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Eckes, C.

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# Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?

*Christina Eckes\**

**Abstract:** *The number of international law obligations that have binding force on the Union and/or its Member States is sharply increasing. This paper argues that in this light the well-functioning of the European Union ultimately depends on the protection of the principle of supremacy from law originating outside of the EU legal order. The supremacy of EU law is essential to ensuring that Member States cannot use national rules to justify derogation from EU law.*

*As a matter of principle, international treaties concluded by the Member States rank at the level of ordinary national law within the European legal order and below all forms of European law (both primary and secondary). Article 351 TFEU exceptionally allows Member States to derogate from primary EU law in order to comply with obligations under anterior international agreements. It does not however allow a departure from the principle of supremacy that underlies the European legal order. In *Kadi I*, the Court of Justice of the European Union stated that Article 351 TFEU, while it permits derogation from primary law, may under no circumstances permit circumvention of the “very foundations” of the EU legal order. This introduces an additional condition that all acts within the sphere of EU law need to comply with a form of “super-supreme law”. It also strengthened the principle of supremacy and gave the Court of Justice the role of the guardian of the Union’s “foundations”. The Court of Justice acted on the necessity of defending the Union as a distinct legal order, retaining the autonomous interpretation of its own law, and ultimately ensuring that the Union can act as an independent actor on the international plane.*

## I Introduction

In fashion, purple is the new black; in European law, constitutional law is the new internal market. Indeed both in importance and in development, European constitutional law is today what the internal market was in the eighties and early nineties. As is well known, the establishment of the internal market depended not only on abolishing internal rules that create obstacles to interstate trade but also on establishing a

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\* Associate Professor, Amsterdam Centre for European Law and Governance (<http://jur.uva.nl/ace/g>), University of Amsterdam. I would like to thank Dennis van Berkel, Stephan Hollenberg, Joana Mendes, Jan Willem van Rossem and Jure Vidmar for their insightful comments on earlier drafts. Any remaining errors are of course my own.

common external tariff and a common commercial policy.<sup>1</sup> Goods cannot freely circulate without distortion of competition if the conditions for access to the European market differ between Member States. Similarly, the functioning of the European constitutional legal order depends on the protection of the principle of supremacy from law originating outside of the EU. The supremacy of EU law is crucial to ensuring that Member States cannot use national rules to justify derogation from EU law.<sup>2</sup> It applies to all types of national legal rules, be it ordinary laws or constitutional provisions,<sup>3</sup> in the event that they conflict with any instrument of European law, be it primary or secondary law.<sup>4</sup> Additionally, and this is the core argument of this paper, just as a common approach to international trade is necessary for the internal market, the well-functioning of European constitutional law based on the principle of supremacy requires a common approach towards international law obligations that claim binding force on the Union or the Member States, and primacy over European law.

The whole European construction depends on the willingness of the European institutions and national actors to give priority to the *effet utile* of European law when they take external actions. Despite the complexity of the Union's internal constitutional structure and the multitude of legal relations of the different actors with the outside, the Union and the Member States coordinate their external relations in practice well enough to ensure the functioning of the European legal order. On the international plane, the Member States and the EU, now with international legal personality in its own right,<sup>5</sup> struggle for external visibility. Within the European legal order, the institutions and the Member States try to defend and extend their powers. At the same time, all actors are obliged to act with loyalty towards each other and towards the European project. This is acknowledged in a number of Treaty provisions<sup>6</sup> and has repeatedly been confirmed by the European Court of Justice (Court of Justice).<sup>7</sup>

Strong pulling forces and great disagreement of how to reconcile these forces came to the surface in the recent discussion on the binding force and status of counter-terrorist sanctions against private individuals imposed by the United Nations (UN) Security Council. In the well-known case of *Kadi*,<sup>8</sup> the Court of First Instance could be said to have prioritised the effectiveness of international law above that of European law. It submitted the domestic measures giving effect to UN sanctions to a *jus cogens* review only, refusing to apply European law standards. The Court of Justice took in the appeal decision a diametrical opposed position. It protected the autonomy of the European legal order—arguably at the expense of the effectiveness of UN Charter

<sup>1</sup> Pieter Jan Kuijper calls the common commercial policy, 'The Flip Side of the Common Market, the Hard Core of the Community': P. J. Kuijper, 'Of "Mixity" and "Double-hatting"—EU External Relations Law Explained', Inaugural Lecture delivered at the University of Amsterdam on 23 May 2008, 10.

<sup>2</sup> Some make a distinction between supremacy (relating to the hierarchy of norms) and primacy (a conflict rule relating the application of norms), see D. Chalmers, C. Hadjiemmanuil, G. Monti and A. Tomkins, *European Union Law* (Cambridge University Press, 2006), at 196–201. This discussion however is not the focus of the present paper.

<sup>3</sup> Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125; C-106/77, *Simmenthal II* [1978] ECR 629.

<sup>4</sup> Case 6/64, *Costa v ENEL* [1964] ECR 585.

<sup>5</sup> Article 47 TFEU.

<sup>6</sup> See inter alia Article 351 TFEU, but also the general principle of loyal cooperation in Article 4(3) TEU.

<sup>7</sup> C-124/95, *Centro-Com* [1997] ECR I-81; C-459/03, *Commission v Ireland (Mox Plant)* [2006] ECR I-4635; C-308/06, *Intertanko* [2008] ECR I-4057; C-188/07, *Commune de Mesquer* [2008] ECR I-4501.

<sup>8</sup> C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-6351.

obligations.<sup>9</sup> In any event, individual sanctions are a somewhat extreme example of normative conflict, giving an indication of the possible consequences that the lack of a common approach to international law could produce in other areas.

This article aims to explore and explain to what extent the Court of Justice's choice to protect supremacy from obligations originating outside the EU ('external dimension of supremacy') is a necessary consequence of the Union's complex constitutional set-up. This applies not only to international law that binds the Union and forms part of the European legal order but also to international law that binds the Member States and affects the functioning of the European legal order. Furthermore, the article makes tentative suggestions on what could be the consequences of the Court of Justice's strong confirmation of the external dimension of supremacy.

The article is structured as follows. Section I sets the scene by introducing the complex and intricate (external) relations of political and judicial actors of the Union and its Member States. Section II explains why the constitutional dissonance caused by individual sanctions is on the one hand an exception but on the other hand a glimpse of the future. Section III looks into the consequences of the external dimension of supremacy. Section IV ponders different approaches to international obligations of the Member States within the European legal order. A conclusion rounds up the discussion.

## II Setting the Scene: Complicated Relationships

### A Political Actors Struggling for the Upper Hand

The complexity of the EU's internal constitutional structure and the involvement of so many different actors make it difficult to establish a common approach to obligations originating outside of this structure. At the same time, it is in particular the involvement of so many different actors and the complexity of the interaction that requires the Court of Justice to take a clear and unambiguous approach to the supremacy of EU law over external obligations.

While asserting the role of a *single* international actor, the Union remains internally and externally a complex and compound structure in which numerous actors participate and struggle for visibility. Power is shared between the European institutions and the Member States, who are sometimes subordinated to each other and sometimes act as equals but who ultimately have different, and to a certain extent independent, legal foundations and practical preferences. On the one hand, all Member States act jointly as the 'mothers of the European Treaties.' They determine and delimit the powers of the European institutions.<sup>10</sup> On the other hand, acts of the European institutions are, in practice, accepted to be supreme to national law—both under European<sup>11</sup> and under national law.<sup>12</sup> National legal orders are rooted in separate foundational norms

<sup>9</sup> G. de Búrca, 'The European Court of Justice and the International Legal Order after Kadi', Jean Monnet Working Paper No 01/09, 4, criticising the ECJ for expressing 'Important Parts of Its Reasoning in Chauvinist and Parochial Tones'; J. Klabbers, *Treaty Conflict and the European Union* (CUP Cambridge, 2009), 219, criticising the ECJ to act like an 'ostrich.'

<sup>10</sup> Art 48 TEU, both pre- and post-Lisbon.

<sup>11</sup> Declaration 17 concerning primacy, OJ 2008 C 115/344. The declaration itself but also the discussion surrounding Art I-XX of the Constitutional Treaty reflects both the controversy and the sensitivity/delicacy of the subject.

<sup>12</sup> Bundesverfassungsgericht (BVerfG): Lisbon decision, judgment of the Second Senate of 30 June 2009 (2 BvE 2/08; 2 BvE 5/08; 2 BvR 1010/08; 2 BvR 1022/08); 2 BvR 1259/08; 2 BvR 182/09; EAW decision, of

(constitutions) outside of and independent from the European Treaties, with an independent claim of legitimacy. Both the European institutions and the Member States have maintained their own foreign policy and their own relationships with other actors of international law. They both enter into obligations with third countries and international organisations that can potentially contradict European law.

