

## CASE NOTE

# TAKING STOCK: ASSESSING THE IMPLICATIONS OF THE KADI SAGA FOR INTERNATIONAL LAW AND THE LAW OF THE EUROPEAN UNION

### CONTENTS

|     |  |    |
|-----|--|----|
| I   | Introduction.....  | 1  |
| II  | Terrorist Blacklisting, Human Rights and <i>Kadi</i> .....                     | 2  |
|     | A The CFI's Judgment: <i>Kadi I</i> .....                                      | 4  |
|     | B The ECJ's Judgment: <i>Kadi II</i> .....                                     | 5  |
|     | C The GC's Judgment: <i>Kadi III</i> .....                                     | 6  |
|     | D The CJEU's Judgment: <i>Kadi IV</i> .....                                    | 7  |
| III | Permissibility of Review.....  | 7  |
|     | A Implications for International Law.....                                      | 8  |
|     | B Implications for EU Law.....   | 8  |
| IV  | Trigger for Review.....  | 14 |
|     | A Implications for International Law.....                                      | 15 |
|     | B Implications for EU Law.....   | 17 |
| V   | Focus of Review.....   | 18 |
|     | A Implications for International Law.....                                      | 19 |
|     | B Implications for EU Law.....   | 22 |
| VI  | Standard of Review.....  | 24 |
| VII | Concluding Remarks: The Importance of the CJEU's Judgment in <i>Kadi</i> ..... | 25 |

### I INTRODUCTION

In the *Kadi* judgments, the European Court of First Instance ('CFI') (*Kadi I*), European Court of Justice ('ECJ') (*Kadi II*) and General Court of the European Union ('GC') (*Kadi III*) each decided issues of key significance for defining the interaction between international law and the law of the European Union ('EU').<sup>1</sup> More recently, on 18 July 2013, the Court of Justice of the European Union ('CJEU') delivered a further judgment in respect of these proceedings (*Kadi IV*).<sup>2</sup> This most recent judgment affords an opportunity to take stock of how the four judgments differed in defining the identity of the European integrative project in a modern, globalised, age.

*Kadi IV* is of particular note because it clarifies misconceptions about the ECJ's previous judgment to provide a clear statement about the centrality of human rights within the EU legal order and the autonomy and superiority of the EU legal order as against other, external, sources of law. The judgment thus provides an illustration of the key role played by the CJEU in defining and

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<sup>1</sup> *Kadi v Council of the European Union* (T-315/01) [2005] ECR II-3659 (Court of First Instance) (*Kadi I*); *Kadi v Council of the European Union* (C-402/05 P, C-415/05 P) [2008] ECR I-6351 (European Court of Justice) (*Kadi II*); *Kadi v European Commission* (T-85/09) [2010] ECR II-5177 (General Court) (*Kadi III*).

<sup>2</sup> *European Commission v Kadi* (European Court of Justice, C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013) (*Kadi IV*).

enforcing the autonomy and authority of the EU legal order as against other (external) sources of law.

This case note examines the implications of *Kadi I–III* in light of this most recent judgment. It begins by providing an overview of the factual background to the *Kadi* litigation and the legal determinations made by the courts in the first three judgments (Part II). This case note then considers, in light of *Kadi IV*, the implications of the differing approaches of each of the courts for EU law and European integration by considering the messages in *Kadi IV* about the permissibility of (Part III), trigger for (Part IV), focus of (Part V) and deference applicable in (Part VI) the EU-level review of measures implementing United Nations Security Council ('UNSC') resolutions. Part VII concludes.

## II TERRORIST BLACKLISTING, HUMAN RIGHTS AND *KADI*

Following the rising prominence of global terrorism, the UNSC enacted a UN-level financial sanctions regime to hamper the ability of terrorists to obtain the funding necessary to support their activities.<sup>3</sup> Under UNSC *Resolution 1267*, a 'Sanctions Committee' was established to receive the names of individuals or entities deemed to be 'associated' with terrorist activities.<sup>4</sup> The names of these individuals were placed on a UN-level 'blacklist', with Member States obliged to freeze their financial assets and resources.<sup>5</sup> The UN blacklist was directly transposed into EU law by an annex to *Regulation 467/2001*, which was updated

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<sup>3</sup> See, eg, SC Res 1267, UN SCOR, 54<sup>th</sup> sess, 4051<sup>st</sup> mtg, UN Doc S/RES/1267 (15 October 1999) Preamble ('*Resolution 1267*'); SC Res 1333, UN SCOR, 55<sup>th</sup> sess, 4251<sup>st</sup> mtg, UN Doc S/RES/1333 (19 December 2000) Preamble ('*Resolution 1333*').

<sup>4</sup> The key resolutions within this framework are: *Resolution 1267*, UN Doc S/RES/1267 (establishing the Sanctions Committee: at [6]); *Resolution 1333*, UN Doc S/RES/1333; SC Res 1390, UN SCOR, 57<sup>th</sup> sess, 4452<sup>nd</sup> mtg, UN Doc S/RES/1390 (16 January 2002) ('*Resolution 1390*').

<sup>5</sup> *Resolution 1267*, UN Doc S/RES/1267, [4]. A second blacklisting framework (for listing at the domestic level) was introduced by: SC Res 1373, UN SCOR, 56<sup>th</sup> sess, 4385<sup>th</sup> mtg, Agenda Item 166, UN Doc S/RES/1373 (28 September 2001) ('*Resolution 1373*').

each time the Sanctions Committee included a new name on the UN-level blacklist.<sup>6</sup>

In 2001, the UN Sanctions Committee added the names of Mr Yasin Kadi and the Al Barakaat International Foundation ('Al Barakaat') to the UN-level lists, an action replicated at the EU-level by Regulations 2199/2001 and 2062/2001.<sup>7</sup> Mr Kadi and Al Barakaat challenged this measure before the European judiciary, alleging that their inclusion on the list had violated their rights under EU law to

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<sup>6</sup> The key Regulations for the 1267 regime are: *Council Regulation (EC) No 881/2002 of 27 May 2002 Imposing Certain Specific Restrictive Measures Directed against Certain Persons and Entities associated with Usama bin Laden, the Al-Qaida Network and the Taliban, and Repealing Council Regulation (EC) No 467/2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in respect of the Taliban of Afghanistan* [2002] OJ L 139/9 ('*Council Regulation (EC) No 881/2002*'), amended by *Commission Regulation (EC) No 951/2002 of 3 June 2002 amending Council 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, and Repealing Council Regulation (EC) No 467/2001* [2002] OJ L 145/14 ('*Commission Regulation No 951/2002*') and *Council Regulation (EC) No 561/2003 of 27 March 2003 amending, as regards Exceptions to the Freezing of Funds and Economic Resources, 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* [2003] OJ L 82/1 ('*Council Regulation No 561/2003*'). For further discussion of the Council's competency to adopt these measures, see *Kadi I* (T-315/01) [2005] ECR II-3659, II-3689–91 [92]–[97], II-3700 [135] (considering the Council's competency under: *Treaty Establishing the European Community*, opened for signature 7 February 1992 [1992] OJ C 224/6 (entered into force 1 November 1993) arts 60, 301, 308 ('*EC Treaty*'), as amended by *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, opened for signature 2 October 1997 [1997] OJ C 340/1 (entered into force 1 May 1999) ('*Treaty of Amsterdam*'). The European Court of Justice ('ECJ') considered these grounds, upholding (for different reasons) the decision of the European Court of First Instance ('CFI') about the applicable legal basis in: *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [212], [234]. The Regulations were precipitated by Common Positions adopted under: *Treaty on the European Union*, opened for signature 7 February 1992 [1992] OJ C 191/1 (entered into force 1 November 1993) arts 15 and 34, as amended by *Treaty of Amsterdam*. Some of the key Common Positions for the 1267 regime are: *Council Common Position of 27 May 2002 concerning Restrictive Measures against Usama Bin Laden, Members of the Al-Qaida Organisation and the Taliban And Other Individuals, Groups, Undertakings and Entities associated with Them and Repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP* [2002] OJ 139/4; *Council Common Position of 26 February 2001 concerning Additional Restrictive Measures against the Taliban and Amending Common Position 96/746/CFSP* [2001] OJ L 57/1; *Council Common Position of 15 November 1999 concerning Restrictive Measures against the Taliban* [1999] OJ L 294/1. The key Common Positions for the Resolution 1373 regime are: *Council Common Position of 27 December 2001 on Combating Terrorism* [2001] OJ L 344/90; *Council Common Position of 27 December 2001 on the Application of Specific Measures to Combat Terrorism* [2001] OJ L 344/93; *Council Regulation (EC) No 2580/2001 of 27 December 2001 on Specific Restrictive Measures Directed against Certain Persons and Entities with a View to Combating Terrorism* [2001] OJ L 344/70.

<sup>7</sup> *Commission Regulation (EC) No 2199/2001 of 12 November 2001 Amending, for the Fourth Time, Council Regulation (EC) No 467/2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in respect of the Taliban of Afghanistan and Repealing Regulation (EC) No 337/2000* [2001] OJ L 295/16; *Commission Regulation (EC) No 2062/2001 of 19 October 2001 Amending, for the Third Time, Council Regulation (EC) No 467/2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in respect of the Taliban of Afghanistan and Repealing Regulation (EC) No 337/2000* [2001] OJ L 277/25.

be heard, to respect for property and to effective judicial review.<sup>8</sup> Each court rendering judgment in the *Kadi* proceedings was thus called upon to determine whether — and to what extent — it could consider the legality of the EU measures implementing the UN-level terrorist blacklisting regime. The following paragraphs set out the analysis of the judgments of the CFI (Subpart A), ECJ (Subpart B) and GC (Subpart C) in more detail. Parts III and IV draw upon this analysis to examine the implications of the CJEU's most recent judgment in *Kadi IV* for both international law and the European integrative project.

