Is the ECJ ruling in Kadi incompatible with international law?

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Introduction

This article discusses the Kadi ruling by the European Court of Justice² from the perspective of public international law. Its main thesis is that instead of using Kadi as evidence of a conflict between the normative orders of the European Union and the United Nations, it is more useful to speak about tensions that exist within both legal orders. While the form in which those tensions express themselves, and perhaps even the outcomes of efforts to resolve the tensions may differ, the existence of a tension between the imperative of taking decisive and effective measures against terrorism, and the obligation to respect the fundamental rights of the individual while doing so, is a factor creating unity between the two normative orders. While complete harmony may not have been obtained through the first wave of cases litigated on EU and UN fora, this should not be seen as evidence of the two legal orders being irreconcilable or developing to different directions. Rather, the existing discrepancies between the two regimes should be seen as a challenge that needs to be met through increased attention to the unifying factors, with a view of fully utilizing the existing potentials for harmonizing interpretation.

The three following sections of this contribution seek to demonstrate the following: (a) the outcome in the Kadi case is compatible with international human rights law, as expressed in United Nations human rights treaties, (b) the ECJ ruling in Kadi should be seen as an affirmation of a high degree of coherence between EU law and international law, and (c) the outcome in the Kadi case has much support also in institutional United Nations law. The last section (d) of the paper discusses whether there is a feasible alternative to a coherence-based reading of Kadi.

Sayadi and Vinck v. Belgium

In order to illustrate the main point of the paper, the much less well-known case of Sayadi and Vinck v. Belgium,³ decided by the United Nations Human Rights Committee acting under the International Covenant on Civil and Political Rights less than two months after the ECJ ruling in Kadi, is first presented and discussed. While the Human Rights Committee may not have got it right in all

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² Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union, Joined Cases C-402/05 P and C-415/05 P, European Court of Justice (Grand Chamber), 3 September 2008.

respects what comes to applying human rights within a broader United Nations law framework, the case provides evidence of the existence of the same tensions as in EU law between counter-terrorism obligations and human rights obligations, and also demonstrates that there is a prospect of harmony between the UN and EU legal orders.

In 2002, a criminal investigation was launched in Belgium against two Belgian nationals, Mr Sayadi and Ms Vinck. Soon thereafter Belgium informed the 1267 Sanctions Committee of the Security Council that the individuals were, respectively, the director and secretary of Fondation Secours International, reportedly the European branch of the Global Relief Foundation, an American association that had one month earlier put on the sanctions list. Within a period of eight days in January 2003, the two persons were listed as terrorists by the Security Council, by the EU Council, and by Belgium, without giving them access to the information used as basis for their listing. As a consequence the assets of the two individuals, a married couple with four children, were frozen, preventing them from working, travelling, moving funds and defraying family expenses.

After two years the criminal investigation still had not led to prosecution. In February 2005, a Belgian court ordered the government to seek the delisting of the persons. In December 2005 the individuals managed to obtain a judicial dismissal of the criminal investigation against them. While the Belgian government sought at the UN level the delisting of the individuals, it was unable to obtain the unanimous approval of its request within the 1267 Sanctions Committee, even during 2007-2008 when Belgium was a member of the Security Council and for part of that time even Chair of the 1267 Sanctions Committee.

4 The United Nations listing of Taliban, Al-Qaida and associated terrorists in a so-called Consolidated List, is based on Security Council Resolution 1267 (1999), as developed through a number of subsequent resolutions and currently codified into Resolution 1822 (2008). The body deciding on the listing of individuals and entities is usually referred to as the 1267 Sanctions Committee, an intergovernmental body composed of the diplomatic representatives of the fifteen members of the Security Council.

5 Sayadi and Vinck (footnote no. 3), paras. 2.1-2.3.

6 Idem, para. 2.5.

7 As explained in paragraph 4.3 of the Committee’s Views, consensus on de-listing can be obtained through the no-objection procedure implying de-listing in the absence of objections within 48 hours (counted in working days). This was, however, blocked when unspecified ‘members’ of the Sanctions Committee within the established time limit expressed reservations about Belgium’s petition.
In May 2009, Mr Sayadi and Ms Vinck are still on the Consolidated List.\(^8\)

