

¹²¹ A figure often cited, particularly by the media, is that the Court follows the AG in eighty percent of cases, though it is not clear whether this is an impressionistic estimate or an empirically verified figure. See Martin Gelter & Mathias M. Siems, *Judicial Federalism in the ECJ's Berlusconi Case: Towards More Credible Corporate Governance and Financial Reporting?*, 46 HARV. INT'L L.J. 487, 488 n.9 (2005) (citing Paul Meller, *Monti Hits Snag in Merger Spat. Attempt Fails to Alter Tetra-Sidel Ruling*, INT'L HERALD TRIB., May 26, 2004, at Finance 2).

¹²² See *Kadi*, *supra* note 1, ¶ 76.

The ECJ's reasoning was robustly dualist, emphasizing repeatedly the separateness and autonomy of the EC from other legal systems and from the international legal order more generally, and the priority to be given to the EC's own fundamental rules. A related and significant feature was the lack of direct engagement by the Court with the nature and significance of the international rules at issue in the case, or with other relevant sources of international law. The judgment is striking for its treatment of the U.N. Charter, at least insofar as its relationship to EC law was concerned, as no more than any other international treaty. Furthermore, the judgment gives only perfunctory consideration to the traditional idea of the EC's openness to international law. The ECJ denied that its review of the EC regulation implementing the U.N. Resolution would amount to any kind of review of the Resolution itself,¹²³ or of the Charter,¹²⁴ and suggested that its annulment of the EC instrument implementing the resolution would not necessarily call into question the primacy of the resolution in international law. Given the legal significance of binding Security Council Resolutions under Chapter VII of the Charter and the language of Article 103,¹²⁵ the ECJ's depiction of international law as a separate and parallel order whose normative demands do not penetrate the domestic (EC) legal order is all the more striking.

Without specifically mentioning the U.N. Charter, the ECJ declared that "an international agreement cannot affect the allocation of powers fixed by the Treaties or . . . the autonomy of the Community legal system,"¹²⁶ that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty,"¹²⁷ and that the EC is an "internal"¹²⁸ and "autonomous legal system which is not to be prejudiced by an international agreement."¹²⁹

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

¹²³ Cf. Case C-122/95, *Germany v. Council*, 1998 E.C.R. I-973 (annulling the EC's implementation of the Framework Agreement on Bananas in the WTO context, without thereby affecting the WTO agreements themselves).

¹²⁴ See *Kadi*, *supra* note 1, ¶¶ 286–88.

¹²⁵ See U.N. Charter art. 103.

¹²⁶ *Kadi*, *supra* note 1, ¶ 282.

¹²⁷ *Id.* ¶ 285.

¹²⁸ *Id.* ¶ 317.

¹²⁹ *Id.* ¶ 316.

of its powers”¹³⁰ and that relevant EC measures should be interpreted in light of relevant international law rules and the EC’s undertakings in the context of international organizations such as the United Nations.¹³¹ In one of the few sentences in its judgment which acknowledges anything distinctive about the international norms at issue in the case, the ECJ emphasized that the EC should attach particular importance to the adoption of Chapter VII resolutions by the United Nations, and that the objectives of such resolutions should be taken into account in interpreting any EC measures implementing them.¹³² The bottom line of the judgment, however, was that the U.N. Charter and Security Council Resolutions, just like any other piece of international law, exist on a separate plane and cannot call into question or affect the nature, meaning, or primacy of fundamental principles of EC law. In an interesting legal counterfactual, the ECJ asserted that even if the obligations imposed by the U.N. Charter were to be classified as part of the “hierarchy of norms within the Community legal order,” they would rank higher than legislation but lower than the EC Treaties and lower than the “general principles of EC law” which have been held to include “fundamental rights.”¹³³ It should be noted here that the category of “general principles of EC law,” including fundamental rights, is not a small one but is an extensive and growing body of legal principles whose content—although inspired by national constitutional traditions, international human rights agreements, and especially by the ECHR—is determined almost entirely by the ECJ.¹³⁴ In *Kadi*, the ECJ did not expressly distinguish between certain core principles of EC law which take precedence over international law, including the U.N. Charter, but appeared to treat all EC recognized “fundamental rights” as belonging to the normatively superior category.¹³⁵

The ECJ dismissed the relevance of the *Behrami* judgment of the ECtHR, which had been decided a year earlier, and the immunity from ECtHR review granted in that case to acts which were attributed to the U.N. Security Council,¹³⁶ for reasons similar to those given by AG

¹³⁰ *Id.* ¶ 291 (citing Case C-286/90, *Anklagemyndigheden v. Poulsen & Diva Navigation Corp.*, *supra* note 20, and *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, *supra* note 20).

¹³¹ *See id.* ¶¶ 291–94.

¹³² *See id.* ¶ 294.

¹³³ *Id.* ¶¶ 305–09.

¹³⁴ *See generally* ULF BERNITZ, JOAKIM NERGELIUS & CECILIA GARDENER, *GENERAL PRINCIPLES OF EC LAW IN A PROCESS OF DEVELOPMENT* (2d ed. 2008); P. TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* (1999).

¹³⁵ *See Kadi*, *supra* note 1, ¶¶ 303–04.

¹³⁶ *See id.* ¶¶ 310–13 (distinguishing *Kadi* from other ECtHR cases in which acts attributed to the U.N. Security Council were granted immunity from ECtHR review).

Maduro in his opinion.¹³⁷ Further, unlike AG Maduro, the ECJ did not give a direct answer to the question of whether an EC regulation implementing a Security Council resolution might be given immunity from EC judicial review if the sanctions system set up by the resolution offered sufficient guarantees of judicial protection.¹³⁸ However, the language of paragraph 321 appears to suggest that general immunity from jurisdiction for Security Council measures would be inappropriate, since it declared that “the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction,”¹³⁹ before going on in the next paragraph to say that such immunity would anyhow be unjustified in the instant case because the Sanctions Committee procedure lacked sufficient guarantees of judicial protection.¹⁴⁰ It is difficult to know whether the ECJ intended by these paragraphs to hint that certain Security Council Resolutions might enjoy immunity from review if they did provide sufficient guarantees of protection, since the Court chose not to address the question with any clarity.¹⁴¹ This would in fact have been one obvious route for the ECJ to take in *Kadi*—that is, to borrow from the *Bosphorus* approach of the ECHR¹⁴²—and to confer provisional immunity from review on Security Council measures where the levels of due process and basic rights protection provided by the Security Council could be considered sufficient. But the ECJ evidently decided not to adopt such an approach, and also chose not to engage in a more direct dialogue with the Security Council along the lines of the famous “*Solange*” jurisprudence of the German constitutional court.¹⁴³ Ultimately, the ECJ disposed of the case entirely in accordance with the internal legal priorities and values of the EC. It concluded by annulling the relevant EC

¹³⁷ AG Maduro sought to confine the significance of the *Behrami* ruling to the specific circumstances of the case and to what might be called the “ratio decidendi” of the judgment: that the ECtHR declined jurisdiction on the basis that the acts in question were attributable only to the United Nations and not to the participating states, and that the acts took place outside the territorial application of the ECHR. In Maduro’s view, this meant that the case was not a relevant precedent for the ECJ in *Kadi* where the act being challenged was adopted by the EC rather than by the U.N. Security Council. See Maduro Opinion, *supra* note 119.

¹³⁸ See *Kadi*, *supra* note 1, ¶¶ 321–26.

¹³⁹ *Id.* ¶ 321.

¹⁴⁰ See *id.* ¶ 322.

¹⁴¹ For discussion of this question, see Halberstam & Stein, *supra* note 75, at 60–61.

¹⁴² See *Bosphorus*, *supra* note 57.

¹⁴³ See *infra* note 214 and accompanying text for discussion of the *Solange* approach.

regulations, albeit keeping them in effect for three months with a view to giving the EC Council a period of time during which to remedy the due process breaches.¹⁴⁴

III. VARYING JUDICIAL CONCEPTIONS OF THE INTERNATIONAL LEGAL ORDER

The reactions of these different judicial instances to a very similar question concerning the direct or indirect reviewability of the acts of an international organization represent three very different points on a spectrum of possible responses to some of the core questions of international law and governance. It also bears repeating that the cases in question concern not just any international organization but the primary organization of near-universal membership which was created to pursue fundamental goals of international security peace and security, and backed up by strong legal rules (seen particularly in Chapter VII and Article 103 of the Charter¹⁴⁵) which indicate the priority to be given to its decisions. These cases confronted core questions about the authority of international law and institutions, and about the proper relationship between international and regional obligations of different natures and origins. In each instance a regional court was called on to review an act of the Security Council, and in each case the court gave a different answer to the question of whether it had jurisdiction to conduct this review, and if so, by reference to which legal standards or values. In each case, the answer given was premised on a different set of assumptions about the nature, source and effect of the legal authority enjoyed by the Security Council, and was informed by a different conception of

¹⁴⁴ Since then, the EC Commission in Regulation 1190/2008 of November 28, 2008 declared that, having heard representations from Kadi and Al Barakaat earlier that month, in view of their association with Al Qaeda it was justified to continue to list the two as entities or individuals whose assets and resources should be frozen. See Commission Regulation 1190/2008, 2008 O.J. (L 322) 25. It seems that the Security Council on October 21, 2008 provided the EU presidency (on an “exceptional” basis) with some information on Kadi and Al Barakaat, which the Commission relied on to justify Regulation 1190/2008. Kadi, however, has also now initiated annulment proceedings against the Commission’s action re-listing him. See Case T-85/09, *Kadi v. Commission*, 2009 O.J. (C-90), available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:090:0037:0037:EN:PDF>. Also, on April 22, 2009, the Commission published its proposal for a Council Regulation amending Regulation 881/2002 so as to comply with the requirements specified by the ECJ in its ruling in *Kadi*. See *Commission Proposal for a Council Regulation amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban*, COM (2009) 187 final (Apr. 22, 2009). By way of judicial follow-up, the CFI followed the ECJ ruling in *Kadi* by annulling Regulation 881/2002 insofar as it affected the applicant by freezing his funds. Furthermore, the CFI refused to suspend the effect of the judgment for three months, as the ECJ had done in *Kadi*, to give the Council time to remedy the violation of fundamental rights. See *Othman*, *supra* note 76.

