Kosovo to Kadi: Legality and Legitimacy in the Contemporary International Order

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Whence does international law derive its normative force as law in a world that remains, in many respects, one where legitimate politics is practiced primarily at the national level? As with domestically focused legal theories, one standard answer is positivistic: the law's authority is based on its origin in agreed procedures of consent. This is certainly plausible with respect to treaty obligations and commitments that derive from the United Nations Charter, but it leaves customary international law vulnerable to legitimacy critiques—of which there is no shortage among international law skeptics. Even with respect to conventional international norms, such as treaty provisions, there is often a sense that such consent is democratically thinner than the public consent to domestic law, particularly fundamental domestic law, constitutional norms, and derivative principles of legitimate governance. State consent in international law, in this view, is often a very imperfect proxy for democratic consent to international legal norms. While it is obvious to international lawyers why (as a matter of positive law doctrine) state consent should make international norms prevail over domestic norms to which there is arguably deeper democratic consent, persistent critics of international law have questioned whether this should be so as a matter of legitimacy.

An alternative but also complementary (to a large extent) way of understanding the normative force of international legal rules is through the substantive values and interests that these norms protect or express. This is perhaps clearest in the

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case of world peace and human rights. The idea of human rights, for instance, has never been absent from modern international law (it is reflected in the significance of natural law concepts in Hugo Grotius and the derivation of cosmopolitan right from practical reason in Kant's legal theory). But the substantive approach is a double-edged sword. On the one hand, it gives international lawyers resources to deal with attacks on customary international law and soft law, but on the other it raises the possibility that positive international law norms could be ignored where the positive law is at odds with the substantive values that justify the compliance pull of international law more generally. On balance, it is fair to say that there has been a rise in substantive justification, with the case for international law embedded in progressive constitutionalist narratives or, more modestly, in a concept of "humanity law" that I have articulated in recent work.[1] However, many international lawyers are uncomfortable with the consequences to this approach. The NATO intervention in Kosovo in 1999 and the European Court of Justice ruling in the *Kadi* case are ideally suited to exploring these increasingly evident complexities concerning legality and legitimacy in international law.

The Rule of Law, the Security Council, and the Principle of Human Rights

After NATO's intervention in Kosovo on purported humanitarian grounds, but without Security Council approval, a prominent view emerged that the intervention was "legitimate"—that is, it was morally and politically correct—but "illegal," as it was contrary to the letter of the UN Charter.[2] More recently, the problem of the potential gap between legality and legitimacy has been reflected in judicial challenges to the implementation of the UN Security Council antiterrorism sanctions. Consider the case of Yassin Abdullah Kadi and the Al Barakaat International Foundation, suspected of financing al-Qaeda and related organizations. A Security Council resolution had ordered a freeze of the assets of Mr. Kadi, a resident of Saudi Arabia, and those of the foundation, as well as other sanctions against them. In a challenge to the fairness of the procedures surrounding these sanctions, the European Court of Justice (ECJ) ruled in its 2008 decision (reaffirmed in 2013)[3] that even the binding nature of Security Council resolutions could not justify European governments implementing actions contravening fundamental principles of the European Union legal order—in this case, due process

where liberty and property are at stake. What is important to note here is that generally, whenever Security Council sanctions have targeted individuals (for example, during the Balkans conflict, or during the establishment of international criminal tribunals for the former Yugoslavia and Rwanda), there have been clearly elaborated procedures and protections.[4] Here, in sharp contrast, the resolutions directing an asset freeze or travel ban on a person were found lacking in due process, implicitly at the international level and explicitly at the level of domestic implementation. What the decision laid bare were the human rights flaws in the new UN smart sanctions.

