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The European courts and the Security Council: between *dédoublément fonctionnel* and balancing of values: three replies to Pasquale de Sena and Maria Chiara Vitucci

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1 Introduction

One question that thus far has been somewhat neglected in the surge of legal commentary on the *Kadi* judgment of the ECJ¹ is what lessons we can draw from this case for the practice of domestic courts. That question is of obvious relevance. In many, if not all, states, decisions of the Security Council which restrict the right to due process or the right to property will conflict with fundamental rights protected under national

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¹ Joined Cases C-402/05 P & 415/05 P, *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission*, 3 Sept. 2008, not yet reported.

law. Indeed, several claims have been brought before domestic courts, challenging the implementation of Security Council decisions (or, rather, of national legislation which incorporated such decisions) based on an alleged conflict with fundamental rights.²

It is not implausible that the Kadi judgment will induce more such challenges. The ECJ positioned itself as a court of a quasi-domestic legal order autonomous from the international legal order,³ and prioritized its constitutional rights over the commands of the Security Council. Plaintiffs may feel that what the ECJ can do national courts can and arguably should do.⁴

In 'The European Courts and the Security Council: between *Dédoulement Fonctionnel* and Balancing of Values',⁵ De Sena and Vitucci limit their analysis to international courts, and argue that the case law of domestic courts would have to be subject to a specific inquiry.⁶ However, several features of the Kadi judgment are relevant to domestic courts and obviously the very use of the term *dédoulement fonctionnel* suggests such

relevance.⁷ One feature is that the practice of European courts can be characterized better in substantive, value-based terms than in formal terms. The second is that the practice can be characterized in terms of an opposition between courts which act as agents of the international legal order (*dédoulement fonctionnel*) and give effect to decisions of the Security Council, on the one hand, and courts which balance interests of peace and security, on the other. De Sena and Vitucci are not alone in arguing that the latter approach, exemplified in the Kadi judgment, is to be preferred.

Both propositions create a sharper distinction than is warranted. Clearly the room for the ECJ to take into account the quality of review at the level of the Security Council (the 'solange part' of the judgment⁸) was determined by the Court's reading of the formal status of the fundamental rights, the room left by the Treaty and by its consistent case law on the required compatibility of international agreements with the Treaty.⁹ Moreover, courts which prefer to balance interests of peace and security with human rights are not necessarily acting contrary to a role that can be described in terms of *dédoulement fonctionnel*. A decision not to give effect to a particular decision of the Security

² An overview is contained in UNSC, 'Eight Report of the Analytical Support and Sanctions Monitoring Team pursuant to resolution 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities', 14 May 2008, UN Doc S/2008/324, at 36–37.

³ *Kadi*, *supra* note 1, at para. 316.

⁴ See also the discussion in de Wet and Nollkaemper, 'Review of the Security Council by National Courts', 45 *German Yrbk Int'l L* (2003) 166.

⁵ De Sena and Vitucci, 'The European Courts and the Security Council: Between *Dédoulement Fonctionnel* and Balancing of Values', 20 *EJIL* (2009) 193.

⁶ *Ibid.*, at 196.

⁷ Scelle, 'Règles générales du droit de la paix', 46 *Recueil des Cours* (1933) 331, at 356. See for a discussion of Scelle's theory Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoulement fonctionnel*) in International Law', 1 *EJIL* (1990) 210, at 210.

⁸ *Kadi*, *supra* note 1, at paras 318–326.

⁹ Eeckhout, 'Kadi and Al Barakaat: Luxembourg is not Texas – or Washington DC' (contribution to *EJIL:Talk* blog 2009), available at: www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/ (accessed 3 Mar. 2009).

Council may as easily be cast in internationalist terms, seeking to further the goals of the international legal order, as one which faithfully seeks to uphold the decision.

In this short note I will further explore these propositions in relation to the practice of domestic courts. In the second section I will discuss how the formal/value dichotomy manifests itself in the practice of domestic courts which adjudicate on challenges to Security Council decisions (or implementing legislation). In the third section I discuss whether decisions of domestic courts which refrain from giving effect to Security Council decisions that collide with fundamental rights indeed are to be characterized as deviations from *dédoublement fonctionnel*.