¹⁴⁵ See U.N. Charter art. 103.

the role of the court within the international order—perhaps better described as the “disorder of orders.”¹⁴⁶

The ECtHR concluded that since the acts challenged before it were attributable to the Security Council rather than to the participating states, and given the scope and importance of the United Nation’s mission, the ECtHR lacked any jurisdiction to rule on the claim of violation of human rights brought before it. The CFI took the view that although the EU was indirectly bound by Security Council Resolutions, and although the CFI had no direct jurisdiction to review them, it should nevertheless indirectly review the Security Council’s action for possible violation of minimum international standards of *jus cogens*.¹⁴⁷ The ECJ, while referring in general terms to the respect owed by the EC to international treaties including the U.N. Charter and to Security Council Resolutions, emphasized that *no* international treaty could affect the autonomy of the EC legal system, and that even if the Charter were to be ranked as part of EC law it would be ranked below the normative level of the EC treaties themselves and lower than the general principles of EC law.¹⁴⁸ In short, the ECtHR demonstrated strong substantive deference towards the U.N. Security Council,¹⁴⁹ the CFI demonstrated moderate jurisdictional deference, and the ECJ demonstrated little or no deference.

¹⁴⁶ See Neil Walker, *Beyond Boundary Disputes and Basic Grids: The Global Disorder of Normative Orders*, 6 INT’L J. CONST. L. 373, 376 (2008).

¹⁴⁷ See *Kadi II*, *supra* note 23, ¶¶ 226–31.

¹⁴⁸ See *Kadi*, *supra* note 1, ¶¶ 305–08.

¹⁴⁹ *Cf. R (Al Jeddah) v. Sec’y of State for the Home Dep’t*, [2008] 1 A.C. 332, ¶¶ 35–39 (U.K.H.L. 2007). This case demonstrates the approach of Lord Bingham (with whom Baroness Hale and Lords Carswell and Brown agree) in his judgment in a case which raised a similar question to *Behrami*, concerning whether Article 103 of the U.N. Charter as applied to a resolution of the Security Council under Chapter VII should take precedence over the core provisions of the ECHR. He states:

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Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in [A]rticle 103 to ‘any other international agreement’ leaves no room for any excepted category, and such appears to be the consensus of learned opinion. . . . [I]t now seems to be generally recognised in practice that binding Security Council decisions taken under Chapter VII supersede all other treaty commitments. . . . I do not think that the European Court [of Human Rights], if the appellant’s article 5(1) claim were before it as an application, would ignore the significance of [A]rticle 103 of the Charter in international law.

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Id. ¶ 35–36. In response to the appellant’s argument that it would be “anomalous and offensive to principle that the authority of the U.N. should itself serve as a defence of human rights abuses,” Lord Bingham declared that the responsibility remains with the United Kingdom. He states that when it exercises the authority to detain under the Security Council resolution, it must ensure that the detainees’ rights under Article 5 “are not infringed to any greater extent that is inherent in such detention.” *Id.* ¶ 39. Lord Rodgers on the other hand found the *Al-Jeddah* case to be indistinguishable from *Behrami* insofar as attributability was concerned, so that the impugned acts would be attributable, according to the ECHR, to the United Nation rather than to the United Kingdom and so the ECHR would have no application. See *id.* ¶ 57. However, he also considered that had he had to rule on the point about the

The ECtHR positions itself as a specialized regional tribunal established under international law and as part of an international landscape in which the United Nations is the ultimate global forum for transnational cooperation in pursuit of collective security, whose authority should not be open to question by a regional human rights tribunal, and whose acts should not be subjected to the conditions contained in the ECHR. This understanding was derived not from a formal textual approach by the ECtHR which would limit its jurisdiction to what is expressly provided under the ECHR, but rather from a teleological (purposive) interpretation which rejects the dynamic gap-filling approach it has adopted in other contexts to broaden its jurisdiction¹⁵⁰ as being inapposite to the context of U.N. action. The ECtHR understood its own authority to derive from the same ultimate source—that is, from international law, albeit under a geographically and functionally limited international law instrument—as the institutions of the United Nations. On this understanding, the decisions of the Security Council adopted under Chapter VII constitute a singular, hierarchical source of authority which binds and overrides the ECHR and constrains the ECtHR from exercising even indirect jurisdiction over the effects of such decisions.

The EU CFI's approach was more complex, concluding that EU Member States were, both as a matter of international law and as a matter of EC law, bound by the overriding obligations established under the U.N. Charter, including those imposed by Security Council Resolutions. The CFI took the view that customary international law and EC treaty law determine that the international obligations created under the U.N. Charter are binding on the EC and that they override other conflicting obligations. However, unlike the ECtHR, the CFI reached its conclusion on the overriding binding force of the U.N. Charter through a process of reasoning based on the text of the Vienna Convention of the Law on Treaties, the provisions of the U.N. Charter, customary international law, and the provisions of the EC Treaty. The substantive purposes and goals of the United Nations were not brought into the picture. In other words, the CFI's reasoning was largely formal and jurisdiction-based, following the legal hierarchy which was established by an array of international and regional treaties of which the

conflict between Article 5 of the ECHR and Article 103 of the U.N. Charter, he would have found the obligations imposed on the U.K. forces to detain the appellant under the terms of the Security Council Resolution to prevail over the obligations of the United Kingdom under the ECHR. *Id.* ¶ 135.

¹⁵⁰ See, e.g., *Issa v. Turkey*, App. No. 31821/96, 2002-X Eur. Ct. H.R. 41 (refusing to find extraterritorial jurisdiction in claim against Turkey); *Bankovich v. Belgium*, App. No. 52207/99 2001-XII Eur. Ct. H.R. (rejecting extraterritorial jurisdiction in claim against NATO countries).

EC Treaty forms a part. Further, the CFI also differed from the ECtHR in asserting its own power, and perhaps even its duty under *jus cogens*, despite the overriding binding force of the Security Council Resolutions, to exercise a substantively minimal and residual judicial review over the Security Council. It did so on the basis that *jus cogens* norms recognized under customary law and under the Vienna Convention on the Law of Treaties, together with the purposes and principles of the Security Council itself, impose limits on the powers of the Security Council which must be respected. Thus, despite presenting the EC legal order as formally subordinate to that established by the U.N. Charter, there was little institutional reticence on the part of the CFI about undertaking the job of reviewing the U.N. Security Council.

The ECJ, following much of the AG's advice, adopted a very different approach to that of either the ECtHR in *Behrami* or the CFI in *Kadi*. While the AG treated the question of the obligations of the EC under international law, or the status of international law within the EC legal order, as marginal to the case, the ECJ addressed it directly and made clear that if it were to adopt a unitary approach (which it did not, ruling instead that the EC legal order is an entirely separate and internal order from that of international law) it would rank international treaties, including the U.N. Charter and Security Council resolutions, below the level of the EC Treaties. Both the ECJ and the AG took the view that the ECJ's primary obligation is to protect the values of the EU's "municipal" constitutional legal order, including European human rights values, regardless of whether this entails an indirect rejection of the Security Council's actions. Given their dualist premises, they saw no particular relevance in the applicability of Article 103 of the U.N. Charter. Thus, AG Maduro declared that his conclusion as to the primacy of EC norms over the Security Council Resolutions was "without prejudice to the application of Article 103 of the Charter," and the ECJ ruled that annulment of the EC regulation implementing the Security Council resolution for violation of EC legal principles "would not entail any challenge to the primacy of that resolution in international law."¹⁵¹ The ECJ should take its cue from EU constitutional law, not from public international law, even if this means that the EU or the Member States would be held responsible as a matter of international law for breaching U.N. Charter obligations. Both the AG and the ECJ posit two distinct and separate sources of law—"municipal" EC law on the one hand, and international law on the other. For the purposes of

¹⁵¹ *Kadi*, *supra* note 1, ¶ 288.

Kadi’s challenge to the EC Regulation implementing the Security Council Resolutions, it was the former which was of interest to the ECJ. The ECJ’s vision of the international legal space is a horizontal and segregated one, with the EU existing alongside other constitutional systems as an independent and separate municipal legal order, and with no role envisaged for the ECJ in articulating the relationship or developing principles of communication between international norms (such as Security Council resolutions) and EC legal norms. The apparently opposite approaches of the CFI and the ECtHR therefore have more in common with one another at a fundamental level than they have with the ECJ’s approach, in that they presuppose and are premised upon the existence of a common international system and an international community of which they—as different kinds of regional courts—are a part, and in which they have a role to play in articulating the relationship between their sub-system and other parts of the international system.