#### A *The CFI's Judgment: Kadi I*

The CFI held that the EU was bound by the *Charter of the United Nations* ('*UN Charter*') under EU law because the EU had assumed powers previously exercised by Member States, and so had also assumed the Member States' *UN Charter* obligations in those areas.<sup>9</sup> For the CFI, art 25 of the *UN Charter* therefore obliged the EU to comply with, and implement, the UNSC blacklisting measures.<sup>10</sup> In addition, the operation of arts 48 and 103 of the *UN Charter* and art 27 of the *Vienna Convention on the Law of Treaties* ('*VCLT*') meant that the EU's obligation to implement the UNSC measures prevailed over the EU's internal law (set out in other treaty obligations).<sup>11</sup> The CFI further considered this result to be supported by art 307 of the *Treaty Establishing the European Community* ('*EC Treaty*'), which provides that EU law does not displace international treaties concluded before 1958.<sup>12</sup> As such, the CFI held that, in enacting the UN-regime, the EU had acted under 'circumscribed powers' and thus had no 'autonomous discretion' as to how to implement the UNSC measures.<sup>13</sup>

<sup>8</sup> For further description of the history of the claim, see *Kadi I* (T-315/01) [2005] ECR II-3659, II-3679 [59]. This action was brought under *EC Treaty* art 230(4), as amended by *Treaty of Amsterdam*. For similar criticisms of the United Nations-level regime more generally, see Ian Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 *American Journal of International Law* 275, 297–8; Erika de Wet, 'The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation?' (2009) 5 *European Constitutional Law Review* 284, 285; Mielle Bulterman, 'Fundamental Rights and the United Nations Financial Sanction Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities' (2006) 19 *Leiden Journal of International Law* 753, 755–6. Note that some amendments have been made to the regime by, for example, SC Res 1526, UN SCOR, 59<sup>th</sup> sess, 4908<sup>th</sup> mtg, UN Doc S/RES/1526 (30 January 2004) and SC Res 1617, UN SCOR, 60<sup>th</sup> sess, 5244<sup>th</sup> mtg, UN Doc S/RES/1617 (29 July 2005); Jessica Almqvist, 'A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions' (2008) 57 *International and Comparative Law Quarterly* 303, 310.

<sup>9</sup> *Kadi I* (T-315/01) [2005] ECR II-3659, II-3716 [193], II-3716–18 [195]–[203]. By analogy, see *International Fruit Company v Produktschap voor Groenten en Fruit* (C-21/72, C-22/72, C-23/72, C-24/72) [1972] ECR 1219, 1226 [11].

<sup>10</sup> *Kadi I* (T-315/01) [2005] ECR II-3659, II-3713–14 [184], II-3715 [189].

<sup>11</sup> *Ibid* II-3712–II-3715 [181]–[188], II-3723 [222].

<sup>12</sup> *Ibid* [186], [223]. See *EC Treaty* art 307, as amended by *Treaty of Amsterdam*. See also at arts 5, 10 and 296; *Anklagemyndigheden v Poulsen* (C-286/90) [1992] ECR I-6048, [9]; *Racke v Hauptzollamt Mainz* (C-162/96) [1998] ECR I-3688, [45] (EC institutions to comply with international law).

<sup>13</sup> *Kadi I* (T-315/01) [2005] ECR II-3659, II-3721 [214]. Cf the position under the 1373 regime: *Organisation des Modjahedines du peuple d'Iran v Council of the European Union* (T-228/02) [2006] ECR-SC II-4674.

In light of this analysis, the CFI concluded that review of the EU measures under EU law would indirectly implicate the Court in reviewing the legality of the UNSC measures via reference to EU legal norms.<sup>14</sup> Based upon its analysis of both international and EU law, the CFI held that EU legal norms could not affect the validity of the UNSC measure.<sup>15</sup> As such, the EU-level Regulation implementing the UNSC measure could not be reviewed for consistency with EU human rights law.<sup>16</sup>

The CFI concluded, however, that the measures implementing the UNSC regime could be reviewed for their consistency with international norms. The CFI restricted any such review to compliance with *jus cogens* norms, which it defined as incorporating the right to defence, to reasons and to respect to property.<sup>17</sup> This was on the basis that the UNSC was, under the *UN Charter*, itself bound by certain norms on account of art 24(2) of the *UN Charter*, which obliges the UNSC to act ‘in accordance with the Purposes and Principles of the United Nations’.<sup>18</sup> These purposes and principles are defined in arts 1 and 2 of the *UN Charter* to include promoting and ‘encourag[ing] respect for human rights’.<sup>19</sup> On the facts of the case, however, the CFI concluded that no such violation of *jus cogens* had occurred.<sup>20</sup>

### B The ECJ’s Judgment: Kadi II

On 3 September 2008, the ECJ overturned the CFI’s judgment to hold that the EU-level Regulations violated the applicants’ rights under EU law.<sup>21</sup> In reaching this conclusion, the ECJ highlighted the importance of the rule of law and the autonomy and supremacy of EU law within the EU. It held that international law would only be effective within the EU to the extent that it is consistent with primary norms of EU law.<sup>22</sup> The ECJ noted its previous judgment in *The Queen, ex parte Centro-Com v HM Treasury* in which it had considered that art 307 of the *EC Treaty* allowed derogations from EU law where this was necessary to ensure Member State compliance with international obligations.<sup>23</sup> The ECJ clarified this position in *Kadi II*, holding that art 307 would not allow for derogations from the EU’s foundational principles, which included respect for human rights and the rule of law.<sup>24</sup> The ECJ therefore considered review of the EU-level Regulations for consistency with EU human rights law appropriate.<sup>25</sup>

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<sup>14</sup> *Kadi I* (T-315/01) [2005] ECR II-3659, II-3721 [215]–[216], II-3723 [221], II-3724 [225].

<sup>15</sup> *Ibid* II-3723 [224].

<sup>16</sup> *Ibid* II-3724–5 [228]–[230]. For a case confirming this holding, see also *Hassan v Council of the European Union* (C-399/06 P, C-403/06 P) [2009] ECR I-11393, [69].

<sup>17</sup> *Kadi I* (T-315/01) [2005] ECR II-3659, II-3725 [231].

<sup>18</sup> *Ibid* II-3724–5 [228]–[229].

<sup>19</sup> *Ibid* II-3724 [228].

<sup>20</sup> *Ibid* II-3739–41 [286]–[291].

<sup>21</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [348], [353] (right to be heard), [349], [353] (right to effective review), [366], [369], [370]–[371] (right to property).

<sup>22</sup> *Ibid* [298]–[314].

<sup>23</sup> *Ibid* [301]. See also *The Queen, ex parte Centro-Com Srl v HM Treasury* [1997] ECR I-114, [56]–[61]. See also *Kadi I* (T-315/01) [2005] ECR II-3659, II-3714 [186], II-3716 [191].

<sup>24</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [290], [303], [304].

<sup>25</sup> *Ibid* [299], [316], [326]–[327].

The focus of this review comprised consideration of whether the measure was consistent with European — rather than international, *jus cogens* — norms.<sup>26</sup> In light of this focus, the ECJ clarified that the review did not entail review of the UNSC resolutions themselves, but rather focused on the legality of the EU implementing measures. As such, the ECJ considered that such review would not unsettle the standing of the UNSC resolutions as a matter of international law.<sup>27</sup>

### C The GC's Judgment: Kadi III

Following the ECJ's judgment, the European Commission provided a summary of reasons to Mr Kadi to justify its decision to continue to include him on the EU-level blacklist.<sup>28</sup> Mr Kadi contested this decision, and the GC decided on 30 September 2010 that Mr Kadi's continued inclusion on the list breached his rights under EU law.<sup>29</sup> In delivering judgment, the GC observed that the ECJ's understanding of the primacy of EU law posed significant problems for the relationship between Member States and the UN, and for the effect of UNSC resolutions under international law.<sup>30</sup> In particular, the GC noted that, contrary to the ECJ's opinion, review of the contested Regulations amounted to a review of the UNSC resolutions themselves, thus challenging the UNSC's authority by rendering certain resolutions ineffective at the EU-level.<sup>31</sup>

Despite these misgivings, however, the GC applied the ECJ's judgment.<sup>32</sup> In so doing, though, the GC noted its belief that the ECJ judgment gave it jurisdiction to review the Regulations for consistency with human rights only if the UNSC procedure 'clearly [failed] to offer guarantees of effective judicial protection'.<sup>33</sup> The judgment thus endorsed a style of review very similar to the German Federal Constitutional Court's ('GFCC') '*Solange* approach' and the European Court of Human Rights' ('ECtHR') 'equivalent protection' model.<sup>34</sup> The GC reached this interpretation by highlighting the ECJ's discussion of the UNSC regime's deficiencies and held that the ECJ had predicated review of the measures on the deficiencies inherent in the UN-level process.<sup>35</sup> The GC held that these deficiencies still existed despite subsequent reforms of the UN

<sup>26</sup> Ibid [329].

<sup>27</sup> Ibid [286]–[288].

<sup>28</sup> Mr Kadi's inclusion on the list had been maintained for 3 months following the ECJ judgment: *ibid* [375]–[376]. For a description of the history of this case, see *Kadi III* (T-85/09) [2010] ECR II-5177, II-5199–201 [49]–[52].

<sup>29</sup> *Kadi III* (T-85/09) [2010] ECR II-5177, II-5199–201 [49]–[52], II-5237 [157], II-5243 [171]–[173], II-5245 [177].

<sup>30</sup> *Ibid* II-5220–1 [109]–[113].

<sup>31</sup> *Ibid* II-5222 [116], II-5222–3 [118]. Cf *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [288].

<sup>32</sup> *Kadi III* (T-85/09) [2010] ECR II-5177, II-5224 [121], II-5224–5 [123].

<sup>33</sup> *Ibid* II-5226 [127].

<sup>34</sup> On the '*Solange* approach' see Part III. On equivalent protection, see *M & Co v Federal Republic of Germany* (1990) 64 Eur Comm HR 138; Stefan Grillner, 'International Law, Human Rights and the European Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in *Kadi*' (2008) 4 *European Constitutional Law Review* 528, 545.

<sup>35</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [320]–[325]; *Kadi III* (T-85/09) [2010] ECR II-5177, II-5222 [117].

procedure, thus enlivening its jurisdiction to review the implementing measure for consistency with EU human rights law.<sup>36</sup>

#### D *The CJEU's Judgment: Kadi IV*

On 18 July 2013, the CJEU delivered a further judgment in *Kadi IV*, following an appeal by the European Commission, the Council of the European Union and the United Kingdom of Great Britain and Northern Ireland ('the Appellants') to the GC's judgment. This most recent judgment of the CJEU in the *Kadi* proceedings provides an opportune lens through which to take stock of the approaches of the courts throughout the *Kadi* proceedings to defining the permissibility of, trigger for, focus of, and deference applicable to, review under EU law of EU-level measures implementing UNSC decisions. These four matters, and their implications from the perspectives of international and EU law, are set out in the following Parts.