2 Formal and Substantive Approaches in the Practice of Domestic Courts

A Formal Approaches

Conflicts between Security Council decisions and domestic law are primarily governed by domestic law. In this respect there is no difference between Security Council decisions and any other rules of international law. While from an internationalist perspective one may doubt the wisdom of the *Kadi* court in positioning itself as a court of a fully autonomous legal order; not even the strongest devotee of an internationalist perspective would doubt that it is domestic law, not general international law, that governs the conflict between Security Council decisions and fundamental domestic rights.

The effect of Security Council decisions in domestic law can be summarized in a

few propositions.¹⁰ First, most states will not apply Security Council decisions as such, but incorporate them in domestic law. Indeed, in most reported domestic cases on Security Council decisions, the challenge concerned the implementing legislation, not the Resolution as such.

Secondly, to the extent that states have not incorporated Security Council decisions in domestic law, the general practice is that such decisions are not self-executing (or do not have 'direct effect'), and thus cannot be relied upon directly *vis-à-vis* private parties, let alone that they can be applied over conflicting fundamental rights.¹¹

Thirdly, even if they have their direct effect, in most jurisdictions decisions of international organizations will not prevail over the constitution. Only a few states, such as the Netherlands, have accepted that a (directly effective) decision of an international organization, including the UN Security Council, can set aside a fundamental right under domestic law.¹²

For these reasons, one would expect that formally, at least in states which

¹⁰ Gowlland-Debbas, 'The Domestic Implementation of UN Sanctions', in E. de Wet and P.A. Nollkaemper (eds), *Review of the Security Council by Member States* (2003), at 69–70.

¹¹ *Ibid.*, at 70; Gattini, 'Case Law – Joined Cases C-402 & 415/05 P' 46 *CMLRev* (2009) 229. See also the reports in Gowlland-Debbas (ed.), *National Implementation of United Nations Sanctions* (2004).

¹² An example is UNSC Res 1688 (16 June 2006), UN Doc S/RES/1699, on the transfer of Charles Taylor to the Netherlands. The government argued that this resolution was directly effective and prevailed over the constitution. The interpretation was contested in the parliament but was not decided by a court. See *Handelingen Eerste Kamer der Staten Generaal, 'Detentie en berechting Charles Taylor' EK 35* (3 July 2006).

have constitutionalized fundamental rights, conflicts between Security Council decisions and fundamental rights would have been solved by giving priority to the constitutional rights, unless there is a specific rule of domestic law which grants Security Council decisions a hierarchical position.¹³ Article 103 of the UN Charter does not lead to any different result. Whereas in the case of the ECtHR and the ICCPR, and arguably also the obligations of states (not the EU itself) under the EU treaty, Article 103 would have the formal effect of precluding the performance of obligations which are inconsistent with obligations under the UN Charter, this provision will not set aside an obligation under national law.

Unless a specific provision of domestic law held otherwise,¹⁴ on formal grounds one thus might have expected that domestic courts would give priority to the protection of fundamental rights and have followed the approach of the ECJ in *Kadi*. Advocate General Maduro indeed wrote in his opinion in *Kadi* (perhaps to encourage the Court to take a similar stand) that 'in certain legal systems, it seems very unlikely that national measures for the implementation of Security

Council resolutions would enjoy immunity from judicial review'.¹⁵

B Substantive Approaches

Predictions based on such formal principles would be highly unreliable, however. That much can be granted to the analysis of De Sena and Vitucci. There seem to be very few domestic courts' decisions which grant precedence to domestic fundamental rights over Security Council decisions.¹⁶ In practice domestic courts often have deferred to Security Council functions.¹⁷

In some cases that balance of interests is made express. The decision of the House of Lords in *Al Jeddah* is an example.¹⁸ The House of Lords resolved a conflict between its obligations under the Charter and its human rights obligations by ruling that the United Kingdom may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorized by UN Security Council Resolution 1546 and successive resolutions, but must ensure that the detainee's rights under Article 5 are not infringed to any greater extent than is inherent in such detention. On the basis of that balance of interests, it was held that the detention was lawful.¹⁹

¹³ Herdegen, 'Review of the Security Council by National Courts: A Constitutional Perspective', in de Wet and Nollkaemper (eds), *supra* note 10, at 77, 82.

¹⁴ An example may be Art. 24 (2) of the German constitution (Grundgesetz, GG), providing that '[f]or the maintenance of peace, the Federation may join a system of mutual collective security; in doing so it will consent to such limitations upon its sovereign powers as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world': see Herdegen, *supra* note 13, at 83.