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

Regional Judicial Instance	Basis for the court’s recognition of the legal authority of another international entity (here the United Nations & U.N. Security Council)	Court’s conception of the source(s) of legal authority in the global regime	Court’s vision of the global legal regime	Court’s jurisdiction to review the decisions of the other legal authority (here the United Nations & U.N. Security Council)
ECtHR/ <i>Behrami</i>	Substantive values and role	Singular	Vertical, hierarchical, integrated	None

CFI/Kadi	Formal jurisdiction granted under EC or international law	Singular	Vertical, hierarchical, integrated	Review for compliance with <i>jus cogens</i> only
AG/Kadi	Substantive values, role, and formal jurisdiction under EC law	Plural	Horizontal, heterarchical, segregated	Full power of indirect review
ECJ/Kadi	Formal jurisdiction under EC law	Plural	Horizontal, heterarchical, segregated	None, but no impediment to reviewing measures implementing such decisions

Each of the three judicial approaches has been met with a mixed response. Some commentators have been critical of the CFI's unexpected move in taking upon itself to review—even if only indirectly—the supreme political body of the United Nations,¹⁵² particularly when it is unclear that the ICJ would be willing to engage in such review of the Security Council.¹⁵³ Others criticized the CFI for abdicating a strong judicial role and for subordinating EC law to

¹⁵² See Matteo Winkler, *When Legal Systems Collide: Judicial Review of Freezing Measures in the Fight Against International Terrorism* (Apr. 2007) (unpublished manuscript, on file at the Yale Law Legal Scholarship Repository).

¹⁵³ Regarding this question, different interpretations of *Libyan Arab Jamahiriya v. United States of America (Libya v. U.S.)*, 1992 I.C.J. 114 (Apr. 14), have been expressed. For further information, see also the appellate level of the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case which purported to examine whether the U.N. Security Council had jurisdiction to establish the tribunal by means of a Chapter VII resolution. See *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion of Jurisdiction (Aug. 10, 1995). See Alvarez, *supra* note 105, for a full discussion.

U.N. Security Council decisions.¹⁵⁴ Still others have been critical of the ECtHR for its blanket denial of jurisdiction in *Behrami*, for abandoning its “dynamic and evolutionary” approach to human rights protection under the ECHR, and for tolerating a significant vacuum in legal accountability for human rights violations in Europe.¹⁵⁵ Some have specifically commended AG Maduro’s approach,¹⁵⁶ which exempts the EC as a matter of EC law from the requirement of compliance with obligations under Article 103 of the U.N. Charter and reviews EC laws that implement the Security Council resolutions for compliance with the full panoply of human rights standards set by the EU for itself, and many of the responses to the ECJ’s ruling have been positive.¹⁵⁷

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

¹⁵⁴ See, e.g., ECKHOUT, EUROPE’S CONSTITUTION, *supra* note 115; Eeckhout, *Community Terrorism Listings*, *supra* note 75. For a broader human-rights based critique of the CFI in *Kadi* and of the CFI’s and the ECJ’s numerous other rulings on anti-terrorist sanctions, see Almqvist, *supra* note 114.

¹⁵⁵ See, e.g., Larsen, *supra* note 54; Milanović & Papić, *supra* note 54.

¹⁵⁶ See Nicolas Lavranos, *The Interface between European and National Procedural Law: UN Sanctions and Judicial Review*, in *THE INTERFACE BETWEEN EUROPEAN AND NATIONAL LAW* 349 (Nicolas Lavranos & Daniela Obradovic eds., 2007).

¹⁵⁷ See, e.g., d’Aspremont & Dopagne, *supra* note 75; De Sena & Vitucci, *supra* note 75; Eeckhout, *supra* note 3; Harpaz, *supra* note 3; Kunoy & Dawes, *supra* note 3; P. Takis Tridimas, *Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order*, 34 EUR. L. REV. 103 (2009).

IV. PLURALIST VS. CONSTITUTIONALIST APPROACHES TO THE INTERNATIONAL LEGAL ORDER

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

The body of literature which describes and advocates a pluralist approach to international law and governance is growing rapidly.¹⁵⁸ Although some of the earlier literature on legal pluralism was more sociological than normative in nature,¹⁵⁹ the recent scholarship on international and global legal pluralism in particular is notable for its advocacy of the merits of legal pluralism. It emphasizes the value of diversity and difference amongst various national and international normative systems and levels of governance, and the undesirability and

¹⁵⁸ See sources cited *supra* note 25.

¹⁵⁹ See, e.g., Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981); John Griffiths, *What is Legal Pluralism?*, 24 J. OF LEGAL PLURALISM 1 (1986); Sally E. Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988).

implausibility of constitutional approaches which seek coherence between these systems. There are, however, different strands of argument within the growing body of contemporary scholarship on global legal pluralism, some of which advocate what may be called “strong pluralism,” and others which favor a softer variant.

Amongst the strong pluralists is Nico Krisch, who has written about the problem of accountability at the level of global governance, and has argued that the pragmatic accommodations of pluralism are normatively preferable to constitutionalist approaches premised on ideals of coherence and unity.¹⁶⁰ Krisch suggests that pluralist approaches, by comparison with constitutionalist approaches, could lead to stronger transnational accountability. He defends the “disorderly” and disconnected landscape of global administrative accountability, arguing that it allows for “mutual influence and gradual approximation,” while preventing any one level or site of governance from dominating the others.¹⁶¹ Pluralist approaches, in his account, are contrasted favorably with constitutionalist approaches which force the political order into a coherent, unified framework by downplaying the extent of legitimate diversity in the global polity. Understanding the international order in pluralist terms presents the relationships among different systems as being governed by politics rather than by law, with different actors and rules competing for authority through politics rather than legal argument.¹⁶² Pluralism’s ad hoc mutual accommodation between different legal regimes is preferred over the imposition of what are viewed as sovereigntist or universal-harmonization schemes.¹⁶³

Pluralist approaches to the international legal order claim to preserve space for contestation, resistance, and innovation, and to encourage tolerance and mutual accommodation.¹⁶⁴ Thus, David Kennedy argues for “a more vigorous but fragmented public capacity, and for a normative order that embraces legal pluralism” and challenges the idea that

¹⁶⁰ See Krisch, *supra* note 25, at 278 (2006). The version of pluralism Krisch advocates in the regional context (i.e. within Europe, within the EU and the ECHR, and in the interaction between these two) is a softer form of pluralism than that which he advocates in the global context. In the European context he points to the importance of mutual persuasion, even while emphasizing the autonomy and authority of each unit. See Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MOD. L. REV. 183, 214 (2008) [hereinafter Krisch, *Open Architecture*].

¹⁶¹ See Krisch, *supra* note 25, at 256.

¹⁶² See Krisch, *Open Architecture*, *supra* note 160, at 185.

¹⁶³ See Berman, *Global Legal Pluralism*, *supra* note 25.

¹⁶⁴ See *id.* at 1237. See also Cohen, *supra* note 31.

there is such a thing as an “international community.”¹⁶⁵ Even within the growing body of scholarship on *constitutional* pluralism, which presents the global order as a plurality, not just of legal but of national and transnational *constitutional* sites, the emphasis is on the proliferation of separate systems which engage primarily through “agonistic processes of negotiation.”¹⁶⁶ Despite the normative emphasis on tolerance, accommodation and the possibility of mutual learning, there is an acknowledgment that the proliferation of separate and self-contained constitutional systems seeking to establish their own authority may well “exacerbate conflict and pathologize communication” or “encourage a strident fundamentalism, a refusal of dialogue with other sites and processes.”¹⁶⁷

In sum, what joins pluralist approaches to the international legal order is the significance they ascribe to the existence of a multiplicity of distinct and diverse normative systems and the likelihood of clashes of authority-claims and competition for primacy in specific contexts. From the perspective of its advocates, the multiple pressure points of global legal pluralism, and the constant risk of mutual rejection of the authority-claims of different functional or territorial sites, provide a more promising model for promoting responsible and responsive global governance than constitutional or cosmopolitan approaches that emphasize coherence or unity. Robust pluralist approaches deny the possibility of a shared, universally-oriented system of values and question the meaningfulness of the idea of an international community. They do not seek the development of a shared communicative framework for addressing the different authority-claims of different polities or legal orders. Rather than advocating coordination between legal systems, they promote agonistic, ad hoc, pragmatic, and political processes of interaction. Pluralist approaches applaud this diversity, competition, and lack of coordination as being more likely to lead to a healthy degree of global accountability. For the most part, pluralist approaches to the international realm have been consciously advocated as a corrective to or in opposition to constitutional “monist” or “sovereign” approaches, which are presented as being naïvely, misleadingly, and even dangerously focused on unity, universalism, and consensus.¹⁶⁸ Constitutional approaches are presented in the pluralist literature as misconceived or even

¹⁶⁵ David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 N.Y.U. REV. L. & SOC. CHANGE 641, 659 (2007). See also David Kennedy, *The Mystery of Global Governance*, 34 OHIO N.U. L. REV. 827 (2008) [hereinafter Kennedy, *Mystery of Global Governance*].

¹⁶⁶ Walker, *supra* note 25, at 361.

¹⁶⁷ *Id.*

¹⁶⁸ See, e.g., Berman, *Global Legal Pluralism*, *supra* note 25; Cohen, *supra* note 31; Kennedy, *Mystery of Global Governance*, *supra* note 165; Krisch, *supra* note 25.

dangerous attempts to transpose the model of domestic government, the solutions designed for domestic political constituencies, and the political imaginary of domestic constitutionalism onto the transnational stage.¹⁶⁹

A. *Constitutionalist Approaches to International Law and Governance*

Unlike the literature on international legal pluralism, which, although growing, is not vast and is relatively recent in origin, there is sizeable literature on constitutionalist approaches to international law.¹⁷⁰ An influential part of this literature consists of German legal scholarship throughout the twentieth century,¹⁷¹ and its intellectual roots are often traced to Kant's cosmopolitanism.¹⁷² As might be expected from such extensive literature on a rich and elusive

¹⁶⁹ See Nico Krisch, *Postnational Constitutionalism?* (Aug. 2008) (draft for discussion at the Hauser Globalization Colloquium Fall 2008: Global Governance and Legal Theory), available at <http://www.iilj.org/courses/documents/Krisch.IdeaofConstitutionalism.pdf> (offering an excellent discussion and critique of the idea of constitutionalism in a postnational context).