### III PERMISSIBILITY OF REVIEW

The CJEU's judgment confirms that, as a matter of EU law, EU-level Regulations of the kind at issue in the *Kadi* proceedings will not be immune from review solely because of their connection to a UNSC-mandated measure.

The CJEU was afforded this opportunity to revisit *Kadi I–III* on the basis of the Appellants' contention that the GC's judgment was flawed because it had failed to recognise that, as a regulation implementing a UNSC measure, 'the contested regulation had immunity from jurisdiction'.<sup>37</sup> Specifically, the Appellants argued that the GC's review of the Regulation improperly 'amount[ed] to reviewing the legality of [SC] resolutions in the light of European Union law'. This, they alleged, 'jeopardised' the 'uniform, unconditional and immediate application of those resolutions' and was as such contrary to both international and EU law.<sup>38</sup>

As should be evident, this ground of appeal amounted, in effect, to an appeal of the ECJ's earlier judgment. As will be recalled from the discussion above, the GC itself expressed some doubt as to the propriety of the analysis of the ECJ in that judgment, but reserved the right to revise that line of analysis to the ECJ itself. On appeal, the CJEU declined to revise the ruling. Instead, it rejected this ground of appeal, noting that 'the constitutional guarantee ... in a Union based on the rule of law' required the availability of 'judicial review of the lawfulness of all European Union measures, including those which, as in the present case, implement an international law measure, in the light of the fundamental rights guaranteed by the European Union'.<sup>39</sup>

It followed, according to this reasoning, that the GC's refusal 'to afford the contested regulation immunity from jurisdiction' was not vitiated as a matter of law.<sup>40</sup> The CJEU's judgment thus endorsed the approach taken by the ECJ, and brings into focus the differences between its approach and that taken by the CFI

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<sup>36</sup> *Kadi III* (T-85/09) [2010] ECR II-5177, II-5227 [128].

<sup>37</sup> *Kadi IV* (European Court of Justice, C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013) [60].

<sup>38</sup> *Ibid* [61]–[62].

<sup>39</sup> *Ibid* [66].

<sup>40</sup> *Ibid* [68].

to defining the permissibility of such review. This has important implications for both international and EU law.

#### A Implications for International Law

From the perspective of international law, the CJEU's recent judgment does little to dispel criticisms (also directed at the ECJ's judgment) that it has inappropriately privileged EU law at the expense of the international legal order. This criticism emanates from the concern that the approach adopted by the Court has the potential to lead to a situation in which Member States could have obligations under international law for which they remain (internationally) responsible but cannot uphold because of the inconsistency of these obligations with EU law.<sup>41</sup> Such non-compliance could not, from the perspective of international law, be justified via reference to constitutional (internal) principles of EU law.<sup>42</sup> As such, EU Member States could find themselves in a situation in which they have competing obligations flowing from their dual membership in the EU and UN.<sup>43</sup> The full force of this implication can partly be overcome by limiting the range of circumstances in which such review will be available. The manner in which the CJEU grappled with this issue — in defining the appropriate 'trigger' for review — is considered in more detail in Part IV below.

#### B Implications for EU Law

From the perspective of EU law, the ECJ and CJEU's judgments both demonstrate that the European courts no longer consider the EU to be an international organisation in the traditional sense. Indeed, the ECJ and CJEU clearly held in *Kadi II* and *Kadi IV* (respectively) that the EU's relationship with external legal orders is governed not by rules of international law, but by its own treaties as interpreted by its judiciary.<sup>44</sup> Both judgments thus demonstrate that the EU has developed the mechanisms (and willingness) to defend the existence of its own legal norms against incursions of those from legal orders considered to be, in effect, external to it.<sup>45</sup>

The judgments thus evidence and reinforce a broader movement toward constitutionalisation of the EU legal order. For the purposes of this case note, 'constitutionalism' is taken to exist when a polity is governed by 'constitutional

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<sup>41</sup> This was recognised by both the European Court of First Instance ('CFI') and General Court of the European Union ('GC'): *Kadi I* (T-315/01) [2005] ECR II-3659, II-3708 [163]; *Kadi III* (T-85/09) [2010] ECR II-5177, II-5220 [109]. See also Katja S Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights' (2009) 9 *Human Rights Law Review* 288, 296.

<sup>42</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 27 ('VCLT').

<sup>43</sup> This is recognised in: *Kadi I* (T-315/01) [2005] ECR II-3659, II-3708 [163]; *Kadi III* (T-85/09) [2010] ECR II-5177, II-5220 [109]. See also Takis Tridimas and Jose A Gutierrez-Fons, 'EU Law, International Law, and Economic Sanctions against Terrorism: The Judiciary in Distress?' (2008) 32 *Fordham International Law Journal* 660, 705–6.

<sup>44</sup> Jan Willem van Rossem, 'Interaction between EU Law and International Law in the Light of *Intertanko* and *Kadi*: The Dilemma of Norms Binding the Member States but not the Community' (2009) 40 *Netherlands Yearbook of International Law* 183, 185–6, 201, 222; Ziegler, above n 41, 295. Cf VCLT art 30.

<sup>45</sup> van Rossem, above n 44, 211, 226.



law' displaying three key characteristics.<sup>46</sup> First, a constitutionalised polity has a set of norms which govern the legal relationships between its citizens and its institutions.<sup>47</sup> These norms define and constrain governmental power, usually by providing for the rule of law, separation of powers and human rights protections.<sup>48</sup> Secondly, these norms are accorded superior (constitutional) status, determining the validity of all other legal norms within the system.<sup>49</sup> Thirdly, this constitutional law expresses the polity's core foundational values, containing the 'basic ideas, principles, and values' that unite individuals in that polity as members of a collective entity.<sup>50</sup> The process of constitutionalisation is not exclusive to states and may apply equally to intergovernmental or supranational organisations like the EU.<sup>51</sup> Indeed, since its inception, the EU has

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<sup>46</sup> For further discussion of 'constitutionalism', see generally Paul Craig, 'Constitutions, Constitutionalism and the European Union' (2001) 7 *European Law Journal* 125; Alec Sweet, 'What is a Supranational Constitution? An Essay in International Relations Theory' (1994) 56 *Review of Politics* 441; Alec Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes' (2009) 16 *Indiana Journal of Global Legal Studies* 621.

<sup>47</sup> Koen Lenaerts, 'The Constitution for Europe: Fiction or Reality?' (2005) 11 *Columbia Journal of European Law* 465, 475; Ingolf Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 15 *Columbia Journal of European Law* 349, 365; Neil Walker, 'European Constitutionalism and European Integration' [1996] *Public Law* 266, 271, 275.

<sup>48</sup> Jo Shaw, 'Process and Constitutional Discourse in the European Union' (2000) 27 *Journal of Law and Society* 4, 7; Gráinne de Búrca and Jo Beatrix Aschenbrenner, 'The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights' (2003) 9 *Columbia Journal of European Law* 355, 360; Stone Sweet, 'Constitutionalism', above n 46, 626; Carl J Friedrich, *Constitutional Government and Democracy* (Ginn and Company, 1950) 24; Michel Rosenfeld, 'Modern Constitutionalism as Interplay between Identity and Diversity' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press, 1994) 3, 3.

<sup>49</sup> de Wet, 'The Role of European Courts', above n 8, 286–7; David Fellman, 'Constitutionalism' in Philip P Wiener (ed), *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas* (Charles Scribner's Sons, 1973–74) vol 1, 485, 491–2; Robert O Keohane and Stanley Hoffmann, 'Institutional Change in Europe in the 1980s' in Robert O Keohane and Stanley Hoffmann (eds), *The New European Community: Decisionmaking and Institutional Change* (Westview, 1991) 1, 11; J H H Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors' (1994) 26 *Comparative Political Studies* 510, 511; Stone Sweet, 'Constitutionalism', above n 46, 626.

<sup>50</sup> Ulrich K Preuss, 'The Political Meaning of Constitutionalism' in Richard Bellamy (ed), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avebury, 1996) 11, 12. See also Walker, above n 47, 267; Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998) 152, 154; Udo Di Fabio, 'A European Charter: Towards a Constitution for the Union' (2001) 7 *Columbia Journal of European Law* 159, 162; de Wet, 'The Role of European Courts', above n 8, 164, 287; Lenaerts, 'Constitution for Europe', above n 47, 475; Craig Calhoun, 'Constitutional Patriotism and the Public Sphere: Interests, Identity, and Solidarity in the Integration of Europe' (2005) 18 *International Journal of Politics, Culture, and Society* 257, 259; Craig Calhoun, 'Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere' (2002) 14 *Public Culture* 147, 149; Sheldon S Wolin, *The Presence of the Past: Essays on the State and the Constitution* (Johns Hopkins University Press, 1989); Stone Sweet, 'Constitutionalism', above n 46, 628.

<sup>51</sup> See, for example, Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529, 532–8; Erika de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *Leiden Journal of International Law* 611, 611–12.

taken progressive steps toward constitutionalism.<sup>52</sup> This process culminated in 2004 when EU Member States attempted to implement the *Treaty Establishing a Constitution for Europe*.<sup>53</sup> The treaty was not implemented because it failed to pass at referenda in France and the Netherlands.<sup>54</sup> The negative referenda results are widely attributed to a general unwillingness of Europeans and their governments to accept ‘formal’ constitutionalism, a postulation supported by the fact that a revised constitutional treaty without formal references to constitutionalism was passed in 2007.<sup>55</sup>

Despite the failures of formal constitutionalisation, modern commentators now almost universally agree that the EU functions under constitutional principles.<sup>56</sup> EU constitutionalism is evidenced by, for example, treaties that define the main institutions and their competencies, doctrines that define the relationship between key actors within the EU, such as the judicially developed principle of direct effect and the judicial enforcement of respect for human rights.<sup>57</sup> The CJEU has also been instrumental in developing principles of EU constitutional law.<sup>58</sup> The Court’s role is secured by treaties which accord it jurisdiction to review the actions of Member States and EU institutions for

<sup>52</sup> See, eg, Pernice, ‘The Treaty of Lisbon’, above n 47, 365; de Búrca and Aschenbrenner, ‘The Development of European Constitutionalism’, above n 48, 360.

<sup>53</sup> *Treaty Establishing a Constitution for Europe* [2004] OJ C 310/1.

