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Inge Govaere*

1. Introduction

In the USA, the debate is still ongoing as to whether and to what extent the Supreme Court could or should refer to foreign precedent, in particular in relation to constitutional matters such as the death penalty.¹ In the EU, in particular the recent *Kadi* case of 2008² has triggered much controversy,³ thereby highlighting the opposite angle to a similar discussion. The focus of attention in Europe is namely to what extent the European Court of Justice (hereafter "ECJ") could lawfully and rightfully refuse to plainly 'surrender' or to subordinate the EC legal system to UN law and obligations when dealing with human rights issues. This question becomes all the more pertinent in view of the fact that in the past the ECJ has been rather receptive and constructive in forging interconnectivity between the EC legal order and international law developments. A bench mark in that respect was undoubtedly the *Racke* case of 1998,⁴ where the ECJ spelled out the necessity for the EC to respect international law with direct reference to a ruling of the International Court of Justice. This judgment which was rendered 10 years earlier than *Kadi* equally concerned EC/EU economic sanctions taken in implementation of UN Security Council Resolutions. A major question is therefore whether it is at all possible, and if so to determine how, to reconcile those apparently conflicting judgments.

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¹ See for instance the discussion reported in the recent issue of the Columbia Law School Magazine, Winter 2009, pp. 24-29. At p. 26, George P. Fletcher situates the beginning of the current US controversy at the time of the 2005 *Roper v. Simmons* case, where Justice Anthony M. Kennedy writing for the majority referred the UN Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, as well as the UK approach to the death penalty for juvenile offenders as being 'instructive'.

² Joined Cases C-402/05 P and C-415/05 P, *Kadi*, Judgment of 3 September 2008, nyr.

³ The *Kadi* case has immediately triggered much debate in legal writings, see for instance Beulay, M., "Les arrêts 'Kadi' et 'Al Barakaat International Foundation' : réaffirmation par la Cour de Justice de l'autonomie de l'ordre juridique communautaire vis-à-vis le droit international", *Revue du Marché Commun et de l'Union européenne* (2009) 32-40; Gattini, A., "Joined Cases C-402/05 P and 415/05 P, 'Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission', judgment of the Grand Chamber of 3 September 2008," *C.M.L.Rev.* (2009) 213-239; Guttierrez-Fons, J.A., Tridimas, T., "EU law, International law and economic sanctions against terrorism: the judiciary in distress ?", *Fordham International Law Journal* (2009) 660; Griller, S., "International law, Human rights and the European Community's Autonomous legal order: notes on the European Court of Justice Decision in *Kadi*", *European Constitutional Law Review* (2008) 528-553; Halberstam, D., Stein, E., "The United Nations, the European Union, and the King of Sweden: economic sanctions and individual rights in a plural world order", *C.M.L.Rev.* (2009) 13-72; Harpaz, G., "Judicial review by the European Court of Justice of UN 'smart sanctions' against terror in the 'Kadi' dispute", *European Foreign Affairs Review* (2009) 65-88; Kunoy, B., Dawes, A., "Plate tectonics in Luxembourg: the Ménage à Trois between EC law, International law and the European Convention on Human Rights following the UN Sanctions Cases", *C.M.L.Rev.* (2009) 73-104; Tridimas, T., "Terrorism and the ECJ: empowerment and democracy in the EC legal order", *European Law Review* (2009) 103-126.

⁴ Case C-162/96, *Racke*, ECR (1998) I-3688.

The common denominator in all these discussion and developments appears to be the necessity of forging interconnecting legal systems whilst maintaining the respect for the sovereignty of a state. In the case of a *sui generis* kind of international organisation with only attributed competence such as the EU, state sovereignty translates into the most difficult concept of safeguarding the 'autonomy' of the EC legal order. A difficult task for the ECJ is that, in creating this autonomous legal system, it has to find a niche in-between domestic/constitutional law of the Member States and public international law. The ensuing and ongoing dialogue, albeit indirectly, with constitutional courts of the Member States as well as the European Court of Human Rights (hereafter ECHR) most likely helps to explain the external constraints faced by the ECJ in the formulation of an answer in the *Kadi* case.