¹⁷⁰ The literature is too vast to cite comprehensively or even representatively, but the following are a few of the canonical texts, as well as some of the recent collections of essays dedicated to the subject. See, e.g., Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51 (2006); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998); Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT'L L. (2006); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 REC. DES COURS 217 (1994); Christian Tomuschat, *Obligations Arising for States Without or Against their Will*, 241 REC. DES COURS 195 (1993); Armin von Bogdandy, *Constitutionalism in International Law: Comments on a Proposal from Germany*, 47 HARV. INT'L L.J. 223 (2006). In the field of international trade law there is a wide "constitutionalist" literature. See, e.g., DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM* (2005); Marcus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 J. WORLD TRADE 167 (2001). See also the argument of Petersmann in the series of his articles cited *infra* note 180. Some of the recent collections of essays include: *CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION* (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006); *RULING THE WORLD* (Jeffrey Dunoff & Joel Trachtman eds., forthcoming 2009); *TOWARDS WORLD CONSTITUTIONALISM* (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005). See also Louiza Odysseos & Fabio Petito, *Introducing the International Theory of Carl Schmitt: International Law, International Relations, and the Present Global Predicament(s)*, 19 LEIDEN J. INT'L L. 1 (2006).

¹⁷¹ See Fassbender, *supra* note 170, at 538–51 (addressing three distinct strands of this constitutionalist literature on international law).

¹⁷² See, e.g., Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Intent*, reprinted in *PERPETUAL PEACE AND OTHER ESSAYS* (Ted Humphrey trans., Hackett 1983) (1784); *IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY* (Mary Campbell Smith trans., Swan Sonnenschein 1903) (1795) [hereinafter *KANT, PERPETUAL PEACE*]. Kant's second definitive article of *Perpetual Peace* was that the law of nations "shall be founded on a federation of free states." *KANT, PERPETUAL PEACE*, at 128. To quote one of his more colorful statements of support for international constitutionalism, "[o]n the conclusion of peace at the end of a war, it might not be unseemly for a nation to appoint a day of humiliation, after the festival of Thanksgiving, on which to invoke the mercy of Heaven for the terrible sin of which the human race are guilty of, in their continued unwillingness to submit (in their relations with other states) to a law-governed constitution; preferring rather in the pride of their independence to use the barbarous method of war, which after all does not settle what is wanted, which is the right of each state in a quarrel." *Id.* at 136–37.

concept like constitutionalism, there are many different kinds of arguments and approaches to be found.

One obvious risk with a concept like constitutionalism is that it is eroded through overuse and over-extension so that it becomes meaningless to describe a particular approach to international law and governance as constitutionalist.¹⁷³ In this vein, Fassbender has criticized the inflationary use of the word “constitution” by equating it with an increase in regulation, or with the evolution of a hierarchical system of rules.¹⁷⁴ Nonetheless, there are many varieties of international constitutionalist approaches which can properly be so called.¹⁷⁵ These include the influential German school, represented by Verdross,¹⁷⁶ Simma,¹⁷⁷ and Tomuschat,¹⁷⁸ which emphasizes the idea of an international legal system premised on an “international community” and international solidarity (as opposed to one premised on the separate interests of individual nation states).¹⁷⁹ Another approach is the Hayek-inspired, political power-limiting version of

¹⁷³ Neil Walker draws attention to the risks of the rhetorical use of constitutionalism which the application of the term to the international legal order entails:

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[W]hat is the added value of the invocation of the term ‘constitutional’ to endorse the favoured narrative of progress? The common rhetorical purpose seems to be to lend additional gravitas to the particular trend or trends in question. In a circular or boot-strapping logic, it is the documentation of the supposedly progressive trend or trends which justifies a ‘constitutional’ attribution, and it is the constitutional attribution which then both dignifies the existing state of affairs and authorizes further progress. Such a discursive move carries with it both dangers and opportunities, and it is on how these dangers are approached and opportunities negotiated that the prospects of a cosmopolitan-inspired constitutionalization of international law depends.

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Neil Walker, *Making a World of Difference: Habermas, Cosmopolitanism and the Constitutionalization of International Law* 10 (Eur. Univ. Inst. Dep’t of Law, Working Paper Law No. 2005/17, 2005), available at <http://ssrn.com/abstract=891036>. Further, Walker notes, “[t]he strategy of political constitutionalism, as we have seen, is to take what is already there as materials towards the self-constitution of a particular political society and through a work of imagination and reform transform it into a more inclusive system of self-government.” *Id.* at 11.

¹⁷⁴ See Bardo Fassbender, *The Meaning of International Constitutional Law*, in *TOWARDS WORLD CONSTITUTIONALISM* 837, 840 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005). Elsewhere Fassbender has made his own strong constitutionalist claim, arguing that the U.N. Charter should be considered the constitution of the international legal order. See Fassbender, *supra* note 170.

¹⁷⁵ See, e.g., Günther Teuber, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 3 (Christian Joerges, Inger-Johanne Sand & Günther Teubner eds., 2004) (proposing the systems-theoretic argument for “societal constitutionalism,” an unusual adaptation of international constitutionalist thought).

¹⁷⁶ See generally ALFRED VERDROSS, *DIE VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT* (1926).

¹⁷⁷ See Simma, *supra* note 170.

¹⁷⁸ See CHRISTIAN TOMUSCHAT, *INTERNATIONAL LAW: ENSURING THE SURVIVAL OF MANKIND ON THE EVE OF A NEW CENTURY* (1999); Tomuschat, *supra* note 170.

¹⁷⁹ See Brun-Otto Bryde, *International Democratic Constitutionalism*, in *TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY* 115 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005) (“In the past, the main object of international constitutionalism has been to bind states to the

international constitutionalism that posits the need for an internationally judicially enforceable and directly effective “global integration law” protecting economic freedoms and rights.¹⁸⁰ A further branch of international constitutionalist thought is the “law of lawmaking”¹⁸¹ approach which posits the need for a law “through which transnational decision-making can be structured in a way which ensures its legitimacy and the rule of law.”¹⁸² The concern animating such approaches is that forms of transnational governance which would otherwise escape domestic constitutional control should be confined by law. More specifically, such approaches argue for an appropriate translation, to the transnational context, of a set of constitutional principles analogous to those developed in the national constitutional context such as rule of law, checks and balances, human rights protection, and democracy.¹⁸³ Many advocates of an international constitutionalist understanding have drawn on the development of the EU with its unusually dense legal order in support of an argument that a constitutionalist approach beyond the state is possible and plausible.¹⁸⁴

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

constitutional principles of the international community.”); von Bogdandy, *supra* note 170 (providing discussion of the German School).

¹⁸⁰ Ernst-Ulrich Petersmann is the leading exponent of this view. *See, e.g.*, Ernst-Ulrich Petersmann, *Constitutionalism and the Regulation of International Markets: How to Define the ‘Development Objectives’ of the World Trading System?* (Eur. Univ. Inst., Working Paper LAW No. 2007/23), available at <http://ssrn.com/abstract=1024105>; Ernst-Ulrich Petersmann, *Why Rational Choice Theory Requires Multilevel Constitutional Approach to International Economic Law—The Case for Reforming the WTO’s Enforcement Mechanism*, 1 U. ILL. L. REV. 359 (2008).

¹⁸¹ This approach is inspired by Frank Michelman’s work on domestic constitutionalism. *See* FRANK MICHELMAN, *BRENNAN AND DEMOCRACY* 3–60 (2005).

¹⁸² Christian Joerges, *Constitutionalism in Postnational Constellations: Contrasting Social Regulation in the EU and in the WTO*, in *CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE, AND SOCIAL REGULATION* 491 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2006).

¹⁸³ *See* Peters, *supra* note 170.

¹⁸⁴ *See de Wet, supra* note 170. De Wet also argues: “European constitutionalists have illustrated the significance of constitutionalism as a frame of reference for a viable and legitimate regulatory framework for any political community, including . . . those constitutional orders that are formed beyond the state, which can be of a regional, international or supra-national nature.” *Id.* at 52–53.