<sup>54</sup> See also Leonard F M Besselink, ‘The Dutch Constitution, the European Constitution and the Referendum in the Netherlands’ in Anneli Albi and Jacques Ziller (eds), *The European Constitution and National Constitutions: Ratification and Beyond* (Kluwer Law, 2007) 113, 118; Paul Hainsworth, ‘France Says No: The 29 May 2005 Referendum on the European Constitution’ (2006) 59 *Parliamentary Affairs* 98.

<sup>55</sup> *Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community*, signed 13 December 2007, [2007] OJ C 306/01 (entered into force 1 December 2009) (*Treaty of Lisbon*). For explanations for the ‘no’ vote, see Richard Whitman, ‘No and After: Options for Europe’ (2005) 81 *International Affairs* 673; Hainsworth, above n 54, 98.

<sup>56</sup> J H H Weiler, ‘The Reformation of European Constitutionalism’ (1997) 35 *Journal of Common Market Studies* 97; Shaw, above n 48, 11; J H H Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (Cambridge University Press, 2003); Wayne Sandholtz and Alec Stone Sweet (eds), *European Integration and Supranational Governance* (Oxford University Press, 1998).

<sup>57</sup> de Búrca and Aschenbrenner, ‘The Development of European Constitutionalism’, above n 48, 363; Weiler, ‘Reformation of European Constitutionalism’, above n 56, 97; Weiler and Wind, *European Constitutionalism beyond the State*, above n 56; *NV Algemene Transport en Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen* (C-26/62) [1963] ECR I.

<sup>58</sup> Originally established in 1952 by: *Treaty Constituting the European Coal and Steel Community*, signed 18 April 1951, 261 UNTS 140 (entered into force 23 July 1952). This treaty was modified by: *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958); *Single European Act*, signed 17 February 1986, [1987] OJ L 169/1 (entered into force 1 July 1987); *Treaty on European Union*; *Treaty of Amsterdam*; *Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, opened for signature 26 February 2001, [2001] OJ C 80/1 (entered into force 1 February 2003). The name of the CFI was changed to GC by the *Treaty of Lisbon*. On the role of the Court in processes of constitutionalisation, see generally Ole Due, ‘A Constitutional Court for the European Communities’ in Deirdre Curtin and David O’Keefe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworth, 1992) 3; F G Jacobs, ‘Is the Court of Justice of the European Communities a Constitutional Court?’ in Deirdre Curtin and David O’Keefe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworth, 1992) 25; Bo Vesterdorf, ‘A Constitutional Court for the EU?’ (2006) 4 *International Journal of Constitutional Law* 607.

compliance with EU law.<sup>59</sup> The ECJ and CJEU's judgments in *Kadi II* and *Kadi IV* respectively highlight the role of courts in shaping the evolving values and constitutional principles of an integrated Europe.<sup>60</sup> The judgments confirm the Court's ability to define, review and maintain the authority of constitutional norms within the EU legal sphere, providing the Court with an authoritative voice in an ongoing judicial, political and academic dialogue about the nature and identity of the EU as a political actor.<sup>61</sup>

The judgments are particularly important for EU constitutional law because they exemplify the changing focus of the European integrative project. The judgments highlight that the EU is increasingly transitioning from a purely economic union into a supranational structure with competence in key political and social policy areas.<sup>62</sup> To understand the importance of the *Kadi* judgments in this broader context, it is necessary to first look at the EU's historical nature and focus.

The EU was originally established to effectuate the integration of the European market and to improve economic relations between Member States.<sup>63</sup> This economic integration was intended to unify Europe and limit the potential for future warfare.<sup>64</sup> The constituting treaties were therefore originally envisaged as only applicable *inter partes*, human rights protections remaining peripheral to the early integrative project.<sup>65</sup> The ECJ in its early case law confirmed this peripheral status, grouping constitutional domestic human rights protections into the category of 'national law', which could be overruled by EU law in the case of conflict.<sup>66</sup>

Many states were concerned about the lack of human rights protections at the European level, particularly when coupled with the ability for EU law to override

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<sup>59</sup> For further description of the ECJ's role under the above treaties, see *Court of Justice of the European Union* (2014) Europa <[http://europa.eu/about-eu/institutions-bodies/court-justice/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm)>. For further analysis of the role of the Court, see generally Weiler, 'A Quiet Revolution', above n 49; Karen J Alter, 'Who Are the "Masters of the Treaty?": European Governments and the European Court of Justice' (1998) 52 *International Organization* 121.

<sup>60</sup> On the role of the Court, see Weiler, 'A Quiet Revolution', above n 49, 512, 514, 517; Walter Mattli and Anne-Marie Slaughter, 'Revisiting the European Court of Justice' (1998) 52 *International Organization* 177, 181; Stone Sweet, 'Constitutionalism', above n 46, 641.

<sup>61</sup> Stone Sweet, 'Constitutionalism', above n 46, 639–41; Weiler, 'A Quiet Revolution', above n 49, 516.

<sup>62</sup> Giorgio Sacerdoti, 'The *European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens' Europe*' (2002) 8 *Columbia Journal of European Law* 37, 52. See generally N Türküler Isiksel, 'Fundamental Rights in the EU after *Kadi and Al Barakaat*' (2010) 16 *European Law Journal* 551.

<sup>63</sup> John McCormick, *Understanding the European Union: A Concise Introduction* (Palgrave Macmillan, 3<sup>rd</sup> ed, 2005); Matthias Kumm, 'To be a European Citizen? The Absence of Constitutional Patriotism and the Constitutional Treaty' (2005) 11 *Columbia Journal of European Law* 481, 501–11.

<sup>64</sup> Calhoun, 'Constitutional Patriotism', above n 50, 274, 272; McCormick, above n 63, 1.

<sup>65</sup> See, eg, Carlos Closa, 'Deliberative Constitutional Politics and the Turn Towards a Norms-Based Legitimacy of the EU Constitution' (2005) 11 *European Law Journal* 411, 424; Isiksel, above n 62, 553, 571; Charles F Sabel and Oliver Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order' (2010) 16 *European Law Journal* 511, 514.

<sup>66</sup> *Friedrich Stork and Co v High Authority of the European Coal and Steel Community* (C-1/58) [1959] ECR 19, 26 [4(a)].

those protections entrenched at the domestic level.<sup>67</sup> An indicator of this concern was the GFCC's 1974 *Solange I* judgment, which reserved for the GFCC the right to review EU law for its conformity with the human rights protections recognised under German law until such a time ('*Solange*') that a similar standard of human rights protection was provided at the EU-level.<sup>68</sup> Responding perhaps to the possibility that the supremacy of EU law might be damaged by such judgments, the ECJ began to accord a greater significance to human rights in its jurisprudence.<sup>69</sup> This was most prominent in the 1970 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* and 1974 *Nold KG v Commission* judgments, in which the ECJ recognised that human rights ought to be accorded protection as part of the 'general principles' of EU law.<sup>70</sup> Following these judgments, in 1986 the GFCC in *Solange II* ruled that sufficient human rights protections had developed in EU law, precluding German domestic review of EU measures for consistency with domestic human rights norms.<sup>71</sup> The growing importance of human rights norms in the ECJ's jurisprudence is illustrated by the ECJ's 2003 *Schmidberger v Republik Österreich* judgment in which it held that the obligation to protect human rights could, in certain situations, justify restrictions to the basic market freedoms on which the EU was originally founded.<sup>72</sup>

Beginning in the 1970s, human rights were also progressively accorded a greater prominence in political dialogue as a foundational principle of the EU.<sup>73</sup> In the preamble to the *Single European Act* (1987), and in arts 2 and 6 of the *Treaty on European Union* (1993), for example, Member States formally signified a commitment to fundamental human rights.<sup>74</sup> In addition, new membership rules were introduced to require candidate states to exhibit commitment to human rights norms prior to their accession to the EU.<sup>75</sup> These political developments solidified the Court's formal role in EU human rights discourse. In 1993, the *Treaty on European Union* granted the Court formal competence to examine the compatibility of EU law with the human rights

<sup>67</sup> Isiksel, above n 62, 554.

<sup>68</sup> *Solange I*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvL 52/71, 29 May 1974, reported in (1974) 37 BVerfGE 271 ('*Solange I*'). An English translation of this decision may be found in: *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] 2 CMLR 540.

<sup>69</sup> See, eg, *Stauder v City of Ulm* (C-29/69) [1969] ECR 419; *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (C-11/70) [1970] ECR 1125, [1131] ('*Internationale*'); *Nold KG v Commission of European Communities* (C-4/73) [1974] ECR 491 ('*Nold*'); *European Parliament v Council of the European Union* (C-540/03) [2006] ECR I-5809, I-5821-3 [35].

<sup>70</sup> *Internationale* (C-11/70) [1970] ECR 1125, [1131]; *Nold* (C-4/73) [1974] ECR 491.

<sup>71</sup> *Solange II*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvL 197/83, 22 October 1986 reported in (1986) 73 BVerfGE 339, 378, 387. ('*Solange II*'). An English translation of this decision may be found in *Re the Application of Wünsche Handelsgesellschaft* [1987] 3 CMLR 225, 259 [35], 265 [48].

<sup>72</sup> *Schmidberger v Republik Österreich* (C-112/00) [2003] ECR I-5694, 10.

<sup>73</sup> Koen Lenaerts, 'Respect for Fundamental Rights as a Constitutional Principle of the European Union' (2000) 6 *Columbia Journal of European Law* 1, 2.

<sup>74</sup> *Single European Act Preamble*; *Treaty on European Union* arts 2, 6, as amended by *Treaty of Amsterdam*.