2. The dilemma posed by *Kadi* : outward or inward looking approach ?

The *Kadi* case is to be situated in the aftermath of September 11, 2001 and the search for an appropriate response of the international community to terrorist threats. An UN Security Council Resolution⁵ relating to the adoption of so-called smart sanctions, targeting individuals associated with the Al-Qaeda network and the Taliban through freezing their financial assets, was duly implemented at EC/EU level.⁶ This immediately triggered a series of cases before the EC Courts invoking important legal questions in terms of protection of fundamental rights and the relationship of the EC legal order to the UN. Several persons, including *Kadi*, contested the inclusion of their name on the UN blacklist as taken over in annex to the EC implementing measure. They sought annulment of the latter before the European Court of First Instance (hereafter "CFI") *inter alia* on grounds of breach of fundamental rights in the form of respect of property, right to be heard and right to effective judicial review.⁷

Although the case was brought only against the EC implementing measure, it was clear that it was in fact a weakness in terms of fundamental rights protection at the international, UN level, that was pinpointed. The EC courts thus found themselves in the rather paradoxical situation to be forced to choose between respecting either UN obligations (in particular of the Member States, as the EC/EU is not itself a member) or fundamental rights. The CFI and the ECJ in appeal both opted for a fundamentally different balancing trick as a solution to this dilemma.

⁵ UN Security Council Resolution 1390 (2002).

⁶ Articles 60 and 301 TEC expressly state that financial and economic sanctions require the adoption of both an EU measure under the so-called second pillar relating to Common Foreign and Security Policy (hereafter "CFSP") and an implementing EC measure. In the *Kadi* case this concerned Common Position 2002/402/CFSP and Regulation (EC) N° 881/2002, O.J. 2002 L 139/9.

⁷ Another crucial question concerned the proper legal basis for the adoption of the EC measure. Articles 301 and 60 TEC only mention the possibility to adopt economic sanctions against states, not individuals as such. Whereas the CFSP is very specific in nature. Its objectives are confound to that specific pillar which is essentially intergovernmental in nature; it cannot impinge on the EC Treaty; and jurisdiction of the ECJ is excluded. This problem should however be remedied with the entry into force of the Lisbon Reform Treaty as Article 215 TFEU (ex article 301 TEC) and Article 75 (ex Article 60 TEC) TFEU expressly open up the scope of sanctions measures to target individuals and none-state entities. This aspect of the case will not further be dealt with here.

The CFI fully took into account the international context and appeared to accept a subordinate place of the EC in the international legal order. In a highly complex judgment,⁸ it appeared to heavily emphasise the fact that the contested EC regulation was merely implementing UN Security Council Resolutions without exercising any discretion whatsoever as to the names of the individuals to be included on the list. In the view of the CFI, contesting the validity of the EC sanctions regulation thus amounted to challenging directly the UN decisions on grounds of breach of fundamental rights and should therefore, in principle, enjoy immunity from jurisdiction in so far as its internal lawfulness is concerned. The rather uneasy balancing trick was performed by continuing to state that judicial review would nonetheless be possible in case incompatibility with the norms of *jus cogens* were to be established. Such a solution was highly questionable as, for one thing, it was not totally clear whether the CFI would then propose to review the compatibility of the UN or the EC measure with *jus cogens*, as in its view those two cannot be dissociated.⁹

On appeal the ECJ unequivocally stated that by adopting such an approach, the CFI had erred in law.¹⁰ The ECJ to the contrary stressed the need for a full judicial review by pointing out that “...the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, 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”.¹¹ It clearly was not convinced by the theory of the unitary act as developed by the CFI but instead started from the opposite premise, emphasising the need to clearly dissociate the UN Security Council Resolution from the contested the EC sanctions regulation. It underlined that the ECJ is only called upon to judge the lawfulness of the latter whereas its rulings anyhow can not affect the validity of the former.¹²

Although this statement is of course true from a strictly legal point of view, it clearly all too easily discards arguments to the effect that a ruling establishing a breach of fundamental

⁸ Case T-315/01, *Kadi v. Council*, ECR (2005) II-3649, esp. at para 212-231.

⁹ For a critical reading of this judgment, see for instance Eckes, C., “Judicial review of European anti-terrorism measures – the *Yusuf* and *Kadi* Judgments of the Court of First Instance”, *European Law Review* (2008) 74-92; Eeckhout, P., “Community terrorism listings, fundamental rights, and UN Security Council resolution. In search of the right fit”, *European Constitutional Law Review* (2007) 183-206; Lavranos, N., “Judicial review of UN Sanctions by the Court of First Instance”, *European Foreign Affairs Review* (2006) 47; Nettesheim, M., “U.N. Sanctions against individuals – a challenge to the architecture of European Union governance”, *C.M.L.Rev.* (2007) 567-600; Simon, D., Rigaux, A., “Le jugement des pourvois dans les affaires *Kadi* et *Al Barakaat* : smart sanctions pour le Tribunal de Première Instance ?”, *Europe* (2008) 5-11.

