The Impact of the *Kadi* Judgment on the International Obligations of the EC Member States and the EC

*Dr Nikolaos Lavranos, LL M*

I. Introduction

The main aim of this contribution is to explore the impact of the ECJ’s *Kadi* judgment\(^1\) on the international obligations of EC Member States and the EC/EU. More specifically, the focus will be on Article 307 EC, which states that rights and obligations of the EC Member States arising out of pre-accession international agreements shall not be affected by the EC Treaty. This provision has been construed by some EC Member States as allowing them to deviate from their EC law obligations, notably, fundamental rights obligations, in order to fulfil their obligations arising out of UN Security Council resolutions.

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\(^1\) ECJ Case C-402/05 P, *Kadi* [2008] ECR I-6351.

However, before proceeding with the analysis, it is important to emphasize that the analytical framework of this contribution is based on a strictly European constitutional law perspective. Accordingly, the starting point of this analysis is the acceptance that the EC legal order is a separate, autonomous, *sui generis* legal order that exists next, but not subordinated, to the international legal order.² As a result, the EC legal order has autonomously determined its internal hierarchy of norms. According to the longstanding jurisprudence of the ECJ, international agreements and binding decisions of International Organizations (IOs), which have become an integral part of the Community legal order, are placed below primary EC law, ie the EC Treaty, the European Convention of Human Rights (ECHR),³ and general principles of Community law.⁴ Therefore, such ‘communitarized’ international law obligations must be in conformity with the higher ranking norms, in this case primary EC law and the ECHR.

Moreover, due to the fact that the legal status and effect of international obligations that have become an integral part of the Community legal order are not explicitly regulated in the EC or EU Treaties, the ECJ, acting as the ‘gatekeeper’ between the European and international legal orders, has been determining the internal legal effect of ‘communitarized’ international obligations through its jurisprudence.⁵

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² In accordance with the seminal ECJ judgments Case 26/62 *Van Gend & Loos* [1963] ECR 1; Case 6/64 *Costa v ENEL* [1964] ECR 585.

³ The ECHR is the only exception of an international treaty that has been promoted to quasi-primary EC law status. See to this effect eg ECJ Case C-112/00 *Schmidberger* [2003] ECR I-5659.

⁴ See eg N Lavranos, *Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Member States* (Groningen, 2004).

In addition, according to Article 220 EC\(^6\) the ECJ and CFI must ensure that the Law is observed. This includes, in particular, also safeguarding the autonomous nature of the Community legal order\(^7\) as well as fully protecting fundamental rights\(^8\) and the Rule of Law.\(^9\)

In addition, Article 292 EC,\(^10\) as understood by the ECJ in Opinion 1/91,\(^11\) MOX plant,\(^12\) and Kadi,\(^13\) excludes the possibility that an international agreement can modify in any way the ‘very foundations of the Community legal order’.\(^14\)

As a result, the ECJ is applying—for once to use this simplistic category—a ‘dualist’ approach towards binding international obligations. In other words, ‘communitarized’ international obligations of the EC and/or its Member States are conditioned by the Community legal order and

\(^6\) Article 220 EC reads as follows:

‘The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed. In addition, judicial panels may be attached to the Court of First Instance under the conditions laid down in Article 225a in order to exercise, in certain specific areas, the judicial competence laid down in this Treaty.’


\(^10\) Article 292 EC reads as follows:

‘Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.’


\(^12\) ECJ Case C-459/03 MOX plant [2006] ECR I-4635.

\(^13\) ECJ Case C-402/05 P Kadi [2008] ECR I-6351.

\(^14\) Ibid, para 282.
the jurisprudence of the ECJ. This means that international obligations binding on the EC and/or its
EC Member States, whether prior or subsequent to the entering into force of the E(E)C Treaty, must
always be in compliance with primary EC law, the ECHR and, ultimately, the very foundations of
the Community legal order.

Thus, the UN Charter and UN Security Council Resolutions—as far as they are binding on
the EC and have become an integral part of the Community legal order through EC implementing
measures—are situated in the EC hierarchy of norms below primary EC law, and therefore, cannot
be in conflict with the latter.