<sup>75</sup> See European Council in Copenhagen, 'Conclusions of the Presidency' (Press Release, DOC/93/3, 22 June 1993) <[http://europa.eu/rapid/press-release\\_DOC-93-3\\_en.htm?locale=en](http://europa.eu/rapid/press-release_DOC-93-3_en.htm?locale=en)>; *Treaty on European Union* art 49, as amended by *Treaty of Amsterdam*.

standards recognised by the ECtHR and Member States.<sup>76</sup> The importance of human rights to the EU was confirmed by the declaration in 2000 of the *Charter of Fundamental Rights of the European Union* ('*Charter of Fundamental Rights*'). The *Charter of Fundamental Rights* is given the same binding status as other EU treaties under art 6 of the *Treaty on European Union*, as amended by the *Treaty of Lisbon*.<sup>77</sup> The *Charter of Fundamental Rights* thus accords human rights a greater prominence in EU law.<sup>78</sup>

The increasing prominence of human rights in the court's jurisprudence was reinforced by *Kadi II* and *Kadi IV*, in which the ECJ and CJEU recognised and upheld human rights constraints upon the institutions that wield public power within the EU.<sup>79</sup> The *Kadi* judgments thus tie into the process of evolution sketched above by bolstering the status of human rights norms in European political and judicial dialogue.<sup>80</sup> The ECJ and CJEU primarily emphasised the importance of the rule of law, holding that every institutional act must be subject to judicial review for conformity with the constitutional principles of EU law.<sup>81</sup> In the context of *Kadi II* and *IV*, this meant that both courts declined to grant unrestricted deference to the EU blacklisting measures merely because they replicated a UNSC resolution. To do otherwise would have effectively placed certain actions of EU institutions beyond the scope of the law.<sup>82</sup> The ECJ and CJEU also established the constitutional superiority of human rights norms, thus confirming and enhancing the status of Europeans as citizens of a Union within which they are entitled to certain basic standards of treatment.<sup>83</sup> By so doing, the judgments illustrate the increasing importance attributed to human rights within EU law, signifying the EU's transition from a purely market-oriented integrative project towards a constitutionalised polity focused upon its relationship with the individuals over whom it governs.

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<sup>76</sup> *Treaty on European Union* art 6(2), as amended by *Treaty of Amsterdam*.

<sup>77</sup> *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1; *Treaty on European Union* art 6, as amended by *Treaty of Lisbon*.

<sup>78</sup> Ingolf Pernice, 'Integrating the Charter of Fundamental Rights into the Constitution of the European Union: Practical and Theoretical Propositions' (2003) 10 *Columbia Journal of European Law* 5, 7; Marta Cartabia, 'Europe and Rights: Taking Dialogue Seriously' (2009) 5 *European Constitutional Law Review* 5, 5–6; Lenaerts, 'Respect for Fundamental Rights', above n 73, 4, 9.

<sup>79</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [290], [303], [304]. Cf the position prior to *Kadi II*: *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni* (*Advisory Opinion of Advocate General Maduro*) (C-380/05) [2008] ECR I-0000, [18]–[21]. See also Lenaerts, 'Constitution for Europe', above n 47, 475; Pernice, 'The *Treaty of Lisbon*', above n 47, 365; Volker Röben, 'Constitutionalism of the European Union after the Draft Constitutional Treaty: How Much Hierarchy?' (2004) 10 *Columbia Journal of European Law* 339, 369.

<sup>80</sup> Pernice, 'The *Treaty of Lisbon*', above n 47, 386; Isiksel, above n 62, 569.

<sup>81</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [281]. See also *Les Verts v European Parliament* (C-294/83) [1986] ECR 1357, [23].

<sup>82</sup> See also *Kadi II* (*Advisory Opinion of Advocate General Maduro*) (C-402/05 P, C-415/05 P) [2008] ECR I-0000, [25].

<sup>83</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [283], [285]. See also Pernice, 'The *Treaty of Lisbon*', above n 47, 407.

## IV TRIGGER FOR REVIEW

The ECJ judgment in *Kadi II* was read by some commentators as endorsing the availability of EU-level review in all cases, regardless of the human rights protections that subsisted at the international level.<sup>84</sup> By contrast, the GC interpreted the ECJ's judgment as imposing a trigger for review in the form of a doctrine analogous to the '*Solange* approach' of the GFCC. This 'trigger' meant that review would be precluded in situations where the UNSC had adopted adequate human rights protections at the international level.<sup>85</sup>

Prior to *Kadi IV*, therefore, there was considerable debate about whether the ECJ's judgment differed in any significant respect from that of the GC in defining the relevant 'trigger' for EU-level review. Many commentators argued that the line of reasoning adopted by the GC stemmed from the ECJ's judgment.<sup>86</sup> They highlighted that the ECJ's consideration of the deficiencies of UNSC human rights protections and that its acceptance of 'in *principle* full review' indicated that the scope of EU-level review was dependent upon the levels of protection offered at the international level (ie a '*Solange* approach').<sup>87</sup> By contrast, other commentators argued that the GC creatively read into the ECJ's judgment a deferent style of reasoning which the ECJ had not endorsed.<sup>88</sup> This view was supported by the fact that the approach the GC ultimately adopted was argued before the ECJ by both Mr Kadi and Advocate-General Maduro but, despite this, the ECJ did not expressly rely upon this chain of reasoning in delivering its final judgment.<sup>89</sup> Instead, the ECJ relied heavily upon the autonomy of EU law, not the lack of adequate protections at the international level, to justify its review of the measures.<sup>90</sup>

The issue was raised again, albeit indirectly, in the case brought before the CJEU. On the one hand, the Appellants contended that the GC's examination and conclusions in respect of the UNSC's human rights safeguards for listing decisions had been flawed.<sup>91</sup> They asserted that the procedures introduced by the UNSC in between the ECJ's judgment and the GC's judgment had 'contributed

<sup>84</sup> See, eg, Daniel Halberstam and Eric Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order' (2009) 46 *Common Market Law Review* 13.

<sup>85</sup> *Kadi III* (T-85/09) [2010] ECR II-5177, II-5226–7 [127].

<sup>86</sup> See, eg, Isiksel, above n 62, 560–1; Halberstam and Stein, above n 84, 68; Sabel and Gerstenberg, above n 65, 529–30; Piet Eeckhout, 'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit' (2007) 3 *European Constitutional Law Review* 183; Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51 *Harvard International Law Journal* 1, 25.

<sup>87</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [321]–[322], [326], [330] (emphasis added). See, eg, Griller, above n 34, 549; Halberstam and Stein, above n 84, 68; Mattias Kumm, 'How Does European Union Law Fit into the World of Public Law? *Costa*, *Kadi*, and Three Conceptions of Public Law' in Jürgen Neyer and Antje Wiener (eds), *Political Theory of the European Union* (Oxford University Press, 2011) 111.

<sup>88</sup> See, eg, Samantha Besson, 'European Legal Pluralism after *Kadi*' (2009) 5 *European Constitutional Law Review* 237, 262; Isiksel, above n 62, 559–62; Ziegler, above n 41, 306.

<sup>89</sup> *Kadi II* (*Advisory Opinion of Advocate General Maduro*) (C-402/05 P, C-415/05 P) [2008] ECR I-0000, [54]; *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [254] (Kadi's grounds of appeal). Halberstam and Stein, above n 84, 48.

<sup>90</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [298]–[314].

<sup>91</sup> *Kadi IV* (European Court of Justice, C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013) [82].

to an improvement in the protection of fundamental rights'.<sup>92</sup> By contrast, Mr Kadi contended that the 'shortcomings' in the UNSC's listing procedures had not been overcome, and that the lack of 'any procedure safeguarding respect for the [relevant] rights ... is an argument which supports the enhancement of effective judicial protection at European Union level'.<sup>93</sup> On appeal, then, the CJEU was provided with the opportunity to clarify the reasoning of the ECJ judgment with respect to this 'trigger' issue, and to confirm whether or not this original reasoning had been properly interpreted and applied by the GC.

In summarising the GC's approach to this issue, the CJEU expressly recognised the '*Solange* approach' that had been adopted by the GC. Specifically, it summarised the GC's judgment as having endorsed review 'so long as the re-examination procedure operated by the [SC] clearly fails to offer guarantees of effective judicial protection'.<sup>94</sup> In endorsing the permissibility of reviewing the EU implementing measures, the CJEU then went on to acknowledge that

[s]uch a review is all the more essential since, despite the improvements added ... the procedure for delisting and ex officio re-examination at UN level ... do[es] not provide to the person whose name is listed ... the guarantee of effective judicial protection.<sup>95</sup>

As such, the CJEU considered that it was incumbent upon the relevant EU organs to ensure that individual human rights were upheld throughout the listing process.<sup>96</sup> The CJEU thus appeared to recognise and endorse the GC's *Solange*-oriented approach as having been 'in accordance with' the ECJ's judgment, and correct as a matter of law.<sup>97</sup> The CJEU's endorsement of the GC's imposition of a trigger for review holds further important implications from the perspective of both international and EU law.

#### A *Implications for International Law*

In adopting a *Solange*-style trigger for its review, the CJEU judgment joined that of the GC in endorsing a form of coordinate constitutionalism as between the international and EU legal orders. Coordinate constitutionalism occurs where independent legal orders agree to defer to each other's norms and judgments

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<sup>92</sup> Ibid [83].

<sup>93</sup> Ibid [85], [96].

<sup>94</sup> Ibid [38].

<sup>95</sup> Ibid [133].

<sup>96</sup> Ibid [111]–[115].

<sup>97</sup> Ibid [68]. For a similar interpretation of the judgment, see Antonios Tzanakopoulos, '*Kadi* Showdown: Substantive Review of (UN) Sanctions by the ECJ' on Blog of the European Journal of International Law, *EJIL: Talk!* (19 July 2013) <<http://www.ejiltalk.org/kadi-showdown/>> ('it affirmed that it will continue to review EU listings implementing strict Security Council obligations in the face of lack of equivalent control at UN level').

providing that they meet certain minimum standards.<sup>98</sup> Such coordinate constitutionalism creates a horizontal relationship of respect between the international, regional and domestic legal orders: once one system implements measures to ensure respect for fundamental rights, the other systems must respect its autonomy.<sup>99</sup> Under the CJEU's (and the GC's) model of coordinate constitutionalism, EU courts undertake to respect the UNSC's autonomy insofar as it adopts human rights protections equivalent to those that exist at the EU-level.<sup>100</sup> This more deferential review is designed to ensure that the values of the European system are not compromised whilst, at the same time, ensuring that due deference is accorded to UNSC decisions.<sup>101</sup>

This type of approach to review generally only pertains to cases where the institutions in question maintain close normative and institutional links.<sup>102</sup> Thus, the *Solange* principle governs the relationship between a Member State and the EU; and the doctrine of equivalent protection governs the relationship between the ECtHR and its Member States. The approach may thus not be as applicable in the context of defining the relationship between the EU and UN legal orders. First, the UNSC and CJEU are not in a long-term institutional relationship promoting ongoing judicial dialogue. The CJEU cannot thus 'address' the UNSC in the same manner as the GFCC and ECtHR are able to address the EU institutions and ECtHR Member States respectively.<sup>103</sup> Secondly, the UNSC and CJEU are not similar institutions. In fact, the *Kadi* litigation arose precisely because the UNSC, an executive body focused on maintaining international peace and security, had not implemented the types of measures guaranteed by the CJEU, a judicial body concerned with the enforcement of legality in EU action.<sup>104</sup>

Nevertheless, the CJEU's approach arguably strikes the best compromise from the perspective of both international and EU law by balancing the need to maintain human rights protection with respect for the UNSC's efficacy and authority. The UNSC's increasing jurisdiction over individuals means that it is vital that the UNSC maintains appropriate levels of human rights protections for those individuals over whom it exercises power.<sup>105</sup> The coordinate

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<sup>98</sup> Sabel and Gerstenberg, above n 65, 511–12; Ernst-Ulrich Petersmann, 'Do Judges Meet Their Constitutional Obligation to Settle Disputes in Conformity with "Principles of Justice and International Law"?' (2007) 1(2) *European Journal of Legal Studies* 1, 34 <<http://www.ejls.eu/2/22UK.pdf>>; Luzius Wildhaber, 'The Coordination of the Protection of Fundamental Rights in Europe' (Speech delivered in Geneva, 8 September 2005), cited in Cathryn Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 *Human Rights Law Review* 87, 100; Isiksel, above n 62, 560–1.