¹⁰ Joined Cases C-402/05 P and C- 415/05 P, o.c., at para 327.

¹¹ *Idem*, at para 326.

¹² *Idem*, at para 286-288.

rights in such a circumstance would most likely indirectly affect (or badly reflect on) also the UN level and at the very least might pose problems in terms of the possibility for the EC/EU and its Member States to fulfil UN obligations. This may be explained by the fact that the focus was almost exclusively put on the need to safeguard the autonomy of the EC legal order. The ECJ recalled that the latter is based on the strict observance of the rule of law which entails that no acts of the EC or its Member States may escape control of their conformity with the basic constitutional charter which is the EC Treaty.¹³ To conclude firmly that “..obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of remedies established by the Treaty”.¹⁴

The highly controversial outcome of the case was that the ECJ indeed annulled the contested EC sanctions regulation for breach of fundamental rights. Also here a rather uneasy and not totally satisfactory balancing trick was performed. The ECJ ordered the effects of the contested Regulation to be maintained for a maximum of three months from the date of the judgment. The rationale is that this margin of flexibility should allow the Council, at least at EC level, to remedy the established deficit in terms of rights of defence, in particular the right to be heard, and thus to try and avoid an open clash with UN obligations.

Comparing those two radically different approaches, one might at first sight be tempted to conclude that the CFI took an outspoken outward looking view in keeping with international developments at UN level, whereas the ECJ opted for a strictly inward looking and even more isolationist approach.¹⁵ The picture is however much more complex as will be seen below.

3. Creating a niche for the new and autonomous legal order

Even a cursory look at prior case law of the ECJ quickly dispels the impression that the ECJ usually adopts a strictly inward-looking and isolationist approach. In the field of common commercial policy, for instance, the ECJ already in the 1970's pointed to the need to interpret key concepts in keeping with international developments in a manner receptive to the establishment of 'modern' trade relations within the framework of *inter alia* GATT and the

¹³ *Idem*, esp. at para 281-285.

¹⁴ *Idem*, at para 285.

¹⁵ It has for instance been argued in this respect that the CFI (wrongfully) “adopted an international constitutionalist posture”, whereas “..the reminder made by the ECJ is to be welcomed: by recalling that legal orders are naturally and inextricably estranged from each other, the decision may help wean legal scholars and judges off from the sirens of international constitutionalism”, see d'Aspremont, J., Dopagne, F., “Kadi: the ECJ's reminder of the elementary divide between legal orders”, *International Organization Law Review* (2008), available at SSRN: <http://ssrn.com/abstract=1341982>.

OECD.¹⁶ Similarly, the ECJ readily takes into account the international context and developments when dealing with other substantive matters, such as environmental protection.¹⁷ It is, however, especially with respect to constitutional issues that the influence of international developments is most visible and has even gradually been translated into direct references to foreign court rulings.

It should be recalled that in the groundbreaking *Van Gend and Loos* case,¹⁸ the ECJ rather audaciously stated that, through the conclusion of the EC Treaty in 1957, the EC Member States had created a new and autonomous legal order distinct from public international law as well as distinct from constitutional law of the Member States. Contrary to the EU pillars which were introduced in the early 1990's by the Maastricht Treaty, EC law comes squarely within the exclusive jurisdiction of the ECJ¹⁹ and is characterised by the application of the EC principles of direct effect and primacy. As could be expected, the *Van Gend and Loos* ruling did not lead to a complete isolation of the newly created supranational legal order, but instead triggered a series of developments and cases just begging the question of how to interconnect of this new EC legal order with both public international law and the constitutional orders of the respective Member States alike.

The ECJ initially found itself in the rather luxurious position that it had no prior case law to abide by so that it could 'invent' the new and autonomous legal system, at least for internal application, virtually from scratch.²⁰ Yet in establishing the boundaries of EC law, determining the scope of its own exclusive jurisdiction,²¹ as well as gradually fitting the EC legal order into a niche in-between public international law and constitutional law of the Member States, the ECJ has gradually started to point to rulings of other courts such as the International Court of Justice (hereafter "ICJ")²² and the European Court on Human Rights (hereafter "ECHR")²³ in support of its findings.