Marko Milanovic has extensively criticized the Human Rights Committee for not acknowledging that the case involved a potential conflict between the Covenant on Civil and Political Rights and Belgium’s obligations under the United Nations Charter.\(^9\) It is certainly true that the Committee could have been more thorough in this issue than it was. But basically the Human Rights Committee adopted the same approach as Advocate General Miguel Poiares Maduro and the European Court of Justice in \textit{Kadi}: That the Committee was merely assessing the compatibility of Belgium’s measures related to the listing of the two individuals by the UN, rather than examining the lawfulness of the listing itself:

\begin{quote}
10.3 Although the parties have not invoked article 46 of the Covenant, in view of the particular circumstances of the case the Committee decided to consider the relevance of article 46. The Committee recalls that article 46 states that nothing in the Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations. However, it considers that there is nothing in this case that involves interpreting a provision of the Covenant as impairing the provisions of the Charter of the United Nations. The case concerns the compatibility with the Covenant of national measures taken by the State party in implementation of a Security Council resolution. Consequently, the Committee finds that article 46 is not relevant in this case.\(^{10}\)
\end{quote}

Through this somewhat artificial or stretched distinction between the UN imposing the sanctions and Belgium merely implementing them, the Committee avoided questions such as whether Security Council powers under Chapter VII of the Charter trump human rights obligations of member states through the application of Article 103 of the Charter, or whether member states are under the UN Charter itself allowed or even obliged to find a way to implement UN sanctions in a way that does not conflict with human rights, or whether there could be an in-between position that a threat to peace and security that has been identified by the Security Council and resulted in a Chapter VII resolution that is mandatory to all member states, constitutes a valid ground for declaring a state

\(^8\) In the list, as available on 17 May 2009 on the UN website (http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf) and dated 20 April 2009, Mr Sayadi and Ms Vinck appear in section C of the list, i.e. as individuals associated with Al-Qaida.

\(^9\) Marko Milanovic, ‘Sayadi: The Human Rights Committee’s Kadi (or a pretty poor excuse for one…)’, available on \textit{EJIL: Talk!} at http://www.ejiltalk.org/index.php

\(^{10}\) \textit{Sayadi and Vinck} (footnote no. 3). See, however, the dissent to the admissibility of the case by Committee member Ruth Wedgwood: “The only actions taken by Belgium were in accordance with the binding mandate of the Security Council.”
of emergency pursuant to article 4 of the Covenant and then proceeding to derogation from some but not all Covenant rights.

In their individual opinions, Committee members did engage in some discussion in these or related matters. 11 For instance Yuji Iwasawa, who currently is the Chair of the Human Rights Committee, engaged in harmonizing interpretation in his concurring individual opinion where he basically says that while Belgium was compelled to comply with its Charter obligations, it could have done so through measures that were less intrusive in human rights than those chosen. According to Iwasawa,

The State parties to the Covenant are obliged to comply with the obligations under it to the maximum extent possible, even when they implement a resolution of the United Nations Security Council... The State party could have acted otherwise while in compliance with the resolutions of the Security Council of the United Nations.

Similarly, in his concurring individual opinion on the merits, Nigel Rodley held that that "the course of action adopted by the State party was not compelled by Security Council resolutions, notably resolution 1267 (1999)". Rodley listed a number of criteria that in his view are applicable when assessing the permissibility of measures by states in the implementation of their Charter obligations and concluded that "the answers vary according to the conditions being faced". For him,

It is not easy to see why nearly a decade after the first resolution 1267 (1999) and seven years after 9/11 the Council could not have evolved procedures more consistent with the human rights values of transparency, accountability and impartial, independent assessment of fact.

While the dissenting and concurring individual opinions shed some light upon the differing schools of thought within the Human Rights Committee, the Committee itself was blunt and straightforward in simply applying the distinction between UN imposition of sanctions and the role of the member state in implementing them.

The present author, in his capacity as United Nations Special Rapporteur on human rights and counter-terrorism, has argued for a distinction between the

11 Ivan Shearer (dissenting) referred to the primacy of UN Charter obligations pursuant to Article 103 of the Charter: "Human rights law must be accommodated within, and harmonized with, the law of the Charter as well as the corpus of customary and general international law." He held that Belgium had acted in good faith in trying to have the applicants delisted, and therefore he found no violations of the Covenant. However, Shearer commented favorably on the ECJ ruling in Kadi, and stated that "there can be said to exist a certain margin of appreciation vested in States when giving effect to binding decisions of the Security Council."
Security Council imposing targeted sanctions through its listing of terrorists, and member states having to comply with human rights when implementing those sanctions. Applying a kind of 'Solange' approach, the conclusion then was to call for national level judicial review over the implementation of the sanctions, not over the validity of the Security Council measures themselves:

The Special Rapporteur is of the view that if there is no proper or adequate international review available, national review procedures — even for international lists — are necessary. These should be available in the States that apply the sanctions.  