<sup>99</sup> Besson, above n 88, 261.

<sup>100</sup> Ibid; Costello, above n 98, 91.

<sup>101</sup> Costello, above n 98, 91.

<sup>102</sup> Enzo Cannizzaro, 'A Machiavellian Moment? The UN Security Council and the Rule of Law' (2006) 3 *International Organizations Law Review* 189, 220.

<sup>103</sup> Isiksel, above n 62, 564.

<sup>104</sup> See, for example, *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [294], [304]; *ibid* 565.

<sup>105</sup> Sabel and Gerstenberg, above n 65, 529–30; Larissa van den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual' (2007) 20 *Leiden Journal of International Law* 797, 797; Bulterman, above n 8, 764; Johnstone, above n 8, 300.



constitutionalist approach confirmed by the CJEU could support attainment of these aims by encouraging the UNSC to develop more appropriate human rights protections at the international level.<sup>106</sup> Such an outcome would not only ensure some level of protection of the individuals concerned, but would also support the UN structure's ongoing legitimacy.<sup>107</sup> By adopting an approach that accords the UNSC deference once it acts to establish the necessary institutional capacities, the CJEU arguably enhances, rather than diminishes, the UNSC's efficacy and authority.<sup>108</sup> That said, the focus of review on European values has meant that the judgment has been criticised by some commentators for failing to strike an appropriate balance between EU and international law. This is an issue that will be returned to in Part V below.

### B *Implications for EU Law*

From the perspective of EU law, scholarly interpretations of the ECJ's judgment led to concern that the judgment would disrupt the constitutional principles underpinning the EU's relationship with its own Member States. This is because those commentators who interpreted the ECJ's judgment as not having endorsed a 'trigger' for the review of EU-implementing measures concluded that the ECJ's approach was inconsistent with the principle of direct effect, which governed the relationship between EU law and the legal orders of its Member States. Under the principle of direct effect, EU legal norms have direct and immediate effect in each Member State's jurisdiction notwithstanding any conflict with national, even constitutional, law.<sup>109</sup> By contrast, one available reading of the ECJ's judgment in *Kadi II*, would lead to a situation in which the EU legal order appeared to envisage the whole-scale review of all international legal norms for consistency with European constitutional norms.<sup>110</sup> A number of commentators expressed concern that this apparent hypocrisy would lead to the rejection of the principle of direct effect at the national level.<sup>111</sup> In fact, the GFCC, in the *Lisbon Treaty Decision*, indicated that *Kadi II* contained an approach that might be open to the courts of Member States in the case of conflict between national constitutional law and EU law.<sup>112</sup>

The CJEU's judgment clarifies the ECJ's judgment, ensuring the internal consistency of EU jurisprudence governing the relationship between EU and external law. It thus precludes the possibility for Member States to use the

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<sup>106</sup> André Nollkaemper, 'Rethinking the Supremacy of International Law' (Working Paper, Amsterdam Center for International Law, 2009) 35; Ziegler, above n 41, 303.

<sup>107</sup> de Wet, 'The Role of European Courts', above n 8, 303; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2008) 192; Cannizzaro, above n 102, 191.

<sup>108</sup> *Kadi III* (T-85/09) [2010] ECR II-5177, II-5226 [127]; *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [322]–[323]. See also Johnstone, above n 8, 300; van den Herik, above n 105, 799.

<sup>109</sup> *Van Gend en Loos v Nederlandse Administratie der Belastingen* (C-26/62) [1963] ECR 1.

<sup>110</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [285], [307]–[308].

<sup>111</sup> Besson, above n 88, 256.

<sup>112</sup> *Lisbon Treaty Decision*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvE 2/08, 30 June 2009 reported in (2009) 123 BVerfGE 267, 400–1. An English translation of this decision may be found in: *Re Ratification of the Treaty of Lisbon* [2010] 3 CMLR 13, 364 [316].

contradictions potentially contained within the ECJ judgment to challenge other key constitutional principles, including the principle of direct effect.

## V FOCUS OF REVIEW

The CJEU judgment further provides an opportunity to reconsider the differing understandings exhibited by each EU court as to the origin and content of the limits that constrain UNSC power — either as a matter of international or EU law. It will be recalled that the CFI's judgment on the one hand, and the ECJ's and GC's judgments on the other, differed significantly in their understanding of how international and EU legal norms interact.

The CFI adopted a monist (international) approach which accords international law — provided it complies with *jus cogens* norms — instant validity and supremacy over every existing legal norm within the EU legal order.<sup>113</sup> In accepting *jus cogens* norms as the outer limits of UNSC action, the CFI endorsed a cautious model of international constitutionalism.<sup>114</sup> International constitutionalism holds that UNSC actions are circumscribed by certain legal norms, it being the prerogative of regional and national courts to review and enforce compliance with those norms.<sup>115</sup> International constitutionalists disagree about the content of the norms binding the UNSC, but broadly agree that there are at least some restrictions on UNSC action, and that they are sourced in international law.<sup>116</sup> The CFI elected to so-constrain UNSC action via review of such action for compliance with *jus cogens* norms, which are given formal status as 'peremptory norm[s]' in the international legal order by the *VCLT*.<sup>117</sup>

By contrast, the ECJ and GC, and ultimately the CJEU, adopted more expressly dualist (EU-centric) approaches, holding that international legal norms gain validity within the EU legal system only if they comply with primary EU law.<sup>118</sup> Rather than focusing upon the norms that bind the UNSC as a matter of international law (as per the CFI's approach), therefore, the ECJ, GC and CJEU

<sup>113</sup> See, eg, *Kadi I* (T-315/01) [2005] ECR II-3659, II-3723 [224].

<sup>114</sup> *Ibid* II-3724–5 [228]–[230]. See, eg, Bulterman, above n 8, 769; de Wet, 'The Role of European Courts', above n 8, 287, 293–94, 304; Pasquale De Sena and Maria Chiara Vitucci, 'The European Courts and the Security Council: Between *Dédoublement Fonctionnel* and Balancing of Values' (2009) 20 *European Journal of International Law* 193, 193.

<sup>115</sup> Griller, above n 34, 540–1; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003) 285–90. Cf *R (on the Application of Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332; *Behrami v France* (2007) 45 EHRR SE 10.

<sup>116</sup> Eeckhout, above n 86, 193–4; de Wet, 'The Role of European Courts', above n 8, 304.

<sup>117</sup> *VCLT* art 53. For an account of the existence of *jus cogens* prior to the *VCLT*, see Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291, 297–9. Note that there is some other international and municipal jurisprudence which concurs with the CFI in holding that these norms could play a role in constraining the powers of the UNSC: see, eg, *Al-Adsani v United Kingdom* [2001] XI Eur Court HR 79, 112 [3] (Joint Dissenting Opinion of Judges Rozakis and Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Order on Further Requests for the Indication of Provisional Measures)* [1993] ICJ Rep 325, 440 [100] (Separate Opinion of Judge Lauterpacht).

<sup>118</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [290], [303], [304].

all considered the matter from the standpoint of EU law to hold that the contested EU measures could be reviewed for their compliance with EU human rights norms.<sup>119</sup> They thus adopted a ‘stricter’ scope of review than the CFI, endorsing review of the EU implementing measure (and, indirectly, the UNSC measure) for compliance with ‘the full range of Community human rights’ norms.<sup>120</sup> The ECJ’s judgment, for example, expressly justified the focus of review as appropriately being on insular, EU, human rights. First, it held that the EU legal order is an autonomous and independent system. As a result, EU, not international, legal norms determine the relationship between EU and external (national and international) law.<sup>121</sup> For the ECJ, this understanding of the European system dictated that the force of international norms within the EU legal order must be determined according to principles of EU law.<sup>122</sup> Secondly, the ECJ confirmed the superior nature of certain European norms vis-a-vis international norms, holding that international legal norms cannot override fundamental EU law.<sup>123</sup> Thus, to attain validity within the Community’s legal structure, all international legal norms must comply with the primary, constitutional, norms of EU law.<sup>124</sup> According to the ECJ’s judgment, therefore, international legal norms would sit within the EU legal order below principles of constitutional law but above principles of general EU law.<sup>125</sup>

Further implications for both international and EU law can be extrapolated from the ECJ’s, GC’s and CJEU’s characterisation of the source and content of the standards against which they reviewed the EU implementing measures.

#### A *Implications for International Law*

In basing review upon EU legal norms, the ECJ and GC, and later the CJEU, implied that the only way to protect European values is to privilege the European system over its international counterpart.<sup>126</sup> This creates an ‘us/them’ paradigm in which applicable international human rights norms are discarded as the basis of review because European values are perceived to be better developed (for the GC) or simply more applicable (for the ECJ and CJEU).<sup>127</sup>

From this perspective, the differences between the CFI’s approach on the one hand, and the ECJ, GC and CJEU’s approaches on the other, appear at first glance to be quite stark. It ought to be noted, however, that commentators, and the Council of the European Union and the European Commission before the ECJ, have argued that the CFI inappropriately expanded the category of *jus cogens* norms to enable it to review UNSC measures for compliance with norms

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<sup>119</sup> Ibid [299], [316], [326]–[327].