The warning signals sent out by constitutional courts of Member States has most likely added to the perceived necessity to increase the legitimacy of the ECJ's rulings by reference to the practice of other international courts, not in the least the ECHR. Pinpointed in this respect are in particular the famous judgments rendered by the German Bundesverfassungsgericht in the

¹⁶ See for instance Opinion 1/78, International agreement on natural rubber, ECR (1979) 2871 and the Case 45/86, Commission v. Council (GSP), ECR (1987) 1493.

¹⁷ See for instance Opinion 2/00, Cartagena Protocol, ECR (2001) I-9713.

¹⁸ Case 26/62, *Van Gend & Loos*, ECR (1963) 1.

¹⁹ Article 220 juncto 292 TEC. The full importance of this was exposed recently in the so-called MOX case, Case C-459/03, Commission v. Ireland (Mox), ECR (2006) I-4635.

²⁰ See also Penella, C., « The beginnings of the Court of Justice and its role as a driving force in European integration », *Journal of European Integration History* (1995) 111, esp. at p. 113.

²¹ On this issue, see for instance Govaere, I., "Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EC Legal Order", in Hillion, Koutrakos (eds.), *Mixed Agreements Revisited*, Hart Publishers, at press.

²² *Infra*, at point 4.

²³ *Infra*, at point 5.

so-called 'Solange' cases.²⁴ The German constitutional court spelled it out loud and clearly that the acceptance of ECJ rulings claiming primacy of EC law over constitutional law of the Member States is not to be taken for granted and can at the most be tolerated for as long as (hence 'solange') the German constitutional principles are sufficiently safeguarded also at EC level by the ECJ.²⁵ As to the necessity to respect international law in dealings with third countries and other international organisations, the ECJ has always considered this to be a normal consequence of the (limited) legal personality conferred on the EC by the founding Treaties.²⁶

4. Reconciling *Racke* and *Kadi* on international law developments

The *Racke* case is most illustrative of the openness of the ECJ to rulings of foreign courts, and in particular the ICJ, in order to interconnect as smoothly as possible the EC legal order with public international law.²⁷ It concerned the suspension of a bilateral agreement EC-Yugoslavia (agreement which was concluded before the break down of that country), subsequent to the unilateral adoption of an EC sanctions regulation against Serbia and Montenegro adopted in implementation of an UN Security Council Resolution. This case differs from *Kadi* as it was not fundamental rights but public international law and in particular the *pacta sunt servanda* principle enshrined in the Vienna Convention on the Law of Treaties that was invoked to contest the application of the EC sanctions regulation. The EC is not a signatory party to the Vienna convention, so the ECJ first had to establish its effect in EC law.

As a matter of principle, the ECJ firmly asserted its jurisdiction to rule on the compatibility of EC law with a rule of international law.²⁸ Specifically with respect to the Vienna Convention, the ECJ in essence held that although the EC is not a signatory party, it is nonetheless bound but only by the principles of customary international law as codified therein. The difficulty is then of course to determine what are principles of customary international law that the EC should abide by and which are not.

It is in this respect that the ECJ openly turned to the case law of the ICJ in support of its reasoning. It is significant that it is not only a source reference that is made. The ECJ directly and authoritatively quotes the ICJ on the possibility to invoke, albeit in exceptional cases, the plea of fundamental change of circumstance to escape the application of the principle of

²⁴ See for instance Lenaerts, K., and Van Nuffel, P., "Europees Recht in Hoofdlijnen, Maklu, 2008, at p. 411-412.

²⁵ Judgment of 22 October 1986, *Solange II*, BVerfGE, 73, 339. See also the Judgment of 29 May 1974, *Solange I*, BVerfGE, 37, 271, where the link was made with the absence of a democratically elected and legislative Parliament and an European catalogue of fundamental rights protection.

²⁶ See my article, o.c., (Hart Publishers, at press).

²⁷ Case C-162/96, *Racke*, o.c.

²⁸ Case C-162/96, *Racke*, o.c., at para 25-27.

pacta sunt servanda.²⁹ This judgment has both been welcomed and subject to critique.³⁰ It could be maintained that the problem is not so much the fact that the ECJ openly referred to a foreign court, the ICJ, to support its argument. It is rather the failure to do so, also with respect to the further blunt statement that the procedural provisions of Article 65 of the Vienna Convention were not considered to be a codification of customary international law and hence did not need to be complied with by the EC.³¹ One may thus more easily take issue with the fact that the ECJ itself claimed jurisdiction to interpret international law and got caught on a slippery road, in particular by failing to substantiate such a far reaching (but perhaps not surprisingly 'fact accommodating') contention.