Obviously, I do not think the Human Rights Committee was 'wrong' in framing the question as it did. True, a broader discussion would have been interesting for us academics to read. However, as the Committee was deciding a human rights case brought to it by two individuals, it may have been wise to set aside the broader issues by simply insisting on the somewhat artificial distinction between the imposition and the implementation of the sanctions. Hence, the present author finds Milanovic’ strong criticism of the Committee as unjustified.

Of course, the Committee could have faced the broader UN law issues head-on. Whether its 18-member composition could ever have come even close to agreement in those issues is another matter. Here, it is worth to note that Belgium did provide an opportunity for the Committee to address the UN law issues. As paraphrased by the Committee, Belgium argued:

4.12 Moreover, the measures to combat the financing of terrorism were adopted by the Security Council under Chapter VII of the Charter of the United Nations. The existence of a threat to international peace and security is an exceptional circumstance justifying restrictions on the enjoyment of the individual rights established in international human rights instruments. Article 103 of the Charter provides that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.  

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12 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/61/267 (2006), para. 39. Incidentally, this paragraph was quoted by Advocate General Miguel Poiares Maduro in his Opinion in Kadi (paragraph 38 and footnote 46).

13 Sayadi and Vinck (footnote no. 3). See, also, paras. 6.3 and 8.1, and also para 6.4 where Belgium addresses the question whether the derogation powers of states under article 4 of the Covenant are applicable in respect of UN Security Council resolutions adopted under Chapter VII. Further, Belgium made a number of objections to the admissibility of the case, arguing, inter alia, that the case before the Human Rights Committee constituted 'the same matter' as Belgium's request
Moving then to the merits of the case of Mr Sayadi and Ms Vinck against Belgium, the Human Rights Committee examined their claims that Belgium had violated a number of ICCPR provisions, including articles 12 (freedom of movement), 14 (fair trial), and 17 (privacy). The Committee found a violation of the right to freedom of movement (article 12), considering that the travel ban implemented by Belgium upon the two individuals was not merely a permissible restriction on freedom of movement but an actual violation of this human right. Of course, the answer could have been different had the Committee considered that the threat to peace and security identified by the Security Council constituted a state of emergency and triggered Belgium’s right to derogate from article 12. And certainly the answer would have been different had the Committee based itself on the construction that the listing of the authors was in conflict with Belgium’s human rights obligations otherwise stemming from article 12 but Article 103 of the UN Charter resolved that conflict in favor of the Charter obligation to keep the individuals under a travel ban.

10.7 The Committee notes that the obligation to comply with the Security Council decisions adopted under Chapter VII of the Charter may constitute a “restriction” covered by article 12, paragraph 3, which is necessary to protect national security or public order. It recalls, however, that the travel ban results from the fact that the State party first transmitted the authors’ names to the Sanctions Committee. ... The Committee finds that the State party’s arguments are not determinative, particularly in view of the fact that other States have not transmitted the names of other employees of the same charitable organization to the Sanctions Committee (see paragraph 9.2 above). It also notes that the authors’ names were transmitted to the Sanctions Committee even before the authors could be heard. In the present case, the Committee finds that, even though the State party is not competent to remove the authors’ names from the United Nations and European lists, it is responsible for the presence of the authors’ names on those lists and for the resulting travel ban.

10.8 Moreover, on two occasions the State party itself requested the removal of the authors’ names from the sanctions list, considering that the authors should no longer be subject, inter alia, to restrictions of the right to leave the country. The dismissal of the case and the Belgian authorities’ requests for the removal of the authors’ names from the sanctions list show that such restrictions are not covered by article 12, paragraph 3. The Committee considers that the facts, taken for delisting was pending before the Sanctions Committee which constituted another international procedure for investigation or settlement (para. 4.5). Also, Belgium argued that for the purpose of the sanctions, the applicants did not fall within the ‘jurisdiction’ of Belgium (paras. 4.11 and 6.1).

14 Paragraph 10.4.
together, do not disclose that the restrictions of the authors' rights to leave the country were necessary to protect national security or public order. The Committee concludes that there has been a violation of article 12 of the Covenant.

In short, the Committee held that as Belgium initiated the listing of the two individuals, the chain of causality between that act and the consequence of the continuing travel ban meant that the interference with the authors' freedom of movement was attributable to Belgium. And because Belgium itself had tried to have the individuals delisted, the travel ban could not be necessary and constitute a permissible restriction on freedom of movement.