In short, this European constitutional law perspective, which is in line with the ECJ’s point
of view, is diametrically opposed to the international law perspective adopted by the CFI’s Kadi and
Yusuf judgments. Therefore, it is important to keep the European constitutional law perspective in
mind because it determines to a large extent the way Article 307 EC must be understood.

II. Misunderstandings and Misconceptions of Article 307 EC

From the outset, it should be noted that Article 307 EC consists of three paragraphs (the first
two are relevant for our purposes) and contains several rights and obligations that must be
distinguished from one another. Furthermore, a distinction must be made between the rights and

a detailed analysis, N Lavranos, ‘Judicial Review of UN sanctions by the CFI’ (2006) European
Foreign Affairs Review 471–490.
16 Article 307 EC reads as follows:

‘(1) The rights and obligations arising from agreements concluded before 1 January 1958 or, for
acceding States, before the date of their accession, between one or more Member States on the one
hand, and one or more third countries on the other, shall not be affected by the provisions of this
Treaty.'
obligations arising out of Article 307 EC for the EC Member States and those arising for the EC itself.

Regarding the EC Member States’ obligations, it must first be recalled that Article 307(1) EC contains a ‘stand-still’ clause for pre-1958 international agreements (indeed for all pre-accession agreements) of EC Member States, which shall not be affected by EC Treaty obligations. This could be misunderstood as a carte blanche for the EC Member States to continue fulfilling their international obligations arising out of pre-1958 accession agreements by disregarding conflicting EC law obligations. In particular, this misunderstanding seems to have been based on the fact that the ECJ had accepted in Centro-Com\textsuperscript{17} that derogations—even from primary EC law—may be allowed.\textsuperscript{18}

But that is clearly a misunderstanding and a misconception of the first paragraph of Article 307 EC, as becomes clear if we look at Article 307(2) EC as interpreted by the ECJ.

\begin{verbatim}
(2) To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

(3) In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.’
\end{verbatim}


\textsuperscript{17} ECJ Case C-124/95 Centro-Com [1997] ECR I-81.

\textsuperscript{18} Ibid, paras 56–61.
According to the ECJ, Article 307(2) EC imposes an obligation on the EC Member States—not on the EC institutions—to take all appropriate measures to eliminate the incompatibilities (to the extent that they exist) between the European and international legal order—in favour of Community law!\(^\text{19}\)

Indeed, this obligation goes as far as denouncing the international agreement, if an adjustment of the international agreement proved impossible or failed.\(^\text{20}\)

In its \textit{Kadi} judgment the ECJ even went one step further by substantially restricting the scope for invoking Article 307 EC. First, the ECJ emphasized that Article 307 (and 297) EC:

\textit{do not authorize any derogation} from principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6 (1) TEU as a foundation of the Union.\(^\text{21}\) (emphasis added)\(^\text{21}\)

Second, the ECJ stressed that Article 307 EC:

\textit{may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of}


\(^\text{20}\) See also the recent Opinion of Advocate General Kokott in Case C-308/06 \textit{Intertanko} [2008] ECR I-4057 in which she summed up the ECJ jurisprudence on Article 307 EC as follows:

‘77. Accordingly, the Community can in principle require the Member States to take measures which run counter to their obligations under international law. This is already demonstrated by Article 307 EC, which governs inconsistencies between pre-existing international agreements and Community law. Even if the Member States’ obligations under pre-existing agreements are initially unaffected by conflicts with Community law, the \textit{Member States must nevertheless take all appropriate measures to put an end to such conflicts. This may even require the denunciation of international agreements.} Member States cannot in principle invoke agreements concluded after accession as against Community law’ (emphasis added).

\(^\text{21}\) ECJ, \textit{Kadi}, para 303.
fundamental rights, including the review by the Community courts of the lawfulness of Community measures as regards their consistency with those fundamental rights.\(^{22}\) (emphasis added)</dis>

Applying this to UN sanctions, it means that if we accept that the complete lack of independent review at the UN level is incompatible with primary EC law and the ECHR, then EC Member States are obliged to establish an appropriate independent review system at the UN level, or if impossible, at the European level, in order to bring their UN law obligations into conformity with their obligations arising out of primary EC law, the ECHR and, ultimately, the very foundations of the Community legal order.

