ECLAN Conference on European Criminal Law in the Global Context: Values, Principles and Policies

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RESTRICTIVE MEASURES IN THE FIGHTS AGAINST TERRORISM **[1]**

1. The term Kadi law is normally not used in a positive meaning. **[2]**

> [See slide: quote from the famous U.S. Supreme Court justice Felix Frankfurter: "This is a court of review, not a tribunal unbounded by rules. We do not sit like a Kadi under a tree, dispensing justice according to considerations of individual expediency."]

In Arabic, *Kadi* is a term for a judge who rules in accordance **[3]** with *Sharia* law. Max Weber applied the concept *Kadi-Justiz* as an *Idealtypus*, and the term has been widely adopted as a designation for judge-made law that lacks determinate rules and emphasises an individualised appreciation of a given case's specific facts, followed by a discretionary disposition. Thus, Weber regarded Kadi law as being predominantly characterised by contextual unpredictability and substantive irrationality.

2. As is well known, *Kadi* is also the name of a notable plaintiff **[4]** in the caselaw of the European Court of Justice. The Court's landmark judgment in *Kadi I* is seminal, because it accounts for the complex interaction between the UN Charter, European constitutional law, and the national legal orders of the Member States. Naturally, the matter of the case was the uneasy relationship between security considerations, the use of restrictive measures, and fundamental rights. The highly acclaimed judgment maintained the Court's function as a firm and faithful defender of the EU's internal legal order. The case marked the remarkable culmination of a series of events in which a number of controversial UN initiatives had given rise to serious public criticism

and brought a number of prominent cases before the EU courts as well as some national courts.

The *Kadi* saga has given rise to an overwhelming bulk of **[5]** legal writing. My own modest contribution to this literature can be found in NJECL 2/2011. Among the more recent comments, contributions to volumes by Cameron, Murphy, and others deserves mentioning. **[6]**

3. The détente following end of the Cold War gave rise to what **[7]** has been labelled the "sanctions decade". In the wake of the humanitarian disaster caused by the trade sanctions imposed on Iraq after the second Gulf War, a shift in the exercise of Security Council emergency powers occurred – from 'blunt' towards so-called "targeted" or "smart" sanctions. Such measures are specifically directed towards individuals and entities instead of whole countries, and they are intended not to damage the general population or vulnerable segments of citizens. Inspired by previous US practice, targets were from now on identified by being put on a blacklist generated on the basis of more or less reliable information from intelligence sources or other providers in authority, notably the US Office of Foreign Assets Control (OFAC). Among the most notable attributes of targeted sanctions is the obligation of states to freeze assets belonging to or relating to the target. In addition, bans on travel, trade and financial relations can be involved. Appropriate penalties must be imposed on anybody interacting illegally with a listed person or entity. The implementation of such measures naturally triggers the question regarding conformity with human rights.

Originally, targeted sanctions were directed against government representatives. Then there came a shift towards targeted sanctions being deployed against insurgent groups and their associates, e.g. Unita in Angola. Subsequently suspected terrorist movements and their financiers became sanction targets in the fight against international terrorism. **[8]** The first step on that path was the issuing under the UN Charter Chapter VII of

SCRES 1267 (1999), directed against the Taliban and associates, among which Osama bin Laden was specifically mentioned. By SCRES 1333 (2000), Al-Qaeda and associates were added to the targets.

The EU chose to implement the UN requirements by means of a common position and an EC Regulation, and the Commission were authorised to include additions to the UN list to a continuously maintained EU list.

After 9/11, SCRES resolution 1373 (2001) obligated states to criminalise the financing of terrorism, which prompted the Council to take common action by setting up an internal procedure for listing targets and issuing a directly applicable Regulation. Violations were to be sanctioned under national criminal and administrative law.

Originally, legal safeguards were scarce. No information was disclosed regarding the reason for being blacklisted, and no specific procedure for getting off the lists was available. Basically, the core of the matter was the well known cautiousness of the intelligence community to share sensitive information.

4. In 2001, the Saudi businessman and philanthropist Mr. Kadi was added to the resolution 1267 blacklist, and he was instantly entered on the induced EU list. In the 2008 *Kadi I* judgement, the ECJ elegantly ruled that the implementation of the Al-Qaeda sanctioning system was in violence of EC law and consequently annulled the concerned Council Regulation. Basically, the Court acknowledged the Security Council's authority to issue binding resolutions, which in accordance with Article 103 of the Charter prevail over other treaty obligations. However, the Court maintained the autonomy of EU law as a domestic legal order and rejected its integration into an overarching international legal order. From this dualist position, the Court was not challenging Security Council actions but merely reviewing the implementation of sanctions in EU law.

