1. Judicial Review in the Light of EU Law or International Law?

Recent practice shows that domestic courts are increasingly confronted with complaints lodged by individuals or entities affected by measures adopted by the United Nations (UN) Security Council. Most of these cases originated by the implementation, within the domestic legal orders of UN Member States, of Security Council’s restrictive measures aimed at targeting individuals and entities suspected of being associated with terrorist groups.\(^1\) The approaches taken by domestic judges confronting the question of the legal validity of Security Council resolutions or, in most cases, of the domestic acts implementing such resolutions may be summarily classified in two distinct categories: either they assessed the validity of these resolutions in the light of domestic standards, in particular by ascertaining whether the implementation of the challenged act would have the effect of prejudicing domestic constitutional principles,\(^2\) or they reviewed such act by applying an international standard, in order to assess whether the act under review was to be considered as valid under international law.\(^3\)

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\(^3\) One may refer, for instance, to the decision rendered on 14 November 2007 by the Swiss Federal Court in the case of *Nada v. State Secretariat for Economic Affairs and Federal Department for Economic Affairs* (see the text in *Oxford Reports on*
One of the distinctive features of the Kadi saga before the European courts is constituted by the fact that the Court of First Instance (CFI) (now General Court) and the Court of Justice (ECJ) took opposite views with regard to the question of the standard of review – domestic or international – to be applied for assessing the validity of a Security Council resolution. However, while reaching opposite conclusions in that regard, they agreed on one point. Both courts regarded the standard of review which they applied as the only one to which they were entitled to resort under European Union (EU) law. For different reasons, both denied the possibility that, when assessing the validity of a Security Council resolution or of an act implementing such resolution within the EU legal order, the EU judge would be entitled to apply a twofold standard of review, i.e. a review under the EU law as well as under international law. *Electa una via, altera non datur.*

As is well known, in its judgment of 21 September 2005, the CFI held the view that “the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court’s judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law”. The Court reached this conclusion on the basis of the consideration that a judicial review, in the light of EU law, would be contrary to both Article 351 TFEU (former Article 307 TEC) and Article 103 UN Charter. At the same time, the Court acknowledged that it was “empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation

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*International Law in Domestic Courts, www.oxfordlawreports.com, with a comment by M. Lanter).*
