Eroding the Primacy of the UN System of Collective Security: The Judgment of the European Court of Justice in the Cases of Kadi and Al Barakaat

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Introduction

The European Court of Justice (ECJ) rendered its decision in the cases of Kadi and Al Barakaat on 3 September 2008. In the Judgment, it took the notable step of annulling the contested EU Regulation No. 881/2002 of 27 May 2002, in so far as it specifically placed Kadi and Al Barakaat International Foundation on the sanctions list.\textsuperscript{1} In doing so, the Court also set aside the Judgments of the Court of First Instance (CFI) of 21 September 2005 in which this Court had tested the compatibility of this regulation and the underlying Security Council Resolution with \textit{jus cogens}. The Court of First Instance had arrived at the conclusion that the EU Regulation was not unlawful.\textsuperscript{2} Ever since, the view of the ECJ on appeal has been eagerly

\textsuperscript{1) Judgment of the European Court of Justice, Joined Cases C-402/05 P and C-415/05, \textit{Kadi and Al Barakaat International Foundation}, 3 September 2008, available at <curia.europa.eu> (hereinafter referred to ECJ \textit{Kadi} Judgment).}

\textsuperscript{2) Judgment of the Court of First Instance, Case T-315/01, \textit{Kadi v. Council and Commission}, 21 September 2005, [2005] ECR II-3649 (hereinafter referred to as CFI \textit{Kadi} Judgment), and
awaited. On 16 January 2008, EU Advocate General Maduro had already given an indication of which way the wind was blowing in his Opinion, both in his legal reasoning and in the conclusion. Although different on some legal points, the ECJ generally endorsed the position of the Advocate General. This was probably not what had been anticipated in European capitals, let alone at the United Nations in New York.

The Judgment of the European Court can be described as somewhat rebellious, as it indirectly calls into question the primacy of the UN Security Council, if not the entire UN system of collective security. This collective system was established with great care and thought in response to the Second World War after the League of Nations had so utterly failed in its objectives with respect to international peace and security. Around the same time, and for similar reasons, European States decided to associate regionally in the European Economic Community which evolved over the years into the European Union of today. Both systems, the UN and the EU, thus have their direct roots in the post-World War II idea of forming a union in order to preserve and strengthen peace and to save succeeding generations from the scourge of war. It is therefore ironic, if not regrettable, that these two systems now appear to be at odds on this issue.

The Judgment brings to the fore a number of intricate legal questions pertaining to the relationship between the UN, the EU and Member States in terms of hierarchy as well as monistic versus dualistic conceptions on the relationship between their respective legal systems. This contribution is written from the international law perspective that recognizes the paramount role of the UN Security Council in the maintenance or restoration of peace and security in present-day society. From this perspective, it is of some concern that judicial review of Security Council resolutions at a regional level is allowed.

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3) Ibid., eight preambular paragraph of EEC Treaty.
4) First preambular paragraph of the UN Charter. Charter of the United Nations, 26 June 1945, entered into force on 24 October 1945; 1 UNTS xvi.