The fundamental principles outlining the relationship with public international law are not simply forgotten in the *Kadi* case. To the contrary, the ECJ expressly refers back to the prior *Racke* ruling to recall that the EC must respect international law, whereas a measure adopted in the exercise of its powers must be interpreted in the light of the relevant rules of international law.³² The ECJ also recognises the special importance to be attached to the adoption of UN Security Council Resolutions under Chapter VII of the UN Charter, the need to comply with the terms and objectives of such a resolution in adopting EC implementing measures, and even the necessity to take into account the wording and objective of the UN Security Council Resolution when interpreting the EC implementing act.³³

Quite ironically, it should be noted that in the past the ECJ had been criticised for doing precisely that, namely broadly interpreting EC sanctions regulations in the light of the finality, wording and purpose of the UN Security Council Resolution that was being implemented so as to give a maximum effect to the latter.³⁴ In particular the limited jurisdiction and ability of the ECJ to interpret correctly the aims of UN Security Council Resolution was thereby contested.³⁵ Subsequent to the *Kadi* ruling of course the opposite criticism could all too easily be made, pointing to the failure of the ECJ to sufficiently take into account the finality and effect to be given to the underlying UN Security Council Resolution.

The major difference with *Racke* is that in *Kadi* it is not the compatibility of the EC measure with the source of international law to which it refers, *in casu* UN obligations, that is being challenged. Not only does it go totally undisputed that the contested EC measure indeed conformed to the UN Security Council Resolution, it is precisely the fact that the former

²⁹ Case C-162/96, *Racke*, o.c., at para 50, where the ECJ quotes para 104 of the ICJ Judgement of 25 September 1997 in the case *Hungary v. Slovakia*.

³⁰ See for instance Eeckhout, P., *External relations of the European Union: legal and constitutional foundations*, Oxford EC Law Library, 2004, at p. 328-333.

³¹ Case C-162/96, *Racke*, o.c., at para 58.

³² Joined Cases C-402/05 P and C-415/05 P, *Kadi*, o.c., at para 290.

³³ Joined Cases C-402/05 P and C-415/05, *Kadi*, o.c., at para 292-297.

³⁴ For instance Case C-177/95, *Ebony Maritime*, ECR (1997) I-11111; Case C-84/95, *Bosphorus*, ECR (1996) I-3953.

essentially literally copied the latter's blacklist that can be identified as the source of all legal problems. The key issue instead becomes whether or not the EC, in so implementing the UN Security Council Resolution, has failed to live up to its own constitutional principles of respect for fundamental rights. As a premise to this analysis, the ECJ points out that UN members are free to decide how to transpose UN Security Council Resolutions into their domestic legal order, to conclude 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*".³⁶ In other words, the ECJ does not consider it to be an international (UN) obligation to grant immunity from jurisdiction to such an implementing EC act.

5. The silent dialogue between Courts on fundamental rights issues underlying *Kadi*

If it is not an international obligation by virtue of UN law to refrain from reviewing the legality of implementing EC sanctions regulations in terms of protection of fundamental rights, the exercise of such a full judicial review by the ECJ appears to be all the more warranted in view of the above mentioned warning signals sent out to the ECJ by constitutional courts of the Member States as well as recent developments in the case law of the ECHR. The key importance of this silent or indirect dialogue between courts can hardly be overstated, as it conditions the external acceptance of -and respect for- the autonomy of the EC legal order.

The fact that neither the EC nor the EU is a state takes on all its significance when considering issues such as fundamental rights. As a *sui generis* international organisation, the EC/EU only has competence to the extent that this is expressly or impliedly attributed to it by the founding Treaties.³⁷ Also the exclusive jurisdiction of the ECJ (being an EC institution in the sense of Article 7 TEC) is confined to what is expressly stated in Article 46 TEU, extending to the full EC Treaty but excluding for instance jurisdiction over the EU CFSP pillar.³⁸

A major problem was that, originally, the EC Treaty did not at all mention fundamental rights so that they were not really attributed a place in the EC legal order. It is only gradually that the ECJ of its own initiative has come to review the legality of acts adopted under the EC Treaty (but still not the EU Treaty for lack of jurisdiction) upon compliance with fundamental rights.

³⁵ Canor, I., "Primus inter pares. Who is the ultimate guardian of fundamental rights in Europe?", ELRev. (2000) 3-21.

³⁶ Joined Cases C-402/05 P and C-415/05 P, *Kadi*, o.c., at para 298 and esp. para 299.

³⁷ Article 5 TEC.

