City Research Online

City St George's, University of London

Citation: Draghici, C. (2012). The development of self-contained regimes as an obstacle to UN global governance. In: Happold, M. (Ed.), International Law in a Multipolar World. (pp. 283-302). Routledge, London. ISBN 9780415565219

This is the accepted version of the paper.

This version of the publication may differ from the final published version. To cite this item please consult the publisher's version.

Permanent repository link: https://openaccess.city.ac.uk/id/eprint/5243/

Copyright and Reuse: Copyright and Moral Rights remain with the author(s) and/or copyright holders. Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge, unless otherwise indicated, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way. For full details of reuse please refer to City Research Online policy.

City Research Online: http://openaccess.city.ac.uk/ publications@citystgeorges.ac.uk

THE DEVELOPMENT OF SELF-CONTAINED REGIMES AS AN OBSTACLE TO UN GLOBAL GOVERNANCE

Carmen Draghici

Whilst the absence of a coherent normative and institutional hierarchy has characterized the international community of states at all times, until recently the potential conflicts arising from the fragmentation of international law were mostly relegated to the realm of academic debate.[1] Where they did arise, they typically involved divergent (substantial/procedural) solutions provided for by

[1] On hierarchies in international law see e.g. P Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413; B Oxman, 'Complementary Agreements and Compulsory Jurisdiction' (2001) 95 AJIL 277; D Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291. On the topic of fragmentation and references to the scholarly debate see M Koskenniemi and P Leino, 'Fragmentation of International Law. Postmodern Anxieties?' (2002) 15 Leiden JIL 553; G Hafner, 'Pros And Cons Ensuing from Fragmentation of International Law' [2004] 25 Mich.J.Int'l L. 849; A Fischer-Lescano and G Teubner, 'Regime-collisions. The Vain Search for Legal Unity in the Fragmentation of Global Law' [2004] 25 Mich.J.Int'l L. 999. The consequences of the proliferation of international law sources has been examined by a study group of the International Law Commission (ILC) chaired by Martti Koskenniemi in 'Fragmentation of International Law…Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682 (hereafter *Koskenniemi Report*). The ILC adopted a shorter text containing 'Conclusions o the Work of the Study Group on Fragmentation' in 'Report of the International LawCommission on the Work of its 58th Session' (1 May-9 June and 31 July-11 August 2006) UN Doc A/61/10 (2006) (hereafter *ILC Conclusions on Fragmentation*). See M Matheson, 'The Fifty-seventh Session of the International Law Commission' (2006) 100 AJIL 416, 423 ff.

regional or sectoral agreements on the same matter.[2] The United Nations (UN) Charter norms remained immune from any balancing against particular norms, by virtue of the hierarchical relationship established by Article 103 and of the general acceptance that they codify the international public order. The practical consequences of the fragmentation, and in particular the regionalization, of international law are becoming, nonetheless, appreciable in the light of a series of recent legal developments that redefine the relationship between the UN and the European Union (EU). Such developments were driven by the discrepancy between UN sanctions targeting individuals suspected of terrorist links and the concerns of EU institutions over the infringement of fundamental human rights. The *Kadi* ruling of the European Court of Justice (ECJ)[3] of 3 December 2008[4] and its replications, as well as the subsequent Council Regulation 1286/2009 of 22 December 2009,[5] have challenged the decades-long assumption of the pre-eminence of UN obligations (in particular under Security Council Chapter VII resolutions) over any other international agreements. Starting from these

[2] See the Mox Plant example of overlapping between functional and geographic special regimes in *Koskenniemi Report* (n 1) 12-14, [10]-[13]. See also *Shelton* (n 1) 293.

[3] The Lisbon Treaty, in force since 1 December 2009, renamed the European courts as 'Court of Justice' (formerly 'European Court of Justice') and 'General Court' (formerly 'Court of First Instance'). For the purpose of clarity, this chapter uses the pre-Lisbon denominations.

[4] Joined Cases C-402P & C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and the Commission of the European Communities* [2008] ECR I-6351. On the judgment see e.g. C Draghici, 'Suspected Terrorists' Rights Between the Fragmentation and Merger of Legal Orders: Reflections in Margin of the *Kadi* ECJ Appeal Judgment' (2009) 8 (4) Wash. U. Global Stud. L. Rev. 627; 'Plate Tectonics in Luxembourg: the Ménage à Trois Between EC Law, International Law and the European Convention on Human Rights Following the UN Sanctions Cases' (2009) 46 (1) CMLRev 73; Pe De Sena & MC Vitucci, 'The European Courts and the Security Council: Between Dedoublement Fonctionnel and Balancing of Values (2009) 20 (1) EJIL 193, 221-8.

[5] Council Regulation (EU) 1286/ 2009 amending Regulation (EC) 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban [2009] OJ L346/42.

momentous developments, this chapter seeks to address major quandaries in current international law: what relevance and authority does UN law retain in relation to self-contained regimes? Is UN law still conceived as hierarchically superior in case of contrasting obligations, or do the ordinary rules on conflict of norms (i.e. norms of equivalent status) apply?

Section I discusses the evidence supporting the wide acceptance of the UN Charter as the constitutional framework of the international community. Against this background, Section II examines the emergence of the *Kadi* doctrine rejecting the uncritical execution of UN decisions in the name of non-derogable EU values. The judicial echoes of the *Kadi* ruling, in particular subsequent judgments of both the ECJ and the Court of First Instance (CFI) upholding *Kadi* are also analyzed. The institutional follow-up, most notably the recent EU Council regulation reforming the implementation of UN terrorist sanctions, is addressed in Section III, with a focus on the impact of EU's conditional acceptance of UN supremacy upon actual global governance. Section IV explores the attempt of the UN Security Council to address the latest challenges to its authority by adopting Resolution 1904 (2009) of 17 December 2009,[6] which introduces an Ombudsperson at the core of a new delisting procedure for terrorism suspects. The conclusions highlight the difficulty of achieving UN global governance as long as conspicuous groups of states establish highly homogeneous forms of community on a regional basis and their

[6] UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904.

fundamental rules collide with UN commandments. I argue that the hierarchically superior nature of UN Charter obligations at variance with *lex specialis* finds an exception in the constitutional norms of subsystems such as the EU. Hence the necessity for value-oriented UN reform in order to avoid the risks posed by self-contained regimes to the uniform application of UN law and the recognition of UN primacy itself.