In short, rather than arguing that the automatic implementation of UN Security Council resolutions supersedes primary EC law by virtue of the fact that the UN Charter is a pre-1958 agreement, it must be concluded that EC Member States are obliged to correct in one way or another the lack of judicial review at the UN level.\(^{23}\)

Moreover, it should be noted that the scope of application of Article 307 EC is further limited by the principle that exceptions must be interpreted narrowly—at least in EC law. Accordingly, any incompatibilities between international and EC law must be eliminated by the EC Member States as quickly as possible, so that a potential non-application of EC law is only of a temporary nature, and to ensure that the supremacy and \textit{effet utile} of Community law is restored as soon as possible.

Finally, a close reading of the ECJ’s line of reasoning regarding Article 307 EC reveals an important new aspect, namely, the introduction of a new supra-constitutional law level termed the ‘very foundations of the Community legal order’ which is placed at the apex of the hierarchy of norms of the Community legal order and which enjoys an even higher status than primary EC law.

\(^{22}\) ECJ, \textit{Kadi}, para 304.

\(^{23}\) See further, N Lavranos, above n 15.
This follows from the fact that rather than reversing its remark made in its Centro-Com judgment, ie allowing Member States to derogate from primary EC law, the ECJ introduced this new level of core fundamental constitutional values from which no derogation is possible. In other words, while derogations from primary EC law within the context of Article 307 EC and in the light of the Centro-Com judgment apparently remain still possible, the ECJ signalled to the EC Member States that such derogations can never affect the very foundations of the Community legal order.

Regarding the EC’s obligations under Article 307 EC, it should first be recalled that the EC must, obviously, respect international law as much as possible, but only to the extent that it is consistent with primary EC law.\(^\text{24}\) Second, it is to be noted that the EC itself is not bound by pre-1958 agreements.\(^\text{25}\) Third, Article 307 EC contains only a duty on the part of EC institutions not to impede the performance of the obligations of EC Member States, which stem from pre-1958 agreements and which confer rights on third States.\(^\text{26}\)

Of course, it can already be questioned in the present context whether the UN Charter confers rights on third States. One could construe a right of third States in the sense that all UN members must faithfully implement UN Security Council resolutions in accordance with Articles 24 and 25 of the UN Charter. But even if such a construction was accepted, it is hard to see how the

\(^{24}\) ECJ, Kadi, para 291:

‘291. In this respect it is first to be borne in mind that the European Community must respect international law in the exercise of its powers (Poulsen and Diva Navigation, paragraph 9, and Racke, paragraph 45), the Court having in addition stated, in the same paragraph of the first of those judgments, that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.’


\(^{26}\) Ibid.
‘conditioned’ implementation of UN Security Council Resolutions by introducing an independent review system at the domestic level could affect in any way such a right of third States.

Another question is whether any rights of the UN Security Council—if they exist at all—would be affected in our context. But this question does not have to be answered because Article 307 EC refers only to the rights of third States and not to the rights of International Organizations or their (subsidiary) organs.

However, assuming for the sake of argument that rights of third States are involved in this situation, the next question to be answered would be this: is the EC ‘impeding’ the obligations of EC Member States arising out of the UN Security Council Resolutions by requiring the existence of an effective judicial review system for the listing and delisting procedure? This would only be the case if there was a ‘conflict’ or ‘incompatibility’ between UN law and EC law obligations of EC Member States.

But it is submitted that for the following reasons this is clearly not the case. In the first place, it should be remembered that both the UN Security Council as well as the EU Council have identified the fight against terrorism as an aim and a task of the UN and EC/EU respectively. Consequently, both International Organizations have adopted innumerable counter-terrorism measures, largely in synchronization, such as the freezing of funds of suspected individuals and organizations, and the imposition of travel restrictions etc.29


Accordingly, from the point of view of the EC Member States—also UN members—there is a legally binding obligation to fully and effectively implement these measures as required by Articles 24 and 25 of the UN Charter and the relevant EC law provisions. Therefore, rather than speaking of any ‘conflict’ or ‘incompatibility’ between UN law and EC law obligations, one has to speak of parallel, similar, legal obligations of the EC Member States arising out of two different sources of law. This is further underlined by the fact that the synchronization between UN and EC measures has been perfected and accelerated by the automatic copying of the UN Sanctions Committees’ listings by EC Regulations.\(^\text{30}\)

Thus there is no conflict between European and international law obligations as far as the aim of fighting international terrorism is concerned.