With regard to foreign policy, the set-up and power division within the EU might even be more complicated than in other policy areas. Conducting foreign policy is—both within the EU and at the national level—first and foremost a task of the executive;<sup>13</sup> and the European executive is more fragmented than the average national executive. Indeed, it consists of ‘unseen and many layers.’<sup>14</sup> At the core, the Commission exercises tremendous political and administrative powers, both internally and externally—even if it could be argued that the latter are reduced in the post-Lisbon era.<sup>15</sup> At the same time, European foreign policy is dominated by the Council, consisting of representatives of the national executives but also acting as the main legislator within the European legal sphere. Below and besides these ‘core actors,’ numerous committees and other majoritarian or non-majoritarian actors exercise executive powers including in the area of foreign policy.<sup>16</sup>

At the time of writing, there is very little practice of conducting the EU’s foreign affairs under the Lisbon Treaty that only entered into force on 1 December 2009. Yet, the Treaty provisions alone give a good impression of the complexity of the Union’s top level actors’ tasks and interaction in conducting the Union’s foreign affairs.<sup>17</sup> To mention but the most important actors: the President of the European Council,<sup>18</sup> the High Representative of the Union for Foreign Affairs and Security Policy,<sup>19</sup> the rotating presidency troika of the Council, and the President of the Commission.<sup>20</sup> Finally, the creation of the High Representative’s European External Action Service (EEAS) will require delimitating the powers of national diplomatic

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18 July 2005 (2 BvR 2236/04); Maastricht decision, of 12 October 1993 (BVerfGE 89, 155). Italian Constitutional Court: *Costa v ENEL*, judgment of the Italian Constitutional Court No 14 of 7 Mar 1964; Frontini Case No 18 of 2 Dec 1973. UK House of Lords: *Factortame Ltd v Secretary of State for Transport* (No 2) [1991] 1 AC 603, in particular: 658 (per Lord Bridge); *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 WLR 409, in particular: 418–419 (per Lord Keith). Polish Constitutional Tribunal: Judgment of 11 May 2005, K 18/04, for an English summary, see [http://www.trybunal.gov.pl/eng/summaries/documents/K\\_18\\_04\\_GB.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf). Czech Constitutional Court: Judgment of the Czech Constitutional Court of 3 May 2006, PL US 66/04, par. 53, for a shortened English translation, see <http://www.concourt.cz/view/pl-66-04>.

<sup>13</sup> This is not to say that foreign policy should remain immune from judicial review: T. M. Franck, *Political Question/Judicial Answers* (Princeton University Press, 1992).

<sup>14</sup> D. Curtin, *Executive Power of the European Union: Law, Practice, and the Living Constitution* (Oxford University Press, 2009), Chapter One, Section 1.1.

<sup>15</sup> Predominantly through the introduction of the High Representative and the President of the European Council (see also below).

<sup>16</sup> Examples are European Defence Agency (EDA), European Union Institute for Security Studies (ISS), European Union Satellite Centre (EUSC), and European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX).

<sup>17</sup> See also C. Tomuschat, ‘Guest Editorial—Calling Europe by Phone’, (2010) 47 *Common Market Law Review* 3–7.

<sup>18</sup> Articles 16(6) and 15(6) TEU.

<sup>19</sup> See for the tasks of the High Representative: Articles 15(2) s.2, 18(2), and 18(3) TEU, Articles 221, 215, and 222(3) TFEU.

<sup>20</sup> The President of the Commission gives guidelines to all the commissioners, including those holding the portfolios with great external relevance, such as trade and development (Art. 17(6) TEU).

services and the EEAS.<sup>21</sup> This complex division of powers and practice of conducting foreign affairs creates great potential for ‘horizontal frictions’ between the many actors and intertwined internal structures that can but hamper the Union’s ambitious attempts to create one uniform international presence.<sup>22</sup>

Moreover, there are significant ‘vertical frictions’ between the European actors on the one hand and the Member States on the other. These frictions are best exemplified by the frequent conclusion of mixed agreements in situations where the Union has not fully replaced the Member States.<sup>23</sup> Another less well-discussed but not entirely unusual example for the vertical frictions created by the internal power divisions and the limited external presence of the Union is the situation where Member States (are authorised and/or required to) act on behalf of the Union on the international plane.<sup>24</sup> Furthermore and in a broader manner, frictions are apparent in the discussion on the status and value of international treaty obligations of the Member States within the European legal order.<sup>25</sup> International agreements concluded by the Member States take different force within the European legal order. The Union can, in exceptional circumstances where all Member States are bound under international law and where all powers necessary to give effect to the agreement are transferred to the Union,<sup>26</sup> functionally succeed its Member States;<sup>27</sup> or, if that is not the case, Member States can, under Article 351 TFEU, exceptionally derogate from European law.

By way of conclusion, the relationships between the multiple European actors and their external links are complicated and sometimes contradictory. However, overall, the European legal order, including its foreign relations, works reasonably well.

### B Judicial Actors: A Lot of Talk but No Hockey?

Not only are the political actors, many interacting with each other and all having their own agendas in mind, but also the national courts have long struggled to fully accept the Court of Justice’s vision of the European legal order. As is well-known national (constitutional) courts have not easily accepted the supremacy of European law within their national legal orders. In *Solange I*,<sup>28</sup> the *Bundesverfassungsgericht* (German Constitutional Court) essentially threatened to review cases concerning European law ‘so

<sup>21</sup> B. Crowe, ‘The European External Action Service: Roadmap for Success’, Chatham House Report, May 2008, available at <http://www.chathamhouse.org.uk/publications/papers/view/-/id/621/>.

<sup>22</sup> See on the Union’s international presence: M. Groenleer and L. van Schaik, ‘United We Stand? The European Union’s International Actorness in the Cases of the International Criminal Court and the Kyoto Protocol’, (2007) 45 *Journal of Common Market Studies* 969–998.

<sup>23</sup> C. Hillion, ‘Mixity and Coherence in Union External Relations: The Significance of the “Duty of Cooperation”’, CLEER Working Papers 2009/2.

<sup>24</sup> M. Cremona, Member States as Trustees of the Community Interest: Participating in International Agreements on Behalf of the European Community, EUI Working Papers, Law 2009/17.

<sup>25</sup> C-124/95, *Centro-Com* (n 7 above); C-459/03, *Mox Plant* (n 7 above); C-308/06, *Intertanko* (n 7 above); C-188/07, *Commune de Mesquer* (n 7 above); C-402/05 P and C-415/05 P, *Kadi* (n 8 above).

<sup>26</sup> C. Eckes, ‘Case C-188/07, *Commune de Mesquer v. Total France and Total International Ltd*, Judgment of the Court (Grand Chamber) of 24 June 2008 [2008] ECR I-4501; Case C-301/08, *Irène Bogiatzi v. Deutscher Luftpool, Société Luxair*, European Communities, Luxembourg, Foyer Assurances SA, Judgment of the Court (Fourth Chamber) of 22 October 2009’, (2010) 47 *Common Market Law Review* 899–915.

<sup>27</sup> See Joined Cases 21/72, 22/72, 23/72 and 24/72 *International Fruit Company* [1972] ECR 1219; more recently, C-301/08, *Irène Bogiatzi*, judgment of 22 October 2009; Case C-188/07, *Commune de Mesquer* (n 7 above); C-308/06, *Intertanko* (n 7 above).

<sup>28</sup> BVerfGE 37, 271, of 29 May 1974 (*Solange I*).

long as' the European judiciary did not provide a sufficient level of fundamental rights protection. In *Solange II*,<sup>29</sup> the *Bundesverfassungsgericht* established that 'so long as' the Court of Justice provided sufficient protection, it would leave the review of individual cases to the Court of Justice and maintain only a residual competence to ensure that the general standard of protection did not drop. The latter approach was confirmed in the *Bundesverfassungsgericht*'s decision on the Maastricht Treaty in which the Court strongly defended national sovereignty.<sup>30</sup> In practice, however, the *Bundesverfassungsgericht* has largely accepted the supremacy of European law.<sup>31</sup>

Last year, the *Bundesverfassungsgericht* ruled on the constitutionality of the domestic legal acts adopted to ensure the ratification of the Lisbon Treaty. Again, it seized the opportunity to address fundamental issues of the relationship between European and German law.<sup>32</sup> The theme of the *Lisbon* decision, even though it is phrased in a 'so long as' terminology,<sup>33</sup> would be better described as 'so far and no further.' The *Bundesverfassungsgericht* stated specifically that the Basic Law does not allow transfer of *Kompetenz-Kompetenz*<sup>34</sup> and extended its own last resort review to a threefold review of whether the European institutions act *ultra vires* breach the principle of subsidiarity (where they have competence) and respect the national identity (this is new and follows the Italian and French doctrine).<sup>35</sup> The *Bundesverfassungsgericht* further listed five particularly sensitive policy areas where European competence must be exceptionally well justified.<sup>36</sup> The list did not include foreign policy as such, but only the military monopoly. Yet a general reference to foreign policy as one of the particularly sensitive areas would have been difficult to reconcile with the finding that the extended institutional machinery under the Lisbon Treaty, including the new High Representative and the 'permanent' President, is compatible with the Basic Law.