I. THE UNITED NATIONS CHARTER: A CONSTITUTION OF THE INTERNATIONAL COMMUNITY?

The concept of UN global governance is premised on the assumption that the community of states is evolving towards an international constitutional order, centred on the norms enshrined in the UN Charter and on the UN institutional structure.[7] The UN Charter may be *prima facie* construed as a constitution of the world community, insofar as its main principles and purposes (including the prohibition on the threat or use of force, the obligation concerning the peaceful settlement of disputes, co-operation and friendly relations amongst states and

[7] On UN and the constitutionalization of international law see e.g. P-M Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997) 1 Max Planck Yearbook of International Law 1; B Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 Colum.J.Transnat'l L. 529; S Kirchner, 'Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?' (2004) 5 (1) German LJ 47; S Breau, 'The Constitutionalisation of the International Legal Order', (2008) 21(2) LJIL 545.

the promotion and protection of human rights) provide the framework of all international rules, and every other treaty regime must be consistent therewith. The ILC conclusions on the fragmentation of international law explicitly underscore the universally accepted 'specialty' of UN Charter norms.[8]

Article 52 of the UN Charter suggests that the expansion of regionalism should be subordinated to UN law[9] and state practice largely confirms this understanding. Express reference to the UN Charter is made in regional treaties, by which they acknowledge the Charter as a framework of international law and a source of legitimacy. One such example is the statute of the North-Atlantic Treaty Organization (NATO), which reaffirms in its Preamble the "faith in the purposes and principles of the Charter", and establishes in Article 1 that the 'Parties undertake, *as set forth in the Charter*…,to settle any…dispute…by peaceful means…and to refrain…from the threat or use of force … *inconsistent with the purposes of the United Nations*' (emphasis added). Moreover, Article 5 of the NATO Treaty refers to the 'right of … self-defence recognised by Article 51 of the Charter', though self-help is also a well-established institution of general international law.

[8] See *ILC Conclusions on Fragmentation* (n 1) [36]: 'It is also recognized that the United Nations Charter enjoys special character owing to the fundamental nature of some of its norms, particularly its principles and purposes and its universal acceptance'.

[9] See UN Charter Article 52: 'Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations'.

The presumption of UN constitutionalism is further supported by the increasing tendency towards the overlapping of UN law and international law. This stems from the virtually universal UN membership, the expanding scope of multilateral law-making within the General Assembly as, a privileged forum for the negotiation of international treaties, the general recognition of the 'soft law' value of General Aseembly resolutions, and the codification of international law by the UN-established International Law Commission (ILC), resulting in international conventions or authoritative restatements of international norms.[10]

More decisively, the constitutionalist view of the UN is predicated on the position occupied by the Charter in the hierarchy of international norms (other than *jus cogens*). This is mainly, though not exclusively, because of the supremacy clause in Article 103 of the Charter, establishing that in the event of a conflict between obligations under the Charter and obligations 'under any other international agreement', the former 'shall prevail'. Despite the wording of the provision,[11] the ILC suggested that Charter obligations '*may* also prevail'

---

[10] See S Bleicher, 'The Legal Significance of Re-citation of General Assembly Resolutions' (1969) 63 (3) AJIL 444; C Joyner, 'U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm Creation' (1981) 11 California Western ILJ 445; B Sloan, 'General Assembly Resolutions Revisited (Forty Years Later)' (1987) 58 BYIL 39; H Chodosh, 'Neither Treaty nor Custom: The Emergence of Declarative International Law' (1991) 26 Texas ILJ 87; D Sheltone, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP, Oxford 2000); V Gowland-Debbas (ed), *Multilateral Treaty-Making* (Martinus Nijhoff, The Hague 2000).

[11] The wording reflects the intention of the drafters, as proposals to include reference to 'any international obligation' were rejected at the San Francisco conference. See R Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 ICLQ 583. It can be argued, however, based on Articles 31 (3) (b) and 32 of the Vienna Convention on the Law of Treaties, that the *travaux préparatoires* constitute subsidiary means of interpretation, whereas 'subsequent practice' belongs to the general rules of interpretation and, as such, should prevail.

over inconsistent custom, relying, significantly, on 'the constitutional character of the Charter and the established practice of States and United Nations organs'.[12] Regardless of the pre-eminence over custom, the subordination of any international agreement to the Charter undoubtedly confers on the latter a superior normative status.

The exceptional standing of the Charter is also recognized by treaty law as codified by the 1969 and 1986 Vienna Conventions on the Law of Treaties (VCLT). The Preamble to the 1969 VCLT refers to 'the principles of international law embodied in the Charter', and Article 30 (1) makes the rules on successive treaties on the same matter 'subject to Article 103 of the Charter. Article 52 further stipulates that a 'treaty is void if [concluded] by the threat or use of force in violation of the principles of international law embodied in the Charter'. Similarly, Article 65 (3) on procedures for treaty termination or annulment establishes that, in case of objections, 'the parties shall seek a solution through the means indicated in Article 33 of the Charter'. The 1986 VCLT includes analogous cross-references; most significantly, Article 30 establishes that 'in the event of a conflict between obligations under the Charter

[12] *ILC Conclusions on Fragmentation* (n 1) [35] (emphasis added). It is important to appreciate at the same time that, given the quasi-universal UN membership, the relationship with existing custom presents a theoretical rather than a practical interest. In the event that a norm based on the Charter were to conflict with a customary norm, the Charter-based norm would take precedence as *lex specialis* between the parties. It may be argued, however, that the formation of a new customary norm could prevail over from the Charter as *lex posterior* or 'subsequent practice' in relation to the Charter (for instance, should generalized practice and *opinio juris* arise in connection with humanitarian intervention, this may legitimize an exception from the prohibition of force in derogation of the Charter).

…and obligations under a treaty, the obligations under the Charter shall prevail'.

Article 103 has thus been apparently incorporated into general treaty law.[13] Unlike any other treaty provision, a state cannot contract out of Article 103 of the UN Charter. This does not mean, however, that the norm contained in Article 103 has a peremptory character.[14] Interestingly, the ILC Conclusions on Fragmentation, while recognizing the constitutional character of the Charter and its specialty, specify that a rule conflicting with Article 103 is not applicable.[15] If Article 103 was intended as a peremptory norm, any inconsistent norm would be void altogether rather than not applicable. Also, the Koskenniemi Report found that in case of contrast with *jus cogens*, UN norms would be invalid.[16] The ILC Conclusions also admitted that, while Charter norms are universally accepted, and it is difficult to contemplate any contradiction with *jus cogens*,

[13] This is without prejudice to the legal position of the (few) non-UN states, and of states not parties to the VCTL, unless we agree that the 1969 VCTL has passed into customary law. In any event, as many as 110 States are currently bound by this instrument. See <http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=UNTSONLINE&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en> accessed 6 February 2010. Conversely, the 1986 VCLT between States and International Organizations or between International Organizations is not yet into force; so far it has received 41 instruments of ratification or accession. See <http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XXIII-3&chapter=23&lang=en#1> accessed 6 February 2010.