³⁸ The ECJ does however have jurisdiction to interpret Article 47 TEU which lays down the principle that the EU Treaty needs to respect the *acquis communautaire*. For the importance of this, see for instance Case C-91/05, *Commission v. Council (ECOWAS)*, ECR (2008) I-3651.

The question was of course what standard of protection to use in view of the diversity between the Member States and the silence of the EC Treaty. In the first cases the ECJ in general referred to the respect of fundamental rights as a common constitutional tradition of the Member States and therefore also constituting general (and unwritten) principles of primary EC law.³⁹ The development of this important line of case law was reinforced in response to the warning signals as to the required results, sent out by constitutional courts of the Member States, not in the least the above mentioned *Solange* cases of the German constitutional court.⁴⁰ The essence of the message was that if the ECJ failed to offer adequate judicial protection of the constitutional values of individual Member States, in particular in the field of fundamental rights, constitutional courts might feel obliged to step in and effectively oppose the primacy of EC law. This was a hardly concealed threat to openly attack the core of the autonomous legal order which the ECJ had been so careful to construct over the years. Not surprisingly this message was received loud and clear by the ECJ. Besides continuing to refer in general to the constitutional traditions of the Member States, it gradually also started to refer directly to judgments of the ECHR in support of its findings.⁴¹ An important factor hereby is that all Member States are signatory parties to the ECHR. The latter therefore represents an acceptable standard of fundamental rights protection for the ECJ to work with,⁴² whilst avoiding the pitfall of appearing to discriminate or to prefer the constitutional values of one particular Member State above another.⁴³ This line of case law was codified only in the early 1990's with the Maastricht Treaty.⁴⁴ But even this could not dispel the echo of the *Solange* judgments as illustrated in *Kadi*.

³⁹ For the early case law, see Case 29/67, *Stauder*, ECR (1969) 419 and especially Case 11/70, *Internationale Handelsgesellschaft*, ECR (1970) 1125.

⁴⁰ See *supra*, at pt.3.

⁴¹ The case law of the ECJ in this respect has gradually come to 'maturity'. At first reference was made to the ECHR Convention values with the following early bench mark judgments: Case 4/73, *Nold*, ECR (1974) 491; Case 36/75, *Rutili*, ECR (1975) 1219; Case 44/79, *Hauer*, ECR (1979) 3727. Later on reference was also, albeit at first only sporadically, made to case law of the ECHR, see for instance Case C-13/94, *P v. S*, ECR (1996) I-2143, at para 16. Today the ECJ readily takes into account and openly refers to the case law of the ECHR. The following quote taken from a recent case contains an express acknowledgment of this fact: "*In that regard, while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR.*" , Case C-465/07, *Meki Elgagaji*, Judgment of 17 February 2009, nyr, at para 28, emphasis added. For another recent example, where the ECJ expressly refers to case law of the ECHR with respect to the right to a fair trial in support of its own conclusions, see Case C-308/07 *P, Koldo*, Judgment of 19 February 2009, nyr, at para 43.

⁴² For the sake of completion, it should be mentioned that, once the Lisbon Treaty will enter into force, also the EU Charter on fundamental rights (which is already invoked now before the ECJ) will have binding force. On the importance of this development, see for instance Gerkrath, G., "Les principes généraux du droit ont-ils encore un avenir en tant qu'instruments de protection des droits fondamentaux dans l'Union européenne ?" *R.A.E.-L.E.A.* (2006) 31-43.

⁴³ On the academic discussions about the possibility for the ECJ to use the constitution of any Member State as a bench mark for fundamental rights protection, see for instance Tridimas, Takis, *The General Principles of EC law*, Oxford EC Law Library, 2000, at pp. 213-215.

⁴⁴ Article 6 TEU nowadays expressly states that:

(1) *The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.*

Besides this interaction with the constitutional courts of the Member States, a silent dialogue has also gradually established between the ECJ and the ECHR. Up till now it is only the Member States and not the EC/EU that have signed the ECHR.⁴⁵ From the perspective of the EC, the ECHR therefore is and remains a foreign court, albeit one with special significance. Similarly, as a matter of principle the ECHR only reviews acts attributable to the Member States and will not consider cases brought against acts of the EC, simply because the latter is not a signatory party.⁴⁶ The European integration process is however very dynamic. Every time that competence is transferred to the EC and thus brought under the jurisdiction of the ECJ, those fields are automatically subtracted from the scope of direct control by the ECHR. With the increasing shift of competence from the Member States to the supranational EC over the years, extending far beyond purely economic matters, the question thus became all the more pertinent to know whether and to what extent such a development was in conformity with ECHR obligations of the Member States. The answer was recently provided by the ECHR in two groundbreaking judgments which, however, again condition the (external) acceptance of the autonomy of the EC legal order.