In the second place, a ‘conflict’ or ‘incompatibility’ would thus, if at all, be limited to the question of whether, and if so to what extent, the EC implementing measures must contain an independent review system for the listing and delisting of targeted individuals.

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From the outset, it should be emphasized that neither the UN Charter nor the specific UN Security Council resolutions prohibit the establishment of domestic review systems of the UN members. Nor do these instruments prescribe the legal status, or affect the way UN freezing sanctions must be implemented in the domestic legal systems of the UN members. In this context it is interesting to note that the more recent UN Security Council Resolutions on Counter-Terrorism illustrate an incremental improvement regarding the respect of procedural rights of those listed.\textsuperscript{31}

Besides, it is important to recall that the EC/EU is not a member of the UN. Therefore, the EC/EU cannot be bound by UN Security Council resolutions ‘\textit{in the same way} as the Member States’ as was argued by the CFI.\textsuperscript{32} Consequently, as a result of the non-UN membership of the EC/EU, the EC has the discretion to create an independent review system in order to compensate for the non-existence of such a system at the UN level.

Indeed, because primary EC law and the ECHR so require, the EC and its Member States are actually obliged to establish such an independent review system at the domestic level, ie either at the European or national level, so as to avoid any incompatibilities with primary EC law and the ECHR. In this context, reference can also be made to the Evans Medical\textsuperscript{33} judgment in which the ECJ emphasized that

\begin{quote}
when an international agreement \textit{allows, but does not require}, a Member State to adopt a measure which \textit{appears to be contrary to Community law}, the Member State must refrain \textit{from adopting} such a measure. (emphasis added)
\end{quote}

Based on these reasons, the requirement of primary EC law and the ECHR to provide for independent judicial review for the listing and delisting of suspected terrorists cannot in any way be

\textsuperscript{31} See, for a detailed analysis, M Scheinin’s contribution in this volume. See also generally D Halberstam and E Stein, ‘The UN, the EU and the King of Sweden: Economic sanctions and individual rights in a plural world order’ (2009) CMLR 13–72.

\textsuperscript{32} CFI, \textit{Kadi}, para 193.

\textsuperscript{33} ECJ Case C-324/93, \textit{Evans Medical} [1995] ECR I-563, para 32.
construed within the scope of Article 307 EC as impeding the legal obligations of the EC Member States arising out of the UN Charter and UN Security Council Resolutions.

To be sure, in its *Kadi* judgment the ECJ explicitly accepted that freezing measures imposing substantial limitations on the right to property are justified in the fight against terrorism, and therefore, cannot ‘per se’ be regarded as inappropriate or disproportionate’.34 Moreover, it should be stressed that the ECJ did not remove Mr Kadi from the UN or EC freezing list, but merely annulled the relevant EC Regulation imposing restrictive measures as far as Mr Kadi is concerned. In fact, the ECJ did not judge the correctness of Mr Kadi’s listing at all. Indeed, it should be added that Mr Kadi has been listed again after the EC Commission enabled him to present his comments regarding his listing.35

What the ECJ did do was to remind the EC institutions and Member States that they cannot—unlike in the *Behrami*36 case before the ECtHR—hide behind the UN Security Council and escape judicial review.

In sum, it cannot be said that the requirement of establishing an independent review system at the domestic level for the listing and delisting imposed by primary EC law and the very foundations of the Community legal order creates any ‘conflicts’ or ‘incompatibilities’ with UN law obligations. Indeed, by satisfying this requirement the EC Member States merely fulfil their existing obligations to effectively protect fundamental rights, which are also part of their *international law obligations*—arising out of the ICCPR, ECHR, and possibly even out of *jus cogens*.