On 19 January 2010, the Court of Justice responded to the *Bundesverfassungsgericht*. In the case of *Küçükdeveci*,<sup>37</sup> the Court confirmed its ruling in *Mangold*<sup>38</sup> and reiterated

<sup>29</sup> BVerfGE 73, 339, of Decision of 22 Oct 1986, 2 BvR 197/83 (*Solange II*).

<sup>30</sup> BVerfGE 89, 155, of 12 Oct 1993 (Maastricht decision); see also BVerfGE decision of 17 Feb 2000 (Alcan decision), EuZW 2000, 445 BVerfGE decision (Beschluss) of 7 Jun 2000 (Banana decision), EuZW 2000, 702 ff, 2 BvL 1/97, available at <http://www.bundesverfassungsgericht.de>.

<sup>31</sup> It has been argued that the *BVerfG* has not met the expectations raised by its more critical Maastricht decision in 1993: M. Herdegen, 'Maastricht and the German Constitutional Court', (1994) 31 *Common Market Law Review* 233; J. Kokkot, 'Report on Germany', in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds), *The European Court and National Courts—Doctrine and Jurisprudence* (Hart Publishing, 1998), at 77.

<sup>32</sup> BVerfG, *Lisbon* decision (n 12 above); see on this decision the 'Special Section: The Federal Constitutional Court's *Lisbon* Case', *German Law Journal* 10.8 (2009), 1201–1308.

<sup>33</sup> The *BVerfG* used the 'so long as' terminology citing its own Maastricht decision (para 262), but also to draw new lines to indicate to what level of integration 'democracy' in the Union has to reach a level analogous to a state (para 272), to what extent decision making through conventions is acceptable (para 308), at what point European citizenship could start to threaten 'the existence' of the German people (para 350).

<sup>34</sup> BVerfG 233.

<sup>35</sup> BVerfG 240.

<sup>36</sup> BVerfG, paras 248–260: (1) substantive and formal criminal law; (2) the disposition of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior; (3) the fundamental fiscal decisions on public revenue and public expenditure; (4) the shaping of circumstances of life in a social state; and (5) culture, for instance as regards family law, the school and education system and dealing with religious communities.

<sup>37</sup> C-555/07, *Küçükdeveci*, judgment of 19 January 2010.

<sup>38</sup> C-144/04, *Mangold* [2005] ECR I-9981. Before *Küçükdeveci* the ECJ itself had at several occasions avoided clarifying the relevance of *Mangold*: C-411/05, *Palacios de la Villa* [2007] ECR I-8531; Case

that individuals can rely in horizontal disputes on general principles of EU law— notwithstanding that these principles are usually far from ‘clear, precise and unconditional’,<sup>39</sup> and notwithstanding that the directive, in which the principle had found expression, did not have direct effect. The Court further required national courts to disapply national laws that they consider to be in conflict with European law<sup>40</sup> without imposing an obligation to make a preliminary reference, including where national courts are in fact prohibited under the national constitution to disapply national laws. This is the case in Germany where a law would first have to be declared unconstitutional by the *Bundesverfassungsgericht*.<sup>41</sup> The Court of Justice’s ruling is particularly interesting in the light of the recent case of *Commission v Spain* in which the Court of Justice has, for the first time, found that a national court had infringed Union law.<sup>42</sup> Moreover, the Court of Justice referred in *Küçükdeveci* to the binding force of the Charter of Fundamental Rights under the Lisbon Treaty even though the facts of the case took place before 1 December 2009.<sup>43</sup>

The *Bundesverfassungsgericht* will soon have the opportunity to express its views on the Court of Justice’s broad interpretation of the effect of general principles. Indeed, in the case of *Honeywell*, pending since 2006,<sup>44</sup> it can hardly avoid taking a stand on this issue.<sup>45</sup> Most recently and after *Küçükdeveci*, the *Bundesverfassungsgericht* has found the national law implementing the European Data Retention Directive<sup>46</sup> unconstitutional,<sup>47</sup> and more controversies are likely to come up in the area of data protection.<sup>48</sup> In its decision on the Data Retention Directive, the *Bundesverfassungsgericht* held that neither the lawfulness nor the supremacy of the directive itself was relevant<sup>49</sup> since it gave the national legislator a large margin of discretion and could have been

C-267/06, *Maruko* [2008] ECR. I-1757; Case C-427/06, *Bartsch* [2008] ECR I-7245. See also: A. Wiesbrock, ‘Case Note—Case C-555/07, *Küçükdeveci v. Swedex*, Judgment of the Court (Grand Chamber) of 19 January 2010’, *German Law Journal* 11.05 (2010), 539–550.

<sup>39</sup> See the conditions for direct effect at: P. Pescatore, ‘The Doctrine of “Direct Effect”: An Infant Disease of Community Law’, (1983) 8 *European Law Review* 155 *et seq.*

<sup>40</sup> C-555/07, *Küçükdeveci* (n 36 above), para 51, referring to *Mangold*, para 77; see even stronger para 54.

<sup>41</sup> See Art 100 GG on the constitutionality of ordinary laws.

<sup>42</sup> C-154/08, *Commission v Spain*, Judgment of 12 November 2009.

<sup>43</sup> C-555/07, *Küçükdeveci* (n 36 above), para 22.

<sup>44</sup> 2 BvR 2661/06 (pending constitutional complaint in the case of *Honeywell* against the decision of a Labour Law Court relying on *Mangold* (7 AZR 500/04)). See also L. Gerken, V. Rieble, G. H. Roth, T. Stein and R. Streinz, ‘“Mangold” als ausbrechender Rechtsakt’, (2009), available at <http://archiv.jura.uni-saarland.de/projekte/Bibliothek/text.php?id=530&show>.

<sup>45</sup> This is even more so because five eminent German Professors of law have made a strong argument that the *BVerfG* should find *Mangold ultra vires*: L. Gerken, V. Rieble, G. H. Roth, T. Stein and R. Streinz, ‘“Mangold” als ausbrechender Rechtsakt’, (2009), available at <http://archiv.jura.uni-saarland.de/projekte/Bibliothek/text.php?id=530&show>; but also: R. Herzog and L. Gerken, Comment: Stop the European Court of Justice, of 10.9.2008, available at <http://euobserver.com>; A German labour court explicitly pondered the question but did not find the ruling *ultra vires*: 7 AZR 500/04.

<sup>46</sup> Dir 2006/24/EC, O.J. 2006 L105/54.

<sup>47</sup> German Constitutional Court, Data Retention decision of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08; see also the ruling of the Romanian Constitutional Court, Decision No 1258 of 8 October 2009 (translation: <http://www.statewatch.org/news/2009/nov/romania-court-data-ret.pdf>; commentary: C. Murphy, ‘National Courts—Romanian Constitutional Court, Decision No 1258 of 8 October 2009’, *Common Market Law Review* 47: 933–941, 2010. See also two interim decisions on the Euro stability measures: 2 BvR 1099/10, decision of 9 June 2010; 2 BvR 987/10, decision of 7 May 2010.

<sup>48</sup> See for the battle over passenger name record scheme with the USA: <http://euobserver.com/9/30428/?rk=1>.

<sup>49</sup> German Constitutional Court, Data Retention decision (n 44 above), para 183.

implemented in accordance with the German constitution. Yet, it referred to the supremacy of the directive in extremely weak terms as ‘possible’ or ‘conceivable supremacy’<sup>50</sup> and found that a preliminary reference was not necessary.<sup>51</sup>

By way of conclusion, the Court of Justice is not developing its approach to supremacy in isolation. National constitutional courts, and in particular the *Bundesverfassungsgericht*, are an autonomous judicial force within the EU. It is fair to say that the dialogue between the Court of Justice and the *Bundesverfassungsgericht* has intensified and that both are taking stronger stands.<sup>52</sup> Certainly, not only governments but also national courts are a force that has to be reckoned with.

### III Constitutional Friction: A Rare Exceptions or the Future?

Frictions between the different European actors surface seldom with the same clarity as in cases concerning individual sanctions. Despite its openness towards international law as a matter of principle,<sup>53</sup> the EU has developed its own distinct legal order.<sup>54</sup> The Court of Justice treats EU law as autonomous both from rules of national and international law. This entails occasional normative conflicts between the different legal spheres. Individual sanctions combine two factors that have led to the outburst of usually well-contained normative friction.