The Human Rights Committee also found a violation of the right to privacy, as enshrined in article 17 of the Covenant. The reasoning is similar to the one applied in respect of freedom of movement, albeit phrased under the notion of 'attack', rather than 'restriction'. This is because unlike ICCPR article 12, article 17 does not contain a genuine limitations clause but merely a prohibition against unlawful or arbitrary attacks.

10.13 The Committee takes note of the authors' argument that the State party should be held responsible for the presence of their names on the United Nations sanctions list, which has led to interference in their private life and to unlawful attacks on their honour and reputation. It recalls that it was the State party that communicated all the personal information concerning the authors to the Sanctions Committee in the first place. The State party argues that it was obliged to transmit the authors' names to the Sanctions Committee (see paragraph 10.7 above). However, the Committee notes that it did so on 19 November 2002, without waiting for the outcome of the criminal investigation initiated at the request of the Public Prosecutor's Office. Moreover, it notes that the names are still on the lists in spite of the dismissal of the criminal investigation in 2005. Despite the State party's requests for removal, the authors' names and contact data are still accessible to the public on United Nations, European and State party lists. The Committee therefore finds that, in the present case, even though the State party is not competent to remove the authors' names from the United Nations and European lists, it is responsible for the presence of the authors' names on those lists. The Committee concludes that the facts, taken together, disclose that, as a result of the actions of the State party, there has been an unlawful attack on the authors' honour and reputation. Consequently, the Committee concludes that there has been a violation of article 17 of the Covenant.

Somewhat surprisingly, the Human Rights Committee did not find a fair trial violation. This was partly because of the success the authors had had before Belgian courts in obtaining a judicial order for the Government to initiate delisting and a dismissal of the criminal investigation against them. Where the present author disagrees with the Committee, is the latter's view that the sanctions against the two individuals, as implemented by Belgium, for their
severity did not reach a level that would have triggered the application of the notion of 'a criminal charge' in ICCPR article 14 and hence requiring full fair trial guarantees in accordance with, inter alia, paragraphs 2 and 3 of the provision.

In my 2006 thematic report to the General Assembly as UN Special Rapporteur, I argued for that conclusion. The domestic classification of sanctions against persons put on a terrorist list as 'administrative' should not prevent their consideration as a matter of international law as criminal sanctions, if they for their severity are comparable to criminal punishments. For instance, if the 'temporary freezing' of a person's assets lasts for years and is never reconsidered, then it should be taken as analogous to confiscation of property and trigger the application of procedural guarantees required in the consideration of a criminal charge against an individual.15

The Human Rights Committee came to a different conclusion through a somewhat truncated reasoning. After paraphrasing the positions of the complainants and the respondent state, the Committee first gives two good arguments for finding that the notion of 'criminal charge' was applicable and then, without even presenting the counter-arguments, just states the opposite conclusion:

10.11 With regard to the allegation of a violation of article 14, paragraphs 2 and 3, and article 15, ... it takes note of the arguments of the authors, who consider that the sanctions imposed on them are criminal in nature and that the State party launched a criminal investigation in addition to enforcing the sanctions (see paragraph 5.9). The Committee also takes note of the State party's arguments that the sanctions cannot be characterized as "criminal", since the assets freeze was not a penalty imposed in connection with a criminal procedure or conviction (see paragraph 6.2). Moreover, the State party maintains that placement on the list was a preventive rather than a punitive measure, as was apparent from the fact that the

15 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/61/267 (2006), para. 35: "In particular, the Special Rapporteur notes the question of whether the nature of the sanctions — civil or criminal — determine the procedural safeguards, including which standards of proof, shall apply. The Analytical Support and Sanctions Monitoring Team of the 1267 Sanctions Committee supports the idea that the Committee's Consolidated List is not a criminal list and that indictment by a court of law is not a precondition for inclusion on the list, because the sanctions do not impose a criminal punishment or procedure such as detention, arrest or extradition, but instead apply administrative measures. However, it is generally accepted that the determination of whether the charges are criminal or civil depend on the seriousness of the sanction or punishment. If the sanctions linked to inclusion on the list are permanent, then no matter how they are qualified, they may fall within the scope of criminal sanctions for the purposes of international human rights law."
persons affected could obtain authorization for an exemption from the freeze on their assets and from the travel ban (see paragraph 6.4). The Committee recalls that its interpretation of the Covenant is based on the principle that the terms and concepts in the Covenant are independent of any national system or legislation and that it must regard them as having an autonomous meaning in terms of the Covenant. Although the sanctions regime has serious consequences for the individuals concerned, which could indicate that it is punitive in nature, the Committee considers that this regime does not concern a “criminal charge” in the meaning of article 14, paragraph 1. The Committee therefore finds that the facts do not disclose a violation of article 14, paragraph 3, article 14, paragraph 2, or article 15 of the Covenant.16