¹⁵ Opinion of Póitares Maduro AG in Case C-402/05 *P Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, 16 Jan. 2008, not yet reported, at para. 34.

¹⁶ Halberstam and Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', 46 *CMLRev* (2009) 13, at 32.

¹⁷ Herdegen, *supra* note 13, at 83; Gowland-Debbas, *supra* note 10, at 70.

¹⁸ *Al-Jeddah* [2007] UKHL 58.

¹⁹ Bingham, 'The UK House of Lords' decision in *Al-Jeddah* [2007] UKHL 58, [2008] 2 *WLR* 31' (First ILDC Colloquium Papers), available at: www.jur.uva.nl/aciluk/object.cfm/24A0465F-1321-BOBE-A477AEC5C2BEDC6B (accessed 3 Mar. 2009).

In other cases one searches in vain for a similarly express balance of interests. In a few cases, courts ‘simply’ give effect to Security Council decisions (or the implementing legislation), without addressing why they should prevail over constitutional law. One example is the *Nada* case, where the Federal Supreme Court of Switzerland framed the conflict exclusively in terms of international law, notably between the European Convention and Security Council Decisions.²⁰ The Court held that, apart from *jus cogens*, obligations under the UN Charter prevailed, apparently irrespective of domestic constitutional constraints. Similarly, the Turkish Council of State held that the Council of Ministers had an obligation to implement the Security Council resolution, and that the only place to seek redress was the UN, again apparently without being bothered about any tensions with fundamental rights under the Turkish constitution.²¹

This approach may at first sight seem to be highly faithful to the international obligations of respectively Switzerland and Turkey, and indeed of the international legal order. In this respect it indeed may be qualified as a manifestation of *dédoublement fonctionnel*. It cannot really be framed in a formal explanation unless one were to adopt a monist reading of the relationship between the international and the domestic legal orders. What appears to be a formal argument in fact

reflects a substantive value assessment. It is doubtful whether the Swiss and Turkish courts would handle a decision of, say, the ICAO in similar terms. In this respect, their approach by and large conforms to the trend that De Sena and Vitucci identified on the basis of the case law of the ECtHR and the CFI, suggesting that courts appear ‘ready to cooperate with the Security Council in order to put into practice methods of fighting terrorism’.²²

Occasionally, however, domestic courts have struck the balance in the other direction. In 2005 the Brussels Court of First Instance ordered Belgium to initiate a procedure to have the names of listed persons removed from the Sanction Committee’s list.²³ In 2008, the English Court of Appeal accepted, in line with *Al Jeddah*, that a balance of interest between Article 8 and the legal consequences of the listing was permissible, and that if it were held that the Applicant should not have been listed, the government should support delisting.²⁴ While in such cases the formal priority of domestic over international law may support the same outcome, this does not appear to be a full explanation. Neither of those cases is based only on a formal argument of the priority of domestic law, but rather reflects a balance of interests.

²⁰ *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs* (2007) Administrative appeal judgment, Case No 1A 45/2007, ILDC 46, BGE 133 II 450 (Supreme Court of Switzerland), at para. 6.2.

²¹ *Yassin Abdullah Kadi v. The State* (2007) Appeal Judgment, E. 2824/K.115 (Council of State of Turkey, Board of Administrative Cases).

²² *Supra* note 5, at 210.

²³ See UNSC, ‘Fourth report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1526 (2004) and 1617 (2005) concerning Al-Qaida and the Taliban and associated individuals and entities’, 10 Mar. 2006, UN Doc S/2006/154, at 45.

²⁴ *A, K, M Q and G v. HM Treasury* [2008] EWCA Civ 1187, at paras 117–121.

3 Balancing Security Interests and Human Rights: the Supremacy of International Law

In those cases where domestic courts indeed balance the substantive values pursued by the Security Council Resolutions and the human rights at stake in favour of the latter, the question arises how the international legal order should deal with such decisions. Can such decisions be seen as an anti-internationalist approach, failing to respect the supremacy of international law,²⁵ which therefore cannot properly be characterized in terms of *dedoublement fonctionnel*? We can construe this situation from two perspectives: a pluralistic and an integrative perspective.

A A Pluralistic Perspective

It can be recalled that Advocate General Maduro cursorily noted that his conclusion was without prejudice to the international responsibility of Member States under international law,²⁶ indeed suggesting that at the constitutional level European values would have no external legal effect, that at the international level the balance might well be struck differently, and, if so, that the international responsibility of the Member States might be engaged. To the extent that domestic challenges to Security Council decisions are based on domestic fundamental rights, the result will be an opposition between the international and the domestic legal orders.