Constitutionalist approaches to the international regime have, however, generated their fair share of criticism even from within the community of international lawyers.¹⁸⁵ Von Bogdandy, writing about the German school, has argued that as a legal project “international constitutionalism might simply be overly ambitious and might lead to normative over-extension.”¹⁸⁶ A range of other objections have been summarized as follows:

The goal of world constitutionalism may be perceived to be threatening for a variety of reasons: jurisprudential, ethical, cultural, social and political . . . *Jurisprudential* resistance is offered mostly by legal realists . . . [who] fear that an excess of constitutionalist ideology in international law will raise the level of *textualism* within the professional community . . . [and] is reinforced by *ethical* concerns about the unrepresentative status of international judges who would be called upon to adjudicate disputes over the interpretation of constitutional text . . . Cultural and ethical opponents to world constitutionalism are likely to find allies in the cognate sector of *social* activists, who champion the cause of local communities seen to be vulnerable to the exploitative or insensitive practices of central state authority and large-scale corporate power.¹⁸⁷

To the extent that the EU is used as a prototype, there are obvious problems in extrapolating from this example, and even the meaningfulness of the idea of constitutionalism in the EU context has been questioned.¹⁸⁸

Despite the range of critiques, some formerly skeptical voices¹⁸⁹ have recently joined the advocates of a constitutionalist approach. Most notably, Jürgen Habermas and Martti Koskenniemi, drawing in different ways on Kant’s writings, have expounded the merits of a

¹⁸⁵ See, e.g., Jeffrey Dunoff, *Constitutional Conceits: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17 EUR. J. OF INT’L L. 647 (2006); Theodor Schilling, *On the Constitutionalization of General International Law* 4 (The Jean Monnet Program, NYU Sch. Of Law, Working Paper No. 6/2005), available at <http://www.jeanmonnetprogram.org/papers/05/050601.html>.

¹⁸⁶ Von Bogdandy, *supra* note 170, at 242.

¹⁸⁷ Douglas M. Johnston, *World Constitutionalism in the Theory of International Law*, in TOWARDS WORLD CONSTITUTIONALISM 3, 19–20 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005).

¹⁸⁸ See Dieter Grimm, *The Constitution in the process of Denationalization*, 12 CONSTELLATIONS 447, 458–59 (2005); Dieter Grimm, *Integration by Constitution*, 3 INT’L J. CONST. L. 193 (2005).

¹⁸⁹ See Martti Koskenniemi, Dir., Erik Castren Inst. of Int’l Law & Human Rights, Lecture at Harvard: Global Legal Pluralism: Multiple Legal Regimes and Multiple Modes of Thought (Mar. 5, 2005), available at <http://www.helsinki.fi/eci/Publications/MKPluralism-Harvard-05d%5B1%5D.pdf>.

cosmopolitan constitutionalist approach to international law. For Habermas, the crucial underpinning of Kant’s cosmopolitan project is the “cognitive procedure of universalization and mutual perspective-taking” which Kant associates with practical reason.¹⁹⁰ Habermas opens the final chapter of his recent book by asking if the constitutionalization of international law has a chance when “confront[ed with] the traditional objections of ‘realists’ who affirm the quasi-ontological primacy of brute power over law.”¹⁹¹ Habermas seeks to reclaim and re-present Kant’s cosmopolitanism as the basis for the international legal order, in the place of either Schmittian realism or hegemonic unilateralism.¹⁹² While drawing on Kant’s peace-making and freedom-securing goals of constitutionalism, he rejects the idea of a “world republic”¹⁹³ and argues for a different path to the constitutionalization of international law. Describing the constitutionalization process in the development of modern nation states as “the reversal of the initial situation in which law serves as an instrument of power,”¹⁹⁴ he argues that “major powers are more likely to fulfill expectations of fairness and cooperation the more they have learned to view themselves at the supranational level as members of a global community—and are so perceived by their own national constituencies from which they must derive their legitimation.”¹⁹⁵

Koskeniemi, drawing similarly on a renewed reading of Kant, has also recently defended the “constitutionalist mindset” in relation to the international legal order.¹⁹⁶ While criticizing the resort by international lawyers “to a vocabulary of institutional hierarchies,” he argues that Kant’s constitutionalism was less an institutional or architectural project, and more “a programme of moral and political regeneration.”¹⁹⁷ Koskeniemi argues that Kant sought to institutionalize a constitutional mindset “from which to judge the world in a manner that aims for

¹⁹⁰ Walker, *supra* note 173 (commenting on the turn to constitutionalism in writings such as Habermas’s *The Kantian Project of the Constitutionalization of International Law: Does it Still Have a Chance?*, in JÜRGEN HABERMAS, *THE DIVIDED WEST* 115 (2006)). Walker suggests that for Habermas the “constitutionalism of international law seems to inhere partly in the substantive quality of the norms generated, partly in their institutional efficacy, and partly in their universalizability—as a matter of both process and outcomes.” *Id.* at 9.

¹⁹¹ HABERMAS, *supra* note 190, at 116.

¹⁹² *Id.* at 122–23.

¹⁹³ *Id.* at 123.

¹⁹⁴ *Id.* at 132.

¹⁹⁵ *Id.* at 142.

¹⁹⁶ See Martti Koskeniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, in 8 *THEORETICAL INQUIRIES IN LAW* 9 (Hanoch Dagan, ed., 2007).

¹⁹⁷ *Id.* at 18.

universality, impartiality, with all the virtues of [Fuller’s] ‘inner morality of law.’”¹⁹⁸ He concludes that constitutional vocabularies not only frame the internal world of moral politicians but also inform political struggles such as “‘self-determination,’ ‘fundamental rights,’ and ‘division and accountability of power,’” which are “historical[ly] thick, [and] contest the structural biases of present institutions.”¹⁹⁹

This Article posits that these Kantian re-readings of cosmopolitan constitutionalism offer the ECJ an attractive alternative to strong constitutional approaches and to strong pluralist approaches alike. The crucial components of what is here referred to as the *soft constitutionalist approach*, inspired by these Kantian re-readings, are the following: the first is the assumption of an international community of some kind; the second is an emphasis on universalizability (the Kantian notion of decision-making that seeks validity beyond the preferences of the decision-maker); and, the third is an emphasis on common norms or principles of communication for addressing conflict. These three features sharply distinguish the soft-constitutionalist approach from the pluralist approach, since the latter assumes the existence of a plurality of distinct and separate entities without any overall community, emphasizes the autonomous, authoritative decision-making processes and autochthonous values of each, and envisages communication and conflict-resolution through agonistic political processes, ad hoc negotiation, and pragmatic adjustment. The soft constitutionalist approach is also distinct from the strong constitutionalist approach in that it does not insist on a clear hierarchy of rules but rather on commonly negotiated and shared principles for addressing conflict.

Some variations on the soft constitutionalist approach can be found in literature, often proposed by scholars who seek to distinguish themselves from the strongly monist or hierarchical elements of international constitutionalist thought but who identify with both the descriptive plurality and the comity-oriented strands of international pluralist thought.²⁰⁰ Examples are seen in the work of Armin Von Bogdandy, who uses the notion of judicial “coupling”—defined as a “system of linkages” which can be realized principally through two doctrines, first the doctrine of “direct effect,” or self execution, of international law (as

¹⁹⁸ *Id.* at 33.

¹⁹⁹ *Id.* at 34.

²⁰⁰ *See, e.g.,* Walker, *supra* note 25, at 355–65 (commenting on “the increasing significance of the relational dimension within the post-Westphalian configuration,” and describing that “the units are no longer isolated, self-sufficient monads . . . their very identity and *raison d’être* as polities or putative polities rests at least in some measure on their orientation towards other sites”).

developed in particular within EC law), and second, the *Charming Betsy* “consistent interpretation” approach—to suggest how the different legal systems might interact with one another in a way that is informed by the values and principles of domestic constitutional law.²⁰¹ Other such proponents include William Burke-White, whose approach blends the descriptive component of pluralism with the constitutional aspirations of universalist standards, positive comity,²⁰² overall coherence, and commitment to a “common enterprise of international law,”²⁰³ as well as Mattias Kumm,²⁰⁴ Daniel Halberstam,²⁰⁵ and Jean Cohen.²⁰⁶

V. THE EU AS A “GOOD INTERNATIONAL CITIZEN”²⁰⁷ AFTER *KADI*?

At first glance, the ruling given by the ECJ in *Kadi* seems to vindicate advocates of a pluralist conception of the international legal order. Not only did the ECJ adopt a pluralist approach to the question of the relationship between EU law and international law but, more significantly, the ECJ in so doing—and by comparison with the approach of the CFI—annulled the EC regulation implementing the Security Council resolutions because of their non-compliance with individual due process rights. Further, the claim that a robustly pluralist approach is more likely to strengthen international accountability seems to be supported by the judgment and its outcome.²⁰⁸ The ECJ effectively ignored the Security Council resolution for the

²⁰¹ See Armin von Bogdandy, *Pluralism, Direct Effect and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law*, 6 INT’L CONST. L.J. 397, 398 (2008).

²⁰² See Burke-White, *supra* note 25, at 973 (referring to Anne-Marie Slaughter’s notion of “positive comity,” developed in ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004), which would require judges to develop a set of shared understandings and principles regarding when to defer to the adjudicatory mechanisms of other states and institutions, and suggesting that four trends together may counteract some of the risks of strong pluralism: first, the recognition of a common body of applicable law; secondly, robust interjudicial dialogue; thirdly, a blending of national legal traditions; and fourthly, the development of hybrid tribunals which bring together national and international law, judges and procedures).

²⁰³ Burke-White, *supra* note 25, at 973. Burke-White argues in constructivist vein that the way in which the relevant actors conceive of the global system is likely to be at least partly self-fulfilling. *Id.* In other words, advocacy of robust pluralist terms is likely to mean that particular legal obligations will be created and enforced without reference to or without consideration of the impact on other normative systems and priorities.

²⁰⁴ See Mattias Kumm, *Constitutional Democracy Encounters International Law: Terms of Engagement* (NYU Pub. Law and Legal Theory, Working Paper No. 47, 2006), available at http://lse.nellco.org/cgi/viewcontent.cgi?article=1046&context=nyu_plltwp.

²⁰⁵ Halberstam, *supra*, note 25.

²⁰⁶ See Cohen, *supra*, note 31.