[14] The peremptory nature of Article 103 has found, however, some support in the scholarly literature. See B Conforti, *Diritto Internazionale* (ESI, Naples 2006) 166. There are two justifications available for the absolute impossibility to derogate from Article 103. One is that the rights of the remaining parties would be affected, since most UN obligations are of an integral nature, depending on compliance by all parties. Also, *inter se* agreements are prohibited in relation to those provisions derogation from which is incompatible with the effective execution of the object and purpose of the treaty. Article 41 (1) VCLT 1969 addresses both situations.

[15] *ILC Conclusions on Fragmentation* (n 1)[41].

[16] *Koskenniemi Report* (N 1)176-7 [346].

problems may arise in connection with UN Security Council resolutions; the Security Council must act according to UN principles (Article 24.2 of the Charter), which include subsequently crystallized *jus cogens*.[17] However, the concept of peremptory norm seems reserved to substantive international law, concerned with ethos and public policy (prohibition of genocide, torture and slavery); [18] norms touching upon the functioning of international law, no matter how essential (e.g. *consuetudo est servanda* or *pacta sunt servanda*) are not peremptory, but their constitutional value is undeniable.[19] Therefore, the fact that Article 103 is not *jus cogens* does not affect its quasi non-derogable nature (as between UN States, i.e. in practice under international law *tout court*).

A further argument in support of UN constitutionalism is provided by international case-law, which upholds the view that the international community is verticalized around Article 103. Until the ECJ *Kadi* judgment in 2008, this seemed to be the prevailing opinion of regional and domestic

[17] *ILC Conclusions on Fragmentation* (n 1) [40]. See also Judge Lauterpacht, Separate Opinion, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Provisional Measures) [1993] ICJ Rep 325 [100]. More generally on limits to UNSC discretion see C Draghici, 'International Organisations and Anti-Terrorist Sanctions: No Accountability for Human Rights Violations?' (2009) 2 (2) Critical Studies on Terrorism 293, 296-9.

[18] See *ILC Conclusions on Fragmentation* (n 1)[33]. See also A Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation. An Attempt at a Re-appraisal' (2005) 74 Nordic JIL 297; *Kirchner* (n 7) 212; *Shelton* (n 1) 303-17.

[19] It is possible to derogate from custom through a treaty (derogation from *consuetudo est servanda*, *inter partes*), but not from *jus cogens*. Also, a treaty in conflict with another treaty will not be void: conflict-of-law principles will apply where possible (*lex posterior*, *lex specialis*), otherwise issues of responsibility will arise, but the validity of the treaty will not be questioned.

courts.[20] This was, in particular, the stance of the CFI in the *Yusuf and Al-Barakaat*[21] and *Kadi*[22] decisions of 21 September 2005, subsequently confirmed in the *Ayadi*[23] and *Hassan*[24] decisions of 12 July 2006. All these rulings regarded the implementation by EU institutions and Member States of UN-imposed sanctions against individuals suspected of (association with) terrorism (assets freeze, travel ban).[25] A list of suspected individuals and corporations is drawn up by the Sanctions Committee[26] following proposals by member states. The submission of listing proposals is not contingent upon any domestic criminal charge or conviction, as the measures are allegedly preventative rather than punitive. Because the mechanism relies on the surprise effect, suspects are not afforded a prior hearing. However, the mechanism guarantees no right to defence even after the measure has been implemented. At the outset, delisting was possible only if the state of residence or nationality undertook negotiations with the designating state or addressed the Sanctions Committee. Currently, an individual may file a delisting petition with the Focal point for delisting established pursuant to Resolution 1730 (2006) but re-

[20] On the judicial trend pre-dating the ECJ *Kadi* judgement see, e.g. *Draghici* (n 17) 300-3.
[21] Case T-306/01 *Yusuf and Al Barakaat v Council and Commission* [2005] ECR II-3533.

[22] Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649.
[23] Case T-253/02 *Ayadi v Council of the European Union* [2006] ECR II-2139.
[24] Case T-49/04 *Hassan v Council of the European Union* [2006] ECR II-52.
[25] By virtue of emergency powers pursuant to Chapter VII of the UN Charter, the UNSC has adopted financial sanctions directly against named individuals. UNSC Resolutions 1267 (1999), 1333 (2000) and 1390 (2002), as subsequently amended, place an obligation on states to freeze without delay any financial assets or economic resources of the suspects.
[26] The The Al-Qaida and Taliban Sanctions Committee, established by UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267, is one of the three subsidiary bodies of the Security Council addressing terrorism-related issues, and its membership reflects the composition of the Council.

examination depends on the initiative of a State in the Committee to place the issue on the Committee's agenda. Moreover, the decision is reviewed by the same body which originally imposed the sanction, and following purely intergovernmental consultations. Furthermore, individuals only have access to the portion of their file that the designating state considers to be publicly disclosable and they are at no time entitled to take part in the procedures.[27]

Before the adoption of Council Regulation 1286/2009 in December 2009, EU institutions automatically endorsed the lists, and the measure was implemented without an ex post facto hearing, insofar as EU delisting entirely depended upon UN delisting.[28] Targeted individuals challenged the relevant acts before the CFI, on the grounds that they breached, *inter alia*, fair trial rights and the right to an effective remedy. In the afore-mentioned rulings *Yusuf*, *Kadi*, *Ayadi* and *Hassan*, the CFI found that the combined effect of Articles 25 and 103 of the UN Charter gave priority to UN Security Council resolutions adopted under Chapter VII over any conflicting treaty obligation, including human rights treaties or the EC Treaty.[29] The court also considered that Community institutions, bound by the Treaty to further the international obligations of

[27] See the 'Guidelines of the Committee for the Conduct of Its Work', adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007, and 9 December 2008 <http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf> [1], [3], [6], [7].

[28] In order to give effect to UNSC's resolutions, the EU Council adopted Common Position 2002/402/CFSP concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organization and the Taliban, and other individuals, groups, undertakings and entities associated with them, implemented by EC Regulation 881/2002 of 27 May 2002, as amended.

[29] See e.g. (n 21) [231].

member states, had no autonomous discretion to alter the contents of the UN resolutions; thus, any judicial review of the implementing measures would have amounted to review of the UN sanction itself, which fell outside that court's jurisdiction.[30]

The findings of the CFI were heavily determined by the authority of the UN Charter, and concerns related to the lack of jurisdiction to review Security Council resolutions. In rulings occasioned by analogous sanctions adopted by EU institutions autonomously, such as *Organisation des Modjahedines du peuple d'Iran* of 12 December 2006,[31] and *Sison*[32] and *Stichting Al-Aqsa*[33] of 11 July 2007, the CFI stated that in order for the restrictive measure to comply with respect for defence rights, suspects must be informed of the reasons leading to the measure immediately after its adoption, afforded a hearing if requested, and given access to the information in their file so that they may express their views thereon.

