EU Law and UN Law in Conflict: The Kadi Case

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I. Introduction

Of all the cases treated by the European Court system in recent years, the Kadi case is surely one of the most contentious. We have here the very particular situation that both the judgment of the CFI (Court of First Instance) and that of the ECJ (European Court of Justice) provoke strong criticism while at the same time they deserve a certain degree of approval. There is no straightforward way to state that one position or the other is unconditionally correct. Only by taking recourse to rather subjective and ideologically loaded concepts can this be achieved. This loses sight of the real dimension of the problems involved and results in an attempt to give general approval to a largely individual standpoint.

1 This contribution was mostly prepared during my stay as a Fernand Braudel Senior Fellow at the European University Institute in Florence.
There are several reasons why the Kadi case has all the ingredients to become a leading case in the EU judicial system without furnishing – in itself – definite hints for the solution of the underlying problems. This case concerns the interplay between UN law and EU law, a field widely unexplored as yet. As the UN is beginning to take notice of the individual not only as a bearer of human rights, but also as a subject to be held directly responsible for his acts, at least in specific areas such as counter-terrorism, the possibility of conflicts with EU law, for which the steadily growing empowerment of the individual is a main trait, is rising simultaneously.

This case puts to test the notion of supremacy, both of International law and of European Community law. The fact that Kadi has been hailed as a natural sequel to Van Gend en Loos is telling: the relationship between the international order and EU law is compared with that of EU law and the law of Member States and in both cases EU law should be supreme. But there is a difference: supremacy of EU law over the law of Member States is a constitutive element for its autonomy and effectiveness, at the same time leaving intact the integrity of the law of the Member States. Supremacy of EU law over International law is potentially disruptive for the latter order.

The next issue that arises regards the question whether it is possible at all to transpose the concept of supremacy, developed in a comparatively uniform if not monolithic system such as that of the EC to the global scene which is characterised by fragmentation, ideological dissent and cultural clashes. If this should happen at all, should it be in a balanced way (the approach taken by the CFI) or in a radical manner

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2 In the following the term “EU law” is used as an overarching concept comprising also EC law.