First, the particular combination of international, European and national rules with overlapping personal, material, and territorial scope is unique. Individual sanctions are exceptional in that nearly identical rules that directly restrict the rights of specific individuals are adopted at all three levels. For a considerable period of time, the EU has been the most prominent example of an international organisation exercising state-like functions both in relation to its citizens. The Union has been adopting measures that directly affect fundamental rights of individuals. More recently now, the Union has also started to participate in international relations almost on a par with states. This development has its roots in the international presence of the Community within certain limited contexts, such as the World Trade Organization.<sup>55</sup> International law, by contrast, has changed more recently in that it increasingly conditions the lives of individuals<sup>56</sup> and affects the functioning and operation of domestic legal orders. The origins of this development lie way back (eg the laws on piracy).<sup>57</sup> Already in 1965, William Coplin identified the changing relation of the individual to the international

<sup>50</sup> German Constitutional Court, Data Retention decision (n 44 above), para 183: ‘Eine Vorlage an den Europäischen Gerichtshof kommt nicht in Betracht, da es auf einen *möglichen Vorrang* des Gemeinschaftsrechts nicht ankommt.’ Para 187: ‘Datenspeicherung kann auch ‘... *unabhängig von einem etwaigen Vorrang* des Gemeinschaftsrechts nach den Maßgaben der Grundrechte des Grundgesetzes zulässig angeordnet werden . . .’

<sup>51</sup> The *BVerfG* has never asked the ECJ for a preliminary ruling.

<sup>52</sup> See below in Section IV the subsection: ‘Heating up?’.

<sup>53</sup> See Art 216(2) TFEU; Art 352(1) TFEU. See also the concept of functional succession in Joined Cases 21–24/72, *International Fruit Company* (n 27 above) and consistent interpretation, eg in Case C-308/06, *Intertanko* (n 7 above).

<sup>54</sup> Most famously, Case 26/62, *van Gend* [1963] ECR 1; Case 6/64, *Costa* (n 4 above).

<sup>55</sup> Joined Cases 21/72, 22/72, 23/72 and 24/72 *International Fruit Company* (n 27 above).

<sup>56</sup> Focusing on the participation of the individual in the international legal order: R. McCorquodale, ‘The Individual in the International Legal System’, in M. Evans (ed), *International Law* (Oxford University Press, 2003), 299–325.

<sup>57</sup> A. Cassese, *International Law* (OUP, 2004), Chapter 12, page 217.

legal order as one of the ‘challenges of the state system.’<sup>58</sup> However, international sanctions against terrorist suspects remain the most prominent current example where individuals are directly made object of international law. These sanctions are adopted by a UN committee, given effect by the Union<sup>59</sup> and additionally implemented by the Member States.<sup>60</sup> This creates a situation where the individual is affected by international, European and national legal instruments, containing identical lists of persons.

Second, the Court of Justice attempted in *Kadi* to treat the UN Charter the same way as any other international treaty.<sup>61</sup> It considered that obligations under Chapter VII of the UN Charter (if they were binding on the Union) ‘would occupy’<sup>62</sup> a rank between primary and secondary European law—just as any other international agreement.<sup>63</sup> In the light of the Court of Justice’s earlier case-law, this is not all that surprising.<sup>64</sup> However, some, as they say, are more equal than others.<sup>65</sup> The UN Charter is the *primus inter pares* of international treaties. It aims to make the very existence of an international community possible by protecting international peace and security,<sup>66</sup> which could be considered the very basic condition for all other international organisations (including the Union) to exist and for all other international treaties to be executed. The UN Charter’s special nature is confirmed by its claim of primacy over all other international treaties (Article 103 UN Charter). Its special status creates particular difficulties for the European legal order where Member States or European institutions give effect to Chapter VII obligations. This has become apparent not only in the European courts in Luxemburg, but equally in Strasbourg<sup>67</sup> and in several national (supreme) courts.<sup>68</sup> The special status of Chapter VII obligations makes it possible to argue that the domestic implementing acts benefit from a particular force. The Court of First Instance took this position in *Kadi*.<sup>69</sup> First, the Court found the Community

<sup>58</sup> W. D. Coplin, ‘International Law and Assumptions about the State System’, *World Politics* 17(4), 615–634, at 628 *et seq.*

<sup>59</sup> C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights—The Case of Individual Sanctions* (Oxford: Oxford University Press, 2010).

<sup>60</sup> UK Supreme Court, *Her Majesty’s Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants); Her Majesty’s Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant); R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v Her Majesty’s Treasury (Appellant)*, judgment of 27 January 2010 [2010] UKSC 2, para 22.

<sup>61</sup> See also on this point C. Eckes, ‘International Sanctions against Individuals: A test Case for the Resilience of the European Union’s Constitutional Foundations’, *European Public Law* (2009), 351–78, 366–7.

<sup>62</sup> *ibid.*, para 305.

<sup>63</sup> The Court herewith took an approach similarly defensive of domestic constitutionalism as the German Constitutional Court; see, for instance, the ruling on the status of the ECHR.

<sup>64</sup> Case C-124/95, *Centro-Com* (n 7 above).

<sup>65</sup> J. Klabbers, *Treaty Conflict and the European Union* (CUP, 2009), Chapter 7, 150. More generally on the importance of the UN Charter, B. Fassbender, ‘The United Nations Charter as Constitution of the International Community’, (1998) 36 *Columbia Journal of Transnational Law* 531–619; R. McCorquodale, ‘An Inclusive International Legal System’, (2004) 17 *Leiden Journal of International Law* 477, at 478.

<sup>66</sup> Art 39 UN Charter.

<sup>67</sup> ECtHR, *Behrami and Saramati* (2007) 45 EHRR 10, and potentially in ECtHR, *Al-Jedda v UK*, Application No 27021/08, pending (hearing on 9 June 2010).

<sup>68</sup> UK Supreme Court, *Ahmed* (n 62 above); on appeal from [2008] EWCA Civ; *R. (Al-Jedda) v Secretary of State for Defence* (Justice and another intervening), [2007] UKHL 58; [2008] 1 A.C. 332; *Swiss Supreme Court, Youssef Mustapha Nada v Staatssekretariat für Wirtschaft* [2007] 1A.45/2007. For an example of a lower court, see also the Canadian Federal Court in *Abousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada* [2009] FC 580.

<sup>69</sup> T-315/01, *Kadi* [2005] ECR II-3649; see also T-306/01, *Yusuf* [2005] ECR II-3533; T-253/02, *Ayadi* [2006] ECR II-2139; appealed: C-403/06 P, *Ayadi*, OJ 2006 C 294/32; T-49/04, *Hassan* [2006] ECR II-52;

bound by UN law obligations, albeit 'by virtue of European law.'<sup>70</sup> Second, it argued that the hierarchical status of UN law exclude review of the domestic measures within the light of primary European law and general principles of European law. In the appeal, the Court of Justice openly discarded the Court of First Instance's interpretation.

While the Court of Justice has been willing to draw inspiration from the constitutional traditions common to the Member States on its own terms,<sup>71</sup> it applies an absolute concept of supremacy,<sup>72</sup> and accepts derogation from European law only under very strict conditions, including for national 'law derived from international agreements.'<sup>73</sup> As a matter of principle, international treaties concluded by the Member States rank at the level of ordinary national law within the European legal order and below all forms of European law (both primary and secondary). Article 351 TFEU (ex-Article 307 TEC) exceptionally allows Member States to derogate from primary European law to comply with obligations under anterior international treaties<sup>74</sup> but it does not implicate a change of the hierarchical understanding that underlies the European legal order and that ensures its functioning.

The Court of Justice found UN Charter obligations only binding on the Member States (not the Union). This raises the question of whether the overwhelming importance of these obligations could nonetheless justify treating them different from other international law. Does the special force and nature of Chapter VII obligations justify departing from the rule that European law is supreme to international law obligations of the Member States? Chapter VII resolutions aim to maintain the very condition for the existence of the current state-based power divisions in international relations whose breakdown would constitute an immediate threat to the life (and well-being) of innumerable people. Short of universally binding force, could this justify at least an obligation of the EU not to prevent Member States from giving effect to Chapter VII resolutions? What must Member States do when faced with irreconcilable obligations under international and European law?

Cases concerning individual sanctions raise fundamental questions that will become more important in the years to come. International legal instruments that claim near absolute primacy are an exception. Yet, Chapter VII resolutions are adopted much more often since the work of the Security Council has picked up momentum after the cold war. International legal instruments that directly alter the legal position of individuals are also still an exception but the role of the individual under international law is changing. The direct impact of international law on the rights of individuals is increasing. In the European legal order's day-to-day life, dissonant sounds remain seldom and more muffled, but they might become more pronounced in the future.

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appealed: C-399/06 P, *Hassan*, OJ 2006 C 294/30; see, however, now, after the ECJ's ruling in the *Kadi* appeal, T-318/01, *Othman*, judgment of 11 June 2009, not yet reported.

<sup>70</sup> T-315/01, *Kadi*, *ibid.*

<sup>71</sup> See also codification in Art 6 TEU.

<sup>72</sup> Case 6/64, *Costa* (n 4 above); Case 11/70, *Internationale Handelsgesellschaft* (n 3 above); Case 11/70 *Simmmenthal II* (n 3 above); J. Weiler, 'Federalism without Constitutionalism: Europe's Sonderweg', in K. Nicolaidis and R. Howse (eds), *The Federal Vision: Legitimacy Levels of Governance in the United States and the European Union* (Oxford University Press, 2000), at 57.