[30] Ibid [265], [276].
[31] Case T-228/02 *Organisation des Modjahedines du Peuple d'Iran v Council of the European Union* [2007] All E.R. (EC) 447. See also CFI decision of 4 December 2008, case T-284/08 *People's Mojahedin Organization of Iran v Council of the European Union* [2009] 1 CMLRev 44.
[32] Case T-47/03 *Sison v Council of the European Union* [2007] 3 CMLRev. 39.
[33] Case T-327/03 *Stichting Al-Aqsa v Council of the European Union* [2007] ECR II-79.

A posture akin to CFI's analysis of UN dictated sanctions was espoused by the UK House of Lords in *Al-Jedda* in 2007,[34] a case regarding prolonged confinement without trial by British forces in Iraq by virtue of the power to detain conferred by a Chapter VII resolution. The House of Lords found that Security Council resolutions prevail over any other treaty, and therefore UN obligations qualify the individual right to liberty enshrined in Article 5 of the European Convention on Human Rights (ECHR).[35]

Arguably, the practice of UN member States (including judicial practice) has further contributed to the verticalization of the international legal order, subordinating inter-state agreements to the Charter and to the undisputed authority of the UN body with the widest mandatory powers.

II. THE *KADI* RULING AND JUDICIAL ECHOES (*OTHMAN, AYADI* AND *HASSAN*): DE-VERTICALIZING THE NTERNATIONAL COMMUNITY

Despite the wide acceptance of its constitutional value as the foundation of current international relations, the UN Charter's value and the unrestrained

[34] *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, on appeal from *R (on the application of Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327.
[35] Ibid [30]-[36].

authority of the Security Council demand rethinking in the light of the recent EU reactions to the UN sanctions regime. These reactions indicate that the emergence of institutionalized self-contained regimes might pose a major challenge to UN global governance.

The notion of self-contained regime, coined by the Permanent Court of International Justice (PCIJ) in the *Wimbledon* case,[36] designates an international arrangement based on a set of special rules applying with priority over general law, a 'strong form of lex specialis';[37] it encompasses, however, a variety of situations, from a set of secondary norms governing the consequences of a breach of a primary norm in derogation of responsibility law[38] to 'interrelated wholes of primary and secondary rules, sometimes also referred to as "systems" or "subsystems" of rules that cover some particular problem differently from the way it would be covered under general law'.[39] The definition adopted by the

[36] *S.S. Wimbledon* (1923) PCIJ Series A, No 1, 23-4. The International Court of Justice (ICJ) identified such a special regime in diplomatic law: 'diplomatic law itself provides the necessary means of defence against, and sanctions for, illicit activities by members of diplomatic or consular missions' therefore violation of diplomatic immunities is not lawful as a counter-measure (see *Case of Tehran Hostages (US v Iran)*, [1980] ICJ Rep 38 [83]). For the ICJ the rules on diplomatic protection constitute a 'self-contained regime' (ibi. [86]) and based on *lex specialis derogat legi generali* such rules prevail on general rules on counter-measures. The Koskenniemi Report, while acknowledging that EU law is sometimes treated as a self-contained regime insofar as 'rules of general international law are assumed to be modified or even excluded in [its] administration' ([129]), discusses EU integration under the regionalization heading, as a 'technique of law-making' (ibid., 89, [205]); see specifically, on European integration, ibid 95-6 [218]-[219].

[37] *Koskenniemi Report* (n 1) 55 [123].

[38] Article 55 of the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts (2001) acknowledges that the general rules on State responsibility 'do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law'.

[39] *Koskenniemi Report* (n 1) 57 [128].

ILC describes the self-contained regime as a 'group of rules and principles concerned with a particular subject matter' and 'applicable as *lex speciali*'.[40] The EU is arguably one of the most advanced forms of subsystem: it is an institutionalized self-contained regime, based on both primary rules and rules of responsibility established by the founding treaty rather than by international law, having its own institutions to administer the relevant rules and monitored by specific tribunals or quasi-judicial bodies. Naturally, no regime is completely self-contained insofar as it depends on general rules to operate (law of treaties etc.), and where there is no special regulation of a matter, general law still plays a residual role.[41] Also, the EU is still subject to the rules of international law in relation to third parties (e.g. in connection with responsibility for breach of UN law vis-à-vis non-EU States).

The 2008 ECJ *Kadi* judgment redefined the relationship between European and international law from a dualist perspective, with a strong emphasis on the autonomous nature of the EU legal order. The court underlined that 'an international agreement (such as the UN Charter) cannot affect the . . . autonomy of the Community legal system'.[42] According to the ECJ, the European legal order comprises non-derogable fundamental principles, such as

[40] *ILC Conclusions on Fragmentation* (n 1) [13].
[41] *Koskenniemi Report* (n 1) 77-83 [172]-[190]; 84-5, [192]-[193]. See also B Simma and D Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law* (2006)17 EJIL 483.
[42] *Kadi and Al-Barakaat* (n 4)[282].

the rule of law and fundamental human rights.[43] Thus, international obligations cannot be accommodated to the extent that they impair those principles that 'form part of the very foundations of the Community legal order'.[44] The system is also endowed with autonomous mechanisms designed to ensure that those principles are enforced, in particular judicial review. Protection of fundamental rights therefore includes for the Court 'the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights'.[45]

Consequently, the ECJ found the power to review the EC regulations giving effect to UN mandatory resolutions within its jurisdiction, insofar as the constitutional guarantee of judicial review 'stemming from the EC Treaty as an autonomous legal system…is not to be prejudiced by an international agreement'.[46] Enquiring whether comparable supervision exists at UN level, so as to justify the court's refraining from review, the ECJ found (despite announcing that it does not review UN measures) that UN re-examination mechanisms infringe the procedural rights of suspects.[47] As a result, the ECJ annulled the asset-freeze regulation insofar as it concerned the applicant: Security Council resolutions conflicting with non-derogable EC principles

[43] See Ibid [303]: '[art. 307] may allow derogations from the primary law in certain instances, '[t]hose provisions cannot, however, be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union'.
[44] Ibid [304].
[45] Ibid.
[46] Ibid [316].
[47] Ibid [319]-[325].

cannot be enforced.[48] This amounts to asserting that UN law needs to pass the test of EC legitimacy in order to be implemented in the EU legal space.