Due to the absence of an appropriate system of review **[9]** at the UN level, the Court had to review the listing of Mr. Kadi under EU law.

As fundamental rights are integral to the general principles and constitutional order of EU law, the EU judiciary must ensure the right to a full judicial review. Otherwise, compliance with the *Bosperous* requirements laid down by the ECtHR would be at stake. Accordingly, adequate notice of reasons must be given for an executive decision to infringe Community rights, and access to an independent appellate review must be granted. Thus, the contested Regulation violated Mr. Kadi's rights to defence, effective judicial remedy, and the right to property, and were therefore incompatible with the fundamental rights under EU law. Although a Chapter VII resolution is binding under international law, the EU must implement Security Council sanctions in compliance with fundamental rights enshrined in EU law. Thus, the Al-Qaeda sanctions could not be applied by an instrument stripping targets of the right to challenge the listing decision before a national court in a Member State.

Influenced by *Kadi I*, and diplomatic action originally **[10]** introduced by Denmark while chairing the SC, the UNSC adopted resolution 1904 (2009), by which a timeframe for reconsidering listings was set out, and an "Office of the Ombudsperson" was established as a focal point to assist the Sanctions Committee. However, the Ombudsperson was vested with only advisory competence in matters regarding delisting requests, and recommendations of the Office of the Ombudsperson have no binding force.

5. Mr. Kadi was still kept on the UN list. After providing him with a summary of the reasons available for the Sanctions Committee's, the Commission adopted a new Regulation reinstating the EU listing of Mr. Kadi. That led to the *Kadi II* case.

Now, the General Court found that the system offered by the UN was little more than a "simulacrum" of judicial review. For a sanctioning decision to be valid under Union law, a genuinely independent remedy going beyond the Ombudsperson must be established at the UN level.

The immediate UNSC response included an option for the Ombudsperson or the designating state to delist by default. However, the 1267 sanctions committee may retain the listing by a consensus desicion. Furthermore, any member of the UNSC may bring the matter up in the full Council, where delisting require a qualified majority vote and may be subject to a permanent member veto. As the UNSC is not accountable to any independent legal authority, listing and de-listing decisions ultimately remain essentially political.

6. The final *Kadi II* judgement of 18 July 2013 by the CJEU was a vindication of the rule of law. The conclusion of the ECJ concurred with that of the General Court, and the Court of Justice largely upheld its own decision in *Kadi I*. The Court stuck to the general due process case law requiring "individual, specific, and concrete reasons". The majority of the Sanctions Committee's reasons were found to be in compliance with these formal requirements. However, there should be a "full", factual review of the lawfulness of the restrictive measures implementing the sanctions and a "verification of the allegations". Assessing the narrative summary received by Mr. Kadi, the Court basically found that the sanctions committee's reasons to re-list Mr. Kadi were either insufficient or not supported by information or evidence. **[11]**

The Court also stated that the office of the Ombudsperson does not provide the guarantee of effective judicial protection. Thus, by reference to the ECtHR *Nada* case, the ECJ held effective judicial review by the EU judiciary to be all the more essential.

In an obiter dictum, the Court stated that secrecy or confidentiality of information or evidence is not by default a valid objection that would preclude disclosure to the Court *in camera*. However, due to "overriding security considerations" it is acceptable that not all relevant information be conveyed to the affected person. In such circumstances the Court must apply certain "techniques", e.g. by providing a summary of the evidence, in order to **[12]**

accommodate legitimate security considerations vis a vis the need to guarantee procedural rights, such as the right to be heard in an adversarial process. The Court will then assess whether and to what extent the failure to disclose confidential information or evidence affect its probative value.

After ten years, and Mr. Kadi was finally removed from the UN list on recommendation of the Ombudsperson. The Commission took him off the EU list 4 days prior to the oral hearing before the ECJ. This might very well have facilitated the Court's deliberations. However, Mr. Kadi remained on the US OFAC list.

As of to date, the office of the Ombudsperson has been responsible for the delisting of 47 individuals and 28 entities.

7. Along the way, the CFI handled the two PMOI cases regarding **[13]** the criteria required for listing under EU's autonomous sanctions regime. In the second one, The CFI took impression of the Court's judgement in *Kadi I*, resulting in the delisting of the Peoples Mojahedin Organisation of Iran.

The possible political interests and potential arbitrariness influencing listing decisions have been demonstrated in several prominent cases, including the PMOI cases and the *Al-Aqsa* case. The controversy regarding the listing of PMOI reflected that the issue was a bargaining chip in the relations between the US and Tehran.