<sup>120</sup> Ziegler, above n 41, 294.

<sup>121</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [218], [282], [316]. See also *Kadi II (Advisory Opinion of Advocate General Maduro)* (C-402/05 P, C-415/05 P) [2008] ECR I-0000, [21]. Cf *Kadi I* (T-315/01) [2005] ECR II-3659, II-3719 [208].

<sup>122</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [317].

<sup>123</sup> Ibid [290], [303], [304].

<sup>124</sup> Ibid [285], [307]–[308].

<sup>125</sup> Ibid [285], [307]–[308]. See also *Intertanko v Secretary of State for Transport* (C-308/06) [2008] ECR I-0000, [42].

<sup>126</sup> de Wet, ‘The Role of European Courts’, above n 8, 305.

<sup>127</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [299], [316], [326]–[327]; *Kadi III* (T-85/09) [2010] ECR II-5177, II-5227 [128].

that had not yet attained *jus cogens* status.<sup>128</sup> Indeed, there is no settled understanding of what constitutes a *jus cogens* norm, such that there is no widespread consensus that the human rights protections identified in the CFI judgment have in fact attained *jus cogens* status.<sup>129</sup> The CFI's review appeared to extend the notion of *jus cogens* norms to impose upon the UNSC an obligation to comply with a wide range of human rights, as defined in UN treaties and under general international law.<sup>130</sup> The CFI arguably thus appeared to restrict the formal ability of regional and domestic courts to review UNSC actions (by limiting that review to compliance with *jus cogens* norms) whilst in practice exercising a broader review function (by defining as *jus cogens* a number of human rights norms that have arguably not attained that status). As such, the practical scope of review adopted by the CFI was significantly less constrained than would appear from a *prima facie* examination of the judgment. As Joris Larik notes, this approach of the CFI has its own challenges from the perspective of international law, not least the fragmentation of international law that might flow from providing domestic courts with the ability to define what constitutes *jus cogens* norms according to their own particular viewpoint.<sup>131</sup>

Despite the fact that the CJEU and CFI did not perhaps differ in the content of the norms they used to review the legality of the EU implementing measures, the identified origin of those norms is, from an international angle, important. Indeed, commentators criticise the ECJ and CJEU's approaches to review for establishing a precedent upon which states can seek to justify challenges to the

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<sup>128</sup> *Kadi I* (T-315/01) [2005] ECR II-3659, II-3734 [266]. See also Bulterman, above n 8, 769–70; Eeckhout, above n 86, 195.

<sup>129</sup> See generally *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 32 [33]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgment)* [1986] ICJ Rep 14, 90–1 [190]; *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 102, [29]; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23; Eeckhout, above n 86, 195; Bulterman, above n 8, 770.

<sup>130</sup> Luis Miguel Hinojosa Martínez, 'The Legislative Role of the Security Council in Its Fight against Terrorism: Legal, Political and Practical Limits' (2008) 57 *International & Comparative Law Quarterly* 333, 345; Jean d'Aspremont and Frédéric Dopagne, 'Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders' (2008) 68 *Heidelberg Journal of International Law* 939, 953.

<sup>131</sup> Joris Larik, 'Two Ships in the Night or in the Same Boat Together? Why the European Court of Justice Made the Right Choice in the *Kadi* Case' (EU Diplomacy Paper No 3/2009, Department of EU International Relations and Diplomacy Studies, College of Europe, 2009) 10.

binding force of their *UN Charter* obligations on the basis of conflicts with national (or regional) constitutional law.<sup>132</sup> As André Nollkaemper notes:

the question is how we can differentiate between challenges based on fundamental human rights, as perceived and construed in Western-Europe, and challenges based on, say, the Sharia? If we can not properly distinguish between such case [sic], would *Kadi*-like challenges not undermine the enterprise of international law?<sup>133</sup>

Similarly, Gráinne de Búrca observes that the ECJ's judgment in *Kadi II*:

seems to offer encouragement to [other municipal or regional courts] to assert their local understandings of human rights and their particular constitutional priorities over international norms and over Chapter VII resolutions of the Security Council.<sup>134</sup>

Widespread challenges to the supremacy of UNSC resolutions on this basis could ultimately undermine the UN system by seriously impeding the UNSC's ability to maintain international peace and security or by fragmenting and undermining the enforceability of international law.<sup>135</sup> The ECJ's insular focus, and neglect of these concerns, led one commentator to observe that the judgment transforms the EU into an 'ostrich' which had placed its 'head in the sand' by creating 'a world where treaty conflict is non-existent'.<sup>136</sup>

These negative implications could perhaps have been overcome had the CJEU elected to review the compatibility of the EU-implementing measures with international, as opposed to European, human rights norms.<sup>137</sup> In so doing, however, the CJEU would have 'repudiated its role of European constitutional court', which would have undermined the constitutionalist dialogue it sought to assert.<sup>138</sup> Indeed, given that the challenged measure was one implementing a UNSC decision at the regional level, the relevant norms for judicial review of

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<sup>132</sup> *Kadi I* (T-315/01) [2005] ECR II-3659, II-3706 [157] (CFI), II-3708 [163] (Commission), II-3708 [162], II-3710–11 [174] (Council). See also *Letter Dated 13 May 2008 from the Chairman of the Security Council Committee Established pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council*, UN SCOR, 63<sup>rd</sup> sess, UN Doc S/2008/324 (14 May 2008) annex [40] ('*Report of the Analytical Support and Sanctions Monitoring Team pursuant to Resolution 1735 (2006) concerning Al-Qaida and the Taliban and Associated Individuals and Entities*'); *Letter Dated 11 May 2009 from the Chairman of the Security Council Committee Established pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council*, UN SCOR, 64<sup>th</sup> sess, UN Doc S/2009/245 (13 May 2009) annex [19] ('*Ninth Report of the Analytical Support and Sanctions Monitoring Team, Submitted pursuant to Resolution 1822 (2008) concerning Al-Qaida and the Taliban and Associated Individuals and Entities*').

<sup>133</sup> Nollkaemper, above n 106, 4.

<sup>134</sup> de Búrca, 'After *Kadi*', above n 86, 41.

<sup>135</sup> *Kadi III* (T-85/09) [2010] ECR II-5177, II-5220–1 [110], [113], [114]; Nollkaemper, above n 106, 18.

<sup>136</sup> Jan Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2009) 219.

<sup>137</sup> Ziegler, above n 41, 305.

<sup>138</sup> Jean d'Aspremont and Frédéric Dopagne, '*Kadi*: The ECJ's Reminder of the Elementary Divide between Legal Orders' (2008) 5 *International Organizations Law Review* 371, 375 (emphasis altered).

such a measure ought arguably to be drawn from that regional system.<sup>139</sup> At the very least, however, and as Nollkaemper notes, the CJEU could alternatively have put ‘more emphasis on the commonality between the European standards it sought to protect ... and the human rights standards under the UN Conventions and customary law’.<sup>140</sup>

### B Implications for EU Law

The ECJ, GC and CJEU judgments identify and privilege distinct European values both within the EU legal system and over other external legal norms. In doing so, the three judgments utilise human rights discourse to identify the values that unify the European project and distinguish it from other external sources of law.<sup>141</sup> Primarily, the judgments confirm the importance of human rights norms as *shared* values within the EU. Thus, for example, the ECJ judgment emphasised that these norms arise from ‘the constitutional traditions common to the Member States’.<sup>142</sup> The ECJ and CJEU judgments differ, however, insofar as they attempt to distinguish EU human rights protections from those which exist at the international level. The ECJ judgment emphasised more strongly a perceived divergence between the UNSC’s practices and those of the ECJ, asserting, for example, that ‘*in the Community*’ human rights abuses will not be tolerated.<sup>143</sup> In comparison, the CJEU judgment recognised that the protection of ‘fundamental human rights and freedoms’ were ‘shared values of the UN and the European Union’.<sup>144</sup>

By identifying EU human rights norms as the proper yardstick against which to conduct their review, the judgments link into the broader discussion of constitutional patriotism occurring in the European public sphere. Such discourse stems from recognition that the EU has accumulated policy competencies in a broad range of areas that were previously the prerogative of individual states.<sup>145</sup> Studies indicate that as the EU’s policy competencies and geographical scope increases its popular legitimacy diminishes.<sup>146</sup> Continued expansion thus arguably requires a clearer expression of how the EU claims legitimacy to ensure its ongoing stability as a supranational institution.<sup>147</sup> Institutional legitimacy garners public respect for, and acceptance of, institutional authority.<sup>148</sup> Legitimacy ensures that people support institutions despite potential

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<sup>139</sup> Cannizzaro, above n 102, 223.

<sup>140</sup> Nollkaemper, above n 106, 25. See also Kumm, ‘How does European Union Law Fit’, above n 87, 30.

<sup>141</sup> See also de Búrca and Aschenbrenner, ‘The Development of European Constitutionalism’, above n 48, 381.

<sup>142</sup> *Kadi II* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [283], [335] (emphasis added).

<sup>143</sup> *Ibid* [284] (emphasis added).

<sup>144</sup> *Kadi IV* (European Court of Justice, C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013) [131].

<sup>145</sup> For further discussion, see Pernice, ‘The *Treaty of Lisbon*’, above n 47, 374–5, 377.

<sup>146</sup> See also Justine Lacroix, ‘For a European Constitutional Patriotism’ (2002) 50 *Political Studies* 944.

<sup>147</sup> Erik Oddvar Eriksen and John Erik Fossum, ‘Europe in Search of Legitimacy: Strategies of Legitimation Assessed’ (2004) 25 *International Political Science Review* 435, 435–6.