<sup>73</sup> C-188/07, *Commune de Mesquer* (n 7 above), para 82, concerning the application and interpretation of a European directive.

<sup>74</sup> For all Member States but Germany the UN Charter is an anterior international treaty, see the discussion at T-315/01, *Kadi* (n 69 above).

#### IV Dissonant Sounds: Supreme International Law Resonating within the European Legal Order

##### A The European Courts

As is well known, the two European Courts made very different attempts to resolve the conflict in *Kadi*.<sup>75</sup> The Court of First Instance chose to confer primacy to Chapter VII obligations including within the European legal order. It left the sanctions in place and the applicants without effective protection. It agreed only to review the European implementation measures on the basis of *jus cogens*.<sup>76</sup> In fact, it approved the transfer of the authority to determine the applicable level of fundamental rights protection to the UN level.

None of the highest courts of the EU Member States ruled on the legality of national sanctioning measures against terrorist suspects in the period between the ruling of the Court of First Instance and the Court of Justice in *Kadi*. Hence, none of the highest courts of the EU Member States followed the Court of First Instance's approach. However, the Court of First Instance's ruling was used as a legal source in non-EU courts. The Swiss Supreme Court rejected on 14 November 2007 a request for deletion from the Swiss list implementing the lists of the 1267 Sanctions Committee.<sup>77</sup> The Swiss Supreme Court followed the Court of First Instance's line that Security Council resolutions take precedence over domestic law.<sup>78</sup> After concluding that the UN sanctions regime does not leave any margin of discretion to the Member States, the Court concluded Switzerland would breach its obligations under the UN Charter if it deleted the applicant's name from the list, and that it cannot therefore take the unilateral decision to do so.<sup>79</sup> Yet, the Court stated explicitly that the Member States are obliged by the European Convention on Human Rights (ECHR) to ensure that the UN sanctioning practice is in conformity with the Convention and that they can be held responsible under the Convention for failing to do so.<sup>80</sup>

The worst-case scenario from a fundamental rights perspective would have been if the highest national courts of the Member States had followed the Court of First Instance and taken the same position as the Swiss Supreme Court. The worst-case scenario from an institutional European law perspective would have been if national supreme courts had challenged the supremacy of European law in order to ensure an acceptable fundamental rights protection in their own legal order. Neither of the two happened.

<sup>75</sup> See on the Court of First Instance's ruling, C. Eckes, 'Judicial Review of European Anti-terrorism Measures—The Yusuf and Kadi Judgments of the Court of First Instance', (2008) 14 *European Law Journal* 74–92; on the ECJ's ruling, Eckes, 'A Test Case for the Resilience of the European Union's Constitutional Foundations' (n 61 above).

<sup>76</sup> See for a harsh critique of UN sanctions against individuals, D. Marty, Report of the Committee on Legal Affairs and Human Rights to the Council of Europe, Document 11454, of 16 Nov 2007, which was endorsed by the parliamentary assembly on 23 Jan 2008 in Recommendation 1824 (2008) and Resolution 1597 (2008).

<sup>77</sup> Schweizer Bundesgericht, *Nada*, judgment of 14 November 2007, 1A.45/2007/daa. See further on this case, Eckes, *Counter-Terrorist Policies* (n 59 above), Chapter 5.

<sup>78</sup> Schweizer Bundesgericht, *Nada*, *ibid*, at 5.1 and 5.2.

<sup>79</sup> *ibid*, at 8.1 and 8.3.

<sup>80</sup> *ibid*, at 5.5.

On appeal, the Court of Justice chose to prioritise the Union's autonomy, both at the institutional and at the substantive level. The Court made clear that obligations under international agreements can neither 'affect the allocation of powers fixed by the Treaties'<sup>81</sup> nor can they 'have the effect of prejudicing the constitutional principles of the EC Treaty.'<sup>82</sup> The Court of Justice considered the 'governing principles' for the review of European measures implementing UN Security Council resolutions to be exclusively principles of *European law*. Furthermore, the Court of Justice introduced the 'foundations of the Community legal order' expressed in Article 6(1) Union as a new layer of law that is hierarchically superior to the rules expressed in the Treaties.<sup>83</sup> These 'foundations' appear to be the core of the long-established general principles of European law, now vested with a new elevated status. In fact, since *Kadi* concerned the validity of European law (a Commission decision to list the applicant and the regulation that it was based on), Article 351 TFEU (ex-Article 307 TEC) was not directly applicable. However, the Court of Justice, as well as the Court of First Instance, considered Article 351 TFEU in their rulings. The Court of Justice stated that Article 351 TFEU,<sup>84</sup> while it allows for derogation from *primary law*,<sup>85</sup> 'may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order.'<sup>86</sup> This introduces the additional condition that any derogation under Article 351 TFEU has to comply with the 'foundations of the Community legal order'<sup>87</sup> and creates a form of 'super-supreme law.'

*Prima facie*, the Court of Justice's ruling sets the clocks back to normal after the Court of First Instance's disconcerting ruling. The Union remains an autonomous legal order producing supreme or even super-supreme law. The seeming contradiction of demanding national courts in its settled case-law to accept the supremacy of European law while refusing to defer to 'supreme' obligations under the UN Charter<sup>88</sup> gives national courts a(n additional) reason to reject the unconditional supremacy of European law. The *Bundesverfassungsgericht* used the Court of Justice's *Kadi* ruling this way in its *Lisbon* decision. The German Court argued that the Court of Justice took a view 'similar' to its own by placing 'the assertion of its own identity as the legal community above the commitment that is otherwise respected.'<sup>89</sup> The UK Supreme Court simply, by contrast, disregarded European law in the case of *Ahmed*.<sup>90</sup>

After all, by not finding the Union bound by the UN Charter, the Court of Justice created at the EU level a legal sphere that is free of UN obligations and that stretches across the territory of twenty-seven EU and UN Member States, including two permanent members of the Security Council. The Court of Justice's rulings on individual sanctions are a strong statement. They can be read as undermining the work of the Security Council, but also on a more favourable reading, seen as demanding reform of the particular procedures used to sanction individuals, including not only the specific

<sup>81</sup> C-402/05 P and C-415/05 P, *Kadi* (n 8 above), para 282.

<sup>82</sup> *ibid*, para 285.

<sup>83</sup> *ibid*, para 304.

<sup>84</sup> At the time Art 307 EC.

<sup>85</sup> C-402/05 P and C-415/05 P, *Kadi* (n 8 above), para 301.

<sup>86</sup> *ibid*, para 304.

<sup>87</sup> This has been long established for derogations from the provisions on free movement: see C-260/89, *ERT* [1991] ECR I-2925.

<sup>88</sup> See Art 103 UN Charter.

<sup>89</sup> BVerfG, *Lisbon* decision (n 12 above), para 340.

<sup>90</sup> UK Supreme Court, *Ahmed* (n 62 above). This is further explored in the following section.

procedures to sanction Al Qaida and Taliban supporters but also other sanctioning mechanisms.<sup>91</sup>

### B UK Supreme Court on Sanctions

Not accepting that the Union is bound by the UN Charter made the situation at the same time easier and more complicated. It was not only easier for the Court of Justice to avoid addressing the status of Chapter VII obligations within the European legal order but it also left this complex question for later and to some extent for others (national constitutional courts) to resolve. National courts cannot do what the Court of Justice did. They cannot as easily cut the link with the UN Charter and turn to a reasoning based on domestic law only. This being said, a strictly dualistic approach allows also states to some extent to avoid conflicts of norms by removing domestic norms from any potential hierarchy of international law.

On 27 January 2010, the newly created UK Supreme Court<sup>92</sup> was the first supreme court of one of the Member States to rule on counter-terrorist sanctions against private individuals.<sup>93</sup> The case of *Ahmed* concerned, *inter alia*, sanctions based on UN lists of terrorist suspects.<sup>94</sup> While the lower UK courts had held that a merits-based review of the listings was possible,<sup>95</sup> the Supreme Court held that there was no effective judicial remedy, either at the time of designation or at the time of the proceedings.<sup>96</sup> This might recall the Court of Justice's conclusion that 'the rights of the defence . . . were patently not respected,'<sup>97</sup> and it could 'do no other than find that it is not able to undertake the review of the lawfulness of the contested regulation.'<sup>98</sup> However, even though the two courts drew similar conclusions about the infringement of the right to a fair trial,<sup>99</sup> the underlying messages of the two judgments are very different.