The ruling thus challenged the presumption of absolute primacy of UN obligations fostered by Article 103 of the UN Charter. The *Kadi* court did not question the primacy of the UN Charter over any other treaty and recognized the requirement for the EC to 'respect international law in the exercise of its powers'.[49] The court claimed, nevertheless, that compliance with UN law cannot go so far as to interfere with those principles representing the very foundation of the EU. This is ultimately equivalent to a finding that Article 103 does not supersede every conflicting obligation arising under a different treaty. For the ECJ, the norms relating to the protection of human rights or regulating the checks and balances within the EU cannot be displaced.

Arguably, the European subsystem has reached a level of integration such that it has generated its own *jus cogens*. The court's reasoning, distant from any recognition of UN global governance and international public order, is concerned with the intransgressible European public order, based on the rule of law and fundamental human rights.[50] The judgment therefore balances UN law

[48] Ibid [304]-[309].
[49] Ibid [291].
[50] The ECJ makes no reference to universal human rights as part of the international *ordre public*. While this can be seen as a reflex of the court's strict definition of jurisdictional boundaries, it may be contrasted with the European Court of Human Rights' recognition that 'the Convention cannot be interpreted and applied in a vacuum'. See *Behrami v France* (2007) 45 EHRR SE10 [71].

as mere treaty obligation against EU norms as constitutional principles. The court stresses, at the same time, that the power of review only concerns the domestic implementation measures, not the original resolutions, and that such review does not entail any challenge to the supremacy of UN decisions.[51] However, a finding of illegitimacy leading to delisting by the EU institutions in spite of the decision of the Sanctions Committee can only mean that UN law has lost its primacy.

It is important to appreciate that the *Kadi* ruling has not remained in isolation. The recent jurisprudence of the EU courts has already confirmed the revisited relationship between EU and UN law. On the one hand, the CFI has adjusted its jurisprudence to the *Kadi* principles. In its decision *Othman v Council and Commission* of 11 June 2009,[52] the CFI found that the EU Council 'at no time informed the applicant of the evidence adduced against him,'[53] denying him a chance to defend himself and obtain a legal remedy.[54] As did the ECJ in *Kadi*, the CFI annulled the EU regulation insofar as it related to the applicant, and it expressly observed that the applicant found himself 'in a factual and legal situation in every way comparable to that of Mr Kadi'.[55] Again similarly to the ECJ's decision, the CFI noted that, because the grounds for applying the

[51] See *Kadi and Al-Barakaat* (n 4)[286]: '[T]he review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such'.
[52] Case T-318/01 *Othman v Council and Commission* [2009] All ER (EC) 873.
[53] Ibid [83].
[54] Ibid [86].
[55] Ibid [82].

regulation were not disclosed to the court, no review of its lawfulness was possible, which amounted to a violation of 'the fundamental right to an effective legal remedy'.[56] The CFI therefore concluded that the Council adopted the regulation in breach of Mr Othman's fundamental rights, in particular rights of the defence, the right to effective judicial review and the right to property.[57]

Further actions seeking annulment of Article 2 of Council Regulation (EC) No 881/2002 of 27 May 2002, as amended, are currently under consideration: *Al-Faqih v Council*,[58] *Sanabel Relief Agency v Council*,[59] *Abdrabbah v Council*[60] and *Nasuf v Council*.[61] These actions, all brought on 5 May 2006, contain the same pleas in law and largely rely on the same main arguments. The applicants allege that Article 2 of Regulation No 881/2002 as amended infringes fundamental principles of Community law, *inter alia* respect for fundamental rights. Other replicas of *Kadi* can therefore be expected.

On the other hand, the ECJ itself has maintained the approach taken in *Kadi*. The recent judgment in the joint appeal cases of *Ayadi* and *Hassan* issued on 3

---

[56] Ibid [88].
[57] The Court recalled that a decision declaring a regulation to be void takes effect only from the date of expiry of the period in which an appeal may be brought before the CFI, two months and ten days from notification of the judgment (or, if an appeal has been brought within that period, as from the date of dismissal of the appeal); the CFI thus considered that the Council would have sufficient time in which to remedy the infringements found by adopting, if appropriate, a new restrictive measure directed against the applicant.
[58] App T-135/06 *Al-Faqih v Council* (15 July 2006) OJ C165, 29.
[59] App T-136/06 *Sanabel Relief Agency v Council* (15 July 2006) OJ C165, 30.
[60] App T-137/06 *Abdrabbah v Council* (15 July 2006) OJ C165, 30.
[61] App T-138/06 *Nasuf v Council* (15 July 2006) OJ C165, 30.

December 2009[62] essentially follows the findings in *Kadi*. We can state that by now a consistent pattern of jurisprudence upholding the rule of law and human rights has developed at EU level against the background of authoritative UN counter-terrorism strategies.

The implementation of UN sanctions in the EU was again put to the test by new claims filed with the CFI by Al Barakaat on 30 January 2009[63] and by Mr Kadi on 26 February 2009,[64] seeking to obtain, insofar as they are concerned, the annulment of the Regulation No 1190/2008 of 28 November 2008 by which the Commission decided to maintain them on the list.[65] The applicants contend that the new regulation violated their defence rights (the right to an effective hearing and the right to effective judicial protection) and failed to remedy the infringements found by the ECJ in its 2008 judgment in that respect. They claim that the contested regulation provides no procedure for communicating the evidence on which the assets-freeze decision was based, or for enabling them to comment meaningfully on that evidence. The applicants further submit that the Commission failed to provide compelling reasons for maintaining the asset freeze, and failed to undertake an assessment of all relevant facts and circumstances in deciding whether to enact the contested regulation.

---

[62] Joined Cases C-399/06 P & C-403/06 P *Hassan and Ayadi v Council and Commission* [2009] not yet reported.

[63] App T-45/09 *Al Barakaat v Commission* (4 July 2009) OJ C153, 39.

[64] App T-85/09 *Kadi v Commission* (18 April 2009) OJ C90, 37.

[65] The new regulation was adopted after the Commission, following the ECJ's ruling, provided the applicants with the statement of reasons on which the listing by the Security Council was based and an opportunity to present their views. See Section III below.

It remains to be seen if the CFI finds that the substance of the narrative summaries of reasons for listing provided by the Commission contains information sufficiently precise on the alleged collaboration with terrorists for the measure to be compliant with the duty to state reasons and defence rights.[66] If not, the transparency and fairness of the current listing procedure will also be challenged. If the court decides that it needs to perform a full review of the case, assessing the evidence supporting inclusion on the UN list, and if the Sanctions Committee shows itself unwilling to reveal that information because of the sensitive nature of its source (intelligence or police information),[67] the court may decide that it is prevented from reviewing the case, which amounts to a breach of the right to effective remedy. The CFI certainly did not seem impressed by the confidentiality argument in the 2008 judgment in *People's Mojahedin Organization of Iran* regarding autonomous EU lists: 'the Court considers that the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said

[66] Res 1735 (2006), giving publicity to the narrative summaries for designation, was not in place of the time of the initial asset freeze against Kadi and Al Barakaat. However, as is known, the narrative summaries only provide essential publicly available information on which the listing proposal was based.