Recapitulation and comparison with Kadi

When addressing the conduct by Belgium in the UN listing as terrorists of, and UN refusal to delist, Mr Sayadi and Ms Vinck, the Human Rights Committee applied a distinction between the UN imposing the sanctions and a member state implementing them. By doing so, the Committee managed to push aside the question whether there was a conflict between Charter obligations and human rights treaty obligations pursuant to the ICCPR, or whether the threat to peace and security identified by the Security Council in a Chapter VII resolution constituted a valid ground for derogation from some of the provisions of the ICCPR. The individual opinions by several members of the Committee add some nuances to the Committee’s line of argumentation.

As the right to property, albeit enshrined in the Universal Declaration of Human Rights, is not covered by the ICCPR, the consequences of the listing where not assessed as a potential violation of that human right. Instead, the Human Rights Committee found violations of the freedom of movement and the right to privacy, as the measures taken in respect of the two individuals were too sweeping or too intrusive to be compatible with articles 12 and 17 of the ICCPR.

16 Sayadi and Vinck (footnote no. 3). In three individual opinions appended to the Committee’s decision to declare the case admissible also under articles 14 and 15, six members of the Committee expressed more categorical positions than the Committee’s subsequent final views on the non-applicability of the notion of ‘criminal charge’: “Nor do we understand on what basis it believes that articles 14 and 15 could be relevant to actions that the State party quite rightly maintains are administrative, not criminal” (Nigel Rodley, Ivan Shearer and Iulia Motoc). “While it is true that freezing of the authors’ financial assets is part of the fight against terrorism, this measure clearly does not serve the purpose of sanctioning the authors for their allegedly illegal behaviour but rather aims at preventing them from continuing their alleged support of terrorist activities, and thus is of administrative character” (Walter Kälin and Yuji Iwasawa). And “… the sanctions regime imposed by the Security Council is not a criminal proceeding” (Ruth Wedgwood).
Interestingly, no violation of the right to a fair trial (article 14) was found, partly because the applicants had had some success before Belgian courts, but ultimately because the Committee accepted the national (and UN) qualification of the sanctions as administrative ones and therefore not as triggering the application of full fair trial guarantees required in the consideration of a ‘criminal charge’. On this point the Committee clearly departed from the position taken by the present author in his UN capacity as Special Rapporteur on human rights and counter-terrorism.

Incidentally, this happens to be exactly the same point where also the European Court of Justice missed an opportunity to explain why its Kadi ruling was in conformity with universal human rights. Instead of looking at the severity of the sanctions for the conclusion that the sanctions amounted to a criminal charge and triggered full fair trial rights, the ECJ based itself on the EU law notion of 'rights of the defence' which for its scope of application is broader than the human rights law notion of 'criminal charge'. The different treatment of the issue of the right to a fair trial by the ECJ and the Human Rights Committee demonstrates that there would have been good legal arguments that the two bodies could both have applied, ending up strengthening the coherence between universal human rights and fundamental rights as enshrined in EU law. This time they both chose differently, resulting in a seeming differentiation between the two bodies of law.

In the wide discussion on the ECJ ruling in Kadi, one strong trend has been to depict the ECJ as defending a European perception of human rights and therefore refusing to apply the UN legal order where human rights are less prominent, or represented in the form of lower substantive standards. While this may reflect some of the wording of Kadi, it is submitted here that the narrative of a conflict between a human-rights-oriented European legal order and a human-rights-ignorant UN legal order is false. The Human Rights Committee case of Sayadi and Vinck, discussed in the previous section, bears witness of the presence of exactly the same tensions within the UN legal order as are said to exist between a European and a UN legal order. Both the ECJ and the Human Rights Committee chose not to dispose of the two cases through the identification of a norm conflict but through a reconciliation approach based on the distinction between UN imposing the sanctions and the EU and member states implementing them, including by taking into account human rights considerations. This demonstrates that not only the same tensions but also the same tools for resolving the tensions, are available in the two legal orders.