<sup>91</sup> UN Security Council Sanctions Committees have been established pursuant to Resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea; Resolution 1132 (1997) concerning Sierra Leone; Resolution 1267 (1999) concerning Al Qaida and the Taliban; Resolution 1518 (2003)—successor body to the Resolution 661 Committee concerning Iraq and Kuwait; Resolution 1521 (2003) concerning Liberia; Resolution 1533 (2004) concerning The Democratic Republic of the Congo; Resolution 1572 (2004) concerning Côte d'Ivoire; Resolution 1591 (2005) concerning The Sudan; Resolution 1636 (2005)—body listing those suspected of involvement in the 14 February 2005 terrorist bombing in Beirut, Lebanon that killed former Lebanese Prime Minister Rafiq Hariri and 22 others; Resolution 1718 (2006)—body overseeing measures relating to the Democratic People's Republic of Korea (DPRK); Resolution 1737 (2006)—body overseeing measures relating to the Islamic Republic of Iran; see, for the most up-to-date list, <http://www.un.org/sc/committees/>.

<sup>92</sup> The UK Supreme Court was established by Part 3 of the Constitutional Reform Act 2005. It started its work on 1 October 2009.

<sup>93</sup> UK Supreme Court, *Ahmed* (n 62 above).

<sup>94</sup> Apart from sanctions based on UN lists the case concerned sanctions adopted autonomously by the UN Member States and by the EU, see comprehensively from a European law perspective: Eckes, *Counter-Terrorist Policies* (n 59 above); the most well-known example of autonomous sanctions in the European Courts: T-284/08, *People's Mojahedin Organisation of Iran v Council (OMPI III)*, judgment of 4 December 2008, not yet reported; T-256/07, *People's Mojahedin Organisation of Iran v Council (OMPI II)*, judgment of 23 October 2008, not yet reported; appeal pending: C-576/08 P, *People's Mojahedin Organisation of Iran*; T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council and UK (OMPI I)* [2006] ECR II-4665.

<sup>95</sup> Court of Appeal, *A, K, M, Q, G v HM Treasury* [2008] EWCA Civ 1187.

<sup>96</sup> UK Supreme Court, *Ahmed* (n 62 above), para 78, per Lord Hope.

<sup>97</sup> C-402/05 P and C-415/05 P, *Kadi* (n 8 above), para 334.

<sup>98</sup> *ibid.*, para 351.

<sup>99</sup> See also Lord Brown at UK Supreme Court, *Ahmed* (n 62 above), para 203.

The UK Supreme Court's main concern was the separation of powers.<sup>100</sup> Lord Hope, giving the leading judgment, used strong words condemning this practice: 'Conferring an unlimited discretion on the executive as to how those resolutions, which it has a hand in making, are to be implemented seems to me wholly unacceptable. It conflicts with the basic rules that lie at the heart of our democracy.'<sup>101</sup> The Court of Justice, by contrast, had focused on the relationship between the UN Charter and the European legal order, as well as procedural rights of those sanctioned. For the Court of Justice, the question had not been *which internal constitutional actor* could restrict fundamental rights to the extent required by the Security Council resolution, but *whether* (only because Security Council resolutions require this) rights could be reduced to that extent *at all*. The latter question was indeed answered differently by the two courts. While the Court of Justice ruled that individual sanctions could not be adopted in the present form because that would violate the foundations of European law, the UK Supreme Court came to the conclusion that if the legislator expressly allowed the executive to reduce fundamental rights, as it is required by the UN sanctions regimes, this would be constitutional within the UK. Following the *Simms* principle,<sup>102</sup> the Supreme Court made a strong statement that the supreme will of the UK Parliament must be fully respected. Indeed, the UK Parliament has now adopted temporary legislation allowing for the adoption of individual sanctions.<sup>103</sup>

The UK Supreme Court did not at all discuss the binding force of directly applicable European regulations<sup>104</sup> implementing the exact same terrorist lists not only into European law but also into the national legal order. It simply stated that many Member States (16 of the 27) have adopted their own legislative measures that run in parallel with the relevant European measures.<sup>105</sup> This is significant because, under European law, Member States are not allowed to adopt additional implementing legislation where this is not required by the regulation.<sup>106</sup> Unintended changes risk jeopardising the effectiveness and uniform application of European law. Moreover, and this is what appears to have happened in *Ahmed*, national legislation implementing directly applicable regulations allows national courts to disregard the applicable European law instrument in their considerations. At the same time, the Court of Justice's annulment of the sanctions adopted against the applicants (in last consequence questioning the legality of the entire European sanctions regime) could be seen to prove right the High Court's speculations that the UK implemented the Security Council resolutions (despite the existence of

<sup>100</sup> The orders were made in Council based on the UN Act 1946 (UK Supreme Court, *Ahmed* (n 62 above), para 4).

<sup>101</sup> *ibid*, para 45 per Lord Hope.

<sup>102</sup> The *Simms* principle states that 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.' See UK Supreme Court, *Ahmed* (n 62 above), para 111, *per* Lord Phillips; 193 *per* Lord Brown; and 240 *per* Lord Mance.

<sup>103</sup> Terrorist Asset-Freezing (Temporary Provisions) Act 2010, available at [http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga\\_20100002\\_en.pdf](http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100002_en.pdf).

<sup>104</sup> Art 288 TFEU.

<sup>105</sup> UK Supreme Court, *Ahmed* (n 62 above), para 22; See also the reference in para 4 to C-117/06, *Möllandorf and Möllandorf-Niehuus* [2007] ECR I-8361 (preliminary reference of the House of Lords to the ECJ on the interpretation of EC Regulation 881/2002 to which the Al-Qa'ida and Taliban (United Nations Measures) Order 2002 (SI 2002/111) gave effect).

<sup>106</sup> Case 39/72, *Commission v Italy* [1973] ECR 101; Case 50/76 *Amsterdam Bulb BV* [1977] ECR-137.

directly applicable European implementing measures) because it ‘may be that the UK government decided, from an abundance of caution, that it should . . . ensure their [measures implementing UN Security Council resolutions] validity and enforceability, lest any challenge to the validity of the regulation should succeed in whole or in part.’<sup>107</sup> It is true that, in last instance, Member States would have to take international responsibility for failure to give effect to UN Security Council resolutions. This might also have been one of the reasons for the UK Supreme Court’s choice to mention the Court of Justice’s ruling in *Kadi*,<sup>108</sup> but reject its relevance, predominantly on the grounds that the Court of Justice had found the Union<sup>109</sup> not to be bound by the UN Charter, which freed it from the ties of Article 103 UN Charter.<sup>110</sup>

Any considerations of whether, in the absence of national implementation measures, the UK would have accepted that *European* law restricts fundamental rights to the extent required by UN sanctions are speculative. The House of Lords (now Supreme Court) accepted the supremacy of European law based on the will of the UK Parliament expressed in the European Community Act 1972. Hence, acceptance of restrictions under European law appears to depend on whether the UK Parliament has authorised the European legislator to adopt the measures in question. Certainly, the UK Parliament of 1972 could not foresee that the EU would ever adopt (quasi-)criminal measures in order to give effect to UN obligations.

By way of conclusion, the UK Supreme Court did not follow the Court of Justice’s (or the Court of First Instance’s) line. It certainly did not hide behind Union law. Even though the facts were strikingly similar, there are many fundamental legal differences between the two judgments. First, the Court of Justice did not find the UN obligations under the UN Charter binding on the Union, while the UK is undoubtedly under an obligation to give effect to the Chapter VII decisions of the UN Security Council. Second, the way human rights are protected in the UK is different from the way human rights are protected within the European legal order. While the EU relies on internal standards (foundations of European law), in the UK, fundamental rights are protected to the extent that is required by the ECHR,<sup>111</sup> which is an international treaty that could fall under the conflict rule in Article 103 UN Charter. In any event and irrespective of these differences, the UK Supreme Court’s ruling contains a message on the (lack of) importance of European law and the Court of Justice’s position for the implementation of Chapter VII resolutions in the UK.

### C Heating Up?

The Court of Justice’s strong stands on the autonomy and supremacy of European law increase the frictions between the Court of Justice and the highest national courts. The

<sup>107</sup> High Court, *M, A, MM v HM Treasury* [2006] EWHC 2328 (Admin), para 41.

<sup>108</sup> UK Supreme Court, *Ahmed* (n 62 above), paras 67 *et seq.*

<sup>109</sup> At the time of the judgment, this was still the European Community.

<sup>110</sup> See UK Supreme Court, *Ahmed* (n 62 above), para 71 (per Lord Hope), para 104 (per Lord Philips), and para 203 (per Lord Brown).