The decision in the *Kadi* case provoked a remarkable debate among international jurists, both academics and practitioners. The court's judgment was heralded by human rights activists and international law skeptics alike as a sign that UN law—even its fundamental treaty, the UN Charter—could be disregarded under certain conditions. For example, international law skeptics such as Jack Goldsmith and Eric Posner characterized the decision as a reflection of democratic positivist logic. *Kadi*'s import, in their view, lies in its assertion that the UN resolution had to yield to the community's constitutional principles, an interpretation arguably in conflict with core international law principles providing for the Charter's superiority.[5] Hence, "European countries must disregard the UN Charter—the most fundamental treaty in our modern international legal system—when it conflicts with European constitutional order."[6]

For Goldsmith and Posner, the basis of the decision was clearly political, that is, it affirmed the principle of sovereign superiority to international authority. In a remarkable statement, the two scholars jointly declared that "there is a simple explanation for all this. Europeans hold their values and interests dear, just as Americans do, and will not subordinate them to the requirements of international law. When a conflict arises, international law must yield."[7]

Yet what the international law skeptics either miss utterly or obviate purposefully is the important substantive rule-of-law question at stake in the case. In *Kadi*, the ECJ was actually confronted with two norms—the supremacy of the UN Charter versus the fundamental principle of human rights in the European Community order—and it was hardly a given which one would triumph. The real international rule-of-law question, therefore, becomes why one norm prevailed. There were at least two significant rule-of-law dimensions to the court's decision. The first was that the appeals division of the ECJ regarded itself as having a duty to review the issue. The second was that the Grand Chamber's choice was

guided by the principle that rule-of-law legitimacy is not detachable from fundamental values, such as human rights.

The ECJ asserted that "it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter . . . ."[8] It further noted that "respect for human rights is a condition of the lawfulness of Community acts, and that measures incompatible with respect for human rights are not acceptable in the Community."[9] The Grand Chamber went on to rule that "it follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights . . . ."[10] The Grand Chamber concluded that "the Court cannot, therefore, do other than find that . . . the fundamental right to an effective legal remedy which they [the defendants] enjoy has not, in the circumstances, been observed."[11] In so doing, the Grand Tribunal implied that deference to the Security Council's authority, and therefore the basis of that authority itself, would depend on the Council's adherence to the value of the rule of law.

The European Court of Justice held that the "Community judicature must, therefore, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures . . . designed to give effect to resolutions adopted by the Security Council."[12] These rights include respect for the rights of the defense and the right to effective judicial protection.[13] While Kadi was, in fact, removed from the Security Council's sanctions list on October 5, 2013, the case nevertheless raises larger issues about what normative principles guide the enforcement of international law.[14]

Building on the Kosovo Precedent: The Illegality/Legitimacy Gap

The demand for the rule of law in the area of UN sanctions drew on earlier controversies, such as the NATO intervention in Kosovo—an intervention which itself drew on even earlier controversies over the legality of forcible humanitarian intervention. Kosovo posed a critical challenge regarding the meaning of the rule of law

and whether it could simply be equated with the positivist view of law under the UN Charter. Despite significant evidence of "ethnic cleansing"[15] and significant political agreement within the United Nations on the need for NATO intervention, Security Council authorization was not forthcoming, above all due to Russia's opposition. Given the stalemate and the perceived sense of urgency, legal scholars were divided on whether the lack of Security Council authorization was fatal to international legality.[16] Prominent international jurist Bruno Simma,[17] as well as Secretary-General Kofi Annan,[18] took the view that the lack of Security Council approval made the Kosovo intervention illegal under international law governing the justification for the use of force (*jus ad bellum*), but at the same time, given the imperative to halt genocide, "legitimate." Moreover, the terrible failure to act during the genocide in Rwanda pointed to the need for operative principles that would make intervention possible despite the lack of authorization. In the end, following the NATO intervention, the question would go to an Independent Commission, which ruled that the intervention was "illegal but legitimate."[19]

This recognition of the "illegal but legitimate" principle meant recognition of a gap between fundamental normative intuitions and the positive law, which would go on to lead to the advocacy of the "responsibility to protect" (RtoP)[20]—arguably an attempt to narrow the gap through "soft law" actions in UN bodies. The apparent willingness to bend what was viewed as the UN Charter's apparent exclusion of humanitarian intervention has occasioned anxiety from scholars such as José Alvarez and Martti Koskenniemi, who view it as sanctioning a form of neo- or crypto-imperialism or as risking a slippery slope where it becomes increasingly easier to field pretexts for the use of force.[21] In their view, and in that of most international lawyers, such intervention was "formally illegal and morally necessary."[22]

Between Illegality and Legitimacy: Is There a Legal Core?