²⁰⁷ See Tim Dunne, *Good Citizen Europe*, 84 INT’L AFF. 13 (2008).

²⁰⁸ S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008). This resolution took certain steps, albeit small, in response to the kind of challenges brought by litigants such as *Kadi* against U.N. sanctions by deciding that at least some parts of the “statements of case” which member states now provide to the Sanctions Committee when seeking the listing of an individual should be made public and placed on a Security Council website, or made available for qualified release on request by states. See *id.* ¶¶ 39–41. The Resolution also calls on the Sanctions Committee to make such brief “statements of case” available in respect of past listings and to keep listings under review to make

purposes of its judgment, treating the aims of the resolution and its purposes as a matter mainly for the EU's political branches when implementing it. Instead the ECJ focused judicial attention only on the question of whether the EC implementing measure could violate principles of the EC's internal constitutional order, without reference to any principles of international law and without reference to the United Nations or to any other entity.

While the specific outcome of the *Kadi* case may be commendable from the short-term perspective of its insistence on minimum procedural-fairness requirements for those whose assets are to be indefinitely frozen pursuant to the implementation of a Security Council resolution,²⁰⁹ the strong pluralist approach that underpins the judgment of the ECJ is at odds with the conventional self-presentation of the EU as an organization which maintains particular fidelity to international law and institutions, and it is an approach that carries certain costs and risks for the EU. The judicial strategy adopted by the ECJ in *Kadi* was an inward-looking one which eschewed engagement in the kind of international dialogue that has generally been presented as one of the EU's strengths as a global actor.

sure they are still warranted. It also requires Member States who have been notified (that is, when one of their citizens or an individual who is located in that state has been listed) to inform individuals who have been listed (or delisted) of this fact and of whatever reasons have been made public. *Id.* Nevertheless, in its 2008 Report, the Analytic Support and Sanctions Monitoring Team of the Sanctions Committee established by the Security Council, while evidently concerned by the possibility that the ECJ might follow the Opinion of AG Maduro, seemed unwilling to contemplate the establishment of any kind of review panel that would be competent to review the Security Council's decisions or processes. See U.N. Sec. Council, Analytical Support & Sanctions Monitoring Team, *Report of the Analytical Support and Sanctions Monitoring Team pursuant to resolution 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities*, U.N. Doc. S/2008/324 (May 14, 2008). A proposal by Qatar to make the focal point process into more of an independent review panel was not taken up by the Security Council. See *Targeted Sanctions: Listing/De-Listing and Due Process*, 2007 U.N. Sec. Council Rep., available at <http://www.securitycouncilreport.org/site/c.gKWLeMTIsG/b.2294423/>. See also Thomas J. Biersteker & Sue E. Eckert, *Targeting Terrorist Financing*, WATSON INSTITUTE FOR INTERNATIONAL STUDIES, http://www.watsoninstitute.org/project_detail.cfm?id=51 (providing further information on the pressure to reform the Security Council Sanctions System and a description of the various reform efforts of the so-called "Interlaken," "Bonn-Berlin," and "Stockholm" processes spearheaded by different states); Bardo Fassbender, *Targeted Sanctions and Due Process* (2006) (study commissioned by the United Nations Office of Legal Affairs) available at http://www.un.org/law/counsel/Fassbender_study.pdf. The Austrian Government also sponsored an initiative on the U.N. Security Council and the Rule of Law. See SIMON CHESTERMAN, *THE ROLE OF THE SECURITY COUNCIL IN STRENGTHENING A RULES-BASED INTERNATIONAL SYSTEM: FINAL REPORT AND RECOMMENDATIONS FROM THE AUSTRIAN INITIATIVE 2004–2008* (2008), available at http://www.iilj.org/research/documents/UNSC_and_the_Rule_of_Law.pdf.

²⁰⁹ However, the fact that *Kadi*'s listing was so rapidly renewed by the Commission following the judgment, apparently after receiving information from the Security Council, suggests that the ECJ's insistence on formal procedural rights may have provided a pyrrhic victory for the complainant. *Kadi* has now initiated annulment proceedings against the Commission's action re-listing him. See *Kadi*, *supra* note 144.

Other judicial strategies were clearly available to the ECJ.²¹⁰ In particular, the ECJ itself pointed toward what this Article has called a “soft constitutionalist” pathway but nevertheless chose not to take it. In paragraph 298 of its judgment in *Kadi*, the ECJ noted that the U.N. Charter leaves it to Member States to decide how to transpose Security Council resolutions into their legal order.²¹¹ This would have provided a doctrinal route by which the ECJ could have reached the same substantive result (viz, reviewing or striking down the EC’s implementation of the Security Council freezing order) even while adopting an internationally-engaged approach which drew directly on principles of international law instead of emphasizing the particularism of Europe’s fundamental rights. In other words, the ECJ could have insisted on respect for basic principles of due process and human rights protection under international law even where these were neglected within the existing Security Council listing and de-listing processes.²¹² By failing to do so, the ECJ lost an important opportunity to contribute to a dialogue about due process as part of customary international law, which would be of relevance for the international community as a whole and not just the EU. Arguments could have been advanced not only about customary international law as a basis for due process protection, but also about the references to protection of human rights in the U.N. Charter itself, as well as in the general principles of international law and *jus cogens* principles which were invoked by the CFI. In doctrinal terms, the ECJ could have concluded that the resolutions could not be implemented as they stood, without the interposition by the EU, within its freedom of transposition, of a layer of due process such as to protect the interests of affected individuals. This would have involved treating the EU’s implementation of the Security Council resolution as an opportunity to address that deficiency.²¹³ By focusing only on the EU’s municipal guarantees of fundamental rights

²¹⁰ See Johannes Reich, *Due Process and Sanctions Targeted Against Individuals Pursuant to U.N. Resolution 1267*, 33 YALE J. INT’L L. 505, 510 (2008) (arguing that there was no such other route for the ECJ to take, and that the only effective solution to the problems of targeted U.N. sanctions against individuals is the installation of an independent administrative mechanism to review the listing and de-listing decisions made by the Security Council, rather than “decentralized” review by states and organizations like the EC which would jeopardize the authority of the Security Council and risk fragmenting the system of sanctions). See also Michael Bothe, *Security Council’s Targeted Sanctions against Presumed Terrorists*, 6 J. INT’L CRIM. JUST. 541 (2008).

²¹¹ See *Kadi*, *supra* note 1.

²¹² See, e.g., Bianchi, *supra* note 103 (arguing that interpretative techniques should be perfectly adequate to ensure the conformity of Security Council resolutions with human rights guarantees which could then be provided by states); Iain Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 27 NOR. J. INT’L L. 159 (2003) (arguing that the U.N. sanctions regime itself could be made compatible with international and European human rights standards).

²¹³ *But cf.* Martin Nettesheim, *UN Sanctions against Individuals—A Challenge to the Architecture of European Union Governance* (Walter Hallstein-Institut, Working Paper No. 1/07, Feb. 27, 2007), 23–24, 26, available at

protection and ignoring international law, the ECJ not only failed to influence an important international debate on an issue which currently affects every member of the United Nations, but also failed to avail itself of the opportunity to develop a channel for the mutual influence of the EU and the U.N. legal orders. The fact that the ECJ chose the pluralist language and the reasoning which it did has sent out a clear message to other players in the international system about the autonomy of the European legal order, and the priority which it gives to its internally determined values. If courts outside the EU are inclined towards judicial borrowing, then the ECJ's ruling in *Kadi* seems to offer encouragement to them to assert their local understandings of human rights and their particular constitutional priorities over international norms and over Chapter VII resolutions of the Security Council.

Another available strategy for addressing the conflict exposed by the facts of the *Kadi* case was the approach taken by the *Bundesverfassungsgericht* (Federal Constitutional Court of Germany) in its famous “*Solange*” judgments.²¹⁴ If we look back at the *Solange* jurisprudence, which was considered by many observers to provide a persuasive model for addressing the kind of conflict at issue in *Kadi*, we see that the German court's decision—especially but not only in *Solange II*—is expressed in more directly dialogic and outward-looking terms which reflect the core elements of a soft constitutionalist approach.²¹⁵ The conflict at issue in the German case was not only between a provision of the German Basic Law and an EC regulation but also between the internal constitutional norms of one political entity and the legal requirements imposed by an international or supranational system of which the former entity is a part. In its *Solange I* judgment, the German Constitutional Court declared that each of the two organs in question (which in that case were the Constitutional Court and the ECJ respectively) had a duty “to concern themselves in their decisions with the concordance of the two systems of law.”²¹⁶ The relationship between the EC and Germany was not presented by the German Constitutional

<http://www.whi-berlin.de/documents/whi-paper0107.pdf> (arguing that the claims of the U.N. Charter for respect and implementation should have been “mediated via the Member States in their dichotomous role” and not by the EU, and that “it is not the responsibility of . . . a constitutionally based jurisdiction to instruct the institutions of other entities whether or not they adhere to their own legal standards. It is certainly not its duty to create a global *ordre public*.”).

²¹⁴ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 29, 1974, 37 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 271 (F.R.G.), 2 C.M.L.R. 540 [hereinafter *Solange I*]; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 22, 1986, 73 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 339 (F.R.G.), 3 C.M.L.R. 225 [hereinafter *Solange II*].

²¹⁵ See *Solange I*, *supra* note 214; *Solange II*, *supra* note 214.

²¹⁶ *Solange I*, *supra* note 214.