This dichotomy of course is not special for the effect of Security Council decisions. Most states make the acceptance and implementation of decisions of international organizations dependent on conformity with fundamental values at domestic level. At the domestic level the supremacy of international law cannot be presumed; but it has to be earned on substance. The strength and persuasive power of the principle of the supremacy of international law at the *domestic* level thus depends on its conformity to substantive fundamental values.²⁷ If there is no such conformity, at the domestic level the conflict will be solved in a different manner from at the international level.²⁸ Whereas at the domestic level the conflict will be solved by giving priority to domestic values, at the international level the conflict will be solved in accordance with the principle of supremacy of international law (Article 27 VCLT).

Whether or not a particular rule of national law which is invoked to deny the application of an international obligation is a *fundamental* rule does not make a difference. Supremacy is, as a formal principle, blind for substance and effect. From the perspective of international law, it is hard to see how that could be otherwise, and how to qualify the general principle of supremacy, without fundamentally undermining the cause of international law.

To the extent that domestic challenges to Security Council decisions are based on

²⁵ Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' 92(II) *Recueil des Cours* (1957) 85.

²⁶ Maduro, *supra* note 15, at para. 39.

²⁷ Peters, 'The Globalization of State Constitutions', in J. Nijman and P.A. Nollkaemper (eds), *Beyond the Divide: New Perspectives on the Divide between International and National Law* (2007), at 251, 267.

²⁸ Cf. T. Broude and Y. Shany, *The Shifting Allocation of Authority in International Law. Considering Sovereignty, Supremacy and Subsidiarity* (2008), at 5.

domestic fundamental rights, the result will be an opposition between the international and the domestic legal orders, with neither system recognizing the internal effects of the claim to supremacy of the other. While that opposition may be problematic from the perspective of international law, from a wider perspective this situation can be assessed in more positive terms. Both systems can complement defects in rule of law protection of the other system.²⁹ International courts may compensate for defects in the rule of law at the domestic level by determining a violation of the Convention and obliging the state to cure the defect. On the other hand, domestic courts may provide redress against decisions of international organizations where no such redress is available at international level.

Blind obedience to the supremacy of international law is not the same thing as the rule of law. Arthur Watts rightly noted that the supremacy of law is not, by itself, a sufficient indication of what the rule of law involves. He wrote that since the law which is to enjoy supremacy may itself be unjust and oppressive, the supremacy of such a law is not what is meant by the rule of law.³⁰ The comple-

mentary nature (even if at times opposing) of the relationship between international and national legal systems may help to bring about that rule of law.

B An Integrative Perspective

An alternative perspective allows for more integration between the international and the domestic legal orders. As the rules of domestic law may conform to or give effect to a rule of international law, domestic courts which seek to uphold the rule of law by prioritizing fundamental rights over decisions of international organizations do not necessarily base themselves on parochial national conceptions of the rule of law.

The argument of De Sena and Vitucci that judicial practice which balances interests of peace and security and human rights could not be characterized in terms of *dédoulement fonctionnel* may create a sharper conflict than is necessary. A decision not to give effect to a particular resolution of the Security Council may as easily be cast in internationalist terms, seeking to further the goals of the international legal order, as a decision which faithfully implements such a resolution. They may be legitimate responses that are necessary to preserve the rule of law – not only at the domestic level but also at the international level. Fundamental rights are part of both, and as such connect the international and the domestic legal orders. This also holds for the *Kadi* judgment of the Court of Justice. The Court protected fundamental rules of Community law which in substance overlapped and indeed were informed by international (ECHR) standards. One could only critique the Court for not having more expressly engaged in a discussion of the

²⁹ Von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law', 6 *I-CON* (2008) 397. See for the notion of complementary between international and national legal orders Nollkaemper, 'Multilevel Accountability in International Law: a Case Study of the Aftermath of Srebrenica', in Shany and Broude (eds), *supra* note 28, at 345.