First of all, in the *Matthews* case of 1999 the ECHR stated as a matter of principle that “(t)he Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’.”⁴⁷ The positive point was that this ‘cleared’ the European integration process from the perspective of the ECHR. Yet the condition was double. The very act of transfer of competence to the EC, namely the primary EC/EU Treaties to be ratified according to the constitutional rules of the Member States and thus directly attributable to the latter, would continue to be subject to scrutiny by the ECHR.⁴⁸ Secondly and more importantly, the ECHR apparently also reserved the right to evaluate whether in the international organisation concerned, ie. the EC, the protection of ECHR fundamental rights standards was indeed ‘secured’. This was just begging the question of whether the EC legal order would be held to offer sufficient guarantees. The liberating answer came only recently with the *Bosphorus* case of 2005.⁴⁹ After a very interesting (external) review of the system of judicial protection in the EC, the ECHR concluded that an equivalent (but not necessarily identical) system of protection of fundamental rights had been put into

(2) *The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*

⁴⁵ In Opinion 2/94, ECHR, ECR (1996) I-1759, the ECJ held that a Treaty modification was need to confer the necessary competence on the EC to adhere to the ECHR. The pending Lisbon Treaty will allow for the Union to become a signatory party.

⁴⁶ ECHR, *Matthews v. United Kingdom*, application n° 24833/94, judgement of 18 February 1999.

⁴⁷ *Idem*, at para 32.

⁴⁸ The ECHR *inter alia* pointed to the fact that for this very reason, the primary Treaties can not be subject to a legality review by the ECJ. It is clear that if also the ECHR had declined jurisdiction then those Treaties would have escaped all legality control.

⁴⁹ ECHR, *Bosphorus v. Ireland*, Application n° 45036/98, Judgment of 30 June 2005.

place and was sufficiently safeguarded by the ECJ.⁵⁰ A legal presumption of compatibility therefore applies which, as a matter of principle, renders an additional scrutiny by the ECHR superfluous. However, the ECHR was careful to include the possibility for rebuttal of this legal presumption of equivalence if, in a given case, there were to be established a manifest insufficiency in terms of protection of fundamental rights.⁵¹ The autonomy of the EC legal system is thus only safeguarded to the extent that it can sufficiently and in all circumstances guarantee the respect of fundamental rights equivalent to the standard of the ECHR.

6. The perceived treath posed by *Kadi* to the autonomy of the EC legal system

The conditional acceptance of the autonomy of the EC legal order by the constitutional courts of Member States and the ECHR alike, helps to explain the firm stance taken by the ECJ on fundamental rights issues in *Kadi*. At least theoretically, the risk was not unreal that if the ECJ were simply to decline to review the contested EC measure upon compliance with its usually applicable fundamental rights standards, the matter would be taken out of the hands of the ECJ all together.⁵² This would set a potentially disastrous precedent for the autonomy of the EC legal order also in future cases.

From this perspective it is interesting to point to the reasoning in terms of the preliminary assessment of the equivalence of fundamental rights protection in the EC and the ECHR as made by the ECJ in *Kadi*. It refuted the argument that the case in point resembled decisions in which also the ECHR had declined jurisdiction to review measures taken in implementation of UN Security Council Resolutions. According to the ECJ such a logic would only relate to cases which involved actions directly attributable to the United Nations. Express reference was made by the ECJ to the above mentioned ECHR *Bosphorus* judgment, to underline that in this case the ECHR had claimed jurisdiction in spite of the fact that the source of the contested national measure was a Community sanctions regulation which itself was taken in pursuance of a UN Security Council Resolution.⁵³

⁵⁰ The same conclusion cannot automatically apply to the EU Treaty and in particular to the CFSP where the ECJ does not have jurisdiction.

⁵¹ ECHR, *Bosphorus*, o.c., at para 165-166. For a discussion of this judgment and its importance for the EU, see inter alia: Hinarejos Parga, A., "Bosphorus v. Ireland and the protection of fundamental rights in Europe", *E.L.Rev.* (2006) 251-259; Constantinesco, V., "C'est comme si ç'était fait ? (observations à propos de l'arrêt de la Cour européenne des droits de l'homme (grande chambre), *Bosphorus Airlines*, du 30 Juin 2005)", *Cahiers de droit européen* (2006) 363-378 ; Maubernard, C., "Union européenne et Convention européenne des droits de l'homme: l'équivalence procédurale", *R.A.E. – L.E.A.* (2006) 65-81.