Court in hierarchical terms, nor was it described in strongly pluralist or confrontational terms. The judgment instead emphasized the mutually disciplining relationship between the two legal systems:

The binding of the Federal Republic of Germany (and of all member states) by the Treaty is not, according to the meaning and spirit of the Treaties, one-sided, but also binds the Community which they establish to carry out its part in order to resolve the conflict here assumed, that is, to seek a system which is compatible with an entrenched precept of the constitutional law of the Federal Republic of Germany. Invoking such a conflict is therefore not in itself a violation of the Treaty, but sets in motion inside the European organs the Treaty mechanism which resolves the conflict on a political level.²¹⁷

Further underscoring the dynamic nature of this relationship, the Constitutional Court went on to articulate expressly what it considered to be deficiencies regarding the EC's protection of fundamental rights, and it also declared that its review of the implementation of EC measures and their compatibility with fundamental rights was not just in the interest of the German court but "also in the interests of the Community and of Community law."²¹⁸ Subsequently in its second *Solange* ruling in 1986, the Bundesverfassungsgericht adopted a more deferential approach (which may have inspired the ECtHR judgment later in *Bosphorus v. Ireland*),²¹⁹ ruling that given the improvements in the EU human rights regime since the first *Solange* judgment, the German Constitutional Court would no longer examine the compatibility of EC legislation with German fundamental rights as long as the ECJ continued to protect fundamental rights adequately.²²⁰

The ECJ, however, eschewed the dialogic approach pioneered by the German constitutional court, which engaged directly with the ostensibly conflicting international regime. Instead, the court in *Kadi* opted for an internally-oriented approach and a form of legal reasoning

²¹⁷ *Id.* at 550.

²¹⁸ *Id.* at 554.

²¹⁹ See *Bosphorus*, *supra* note 57.

²²⁰ *Solange II*, 3 C.M.L.R. 265, *supra* note 214. This stance was subsequently confirmed and even strengthened in the June 7, 2000 *Solange* judgment of the Federal Constitutional Court. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 7, 2000, 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 147 (F.R.G.).

which emphasized the particular requirements of the EU's general principles of law and the importance of the autonomous authority of the EC legal order. The choice of the ECJ in *Kadi* not to borrow from the *Solange* approach, but to reject any judicial role in the process of shaping the relationship between the different legal systems, and to eschew any dialogue over the possible international law norms which the Security Council may be required to observe, seems to have been carefully chosen. More specifically, it seems to have been deliberately calculated by the ECJ as an opportunity instead to emphasize the autonomy, authority, and separateness of the EC from the international legal order. Rather than being a decision which can be understood only on its particular facts and in the context of the Security Council's growing anti-terrorist powers, the *Kadi* judgment seems to have been chosen by the ECJ as the dramatic moment in which to emphatically "make whole on its promise of an autonomous legal order by clarifying the external dimension of European constitutionalism,"²²¹ a promise first delivered in its famous *Van Gend en Loos* case in 1964.²²² This is the most striking feature of the *Kadi* case, and it is one which may well surprise those who have assumed that the difference between U.S. and EU approaches to international law lies in the greater receptiveness and openness on the part of the EU, including its judiciary, to international law and institutions.

In the United States, as is well known, an active debate continues not only over the status of customary international law and the duty of domestic courts to apply it,²²³ but also, and in spite of the language of the supremacy clause of the Constitution, about the status of international treaties in domestic law.²²⁴ The changing nature of the scholarly debate in recent years on these fundamental doctrinal questions of the authority and status of international law to some extent mirrors changing approaches within the U.S. political system towards international law and engagement. This approach is now regularly depicted as reflecting an attitude of exceptionalism, unilateralism, and general distrust of international law and institutions.²²⁵ The

²²¹ Daniel Halberstam, *Local, Global, and Plural Constitutionalism: Europe Meets the World*, in EUROPE'S CONSTITUTIONALISM AND OTHERS (Gráinne de Búrca & Joseph Weiler, eds., forthcoming).

²²² See *Van Gend en Loos NV v. Nederlands Administratie der Belastingen*, 1963 E.C.R. 1, 12.

²²³ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2006); Curtis Bradley, Jack Goldsmith & David Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 870 (2007) (addressing the "revisionist" school of foreign relations law and debating the meaning of the Supreme Court's ruling in *Sosa*).

²²⁴ See Carlos Vasquez, *Treaties as the Law of the Land: The Supremacy Clause and Presumption of Self-execution*, 121 HARV. L. REV. 599 (2008).

²²⁵ See, e.g., Harold Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); Peter Spiro, *The New Sovereignists: American Exceptionalism and its False Prophets*, 79 FOREIGN AFF. 9 (2000). See also Jeffrey S.

power of the United States in the international realm, together with the conviction of many Americans about the merits of U.S.-style democracy, explains this skeptical approach towards international law and institutions, which are perceived to be undemocratic and obstructive of U.S. interests. In contrast, as indicated above, Europe in general and the EU in particular have traditionally been associated with an attitude of respect for, and fidelity to, international law and institutions.²²⁶ This has indeed become an explicit part of the EU's self-image²²⁷ and a cultivated aspect of its international identity.²²⁸ It would have been enshrined in the EU's basic "constitutional" document, the Treaty on European Union ("TEU"), had the recently signed Lisbon Treaty or its predecessor Constitutional Treaty come into force.²²⁹ Art 2(5) as amended would have read:

Lehman, *Unilateralism in International Law: A US-European Symposium*, 11 EUR. J. INT'L L. 1 (2000); AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005).

²²⁶ See Sabrina Safrin, *The Un-Exceptionalism of U.S. Exceptionalism*, 41 VAND. J. TRANSNAT'L L. 1307 (2008) (presenting a critical analysis of the tendency to contrast Europe favorably); Magdalena Licková, *European Exceptionalism in International Law*, 19 EUR. J. INT'L L. 463 (2008) (offering a more nuanced account of Europe's version of exceptionalism).

²²⁷ See, e.g., *A Secure Europe in a Better World—European Security Strategy* (Dec. 12, 2003), <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf> [hereinafter *European Security Strategy*]; Javier Solana, Eur. Union High Representative for the Common Foreign & Sec. Policy, Address at the Stockholm Conference on Preventing Genocide: Threats and Responsibilities (Jan. 28, 2004), available at http://www.europa-eu-un.org/articles/en/article_3176_en.htm ("International law is the guiding spirit and lifeblood of our multilateral system. That system is made strong through our commitment to upholding and developing international law. The establishment of the International Criminal Court has shown that the multilateral system can be adapted and strengthened to meet new challenges. We have a responsibility now to ensure that it can do its job. We have a responsibility also to ensure that the U.N. can do its job; that it is made effective and equipped to fulfil its responsibilities. The United Nations cannot function unless we are prepared to act to uphold its rules when they are broken."); Patricia Galvão Teles, Dep't of Legal Affairs of Port. on behalf of the Eur. Union, Address at the 62nd Session of the General Assembly, 6th Committee Agenda Item 86: Rule of Law at the Nat'l and Int'l Levels (Oct. 25, 2007), available at http://www.europa-eu-un.org/articles/en/article_7569_en.htm ("The European Union is deeply committed to upholding and developing an international order based on international law, including human rights law and the rule of law with the United Nations at its core. We believe that international law and the rule of law are the foundations of the international system. Thus, the rule of law is among the core principles on which the EU builds its international relations and its efforts to promote peace, security and prosperity worldwide.").

²²⁸ See Ian Manners & Richard Whitman, *The 'difference engine': constructing and representing the international identity of the European Union*, 10 J. EUR. PUB. POL'Y 380 (2003).

²²⁹ The fate of the Lisbon Treaty had been uncertain since it was rejected by popular referendum in Ireland, the only one of the twenty-seven EU member states which held a referendum (on the basis that it was constitutionally obliged to do so). See *Ratifying the Treaty of Lisbon*, EurActiv, Feb. 12, 2008, <http://www.euractiv.com/en/future-eu/ratifying-treaty-lisbon/article-170245>. However, upon re-running the referendum on October 2, 2009, the Amendment of the Constitution of Ireland allowing the state to ratify the Treaty of Lisbon was approved. See Henry McDonald, *Ireland votes yes to Lisbon Treaty*, OBSERVER, Oct. 4, 2009, available at <http://www.guardian.co.uk/world/2009/oct/03/ireland-votes-yes-lisbon-treaty>. President Vaclav Klaus of the Czech Republic was the last EU leader to approve the treaty. See Dan Bilefsky & Stephen Castle, *Way is Clear to Centralize Europe's Power*, N.Y. Times, Nov. 4, 2009, at A6. At time of printing, the Treaty of Lisbon was scheduled to enter into force on December 1, 2009.

In its relations with the wider world, the Union shall uphold and promote its values and its interests and contribute to the protection of its citizens. It shall contribute to peace, security and the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights in particular the rights of the child, *as well as to the strict observance and the development of international law, including respect for the principles of the UN Charter.*²³⁰

Apart from these high-level constitutional and political commitments and declarations, the ECJ had professed respect for international law for several decades, at least in the relatively small number of significant “foreign relations” cases it decided. Article 300(7) of the EC Treaty provides that international agreements entered into by the EC are binding on the EC and on the Member States.²³¹ The ECJ supplemented this article by consistently ruling that once an international treaty concluded by the EC enters into force, its provisions form an “integral part” of Community law.²³² As far as the effect of such international agreements that are an “integral part” of the EC legal order is concerned, the ECJ has almost always declared, with the notable exception of the GATT and WTO agreements,²³³ that international agreements entered into by the EC are directly enforceable before domestic courts.²³⁴ In relation to international agreements

²³⁰ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1, art. 1(4), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0134:0134:EN:PDF> (amending Article 2(5) of the Treaty on European Union) (emphasis added).