Here it is important to recognize that the approach of "illegal but legitimate" does not simply drive a wedge between legality and legitimacy, as might first seem to be the case. The extent and nature of the illegality, how great or fundamental a departure it is from the formal legal framework, are quite important for determining legitimacy. As Bruno Simma has argued, independently of Security Council authorizations, there exists a "hard legal core" consisting of the principles of the

UN Charter. As he suggests, in any instance of unauthorized humanitarian intervention, a careful assessment needs to be made of "how heavily such illegality weighs against all the circumstances of a particular concrete case, and of the efforts, if any, undertaken by the parties involved to get 'as close to the law' as possible."[23] For Simma, it is important that in the Kosovo case NATO had worked closely with the Security Council and pursuant to its values. As he noted, "NATO, in the state of humanitarian necessity in which the international community found itself in the Kosovo case, acted in conformity with the 'sense and logic' of the resolutions that the Security Council had managed to pass. The NATO threat of force continued and backed the thrust of SC Resolutions 1160 and 1199 and can with all due caution thus be regarded as legitimately, if not legally, following the direction of these UN decisions."[24]

Simma is worried about the slippery slope to an overly permissive stance on intervention, as well as about what he calls the "boomerang effect." In his words: "To resort to illegality as an explicit *ultima ratio* for reasons as convincing as those put forward in the Kosovo case is one thing. To turn such an exception into a general policy is quite another." He further notes: "The lesson which can be drawn from this is that unfortunately there do occur 'hard cases' in which terrible dilemmas much be faced and imperative political and moral considerations may appear to leave no choice but to act outside the law. The more isolated these instances remain, the smaller will be their potential to erode the precepts of international law."[25]

It is worth observing that in any event there was an argument to be made that there was no gap between legality and legitimacy, thus more directly grounding the legality of NATO intervention on a structural interpretation of the Charter and its values. Indeed, one has to concede that not one prominent opinion on the NATO intervention declared that it was contrary to principles of the United Nations.[26] And in pleading their defense before the International Court of Justice (ICJ) in *Serbia v. Belgium*, NATO members pointed out that the anti-genocide norm was as much *jus cogens* as the UN Charter prohibition on the use of force; each would have to be given equal weight in assessing the overall legality of NATO's actions.

Global Rule of Law: Is There a Way Forward?

The *Kadi* decision and the Kosovo debate regarding the role of the Security Council, as well as the more recent debate about the Libya intervention, point

to new directions regarding the rule of law relating to the regulation of violence. The rules on *jus ad bellum* in the UN Charter were clearly designed to protect the sovereign equality of states; they do not directly address the concern to protect persons and peoples against state violence, which has become a central concern in humanity law today. At the same time, the rule-of-law ideal has generally been viewed in legal theory as connected to the concern to protect individuals—and perhaps also groups—against arbitrary, tyrannical state behavior. It is hard to see the Security Council as maintaining legal authority, or exercising power legitimately, when it is not subject to or deviates from the rule of law. The Security Council's competence cannot directly be challenged by judicial review; and when competences of UN organs have been raised as issues in ICJ litigation, the court has tended to an extremely deferential view that essential organs have wide scope to determine the breadth of their own competences. In *Kadi*, we saw that the absence of such an avenue of judicial review on the international plane led to an intervention by the European Court of Justice to uphold the rule of law.

There is also, however, the broader question of the significance of this evolving normative discourse. It would be hard to conclude that the developments described here are part of an inevitable global rule-of-law trend; rather, they are complex and contingent. What we see are shared substantive norms in a number of regions, overlapping particularly where individual rights are at issue. But the direction is hardly inevitable.

What is the content of this evolving judicial framework and discourse? Judicialization shifts power on the one hand by promoting judicial accountability, and on the other by empowering nonstate actors, who, in turn, by addressing themselves in various ways to international courts and tribunals and by being addressed by them, become agents of legitimacy. International courts and tribunals are well situated to supply a rights-based discourse at least partly detached or autonomous from national political cultures and constitutionalism—universalizable, secular, transnational, and with the authority of high human values. In a world that is clearly interdependent but far from politically integrated, there may simply be a need for a potentially universalizable discourse that can still function in a context of difference between persons and peoples; one that comprehends wrongdoing and atrocities, and that can be diffused through multiple institutions that would otherwise be isolated or fragmented. Such a discourse would allow both recognition of individual rights and the attribution of individual

responsibility and accountability with or without the state, a legal language that lays the foundation for some change. International adjudicators are better situated than many other international institutions to supply this discourse, and the discourse is arguably a source of self-legitimization for international courts.