34 ECJ, *Kadi*, para 363.


As a result, the EC Member States cannot rely in any way on Article 307 EC in order to set aside their primary EC law and ECHR obligations.

III. Conclusions

This contribution has illustrated that Article 307 EC cannot be (ab)used by the EC Member States as a justification for setting aside their basic, fundamental EC law obligations. Indeed, with its Kadi judgment the ECJ made very clear that membership of the EC, and the obligations arising therefrom, restrict and modify the (pre-)existing international law obligations of the EC Member States in that their international conduct in the areas falling within the EC’s competences must always be consistent with the very foundations of Community law, primary EC law, and the ECHR.\(^{37}\) Any incompatibilities with their European and international law obligations must be eliminated as soon as possible and in favour of Community law, either by modifying the international agreement or, ultimately, denouncing it.

This point has been unequivocally stressed again by the ECJ in its most recent judgments on Article 307 EC concerning pre-accession Bilateral Investment Treaties (BITs) between EC Member States. See also A Gattini, above n 1, pp 224–225, who remarked:

‘The Kadi judgment is a direct, if late, offspring of the van Gend en Loos and Costa/Enel jurisprudence, and, without wanting to sound too rhetorical, one might even venture to say that similarly to those decisions it will be a landmark in the history of EC law. For, in unmistakable terms, the Court maintained that every international agreement, even one which is previous in time, universal in character and political in scope, like the UN Charter, can not impinge on the constitutional Community order. In this way the Court definitely broke the shackles of Article 307, which had consciously been laid on the EC by the State parties in order to keep it anchored in the shallow waters of the archipelagos of international treaty law, and happily sailed off in uncharted waters’ (emphasis added).
States and third countries. In these judgments the ECJ established that Article 307 EC obliges EC Member States to eliminate even hypothetical, not yet materialized, incompatibilities between a pre-accession agreement and EC law.

Moreover, because of the autonomous nature of the Community legal order and the task of ensuring that the Law is observed, the ECJ exercises—at all times—full judicial review of all measures of the EC institutions and the Member States—even those that have been adopted for the purpose of implementing obligations arising out of international agreements and/or decisions of International Organizations, such as UN Security Council resolutions. In this sense, it is true that the ECJ is ‘exporting’ to the global level and indeed imposing on non-EC Member States (and International Organizations) European fundamental rights standards and values. Is this bad? I do not think so. For once, European ‘value imperialism’ may serve a good cause, which is to increase the overall level of fundamental rights protection in the world. The daily news from all parts of the globe—sadly—demonstrates that the world is in need of more and better fundamental rights protection rather than less.

Accordingly, the ECJ must continue to be a crusader for promoting European fundamental rights universally. This is even more the case since, in its Behrami judgment, the ECtHR decided to no longer play this frontrunner role but rather showed excessive and misguided deference towards

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the UN Security Council, NATO, and EC Member States, which also happen to be Contracting Parties to the ECHR.⁴¹

⁴¹ In the Behrami judgment the ECtHR pointed out that:

‘149. In the present case, Chapter VII allowed the UNSC to adopt coercive measures in reaction to an identified conflict considered to threaten peace, namely UNSC Resolution 1244 establishing UNMIK and KFOR. Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN’s key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate and, consequently, by the UN of its imperative peace and security aim’ (emphasis added).

This echoes the CFI’s view in its Kadi judgment, when it argued that:

‘284 Nor does it fall to the Court to verify that there has been no error of assessment of the facts and evidence relied on by the Security Council in support of the measures it has taken or, subject to the limited extent defined in paragraph 282 above, to check indirectly the appropriateness and proportionality of those measures. It would be impossible to carry out such a check without trespassing on the Security Council’s prerogatives under Chapter VII of the Charter of the United
Nations in relation to determining, first, whether there exists a threat to international peace and security and, second, the appropriate measures for confronting or settling such a threat.

Moreover, the question whether an individual or organisation poses a threat to international peace and security, like the question of what measures must be adopted vis-à-vis the persons concerned in order to frustrate that threat, entails a political assessment and value judgments which in principle fall within the exclusive competence of the authority to which the international community has entrusted primary responsibility for the maintenance of international peace and security’ (emphasis added).