[67] See UN Security Council, 'Ninth Report of the Analytical Support and Monitoring Team' (19 May 2009) UN Doc S/2009/245 [22]: '[I]f the [CFI] decides to examine the evidence behind the reasons for listing provided by the Committee, or if it decides it must conduct a complete review of the listing decisions, it will give rise to new and more difficult issues. There are limits to the ability of the Committee to reveal the reasons behind its decisions, even to a reviewing body, when these are based on intelligence or law enforcement information which belongs to a particular State. The sensitive nature of information pertaining to persons involved in terrorism and terrorist financing, recognized by the Court of Justice of the European Communities in the Kadi and Barakaat case often inhibits Member States, whether outside or inside the Committee, from sharing this information with others'.

Member State is not willing to authorise its communication to the Community judicature whose task is to review the lawfulness of that decision'.[68] The Tenth Report of the Monitoring Team assisting the Sanctions Committee rightly noted with concern the latest legal challenges:

> When the process of judgement and appeal is completed, the resulting decision in these two cases has the potential to create significant difficulties for all member States of the European Union and may alter the terms of the wider discussion of the fairness of the regime and the need for reform.[69]

III. COUNCIL REGULATION 1286/2009 INTRODUCING DUE PROCESS PROVISIONS: ARE SECURITY COUNCIL BLACKLISTING DECISIONS STILL MANDATORY?

The *Kadi* judgement has also triggered unforeseen institutional responses at the EU level. The first reactions to the judgment were rather modest, and left room for speculation as to the intent of EU institutions to safeguard a façade of legality while complying with UN decisions in the same indiscriminating manner. The Presidency of the Council approached the Sanctions Committee,

[68] Case T‑284/08 *People's Mojahedin Organization of Iran* [73].
[69] UNSC, Tenth Report of the Monitoring Team (2 October 2009) UN Doc S/2009/502 [36].

which provided narrative summaries of reasons for listing, and the Commission made them available to Mr Kadi and Al Barakaat. After having considered comments received from the two parties, the Commission passed Regulation 1190/2008 of 28 November 2008, reconfirming their inclusion on the list, and thus deciding to continue the restrictive measures. On the other hand, on 30 December 2008 the European Commission published a notice for the attention of the persons and entities added to the list by the latest EC Regulations to advise them that they may request the grounds for their listing from the Commission, and challenge the regulations concerned before the CFI.[70]

More significantly, on 22 April 2009 the Commission advanced a proposal for amendments to Council Regulation (EC) No 881/2002 of 27 May 2002, aimed at the inclusion of due process provisions in accordance with the *Kadi* judgment.[71] In the Explanatory memorandum accompanying the proposal, the Commission clarifies that the new procedure for implementing UN sanctions is to be based on the procedure applied in the implementation of Council Regulation (EC) No 2580/2001 of 27 December 2001 concerning the terrorist list drawn up by the EU itself. The reform would thus remove the difference in the treatment of suspected individuals based on the mere origin (EU or UN) of

[70] Commission (EC) 'Notice for the attention of the persons and entities added to the list referred to in…Council Regulation (EC) No 881/2002 … by virtue of Commission Regulations (EC) No 1109/2008 and (EC) No 1330/2008', 2008/C 330/09, 30 December 2008.

[71] Commission (EC) 'Proposal for a Council Regulation amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban' COM(2009)187 final, 22 April 2009.

the list.[72] Under the Commission's proposal, upon notification by the UN Sanctions Committee of a new listing decision and receipt of the statement of reasons, the Commission would provisionally freeze the assets of the party concerned, while at the same time sending them a statement of reasons and inviting their views. Finally, aided by an advisory committee, the Commission would examine the views and adopt a final decision confirming or rescinding the provisional freeze.[73]

Council Regulation No 1286/2009 of 22 December 2009[74] amended Regulation (EC) No 881/2002 pursuant to the Commission's proposal. Point (9) of the new regulation, inserting a new Article 7 (a), is of particular significance for the interplay between the EU and the UN:

> 1. Where the United Nations Security Council or the Sanctions Committee decides to list a natural or legal person…the Commission shall, as soon as a statement of reasons has been provided by the

[72] As recalled in Section II, the CFI had also developed a double pattern of review based on the origin of the list.

[73] COM (2009)187 final [8]: 'The following Articles 7a to 7e are inserted: 'Article 7a 1. Where the United Nations Security Council or the Sanctions Committee decides to list a natural or legal person, entity, body or group for the first time, the Commission shall, as soon as a statement of reasons has been provided by the United Nations, take a provisional decision on the amendment of Annex I without delay. 2. Once the provisional decision referred to in paragraph 1 has been taken, the Commission shall without delay communicate the statement of reasons provided by the United Nations, to the person, entity, body or group concerned, either directly or through the publication of a notice, providing him, her or it an opportunity to express his, her or its views on the matter. 3. The Commission shall take a final decision concerning the person, entity, body or group concerned in accordance with the procedure referred to in Article 7b(2)'.

[74] Council Regulation (EC) 1286/2009 amending Regulation (EC) No 881/2002 imposing certain restrictive measures [2009] OJ L346/42.

> Sanctions Committee, take a decision to include such person … in Annex 1.[75] 2. Once the [Commission's] decision…has been taken, the Commission shall without delay communicate the statement of reasons provided by the Sanctions Committee, to the person, entity, body or group concerned,…providing him, her or it an opportunity to express his, her or its views on the matter. 3. Where observations are submitted, the Commission shall review its decision…in the light of those observations….Those observations shall be forwarded to the Sanctions Committee. The Commission shall communicate the result of its review to the person, entity, body or group concerned. The result of the review shall also be forwarded to the Sanctions Committee.

The text is somewhat elusive and does not provide a definitive solution in the event that the Commission does not consider the designation justified, but the Sanctions Committee insists on maintaining the name on the list. The implication seems to be, however, that the Commission is the final arbiter of the case: it 'communicates' its decision to the Sanctions Committee after having reviewed the case, and apparently no further action is expected from the Sanctions Committee, nor is there any *navette* system envisaged, allowing the two institutions to reach a concerted decision; the Sanctions Committee is, in fact, merely notified. To put it differently, the decisions of the Sanctions

[75] The proposal drafted by the Commission read 'take a *provisional* decision on the amendment of Annex I without delay' (emphasis added).