⁵² After the ruling of the CFI, certain authors, such as Lavranos, N. (o.c.) had pointed to the danger posed in this respect by constitutional courts of the Member States.

⁵³ Joined Cases C-402/05 P and C-415/05 P, *Kadi*, o.c., at para 311-313, esp. para 312.

The silent or indirect dialogue between (European) courts on fundamental rights issues thus seems to be very much alive and ongoing.⁵⁴ Although the ECJ does not spell it out as such, it is possible to discern two paragraphs in the *Kadi* case which anticipate and meet the concerns of the constitutional courts and the ECHR respectively. In para 316 it is stressed that “*the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement*”. Whereas para 317 underlines that “*(t)he question of the Court’s jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulations falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights*”. Through firmly asserting its jurisdiction to scrutinise the EC sanctions regulation upon compliance with fundamental rights, the ECJ thus also endeavoured to shield the ‘internal and autonomous’ legal order of the EC from potential interferences of the other courts. Such a clear stance finds further support in the Lisbon Reform Treaty which has not yet entered into force. The latter will add an important paragraph 3 to the modified provisions on economic and financial sanctions unequivocally stipulating that any such acts adopted by the Union “*shall include necessary provisions on legal safeguards*”.⁵⁵ Although those provisions (are still not and) were not binding at the time of the facts of *Kadi*, and thus strictly speaking not relevant to the case, they could be considered by the ECJ as a clear signal facilitating the adoption of its conclusion.

7. Conclusion

The discussions on whether or not to keep up with international developments and to refer to rulings of foreign courts takes on a wholly different meaning when considered from the perspective of a fully sovereign state, such as the USA, or from the position of a *sui generis* international organisation such as the EC. States are the primary subjects of international law and have full legal personality. Most would agree that for States to openly abide by rulings of a foreign court would plainly be tantamount to a surrender of sovereignty. The discussion will then rather focus on whether and to what extent foreign developments and court rulings could or even should be considered, among other sources of inspiration, for the future direction to be taken by domestic legal system.

The situation is somewhat different for the EC. The judge-made creation of a new and autonomous legal order, with limited legal personality on the basis of the principle of attributed competence, has necessitated forging a niche in-between constitutional law of the Member States and public international law. This brought with it the question of the legal nature of the

⁵⁴ See for instance also Griller, S., o.c.,. Similarly on the ‘constitutional dialogue’ between the ECJ and the ECHR in *Kadi*, see Kunoy, B., Dawes, A., o.c., at pp. 78-82.

interconnection with the pre-existing legal systems. From a strictly legal perspective it would of course be wrong to maintain that the ECJ is bound by rulings of foreign courts, including the ECHR, as this would in itself entail a surrender of the autonomy of the EC legal order. Neither can it seriously be argued that the ECJ is bound by rulings of the constitutional courts of the Member States, as this would conflict with an essential characteristic of EC law namely its primacy over domestic laws of the Member States. The major challenge has been, however, to meet the constraints encountered when trying to forge also 'external' acceptance of this newly established legal order. This has never been automatic nor unconditional. In particular constitutional courts of Member States as well as the ECHR have sent clear warnings that the autonomy of the EC legal order for their part stands or falls with the ability of the ECJ to sufficiently safeguard the respect of fundamental rights. This silent dialogue has forced the ECJ to duly and consistently take into account the standards of fundamental rights protection enacted by those courts.⁵⁶ Proof of the fact that the ECJ remains on the right track is readily offered by the ample references to rulings of the ECHR in support of its own conclusions. As a rather paradoxical conclusion, when compared to the position of fully fledged states, it could therefore be maintained that specifically in so far as the EC legal order is concerned, its autonomy is best safeguarded if and when the ECJ openly demonstrates that it will abide at least by fundamental rights standards set by the constitutional courts of its Member States as well as by a foreign court, the ECHR.

⁵⁵ Article 215 TFEU (ex article 301 TEC) and Article 75 (ex Article 60 TEC) TFEU.

⁵⁶ This concern has most likely also influenced the Omega ruling of the ECJ, on the relationship between fundamental rights (as protected by the German constitution) and internal market principles, see Case C-36/02, Omega, ECR (2004) I-9609.



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