After this positive assessment of harmony or consistency at the level of principle it must be noted that there were also important differences between the two decisions. Where the Human Rights Committee found violations of the freedom of movement and the right to privacy, the European Court of Justice found a violation of the right to property - a right not covered by the ICCPR albeit present

17 See, the contribution by Poli and Tzanou in this volume.

18 See, e.g., the contribution by Lavranos in this volume.
in international human rights law in general - and the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights. While the right to a fair trial is covered by the ICCPR, the Human Rights Committee held that the severity of the sanctions did not reach the severity that would have triggered the application of the notion of a 'criminal charge'. To the present author, it appears that the EU Charter on Fundamental Rights would have allowed to the ECJ an identification of the rights breached in a manner closer to the categories present in international human rights law.

These differences in construction or interpretation are not irreconcilable, in particular as it is widely known that human rights bodies or international courts have a tendency of finding one or two clear violations of human rights and then subsuming other grievances under those findings by saying that it is not 'necessary' to address the additional claims or that those claims do not raise issues 'separate' from those where violations were already established. This said, in particular in the area of the right to a fair trial one is tempted to make the observation that both the Human Rights Committee and the European Court of Justice chose to deviate, in opposite directions, from a middle path that would have allowed for making the same finding under international human rights law and within EU law.

An effort to harmonize the interpretation of EU law and international law, rather than defending some sort of a European feeling of superiority, is nevertheless visible in the way how the ECJ summarizes the interaction between international law and EU law in the question of whether the implementation of UN sanctions can be made subject to judicial review on national or EU level:

299 It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.

300 What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty.19

True, paragraph 299 is formulated negatively. But its basic tenet is that as a matter of international law (or United Nations law) the mandatory nature of Chapter VII resolutions leaves, despite the priority clause of Article 103 of the Charter, room for judicial review of national or EU level measures aimed at the

19 Kadi (footnote no. 2).
implementation of those resolutions. It is submitted here that this position is correct as a matter of international law, and that therefore the ECJ ruling in *Kadi* is not incompatible with the UN Charter or more generally with international law.

Paragraph 300, in turn, is related to the role of the ECJ within the internal legal order of the EU. Although its opening words ('What is more, ...') could be read as affirmation of the primacy of EU law in respect of international law within the EU legal order, they need not be read as representing more than as an introduction of an additional argument after harmony with international law has already been secured.

Human rights are universal, not 'European' in nature. Hence, the insistence of the European Court of Justice to secure compliance with human rights in the implementation of the 1267 sanctions regime is an affirmation of, and not a departure from, the imperative of the EU having to comply with international law.

*The same outcome flows also of United Nations law*

The ECJ ruling in *Kadi* lists a whole range of shortcomings in the UN listing and delisting procedures under the 1267 sanctions regime. The procedure of the 1267 Sanctions Committee is diplomatic and intergovernmental, to the degree that any delisting decision requires consensus. The affected individuals do not have standing before the Committee, and their access to the reasons and evidence for the listing remain restricted. There is no judicial or otherwise independent review of the listing.

As noted by the ECJ, the listing and delisting procedures have been subject to piecemeal reforms by the Security Council itself, including through incremental improvements in the status of the affected individual. However, the ECJ does not include in its discussion the latest set of improvements, introduced through Security Council Resolution 1822 (2008). This resolution does introduce new improvements, such as the notification of listed individuals and the mandatory review of all entries on the list by June 2010. Although this resolution was described as a 'milestone' by the departing Chair of the 1267 Sanctions Committee - which happened to be Belgium - it did not remedy the

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20 *Kadi* (footnote no. 2), paras. 322-325.


22 Jan Grauls (Belgium), speaking in the 6043rd meeting of the Security Council, 15 December 2008 (S/PV.6043). The speaker continued: "One cannot ignore the international context in which these developments have taken place. The reality is that Security Council sanctions regimes find themselves increasingly under pressure and have recently been questioned, especially in light of the need for fair and clear procedures for listing, de-listing and the granting of humanitarian exemptions. I do believe that the Al-Qaida/Taliban Committee has made
fundamental flaws of the 1267 sanctions regime. Under Resolution 1822 the listing and delisting are still made by the 1267 Sanctions Committee, a body composed of diplomatic representatives of the fifteen member states of the Security Council. The decisions - both for listing and delisting - are based on political consensus, rather than judicial or quasi-judicial examination of evidence. The nature of the Security Council as a political body, and its composition strongly reflecting security interests of the five permanent members, justifies skepticism as to whether the members ever will be willing to share with each other the actual evidence that someone is a terrorist. All in all, the problems in the 1267 sanctions regime listed by the ECJ in *Kadi* were not fixed by resolution 1822.