Committee designating suspects and imposing freezing measures are no longer treated as mandatory! The UN listing decisions are considered as *prima facie* appropriate listing proposals, nevertheless open to scrutiny, and the ultimate decision on the merits is reserved to the EU Commission, following an examination of the defence put forward by the suspect. The consequences of the new regulation cannot be overstated: not only is there no automatic compliance with the SC resolutions, but it may lead to a decision to annul a freezing order plainly in contrast with UN Charter obligations.

Clearly, the opposition to a UN sanctions regime insufficiently wary of human rights has now moved from the judiciary to the forefront of EU political institutions. The new Council regulation puts an end to the passive implementation of measures which impinge upon fundamental individual rights as protected by EU law. The possibility to rescind the freezing order demonstrates that the EU is no longer a submissive receptor of UN decisions: the vertical relationship between the EU and the UN is no longer endorsed.

IV. THE OMBUDSPERSON AND THE NEW DELISTING PROCEDURE IN SC RES 1904 (2009): A DISAPPOINTING ATTEMPT AT PRESERVING AUTHORITY BY ENHANCING ACCEPTANCE

The latest resolution of the UN Security Council concerning individual sanctions, Res 1904 (2009) of 17 December 2009, introduces a series of

amendments in response to the criticism of the current listing and delisting procedures. As specified in the Preamble, the adoption of this further reform of the sanctions mechanism was partly driven by the legal challenges faced by domestic implementation measures, and the desire to improve the judicial guarantees available to suspects.[76]

Most significantly, the resolution establishes a new delisting mechanism centred on the institution of the Ombudsperson, an independent expert appointed on the basis of high professional qualifications and moral integrity.[77] The Office of the Ombudsperson will completely replace the Focal point for delisting, whose activity will be limited to receiving delisting requests in connection with other sanctions lists.[78] The establishment of an independent body for the review of delisting petitions, as requested by the critics of the

[76] See *UNSC Res 1904* (n 6) para. 10: '*Taking note of challenges, both legal and otherwise, to the measures implemented by Member States* under paragraph 1 of this resolution, welcoming improvements to the Committee's procedures and the quality of the Consolidated List, and *expressing its intent to continue efforts to ensure that procedures are fair and clear*' (emphasis added).

[77] Ibid 5: 'Decides that, when considering delisting requests, the *Committee shall be assisted by an Office of the Ombudsperson*, to be established for an initial period of 18 months from the date of adoption of this resolution, and requests the Secretary-General, in close consultation with the Committee, to appoint an *eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields*, such as legal, human rights, counter-terrorism and sanctions, to be Ombudsperson, with the mandate outlined in annex II of this resolution, and further decides that the Ombudsperson shall perform these tasks in an *independent and impartial manner* and shall *neither seek nor receive instructions from any government*'.

[78] Ibid 6: 'Decides that, after the appointment of the Ombudsperson, the *Office of the Ombudsperson shall receive requests from individuals and entities seeking to be removed from the Consolidated List*, in accordance with the procedures outlined in annex II of this resolution, and that, after the appointment of the Ombudsperson, *the Focal Point mechanism established in resolution 1730 (2006) shall no longer receive such requests*, and notes that the Focal Point shall *continue to receive requests from individuals and entities seeking to be removed from other sanctions lists*.…' (emphasis added).

existing mechanism,[79] can only be welcomed. Nevertheless, the role assigned to the Ombudsperson in the procedure, as defined in the Annex II of the resolution, is utterly disappointing.

The procedure commences with a two-month period of information gathering, extendable to four months if states need additional time to provide information. During this period, the Ombudsperson informs the petitioner about the Committee's procedures, forwards the delisting request to the members of the Committee, designating state(s), state(s) of residence and nationality/ incorporation, and any UN bodies or other states deemed relevant, asking them to provide any appropriate additional information concerning the delisting request.[80] At the end of the period of information gathering, the Ombudsperson presents a written update to the Sanctions Committee on the progress of the case, including details regarding which states have supplied information.

The second phase of the procedure consists of a two-month period of dialogue (also extendable to four months) in which the Ombudsperson facilitates the exchange of information between the petitioner, the Sanctions Committee, and

[79] See *Tenth Report of the Monitoring Team* (n 69) [41]: 'Most proposals for a panel assume a multiperson expert body with judicial qualifications'.

[80] The Ombudsperson shall also forward the delisting request to the Monitoring Team, which shall provide within two months: all relevant information available to the Monitoring Team, including court decisions and proceedings, news reports, information that States or international organizations have previously shared with the Committee or the Monitoring Team; fact-based assessments of the information provided by the petitioner; questions or requests for clarifications that the Monitoring Team would like asked of the petitioner regarding the delisting request.

the States concerned. The Ombudsperson can ask the petitioner questions or request additional information or clarifications that may help the Committee's consideration of the request (including any questions or information requests received from relevant states, the Committee and the Monitoring Team), forwards replies from the petitioner back to relevant states, the Committee and the Monitoring Team, and follows up with the petitioner. Upon completion of this period of dialogue, the Ombudsperson, with the help of the Monitoring Team, drafts and circulates to the Committee a 'Comprehensive Report' that 'exclusively' summarizes and specifies the sources of all information available (respecting confidential elements of Member States' communications with the Ombudsperson), describes the Ombudsperson's activities with respect to this delisting request, including dialogue with the petitioner, and, based on an analysis of all the information available, lays out for the Committee the principal arguments concerning the delisting request.[81]

The reformed procedure modestly culminates with the 'Committee Discussion and Decision'. After the Committee has had thirty days to review the Comprehensive Report, the delisting request is placed on the Committee's agenda for consideration.[82] The Ombudsperson presents the report in person and responds to questions from members of the Committee.[83] Significantly, the decision whether to approve the delisting request is taken by the Committee

[81] *UNSC Res 1904* (n 6) Annex II [7].
[82] Ibid [8].
[83] Ibid [9].

'through its normal decision-making procedures'.[84] The Ombudsperson is informed of the decision, and in turn informs the petitioner; when applicable, he or she removes the name from the list.[85]

The only substantial improvement introduced by the procedure is that it apparently guarantees the review of the case, regardless of the initiative of a State in the Committee. Other positive developments are enhanced transparency, because of the better coordination of the information exchange between the petitioner, the Committee and any other relevant parties, and the quasi-interlocutory phase (the applicant has an opportunity to respond, indirectly, to the questions addressed by any member of the Committee). That said, the new procedure does not notable alter the decision-making mechanism: the delisting decision is made by the same political body according to the same rules. The Ombudsperson's report is not in the form of a decision on the case, as it merely summarizes arguments and evidence, and whatever his or her findings, the report is in no way binding. Also, the presence of the Ombudsperson when the Committee considers the case should not be overestimated, because the Ombudsperson does not act as defence proxy for the petitioner, but rather as an objective rapporteur.