In sum, given the interpretive and discursive role played by international judiciaries—in concert with other actors, both state and nonstate—good reasons exist for less concern with the legitimacy question. For the problem of legitimacy in international relations has always been to a greater or lesser degree a relative inquiry.[27]

NOTES

[1] Ruti Teitel, *Humanity's Law* (New York: Oxford University Press, 2011).

[2] See the Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000), reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf [hereinafter referred to as the "Commission of Experts on Kosovo"].

[3] See European Commission, Council of the European Union, and United Kingdom of Great Britain and Northern Ireland v. Yassin Abdullah Kadi, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P [2013], ECJ report of cases not yet published (July 18, 2013) [hereinafter "*Kadi* CJEU II"]. This case was preceded by Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities, Case T-315/01 [2005], ECJ II-3649 (September 21, 2005) [hereinafter "*Kadi* GC I"]; Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, Joined Cases C-402/05 P and C-415/05 P [2008], ECR I-6351 (September 3, 2008) [hereinafter "*Kadi* CJEU I"]; and Yassin Abdullah Kadi v. European Commission, Case T-85/09 [2010], ECJ II-5177 (September 30, 2010) [hereinafter "*Kadi* GC II"].

[4] See Statute of the International Tribunal for the Former Yugoslavia, adopted by S.C. Res. 827, UN Doc. S/RES/827 (May 25, 1993), www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [hereinafter "ICTY"] .

[5] Compare Jack Goldsmith and Eric Posner, "Does Europe Believe in International Law?" *Wall Street Journal*, November 25, 2008, with Gráinne De Búrca, "The European Court of Justice and the International Legal Order After *Kadi*," *Harvard International Law Journal* 51, no. 1 (2010).

[6] Goldsmith and Posner, "Does Europe Believe in International Law?"

[7] Ibid.

[8] See *Kadi* CJEU I, at para. 281.

[9] Ibid., para. 284.

[10] Ibid., para. 285.

[11] Ibid., para. 351.

[12] Ibid., para. 326.

[13] According to the ECJ in *Kadi* CJEU II, at para. 134: "The essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognition of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered."

[14] See the Security Council, "Security Council Al-Qaida Sanctions Committee Deletes Entry of Yasin Abdullah Ezzedine Qadi from its List" (UN Press Release SC/10785, October 5, 2012), www.un.org/News/Press/docs//2012/sc10785.doc.htm.

[15] See the Security Council resolution establishing the International Tribunal for the Former Yugoslavia, SC Resolution 827 (1993), May 25, 1993, UN document S/RES/827 (1993).

[16] Compare Michael Ignatieff's "Counting Bodies in Kosovo," *New York Times*, November 21, 1999, section 4 at p. 15 and *Virtual War: Kosovo and Beyond* (New York: Metropolitan Books, 2000) with Martti Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International

Law," *Modern Law Review* 65, no. 2 (2002), Fn 29. See also José Alvarez, "The Schizophrenias of R2P," in *Human Rights, Intervention, and the Use of Force* (New York: Oxford University Press, 2008).

[17] See Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects," *European Journal of International Law* 10, no. 1 (1999), pp. 1–22.

[18] See, e.g., Kofi Annan, "Implications of International Response to Events in Rwanda, Kosovo Examined by Secretary-General, in Address to General Assembly" (UN Press Release GA/9595, September 20, 1999).

[19] See Commission of Experts on Kosovo (note 1, above)

[20] See UN Secretary-General, *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Changes*, at 8, UN Doc. A/59/565 (December 2, 2004), www.ref-world.org/docid/47fdfb22d.html.

[21] See Koskenniemi, "'The Lady Doth Protest Too Much'," pp. 159–75.

[22] Ibid., p. 162.

[23] See Simma, "NATO, the UN and the Use of Force," p. 6.

[24] Ibid., p. 12.

[25] Ibid., p. 22.

[26] For example, it has been argued that the intervention could have been justified under Article 2(4) of the UN Charter. See Robert Howse and Ruti Teitel, "Why Attack Syria?," *Project Syndicate,* September 4, 2013.

[27] See Alexander M. Bickel, *The Least Dangerous Branch* (New Haven, Conn.: Yale University Press 1986). First published in 1962.