²³¹ Article 300(7) of the EC Treaty, as amended most recently by the Treaty of Nice. *See* Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1, *available at* http://eur-lex.europa.eu/en/treaties/dat/12001C/pdf/12001C_EN.pdf.

²³² *See, e.g.*, Opinion 1/91 (Re. The Draft Treaty on a European Economic Area), 1991 E.C.R. I-6079, ¶ 3; *Haegeman, supra* note 20, ¶ 5.

²³³ The ECJ’s treatment of the multilateral trade agreements, and the decision to treat them as “non-self-executing” by comparison with many other international treaties, has generated vast literature. *See, e.g.*, GEERT A. ZONNEKEYN, DIRECT EFFECT OF WTO LAW (2008); Piet Eeckhout, *Judicial Enforcement of WTO Law in the European Union—Some Further Reflections*, 5 J. INT’L ECON. L. 91 (2002); Stefan Grillier, *Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96, Portugal v. Council*, 3 J. INT’L ECON. L. 441 (2000); Steve Peers, *Fundamental Right or Political Whim? WTO Law and the European Court of Justice*, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 111 (Gráinne de Búrca & Joanne Scott eds., 2001); Allan Rosas, *Portugal v. Council*, 37 COMMON MKT. L. REV. 797 (2000).

²³⁴ *See* Paul Craig & Gráinne de Búrca, EU LAW ch. 6, § 8 (4th ed. 2007). *But see* Martin Nettesheim, *UN Sanctions against Individuals—A Challenge to the Architecture of European Union Governance*, 44 COMMON MKT. L. REV. 567, 582 (2006) (arguing that following the CFI judgment in *Kadi*, despite the fact that the ECJ has “repeatedly used the terminology rooted in a monist perception of the relationship between public international law and European Union law” and has “repeatedly stressed the openness and friendly attitude of EU Law towards public international

to which the EC is not a party but which all member states are parties, under the 1947 GATT, the ECJ took the view that the Community had succeeded to the obligations of the states and was bound by its provisions by virtue of the powers the EC had acquired in the sphere of common commercial policy.²³⁵ As with the GATT 1947, neither the EC nor the EU are parties to the U.N. Charter, but the CFI in *Kadi* had followed a similar approach to that taken in the GATT cases by ruling that the EC was nonetheless bound by its provisions.²³⁶ As far as customary international law rather than the law of treaties is concerned, the ECJ has explicitly ruled on a number of occasions that the EC must respect the rules of customary international law in the exercise of its powers, and that such rules bind the EC and form part of its internal legal order.²³⁷ In previous cases in which the reviewability of EC measures implementing Security Council resolutions arose, the ECJ, despite not questioning its own jurisdiction to review those implementing measures, nevertheless expressed itself in very different terms from that of the ECJ in *Kadi*. In cases like *Bosphorus* and *Ebony Maritime*, for example, the tone of the ECJ's judgment was considerably more internationalist than in *Kadi*, expressing concern about the "purposes of the international community" and its fundamental interests, rather than about the separate and autonomous nature of the EC legal order.²³⁸

Furthermore, fed by legal, political and judicial pronouncements such as *Bosphorus* and *Ebony Maritime*, the general perception of the EU as an organization that maintains a distinctive fidelity to international law has been bolstered by academic and popular commentary. Some of this commentary has focused on the phenomenon of Europe as a "soft power"²³⁹ because it lacks the military might of the United States, and thus considers that it can best wield a different form of influence through persuasion, negotiation, conciliation, and incentives, and demonstrate its

law," these are primarily semantics and its case law on the direct effect of GATT/WTO agreements in particular demonstrates that "the ECJ clearly considers the Union as a closed system which opens itself to legal acts from the outside only after thorough controls.").

²³⁵ See Joined Cases 51-54/71, *Int'l Fruit Co. NV v. Produktschap voor Groenten en Fruit*, 1971 E.C.R. 1107.

²³⁶ See *Kadi II*, *supra* note 23

²³⁷ See, e.g., *Racke GmbH & Co. v. Hauptzollamt Mainz*, *supra* note 20, ¶ 46; *Anklagemyndigheden v. Poulsen and Diva Navigation*, *supra* note 20, ¶ 9.

²³⁸ See C-177/95, *Ebony Maritime SA and Loten Navigation Co.Ltd v. Prefetto della Provincia di Brindisi*, 1997 E.C.R. I-1111, ¶ 38; *Bosphorus*, *supra* note 108, ¶ 26 ("As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate.").

²³⁹ See JOSEPH NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004).

bona fides as a cooperative international actor under international law.²⁴⁰ Others have expressly drawn attention to the comparison between the EU and the United States in this respect, praising the European approach precisely for offering an alternative in international relations to the exceptionalist and unilateral approach of the United States.²⁴¹ The professed commitment within Europe and by the EU to international law and international institutions has been the subject of more cynical commentary by U.S. commentators²⁴² but notably they tend to share the perception that the EU and European powers in general differ from the United States in the extent to which they are prepared to trust in and to follow international law and institutions.²⁴³

CONCLUSION

The very different answers offered by various European judicial courts to the question of U.N. Security Council accountability for the impact of its actions on the rights of individuals exhibit a fascinating range of responses to the question of the authority of international law within Europe's regional legal order. Ultimately and perhaps surprisingly, it was the ECtHR that displayed the greatest deference to the U.N. Security Council and an unwillingness to question Security Council measures by reference to European human rights norms. On the other hand, the ECJ robustly refused to implement any Security Council measures—even those adopted under Chapter VII—which did not comply with the EU's own standards of rights-protection. The ECtHR adopted what this Article has termed a strong constitutionalist approach to the international legal order, subordinating the ECHR to the exigencies of the U.N. collective

²⁴⁰ There is extensive literature on Europe's aspirations as a so-called normative power. *See, e.g.*, CHARLOTTE BRETHERTON & JOHN VOGLER, *THE EUROPEAN UNION AS A GLOBAL ACTOR* (2d ed. 2006); Lisbeth Aggestam, *Introduction: Ethical Power Europe?*, 80 J. INT'L AFF. 1 (2008); Tim Dunne, *Good Citizen Europe*, 80 J. INT'L AFF. 13 (2008); Ian Manners, *Normative Power Europe: A Contradiction in Terms*, 40 J. COMMON MKT. STUD. 235 (2002); Kalypso A. Nicolaides & Robert L. Howse, *This is my EUtopia...: Narrative as Power: A Contradiction in Terms*, 40 J. COMMON MARKET STUD. 767 (2002); Helen Sjursen, *The EU as 'Normative' Power: How Can This Be?*, 13 J. EUR. PUB. POL'Y 235 (2006); Timothy G. Ash, *Europe's true stories*, PROSPECT, Feb. 28, 2007, available at <http://www.prospectmagazine.co.uk/2007/02/europestruestories/>; Ivan Krastev & Mark Leonard, *New World Order: The Balance of Soft Power and the Rise of Herbivorous Powers*, Oct. 24, 2007, http://ecfr.3cdn.net/f4ca309878e83f8019_9tm6bhxz0.pdf.

²⁴¹ *See* HABERMAS, *supra* note 190.

²⁴² *See, e.g.*, ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2003); Jed Rubenfeld, *Commentary: Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004).

²⁴³ There are various arguments which challenge the assertion that the European and American approaches to international law are so different from one another. *See, e.g.*, Jack Goldsmith & Eric Posner, *Does Europe Believe in International Law?*, WASH. POST, Nov. 25, 2008; Robert J. Delahunty, *The Battle of Mars and Venus: Why do American and European Attitudes to International Law Differ?* (St. Thomas Law Sch., Working Paper No. 1744, 2006), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=8181&context=expresso>.

security system, while the ECJ adopted a strongly pluralist approach, treating the U.N. system and the EU system as separate and parallel regimes, without any privileged status being accorded to U.N. Charter obligations or U.N. Security Council measures within EC law.

This Article has argued that the ECJ's new-found judicial pluralism in *Kadi* has potentially significant implications for the image the EU has long cultivated of itself as an actor which is committed to "effective multilateralism,"²⁴⁴ professing a distinctive allegiance to international law and institutions and seeking to carve out a global role for itself as a normative power. The striking similarity between the reasoning and interpretative approach of the U.S. Supreme Court in *Medellin* and that of the ECJ in *Kadi* regarding the relationship between international law and the 'domestic constitutional order' at the very least calls into question the conventional wisdom of the United States and the EU as standing at opposite ends of the spectrum in their embrace of or resistance to international law and institutions. Even as Europe's political institutions assert the EU's distinctive role as a global actor committed to multilateralism under international law, and even as a future amendment to the EU Treaties would enshrine the 'strict' commitment to international law in its foundational texts, the ECJ has chosen to use the much-anticipated *Kadi* ruling as the occasion to proclaim the primacy of its internal constitutional values over the norms of international law. Rather than adopting a soft-constitutionalist approach which would seek to mediate the relationship between the norms of the different legal systems, and which would have involved the ECJ in the process of shaping customary international law, the ECJ adopted a strongly pluralist approach which emphasized the internal and external autonomy and separateness of the EC's legal order from the international domain. Not only did the ECJ's approach provide a striking example for other states and legal systems that may be inclined to assert their local constitutional norms as a barrier to the enforcement of international law, but more importantly it suggests a significant paradox at the heart of the EU's relationship with the international legal order, the implications of which have not begun to be addressed.

²⁴⁴ See *European Security Strategy*, *supra* note 227, at 10.