[84] Ibid [10].
[85] Ibid [11].

Compared to the reforms suggested by governmental and independent experts,[86] the amendments introduced by Resolution 1904 (2009) definitely appear unambitious. However, the concern for further adjusting the procedures in the aftermath of important legal challenges to the sanctions regime (in particular the *Kadi* ruling)[87] testifies the Security Council's awareness that non-compliance by major international players will lead to a decrease in UN authority.

V. CONCLUSIONS: EU AND UN, CONFLICT RATHER THAN COLLABORATION?

The reality of self-contained regimes is not novel. The ECJ had long established in historical judgments that the EC Treaty is 'more than an international agreement' and has created 'a new legal order',[88] 'its own legal system',[89] 'a Community based on the rule of law inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted

[86] The Tenth Report of the Monitoring Team quotes a working document emerged after a seminar sponsored by the Government of the Netherlands on the theme 'Effectiveness and legitimacy of United Nations targeted sanctions' (The Hague, May 2009); International Commission of Jurists, 'Assessing damage, urging action — Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights'; Report of the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame 'Overdue process: protecting human rights while sanctioning alleged terrorists'; Report of the Special Rapporteur on the promotion of human rights and fundamental freedoms while countering terrorism (A/63/223); Watson Institute for International Studies at Brown University report 'Strengthening targeted sanctions through fair and clear procedures'.

[87] The Ninth Report of the Monitoring Team describes the *Kadi* judgement as 'the most significant legal development to affect the [sanctions] regime since its inception'. See *Ninth Report* (n 67) 10, [19].

[88] Case 26/62 *Van Gend en Loos* [1963] ECR 3.

[89] Case 6/64 *Costa v ENEL* [1964] ECR 1141.

by them are in conformity with the *basic constitutional charter, the Treaty'*.[90] However, the previous case law suggesting the self-contained nature of the EC/ EU legal order was inward-oriented, reshaping the obligations of member states and institutions in their mutual relationship and *vis-à-vis* individuals. The novelty of *Kadi* is the outward-oriented emphasis on the autonomy and specialty of EU law, preventing the operation of international rules with regard to third parties.

What is most striking in *Kadi* and in the subsequent developments in EU legislation is that, while initially designed to accommodate UN obligations, this special regime places itself in conflict rather than continuity with UN law. Article 307 of the EC Treaty was introduced to safeguard the precedence of UN obligations.[91] Also, Article 10 A of the Lisbon Treaty explicitly confirms that the EU is expected to function in agreement with the UN Charter:

> 1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement:…democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and *respect for*

[90] Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339 [23] (emphasis added).

[91] See Art. 307 EC: 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty'.

> *the principles of the United Nations Charter and international law*….[The Union] shall promote multilateral solutions to common problems, *in particular in the framework of the United Nations*. (emphasis added).

Notwithstanding this general outlook, *Kadi* and post-*Kadi* events suggest that the relationship between the UN and self-contained regimes is not necessarily based on the latter's subordination to the former. Despite the conciliatory language of the 2008 *Kadi* judgment, the emerging doctrine sees the relationship between the EU and the UN through the lens of conflict.[92] This tension, widely confirmed by the new Council regulation, suggests that the role of UN law as a constitutional framework for international relations may be little more than a myth. It is yet difficult to predict how the EU reform of the mechanism giving effect to UN sanctions will work in practice. What appears clear is that the actual implementation of UN lists will face a double challenge: the filter of the EU Commission's revision of the grounds for listing, and a possible decision by the EU courts annulling the implementing regulation. Non-compliance with Security Council decisions pursuant to the new EU legislation and/ or to CFI rulings on the merits will weaken the authority of UN decisions and, possibly, the collaborative relationship between the UN and other treaty-

[92] The court acknowledges that, on the international plane, UN obligations are hierarchically superior, but states that within the EU fundamental EU principles take precedence. This implies that international obligations will not be given effect unless consistent with EU obligations, which reduces the recognition of UN primacy to a 'theoretical concession'. See *Draghici* (n 4) 657.

based regimes. Further instances of defiance are in fact likely to occur based on the same concerns,[93] as the EU example might encourage other legislatures to scrutinize UN decisions, and other courts to renounce judicial self-restraint in cases challenging UN-imposed measures.[94]

The *Kadi* doctrine avows that EU constitutionalism supersedes UN constitutionalism. This contradicts the ILC's findings that, where the principle of harmonious interpretation cannot reconcile an obligation under the Charter with a conflicting treaty obligation, the hierarchically superior norm (the one triggered by the operation of Article 103) prevails.[95] Apparently, where Article 103 enters into competition with the highest-rank principles of a self-contained regime, priority will be given to the 'local' *Grundnorm*, which is closer to the community and protects its fundamental values.[96] For that reason the law of the international community as embodied in UN law and institutions has to attach greater weight to values (human rights, rule of law) if it purports to become an

[93] See *Tenth Report of the Monitoring Team* (n 69) [35]: "As to the fairness and transparency of the regime, the perception remains in many States that it still lacks appropriate protection of individual rights, despite the publication of narrative summaries of reasons for listing and the Committee's review of the appropriateness of all listings. It is important to deal with the continued criticism of the fairness and transparency of the regime, so as to allow the Committee to turn its attention more fully to countering the threat from Al-Qaida and the Taliban".

[94] A claim brought by Youssef Mustapha Nada Ebada against Switzerland is pending before the European Court of Human Rights, following a ruling by the Swiss Federal Tribunal that upholds the sanctions measures against him based on the UN designation. See Nineth Report of the Monitoring Team 12, [24]. The recent views of the Human Rights Committee in the case of *Nabil Sayadi and Patricia Vinck v Belgium* (Communication No 1472/2006, 22 October 2008), finding a breach of Articles 12 and 17 of the International Covenant on Civil and Political Rights in relation to the authors' presence on UN terrorist lists, may also induce the Court to take a rights-favourable approach.

[95] *ILC Conclusions on Fragmentation* (n 1)[42].

[96] No choice-of-norm would be possible if Article 103 were recognized as *jus cogens*, in fact special regimes are not allowed to derogate from general law when the latter amounts to *jus cogens*. See *Koskenniemi Report* (n 1) 84 [191].

authentic global governance.[97] Otherwise, as the *Kadi* saga proves, subsystems having developed a constitutional dimension based on non-derogable norms may invoke their own *ordre public* to deny compliance with UN resolutions, frustrating UN aspirations to universal governance.

[97] Thus, any UN solution to the current crisis of the sanctions regime has to be value-oriented. It is unlikely that litigation will discontinue unless the UNSC introduces procedures reflecting international human rights and rule-of-law standards in terms of access to justice and fair trial.