IF TIME IS SCARCE – SKIP SECTION 8 – JUMP TO SECTION 9

8. The closure of the Kadi saga has been praised by the international human rights community. However, *Kadi I* was also subject to criticism by prominent international lawyers who maintained that by adopting a dualist approach, the judgement was damaging for public international law by marginalizing human rights obligations.

The ECtHR has aimed at resolving resolved the tension between **[14]** Switzerland's duties under the UN Charter and the human rights obligations by applying the *Al-Jedda* derived principle of systemic harmonious – human rights friendly – interpretation in order to avoid a real conflicts of obligations.

In the judgement *Nada v. Switzerland*, the ECtHR found that nothing in SCRES 1267 prevented the Swiss authorities from providing effective judicial remedies. The actual suspension of his right to a fair hearing was therefore in violation of Article 13 (1) ECHR. On a positive note, the judgement can be interpreted as allowing States to implement restrictive measures in accordance with human rights standards, unless of course the particular SCRES explicitly denounces such an option.

In the *Al-Dulimi* judgement of 21 June 2016, the ECtHR majority found a violation of Article 6 (1) ECHR because Swiss courts did not provide meaningful judicial review of sanctions under SCRES 1483 (2003) – (freezing of assets removed from Iraq, etc.). However, review is a minimalistic one, as courts must only exercise sufficient scrutiny to avoid "any arbitrariness" (para. 146). That way, "the Court takes account of the nature and purpose of the measures provided for by the Resolution in question, in order to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security".

Several writers have rightly pointed out, that this kind of harmonious interpretation rets on a fiction, as the UNSC sanctioning system really does not make room for genuine review. If some fortuitous domestic judiciary were to hold a particular listing arbitrary, the executive would still have to choose between Scylla and Charybdis – either complying with the expectations of the domestic judiciary or the conflicting directives of UN sanctioning regime. Either way, state responsibility may be triggered.

9. A particular reason for concern arise from the fact that many of **[15]** the listed organisations have been designated because they are in militant

opposition to regimes that themselves do not respect basic democratic principles or the rule of law, and even violate international law. Such regimes profit by labelling opposition forces as terrorists. Even though being listed might not in itself suffice as evidence regarding financing of terrorism in a national criminal court, is might be attributed high probative value. Also, the chilling effect on the exercise of fundamental rights concerning the freedom of expression and association is in itself problematic.

After a hesitant start, the European Courts have demonstrated ability and willingness to protect the fundamental rights of citizens, and the standard of judicial protection is fairly high. The Courts have distanced themselves from the unpredictability and irrationality that characterised the original legal acts promulgated by the Council for the establishment of lists of individuals and organisations suspected of having links with terrorists, and for the imposition of sanctions against them. Bit by bit, the EU judicature has motivated the Council to improve the legal rights of targeted parties by enforcing customary standards of human rights and the rule of law. The CFI came up to speed after the initial genuflection to the Security Council.

However, individuals and organisations designated on the UN terrorist list can be retained there and still be deprived of certain fundamental rights. Substantive criteria for blacklisting are still vague and imprecise, e.g. regarding association with a terrorist organisation. The procedural rights of the targeted parties remain weak. Information given to the parties concerned is in summary form and do not necessarily provide the basis for challenging the freezing of assets and financial means. Even though the *Kadi* judgments imply that any measure adopted under EU law is, in principle, subject to a full legality review, the parties concerned can remain on the Sanctions Committee's terrorist list – and therefore also on the EU's duplicated list.

The EU judicature can annul measures due to procedural defects in the adoption of a legal act; but neither the EU institutions, nor the parties directly involved, nor the judiciary, have the necessary access to adequate, specific

information about the cases, on the basis of which it would be possible to conduct an effective assessment of the proportionality, tenability and validity of the measures.

There remains a struggle to protect individual freedom, e.g. by articulating with precision rules on the right to be heard, the standard of proof that maintance of restrictive measures requires, and the extent to which evidence must be subject to disclosure.

It might therefore be justified to characterise the practice of the Sanctions Committee an instance of *Kadi Justiz* in international law.

10. Already years ago, Professor Iain Cameron of Uppsala University **[16]** proposed to counter the financing of terrorism solely by reliance on the regime established in accordance with the UN Convention on the Financing of terrorism, under which certain activities are designated as criminal offences. In this system, the freezing of assets is conducted in preparation of a possible criminal prosecution, involving the type of legal safeguards that characterizes a system of criminal procedure. In this perspective it is still relevant to raise the question wheter an anti-money laundering modality in combination with some sort of mutual recognition system between EU states and other democratic states could be a workable alternative to restrictive measures?

THANK YOU FOR YOUR ATTENTION! **[17]**