³⁰ Watts, 'The International Rule of Law', 36 *German Yrbk Int'l L* (2003) 15, at 22–23; See also Palombella, 'The Rule of Law Beyond the State: Failures, Promises and Theory', available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1313018 (accessed 3 Mar. 2009).

human rights norms, beyond the ECHR, which were relevant to the UN itself.³¹

The substantive overlap between international law and domestic law and the commonality of constitutional values at the international and the domestic level also present us with a criterion to distinguish *Kadi*, and domestic *Kadi*-like cases, from *Medellin*.³²

It remains to be seen whether an international court would accept the outcome arrived at by a domestic court. The few hierarchies which international law does establish, such as the hierarchy created by Article 103 of the UN Charter, need not be recognized domestically. Conversely, domestic courts may establish a hierarchy of norms (with fundamental rights on top), or come to a balance of interests, which international courts need not follow. A hypothetical international court which reviewed the international responsibility of Member States of the EU which followed the *Kadi* judgment might find that it could not, like a state, give precedence to international human rights law in view of the effects of Article 103 of the Charter at the international level – a principle that would not play a role domestically.³³ Indeed, the ECtHR decisions in *Behrami* and *Saramati*³⁴ show

that that court is likely to arrive at a different balance of interest.

However, three qualifications are in order. First, it is simplistic to view this from the perspective of an international court with jurisdiction to apply general international law. As shown by *Kadi*, it cannot be assumed that an international court itself would strike the balance in the same way as such a hypothetical court of general jurisdiction would. International courts may operate in a relatively closed legal system, and it cannot be presumed that they would follow the commands of general international law.³⁵ This may be in violation of international law, but one might also say that that fragmented situation is the reality of general international law.³⁶ If international courts can play that role, without their decisions losing the character of decisions which give effect to international law, the same will hold for domestic courts.

The fragmented nature of the international legal system also means that there is no longer (if there ever was) a singular meaning of *dedoublement fonctionnel*, but that different, and perhaps conflicting, approaches by domestic courts can be interpreted as good faith attempts to give effect to particular rules of the international legal order.

Secondly, domestic decisions on the balancing of international obligations are entitled to a deference that leaves states a wide margin of appreciation in the definition, interpretation, and balancing of fundamental rights. We are not concerned with

³¹ Similarly: Eeckhout, *supra* note 9; Halberstam and Stein, *supra* note 16.

³² *Medellin v. Texas*, 128 S Ct 1346 (2008), ILDC 947 (US 2008). A comparison between *Kadi* and *Medellin* was made by Weiler, 'Editorial', 19 *EJIL* (2008) 895.

³³ Unless it were to find that the Council had acted *ultra vires*; see E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), at 375; or the Council had violated a rule of *ius cogens*; see A. Orakhelashvili, *Peremptory Norms in International Law* (2006), at 465.

³⁴ App. No. 71412/01, *Behrami and Behrami v. France* and App. No. 78166/01, *Saramati v. France, Germany and Norway*, 45 EHRR (2007) SE10.

³⁵ This is exemplified by the Human Rights Committee's view in its Ninety-fourth session of 13–31 Oct. 2008, Communication No. 1472/2006 (29 Dec. 2008), UN Doc CCPR/C/94/D/1472/2006, at 10.3.

³⁶ Eeckhout, *supra* note 9.

nationalistic solutions which undermine the cause of international law, and which for that reason are principally rejected at international level. Rather, courts seek to give effect to what they perceive as (domestic translations of) fundamental rules of international law. It seems that the international legal order should treat such cases differently from attempts to prioritize domestic law over international law.

Thirdly, the fact that a state seeks to justify non-compliance with an international obligation by reference to another international obligation, rather than to a rule of domestic law, changes the parameters of the dispute. Rather than being analysed in a black and white manner (domestic law can never trump international law), the conflict is now subjected to rules of international law pertaining to conflicts between two or more international norms.³⁷ While these rules do establish some parameters, they are much more flexible and the outcome is much less straightforward than the application of the principle of Article 27 of the VCLT.

The significance of decisions of domestic courts that give effect to international norms, whether or not made part of domestic law, transcends the domestic legal order. By not resorting to constitutional resistance, but by basing themselves on international standards, they set a standard for other states, and indeed for international courts.³⁸ By doing so,

courts will indeed move beyond nationalistic protectionism from international law towards a productive dialogue with other courts which ultimately may lead to a progressive development of the law of the United Nations pertaining to protection of fundamental rights.

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³⁷ See the discussion of conflict rules in the Report of the Study Group of the ILC, finalized by M. Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc. A/CN.4/L.628 (2006).

³⁸ Halberstam and Stein, *supra* note 16, at 68.