<sup>111</sup> *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, paras 33–34: The UK Human Rights Act 1998 (HRA) was intended to ‘bring rights home’ by providing ‘a remedial structure in domestic law for the rights guaranteed by the Convention.’ This led the House of Lords to conclude that the territorial scope of the HRA was ‘intended to be coextensive with the territorial scope of the obligations of the UK and the rights of victims under the Convention.’ See also Art 21(1) HRA defining the European Convention ‘as it has effect for the time being in relation to the United Kingdom.’

external dimension of supremacy is, in this complex story, only one episode. In recent years, the Court of Justice has continued to develop and strongly defended unconditional supremacy of EU law. In *Kadi*, it introduced the ‘foundations of European law’ as super-supreme layer of law. In *Mangold*, it vested general principles expressed in the specific form of secondary legislation with direct horizontal effect. In *Küçükdeveci*, the Court developed an obligation of national courts to disregard the constitutional boundaries of their competences where this is necessary to render EU law effective. It also appeared to apply the Charter of Fundamental Rights retroactively. In the extreme, the Court of Justice could, in the future, combine these rulings, read the Charter as an expression of the foundations of EU law, exclude any derogation, and declare it to be retroactively applicable and supreme to primary European law. Additionally, the Court could require national courts to give effect to the Charter irrespective of the limits of their competences under national constitutional law. This would effectively render the opt-outs of the Czech Republic,<sup>112</sup> Poland and the UK from the Charter irrelevant.<sup>113</sup> Further, since the entering into force of the Lisbon Treaty, the Court of Justice might move more into the direction of a true constitutional court.<sup>114</sup> It is likely that the Court will more frequently be called to protect individuals from the European institutions or national measures implementing European law. This is due to the extension of its jurisdiction over matters of police and judicial cooperation (former third pillar), and over individual sanctions (275 TFEU). Both are areas where individuals will need to defend their rights against European law rather than using the latter as a shield against national law. This will make the Court of Justice’s interpretation of the Charter even more relevant and contribute to heating up the discussion.

The development of the external dimension of supremacy is in line with the Court of Justice’s previous restrictive interpretation of Article 351 TFEU, preventing Member States from relying on anterior treaty obligations as a justification to derogate from European law.<sup>115</sup> Yet, it excludes more clearly than previously that Member States can use the UN as a forum to circumvent EU law. In *Kadi*, the Court of Justice gave a ruling on Community law, but (at the latest) since the entering into force of the Lisbon Treaty, the same applies to EU law. This includes pre-Lisbon instruments such as guidelines, common positions, joint actions and common strategies (ex-Article 12 TEU) as well as post-Lisbon decisions and guidelines within the meaning of Article 25 TEU (Common Foreign and Security Policy).

The *Solange* rulings of the *Bundesverfassungsgericht*, as well as the *Maastricht* decision were warning shots. Yet, while they had an impact on the development of fundamental rights protection within the European legal order,<sup>116</sup> they did not change the reception of European law within Germany as a matter of principle. The Lisbon decision, by contrast, had immediate practical consequences. It increased the power of

<sup>112</sup> See the Presidency Conclusions of 29/30 October 2009, 15265/1/09 Rev 1, Section I.2 Institutional Issues.

<sup>113</sup> Protocol 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

<sup>114</sup> A. Hinarejos, *Judicial Control in the European Union* (OUP, 2009), Chapter 1.

<sup>115</sup> Eckes, ‘Commune de Mesquer’ (n 26 above).

<sup>116</sup> See Chalmers, Hadjiemmanuil, Monti, and Tomkins, *European Union Law* (n 2 above), 234 *et seq.*, also referring to support of the *BVerfG*’s position by the Italian Constitutional Court.

parliament over the executive<sup>117</sup> and opened the door to new arguments that European law goes beyond the limits set by the German Constitution.<sup>118</sup>

## V Different Approaches

*Prima facie*, the Court of Justice's ruling could be criticised for applying double standards, requiring Member States to respect the supremacy of European law while denying the primacy of Chapter VII resolutions. However, the question should also be what perceivable alternatives the Court of Justice had. It appears equally unlikely that national courts would accept that the 'check point' on the bridge between European law and international law is abolished (as suggested by the Court of First Instance). If there was no mechanism (except for review on the basis of *jus cogens*) to review European law giving effect to UN Charter obligations, national courts, by accepting the supremacy of European law, would surrender fundamental rights protection to the UN.

Even though international sanctions against private individuals are an exception, they demonstrate a very real problem. The increasing role of the individual within the international legal order might make this problem come up in other contexts. Ultimately, the Union institutions (including the Court of Justice) and the Member States have to develop a mutually acceptable approach to deal with their obligations under international law. In the light of the complexity of the European legal order and the delicate balance of powers on which it is based, this seems to require squaring the circle.

### A Due Account to International Sensitivities

The requirement of taking 'due account' of international law in general and Security Council resolutions in particular is reoccurring in the Court of Justice's case-law.<sup>119</sup> In essence, the Court of Justice limits Security Council resolutions this way to an instrument from which the Court will draw inspiration for the interpretation of European law. No more and no less. It excludes any binding force of Security Council resolutions within the European legal order but gives them interpretative value. The latter shows a willingness to integrate at least the underlying principles and guidelines of Security Council resolutions into the European legal order.

The Court of Justice has taken this path in the past. Most prominently, it incorporated the constitutional traditions of the Member States and the ECHR<sup>120</sup> by declaring

<sup>117</sup> Compare the *Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union* as amended on 17 November 2005 with the version amended on 22 September 2009. First applied in the landmark vote on Iceland EU membership, at <http://euobserver.com/15/29913>; see also the discussion on whether the Government breached the new law by not involving the Bundestag sufficiently in the decision on the Greek loan, <http://www.das-parlament.de/2010/20/Titelseite/>.

<sup>118</sup> See eg 2 BvR 2253/06, constitutional complaint, declared inadmissible on 27.1.2010; 2 BvR 2136/09 constitutional complaint, not accepted for decision on 22.09.2009; 2 BvR 471/09 constitutional complaint, not accepted for decision on 13.08.2009.

<sup>119</sup> C-402/05 P and C-415/05 P, *Kadi* (n 8 above), para 296–297, with reference to C-117/06, *Möllandorf and Möllandorf-Niehuus* (n 109 above), para 54; C-84/95, *Bosphorus Airways* [1996] ECR I-3953, para 14; see also Opinion of AG Kokott in C-188/07, *Commune de Mesquer* (n 7 above), paras 103 and Opinion of AG Kokott in C-308/06, *Intertanko* (n 7 above), para 78. AG Kokott argued that the duty of loyalty requires to interpret European law as far as possible in a way that conflicts with the Member States' international law obligations can be avoided.

<sup>120</sup> Now codified in Art 6(3) TEU.

them to be general principles of European law. This incorporation of national constitutional traditions could be considered a necessary trade off for the acceptance of supremacy. Perhaps a similar trade off is required for Member States to fully accept the Union's role in giving effect to UN Charter obligations and to refrain from adopting parallel implementing legislation that threatens to distort the uniformity of European law. However, while the 'due account' approach appeared a sensible option with regard to state sanctions adopted in UN Security Council resolutions,<sup>121</sup> international law that requires specific action against specific persons without leaving any margin of discretion to the implementing states, such as individual sanctions, is different. Individual sanctions but increasingly also other international norms<sup>122</sup> are examples of the increasing gap between the regulatory impact of international law within the legal sphere of individuals and the quality of international law when examined from a rule of law perspective.<sup>123</sup> This makes them more difficult to integrate into the domestic legal order. It also makes control at the domestic level even more pressing.

### *B We Will Accept Supremacy So Long As You Comply With Your Own Foundations*

The Court of Justice sketched out another potential solution to normative conflict between European law and international obligations of the Member States. The Court reminded in *Kadi* both the European institutions and the Member States in clear words of the foundations of European law. Indeed, it introduced the 'foundations of the Community legal order' expressed in Article 6 TEU as a new layer of law that is hierarchically superior to the rules expressed in the Treaties.<sup>124</sup> These foundations are, as mentioned above, based on the constitutional traditions of the Member States and on the ECHR. Hence, they take into account what is considered most fundamental both in national and international law. This focus on the foundations could be developed into a common approach to international law to which all different players within the Union sign up. National courts could pick it up and use it as a criterion for accepting or rejecting the authority of norms originating outside of their own legal order. The foundations, as identified by the Court of Justice, could be further developed into a common set of core principles and values that cannot be violated under any circumstances, and that are not only the foundations of Union law but also form the constitutional underpinnings of the Member States.

National courts have not so far picked up on the Court of Justice's suggestion. The UK Supreme Court did not even consider the Court of Justice's human rights argument.<sup>125</sup> It chose not to discuss the Court of Justice's proposition on substance, distinguishing the Court of Justice's ruling on the grounds that the Court of Justice had found the Union not to be bound by obligations under the UN Charter. For good reasons it would have been desirable if the UK Supreme Court had taken the Court of Justice's ruling more closely into consideration. The similarity of the facts; the close linkage between national

<sup>121</sup> C-84/95, *Bosphorus Airways* (n 119 above), para 14.

<sup>122</sup> Examples are the Program for International Student Assessment (PISA) by the OECD; operational standards of the World Bank and decisions of the World Bank Inspection Panel; certificates for aircrafts and personnel issued by the ICAO; recommendations on quarantine and travel by the WHO; and registration of trademarks by the WIPO.