However, resolution 1822 is important in another respect. It can be seen as a first affirmation by the Security Council itself that there is room for, if not even an obligation for, national or EU level judicial review over the implementation of the sanctions imposed by the 1267 Sanctions Committee. Hence, this resolution should be seen as a tool for constructing coherence between institutional United Nations law, international human rights law and, for the EU region, also EU law.

The preamble of resolution 1822 includes a human rights clause:

> Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee, and humanitarian law, threats to international peace and security caused by terrorist acts, stressing in this regard the important role the United Nations plays in leading and coordinating this effort,...

What is new in this formulation, compared to earlier Security Council counter-terrorism resolutions, is that the 'need' to comply with human rights is at least implicitly attributed also to the United Nations itself and not only its member states.23 Until resolution 1822, the message that the Security Council was giving to member states was that the Security Council can be ignorant of human rights as member states have an obligation to take human rights into account when implementing Security Council resolutions, although at the same time those resolutions are mandatory and enjoy primacy under Article 103 of the United Nations Charter.

significant progress in this regard. However, it is also my belief that all of us must remain committed to continuing to ensure that due, and probably even more, attention is given to these concerns."

23 Compare to the traditional formulation of the human rights clause in Security Council Resolution 1456 (2003) para. 6: "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law".
Resolution 1822 does not stop at implying that the United Nations itself should comply with human rights. It also includes a nuanced paragraph on the obligation of member states to implement the sanctions by calling for “adequate procedures to implement fully” all aspects of the measures imposed by the 1267 Sanctions Committee.\(^{24}\) Read together with the human rights clause in the preamble of the resolution and the paragraph where the Security Council ‘encourages’ the 1267 Sanctions Committee ‘to ensure that fair and clear procedures exist’,\(^{25}\) a situation has been created where the legal framework of the 1267 sanctions regime should be understood to leave room for national or EU level judicial review over the implementation of the sanctions imposed by the 1267 Sanctions Committee through the inclusion of a person on the Consolidated List. Such review is called for as long as the UN sanctions regime itself does not provide for fair and clear procedures that could by member states be considered to constitute an equivalent level of human rights protection.

This construction gets further support from the 2008 resolution by the United Nations General Assembly on human rights while countering terrorism, adopted without a vote on 18 December 2008. This resolution, which because of the consensus and the legal argumentation in it, can be understood as a form of state practice, is explicit in affirming that there is room for national level judicial review over the implementation of the terrorist list emanating from the 1267 Sanctions Committee:

18. Emphasizes the United Nations terrorism related sanctions are a significant tool in countering terrorism and have a direct impact on targeted individuals and entities, recognizes the need to continue ensuring that fair and clear procedures are strengthened in order to enhance the efficiency and transparency of the United Nations terrorism related sanctions regime and welcomes and encourages the Security Council’s continued enhancement of efforts in support of these objectives;

19. Urges States, while ensuring full compliance with their international obligations, to include adequate human rights guarantees in their national procedures for the listing of individuals and entities with a view to combating terrorism.\(^{26}\)

All in all, also in respect of institutional United Nations law, the ECJ did the right thing in \textit{Kadi}. And so did the Human Rights Committee in \textit{Sayadi and Vinck}.

\(^{24}\) Resolution 1822 (2008), para. 27.

\(^{25}\) Idem, para. 28. It should be noted that resolution 1822 itself does not establish the rule that individuals can be delisted only through consensus. This is prescribed in the Guidelines of the 1267 Sanctions Committee itself, available at http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf (as amended 9 December 2008).

\(^{26}\) A/RES/63/185.
Alternative view: The 1267 sanctions regime is ultra vires and should be replaced by improving the 1373 regime

For the present author, the above assessment of the existence of tensions within both international law and EU law, and the realistic prospect of reaching coherence through a reconciliation approach, is the most attractive construction *de lege lata*. The law may be imperfect and reflect internal tensions but that does not preclude reaching coherent outcomes in its application.

However, not all academic authors or other actors will be satisfied with a reconciliation approach. Therefore, this last section of the paper discusses what in the view of the author could be the second-best options.