<sup>148</sup> John Hasnas, ‘The Myth of the Rule of Law’ [1995] *Wisconsin Law Review* 199, 201.

disagreement with particular elements of, or decisions reached in, the system.<sup>149</sup> A lack of legitimacy could lead to the rejection of particular decisions or, more seriously, may result in the rejection of the entire system.<sup>150</sup>

Legitimacy is achieved by justifying the existence of the system and its processes of law-making to the populous.<sup>151</sup> John Rawls and Frank Michelman argue that, in its new phase of existence as a political union, certain ‘constitutional essentials’ are necessary to ensure that the populous submits to the EU’s coercive political power.<sup>152</sup> However, as Craig Calhoun notes, ‘[c]itizens need to be motivated by solidarity, not merely included by law’.<sup>153</sup> Popular allegiance therefore can only be secured by something more than a rational attachment to economic or political structures.<sup>154</sup> Many commentators argue that political legitimacy thus depends on a ‘social imaginary’; an emotional, collective, connection to the polity’s underlying foundational values and to those individuals who constitute it.<sup>155</sup> In light of this, Jürgen Habermas suggests that the legitimacy of political systems like the EU could best be supported by the development of constitutional patriotism.<sup>156</sup> Constitutional patriotism occurs where the individuals of a polity develop a strong sense of loyalty toward it based upon their attachment to its foundational (constitutional) values.<sup>157</sup> The citizenry are thus attached not to a written constitution itself, but rather to the polity’s normative underpinnings, for example a respect for democracy or human rights.<sup>158</sup> Indeed, the ‘constitution’ is more than a physical document; it is the principles which organise and justify the exercise of public power within the polity and which identify and define the values that bind the community together.<sup>159</sup> For constitutional patriotism theory, public discourse is vital to developing the popular attachment to the political project.<sup>160</sup> The

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<sup>149</sup> James L Gibson, Gregory A Caldeira and Vanessa A Baird, ‘On the Legitimacy of National High Courts’ (1998) 92 *American Political Science Review* 343, 343–5; David Easton, *A Systems Analysis of Political Life* (John Wiley & Sons, 1965) 273.

<sup>150</sup> John M Darley, ‘Citizens’ Sense of Justice and the Legal System’ (2001) 10 *Current Directions in Psychological Science* 10, 12.

<sup>151</sup> Jan-Werner Müller, ‘A European Constitutional Patriotism? The Case Restated’ (2008) 14 *European Law Journal* 542, 545.

<sup>152</sup> John Rawls, *Political Liberalism* (Columbia University Press, 1993) 137; Frank I Michelman, ‘Morality, Identity and “Constitutional Patriotism”’ (2001) 14 *Ratio Juris* 253, 261.

<sup>153</sup> Calhoun, ‘Constitutional Patriotism’, above n 50, 262.

<sup>154</sup> Müller, ‘A European Constitutional Patriotism?’, above n 151, 546; Eriksen and Fossum, above n 147, 436.

<sup>155</sup> Calhoun, ‘Constitutional Patriotism’, above n 50, 258; Eriksen and Fossum, above n 147, 436, 438; de Búrca and Aschenbrenner, ‘The Development of European Constitutionalism’, above n 48, 369.

<sup>156</sup> See the description of ‘historian controversy’ in: James Gordon Finlayson, *Habermas: A Very Short Introduction* (Oxford University Press, 2005). On the origins of constitutional patriotism, see Jan-Werner Müller, ‘On the Origins of Constitutional Patriotism’ (2006) 5 *Contemporary Political Theory* 278; Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press, 2007).

<sup>157</sup> Closa, above n 65, 417, 419; Müller, ‘A European Constitutional Patriotism?’, above n 151, 544, 547.

<sup>158</sup> Müller, ‘A European Constitutional Patriotism?’, above n 151, 547, 557; Calhoun, ‘Constitutional Patriotism’, above n 50, 259; Lacroix, above n 146, 950.

<sup>159</sup> Calhoun, ‘Constitutional Patriotism’, above n 50, 259, 261–2; Calhoun, ‘Imagining Solidarity’, above n 50, 149.

<sup>160</sup> Calhoun, ‘Constitutional Patriotism’, above n 50, 263; Closa, above n 65, 411, 423.

articulation of a shared value system encourages citizens to view themselves as part of a collective, helping them to identify both with political institutions and with other citizens.<sup>161</sup>

The ECJ, GC and CJEU emphasise in each of their respective judgments that respect for the rule of law and human rights act as common, foundational, value bases across the European polity.<sup>162</sup> As discussed above, the judgments seek to articulate what constitutes the European people and what distinguishes and separates them from other civic groupings.<sup>163</sup> By upholding the rule of law and individual rights as foundational principles, the ECJ, GC and CJEU enter into a discourse that attempts to identify the EU as a structure that is inclusive and respectful of each individual.<sup>164</sup> Human rights discourse of this kind elevates the EU from a mere political or economic superstructure into something that European citizens can identify more emotively with.<sup>165</sup> As one commentator observes, this sort of discourse utilises values to act as the ‘bond that ensures cohesion among European citizens’.<sup>166</sup>

## VI STANDARD OF REVIEW

Finally, a collective review of the four judgments reveals the differing approaches of each court to the question of the deference due to the UNSC, assuming the permissibility of the direct or indirect review of UNSC decisions. At a general level, the ‘standard of review’ adopted by each court determined the ‘intrusiveness’ of its review into the legality or ‘correctness’ of the particular measure under review.<sup>167</sup> The standard of review adopted thus determined the balance struck by each court between the review of UNSC decisions (or EU measures implementing UNSC decisions) and respect for the UNSC’s autonomy and authority as an international actor.<sup>168</sup>

The CFI struck this balance by acknowledging the existence of deference in any review, indicating that it would be ‘improbable’ for the UNSC to be found in breach of *jus cogens* norms.<sup>169</sup> By contrast, the ECJ judgment endorsed ‘in principle full review’ of the EU implementing measures for consistency with EU human rights standards.<sup>170</sup> The CJEU’s judgment provided an opportunity to

<sup>161</sup> Kumm, ‘To be a European Citizen?’, above n 63, 511; Neil MacCormick, ‘Democracy, Subsidiarity, and Citizenship in the “European Commonwealth”’ (1997) 16 *Law and Philosophy* 331, 339; Di Fabio, above n 50, 168.

<sup>162</sup> Kumm, ‘To be a European Citizen?’, above n 63, 483.

<sup>163</sup> See also Shaw, above n 48, 9, 16.

<sup>164</sup> MacCormick, above n 161, 342; Sacerdoti, above n 62, 40; Röben, above n 79, 369; Eriksen and Fossum, above n 147, 447; Pernice, ‘The Treaty of Lisbon’, above n 47, 386.

<sup>165</sup> E Dana Neacsu, ‘The Draft of the EU Charter of Fundamental Rights: A Step in the Process of Legitimizing EU as a Political Entity, and Economic-Social Rights as Fundamental Human Rights’ (2001) 7 *Columbia Journal of European Law* 141, 145; de Búrca and Aschenbrenner, ‘The Development of European Constitutionalism’, above n 48, 369, 378.

<sup>166</sup> Kumm, ‘To be a European Citizen?’, above n 63, 483.

<sup>167</sup> Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge University Press, 2012) 7.

<sup>168</sup> See generally De Sena and Vitucci, above n 114; Cannizzaro, above n 102, 217.

<sup>169</sup> *Kadi I* (T-315/01) [2005] ECR II-3659, II-3725 [230].

<sup>170</sup> *Kadi IV* (European Court of Justice, C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013) [321]–[322], [326], [330].



give content to the standard applicable to such review.<sup>171</sup> This matter was brought into contention by the Appellants, who submitted that any review ought not to be ‘excessively interventionist’ but rather deferential and restricted on account of ‘the international context’ underlying the measure’s adoption as well as the EU’s circumscribed discretion in adopting it.<sup>172</sup> The CJEU rejected this approach, and instead endorsed a more intensive standard. Such review, the CJEU held, must extend beyond a ‘restricted’ assessment of ‘cogency in the abstract of the reasons relied on’.<sup>173</sup> It found, for instance, that the EU authorities had themselves an obligation to verify that the allegations set forth by the UNSC to support its decision to list an individual were ‘at the very least ... sufficient ... to support that decision’.<sup>174</sup> Despite endorsing a relatively strict standard of review, the CJEU was careful to account for situations in which the entirety of the material relied upon to list an individual was either not provided by the UNSC to the EU organs, or otherwise deemed sensitive and confidential and so not provided to the Court.<sup>175</sup> In such cases, the CJEU clarified that the Court would base its review ‘solely on the material which ha[d] been disclosed’.<sup>176</sup>

## VII CONCLUDING REMARKS: THE IMPORTANCE OF THE CJEU’S JUDGMENT IN *KADI*

The judgment of the CJEU in *Kadi IV* provides an opportunity to take stock of the differing understandings exhibited throughout the proceedings by the relevant courts of how a modern EU should interact with, and within, the UN system. Examination of this most recent judgment in light of the procedural history is also vital to the study of the European integrative project because it exemplifies transitions occurring at the EU-level that have seen distinct changes in the EU’s focus, nature and identity in recent years. Indeed, the *Kadi* judgments hold key significance for the process of constitutionalism occurring in the EU. This is because Mr Kadi provided courts with the opportunity to identify EU constitutional norms, demarcate (and protect) these norms against the norms of external legal orders and define an underlying telos for European unity that may assist to develop a sense of European constitutional patriotism within the EU. The CJEU judgment, in particular, indicates the centrality of human rights discourse within the EU, signifying the changing focus of the EU from a project focused upon market integration to one focused upon broader political and social matters. In so doing, the judgments provide key insights into the contemporary relationship between the EU and European citizens. In engaging in this human rights discourse, the judgments enter into an important constitutional dialogue about what defines the EU and what distinguishes it from other polities. The judgments thus tie into a broader discussion about the role that human rights might play in bolstering popular allegiance to the EU as a supranational organisation.

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<sup>171</sup> Ibid [97].

<sup>172</sup> Ibid [72]–[74].

<sup>173</sup> Ibid [119].

<sup>174</sup> Ibid.

<sup>175</sup> Ibid [123].

<sup>176</sup> Ibid [123], [137].

Importantly, the CJEU judgment also provided the Court with the opportunity to clarify the ECJ's original rulings and to endorse the *Solange*-type approach adopted by the GC in *Kadi III*. This approach to review of EU-level acts that implement UNSC measures achieves some measure of balance between the need to ensure the UN system's efficacy with the need to protect the values considered 'foundational' to the European project. Indeed, as demonstrated by Part IV, the approach most recently adopted by the CJEU allows the EU and UN to enter into a relationship of coordinate constitutionalism that ensures the better protection of human rights in both systems whilst maintaining due deference for the autonomy of each. The judgment also harmonises the Court's jurisprudence about its relationship with national legal orders, and so supports the maintenance of key constitutional principles defining the relationship between the EU and its Member States. These broader developments on an international and EU plane highlight the role of the *Kadi* judgments in the ongoing process of European constitutionalisation and the implications of this process for the EU's status as an actor in international law.

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