<sup>123</sup> Eckes, *Counter-Terrorist Policies* (n 59 above).

<sup>124</sup> C-402/05 P and C-415/05 P, *Kadi* (n 8 above), para 304.

<sup>125</sup> See above.

and European law more generally; and most importantly, the unprecedented overlap of the substantive and personal scope of extremely detailed legal instruments originating at the international, European and national level would have justified that. The Supreme Court could have but did not consider the idea of principles and values that constitute an inviolable core and that cannot be disregarded even if UN Security Council resolutions (appear to) require this. As mentioned above, the *Bundesverfassungsgericht* used the Court of Justice's ruling in *Kadi* as an argument to justify the rejection of the absolute supremacy of European law.<sup>126</sup> It argued that, 'similar' to the Court of Justice, it had to protect the identity of its own legal order. However, if the Court of Justice and national courts could develop a common approach and identify core principles and rules that form the 'foundations' both of the European legal order and of the national legal orders, this could strengthen not only the case for these core principles and values but also protect the functioning of the European legal order and the individual.

One reason for the EU's success in establishing a claim of supremacy over national law lies in the fact that it took to heart Albert Einstein's famous words: 'the state exists for man, not man for the state.' That it established a direct link between the project of European integration and the individual. This direct link places the individual at the heart of European law and forms part of the very foundations of the EU. This was one of the underlying reasons why the Court of Justice rejected the absolute primacy of UN Security Council resolutions, but it might also explain in part why UN Security Council resolutions have not been able to make a claim of supremacy over domestic law. International law differs from the core values both of national constitutional traditions and of European law in that it does not place the individual as an active subject with its own rights in the centre of power.<sup>127</sup> The *Bundesverfassungsgericht* in its *Lisbon* decision addressed the matter from the perspective of the individual. This is due to the constitutional complaint procedure in which individuals defend their subjective rights against the exercise of public authority. As a result, however, the German court concentrated on the free and equal right of citizens to choose their political representatives (Article 38(1) GG<sup>128</sup>). This is the same angle as in the Court's *Maastricht* decision.<sup>129</sup> Yet, the *Bundesverfassungsgericht* went one step further and identified in *Lisbon* that 'the right to free and equal participation is anchored in the inalienable right to human dignity (Article 1(1) GG).'<sup>130</sup> Against this background and in the light of the strictly limited role of individuals as active participants within the framework of the UN, it appears particularly unlikely that the *Bundesverfassungsgericht* would have accepted if the Court of Justice had chosen the opposite route and given absolute primacy to UN Security Council resolutions.

The two approaches of giving 'due account' and establishing inalienable foundations are not mutually exclusive. Indeed, it is argued that, combined, they form a good approach of the European legal order towards the Union's and the Member States' obligations under international law. In return for the acceptance of the supremacy of European law, the Court of Justice should guarantee on the one hand that the Union

<sup>126</sup> BVerfG, *Lisbon* decision (n 12 above), para 340.

<sup>127</sup> This remains true despite developments into this direction (Section II and footnote 122 above).

<sup>128</sup> Art 38(1) GG: 'Members of the German Bundestag shall be elected in general, direct, free, equal, and secret elections. They shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience.'

<sup>129</sup> In both cases this was the subjective right on which individuals could successfully rely in their constitutional complaints.

<sup>130</sup> BVerfG, *Lisbon* decision (n 12 above), para 211–212.

will never vest international law with supremacy by implementing it into European law if the former infringes the very essence of rights constitutionally guaranteed within the European legal order; and on the other hand, that the objectives and principles of the international law obligations will find recognition in the interpretation of European law even where it cannot be implemented into European law.

## VI Conclusion: It is Complicated!

As the Reflection Group pointed out in its report on the Future of the EU in the year 2030, ‘a Union of 27 Member States pooling their sovereignty in order to reach common decisions is not an obvious global powerhouse.’<sup>131</sup> One requirement for the coherence necessary to make it a powerhouse is the external dimension of supremacy. The many actors and complex structures that characterise the EU, including in the area of foreign policy, make this particularly important.

The Court of Justice has, for a long time, contributed to developing the European law into an autonomous and supreme legal order. The rulings on individual sanctions are part of this effort. They brought the conflict between European law and obligations of the Member States out with exceptional clarity. However, the fact that individual sanctions constitute an exception is not to say that the Court of Justice’s rulings do not have an impact on and beyond the European legal order. Yet, the precise impact of the Court of Justice’s strong confirmation of the supremacy of European law is difficult to identify. As a matter of principle, it only confirmed the Court of Justice’s position on the autonomy and supremacy of European law (in this regard, it was nothing new). The Court of Justice’s efforts to establish a *de facto* sovereign legal order with constitutional authority in its own right have provoked and will provoke reactions of political and judicial players at the national level. The *Lisbon* judgment of the *Bundesverfassungsgericht* reconfirms a long entrenched battle position with new conviction, but it also adds new dimensions to the discussion.

*Kadi* in particular has been cited many times both by the Court of Justice and the Court of First Instance.<sup>132</sup> Scholars have filled many pages with their concerns.<sup>133</sup> However, what the precise impact might be is not clear and depends on the

<sup>131</sup> Project Europe 2030—Challenges and Opportunities, A report to the European Council by the Reflection Group on the Future of the EU 2030, May 2010, 36, available at [http://www.reflectiongroup.eu/wp-content/uploads/2010/05/reflection\\_en\\_web.pdf](http://www.reflectiongroup.eu/wp-content/uploads/2010/05/reflection_en_web.pdf).

<sup>132</sup> A search on <http://www.curia.eu> shows that the ECJ’s decision in *Kadi* has been cited approximately 25 times since it was given. (8 AG Opinions: C-409/06, Winner Wetten; C-340/08, M (FC) and Others; C-317/08, C-318/08, C-319/08, and C-320/08, Alassini; C-166/07, *Parliament v Council*; C-13/07, *Commission v Council*, C-75/08, Mellor, C-553/07, Rijkeboer, C-394/07, Gambazzi; 8 ECJ: C-380/08 and C-379/08, ERG and Others; C-45/08, Spector Photo Group and Van Raemdonck; C-403/06 P and C-399/06 P, *Hassan v Council and Commission*; C-166/07, *Parliament v Council*; C-12/08, Mono Car Styling; C-385/07 P, *Der Grüne Punkt—Duales System Deutschland v Commission*; C-9/08 and C-393/07, *Italy v Parliament*; C-47/07 P, *Masdar (UK) v Commission*; 6 Court of First Instance: T-127/09 AJ, *Abdurahim v Council and Commission*; T-390/08, *Bank Melli Iran v Council*; T-284/08 TO, *Avaessian Avaki and Others v People’s Mojahedin Organisation of Iran*; T-332/08 and T-246/08, *Melli Bank v Council*; T-318/01, *Othman v Council and Commission*; T-284/08, *People’s Mojahedin Organisation of Iran v Council*; 1 Staff Tribunal: F-7/05 and F-5/05, *Violetti and Others v Commission*).

<sup>133</sup> See eg T. Tridimas and J. A. Gutierrez-Fons, ‘EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?’, (2009) 32 *Fordham International Law Journal* 660–730; G. de Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi* Europe’s Judicial Resolution and the UN Security Council’, Jean Monnet Working Paper 01/09.

interpretation of the judgment. And that interpretation is far from obvious. Indeed, the Court of Justice's ruling in *Kadi* is like a Freudian drawing: people see it taking the shape of either their hidden fears or their secret desires. Monist and dualist elements have been identified, as well as the offer of a form of 'judicial' dialogue and slamming the door in the Security Council's face. *Kadi* has been interpreted to strengthen the Union's autonomous ramparts, but at the same time scholars have found it to express the Court of Justice's friendliness towards international law. Certainly, the logical fallacy of *post hoc ergo propter hoc*<sup>134</sup> should be avoided. As has been pointed out, the Court of Justice strengthened in *Kadi* the principle of supremacy, acted as the guardian of the Union's 'foundations' including fundamental rights, and agreed to review all European law measures irrespective of their origin.<sup>135</sup> For all the criticism, the Court of Justice's ruling in *Kadi* has contributed to orchestrate our polyphony within the European legal order. Also, the Court of Justice did not have an alternative. It took the perspective of European law. This is the only possible option. After all, the European legal order, despite its ongoing constitutionalisation, remains an international organisation that needs to defend its autonomy more firmly than a well-established state, both towards the inside and towards the outside. The Court of Justice acted on this necessity to shape a distinct legal order, to assume control over its interpretation, and ultimately to ensure that the Union can act as an independent actor on the international plane.

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<sup>134</sup> Latin for 'after this, therefore because of this.'

<sup>135</sup> See, on the latter point, B. Kunoy and A. Dawes, 'Plate Tectonics in Luxembourg: The Ménage a Trois between EC Law, International Law and the European Convention of Human Rights following the UN Sanctions Cases', (2009) 46 *Common Market Law Review* 73–104.