Security Council Resolution 1267 (1999) did not create from scratch a full-fledged regime of UN terrorist sanctions. In the chronological list of Security Council resolutions, this resolution carries the title "On the situation in Afghanistan". The resolution, adopted under Chapter VII of the UN Charter, was territorial in nature, urging the Taliban regime of Afghanistan to hand over Osama bin Laden and targeted it with 'smart sanctions' if it failed to do so. In order to apply its Chapter VII powers, the Security Council had to identify a risk for international peace and security. So it did, with reference to the failure of the Taliban to comply with earlier Resolution 1214 (1998). Resolution 1267 can be seen as a temporary emergency measure, using Chapter VII powers to address a specific threat to peace and security. The specific circumstance of the Taliban exercising *de facto* power in Afghanistan justified the targeting of the Taliban and not a state, for sanctions. Paragraph 6 of the resolution established the 1267 Sanctions Committee and among its functions listed:

(d) To make periodic reports to the Council on information submitted to it regarding alleged violations of the measures imposed by paragraph 4 above, identifying where possible persons or entities reported to be engaged in such violations;

It was only through a series of subsequent resolutions that this response to a threat that was limited in time and space was converted into a regime that came includes a global list of persons associated with the Taliban or Al-Qaida and subjects them to sanctions with indefinite duration, irrespective of whether they had any means of facilitating the apprehension of Osama bin Laden.

In legal doctrine, there is wide support for a narrow understanding of the judicial or quasi-judicial powers the Security Council can exercise under Chapter VII. Such powers are said to be difficult to reconcile with the legal order of the UN Charter. In cases of doubt, a legal determination by the Security Council should be interpreted as possessing preliminary rather than final character. Although


it is said that 'peace takes precedence over justice' in the Charter, human rights norms should be taken as guidance for the exercise of Chapter VII powers, and their 'complete disregard' will constitute a violation of the Charter.29

If a reconciliation approach is pushed aside in favor of an understanding that United Nations law requires the absolute primacy of the Consolidated List, interpreted as a mandatory member state obligation under Chapter VII and Article 103, then the whole 1267 sanctions regime may fall. It is submitted that if the current Consolidated List is to be interpreted as a Charter obligation falling under the Chapter VII powers of the Security Council and enjoying primacy in respect of member states' human rights treaty obligations in the meaning of Article 103, then the resolution should be seen as having been adopted ultra vires and therefore being without legal effect.

If the Consolidated List is to be rescued as a matter of lex lata, then it should be seen only as creating a rebuttable presumption that a person or entity falls under the criteria of resolution 1267 (as amended) and may, through proper procedures, become a target of sanctions by a member state. However, the Security Council listing as such must not be granted the status of evidence by national courts which will be bound by national and international provisions on due process when deciding about the implementation and lifting of sanctions against individuals or entities.

As a matter of de lege ferenda, the 1267 regime is in need of an urgent reform. At first sight several options for such a reform may appear attractive, including the inclusion of a quasi-judicial review body as a part of the decision-making by the Security Council itself, rather than as the subjection of Security Council decisions themselves to independent external review. However, all such efforts to further improve the 1267 regime are likely to fail and not to pass the test of adequate or equivalent protection implied by the ECJ in Kadi when it listed the shortcomings of the 1267 sanctions regime. This is because member states will not be willing to share the real evidence triggering the proposal to list someone as a terrorist, usually sensitive security data, with the members of the Security Council and with the members of an independent review body applying due process, including the right of the affected person to be heard. 'We have

29 Idem. p. 711.

30 Kadi (footnote no. 2), paragraph 256 paraphrases the arguments by the applicant (Mr Kadi), that refer both to 'adequate' and 'equivalent' protection of fundamental rights. The same line of thought is implied in the reasoning of the ECJ itself when it first lists the shortcomings of the Security Council's internal re-examination procedure (paras. 321-325) and then concludes that because of these remaining shortcomings "the Community judicature must ... ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations."
information’ may be a sufficient basis for listing by a Committee of the Security Council, composed of diplomats. But it will never allow for due process.

For this reason the only solution to resolve the tension within United Nations law through a reform of the terrorist listing regime is the repeal of resolution 1267 (as amended) and its replacement with national or EU level terrorist listing pursuant to resolution 1373 (2001) which was adopted in the aftermath of 9/11 and created a comprehensive framework for counter-terrorism measures that are imposed by member states but monitored by the Counter-Terrorism Committee of the Security Council.31 There may be many things that need to be fixed in national or EU level terrorist listing regimes based on resolution 1373 but within them the fundamental issue of securing due process in listing and delisting is possible to solve through securing appropriate procedural guarantees at the national or EU level where the actual individualization of the sanctions is made. The Security Council or its subsidiary bodies with expertise in countering terrorism would not become obsolete, as they could provide expertise to national and EU level actors in the proper implementation of the obligations stemming from resolution 1373.

Besides, this solution would also be in line with what the doctrine of United Nations law says about the powers of the Security Council.

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31 This proposal has been made in Iain Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights', Nordic Journal of International Law 72: 159–214, 2003 (see, in particular, section 6.6).