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Editorial

Kadi – Europe’s *Medellin*? **Georgia**: *Plus ça change, Plus ça reste la même chose*. In this Issue: *EJIL: Debate!* Marking the Anniversary of the UDHR (Contd.); **Private Armies** – A Symposium; Articles and Review Essays; Outside this Issue: *EJIL: Talk!* our new Blog.

Kadi

Just like the Supreme Court’s decision in *Medellin* (see *EJIL* Editorial to Volume 19:2) some months ago, the ECJ’s decision in *Kadi* is destined to become a landmark in the annals of international law. Whereas *Medellin* was generally excoriated as the low water mark of American constitutional and judicial insularity, gruesomely resulting in the actual execution of the principals,¹ *Kadi* was mostly hailed as an example of the more progressive and open attitude of the ECJ, with the proof of the pudding in the eating – overturning the Council Regulations which gave effect to the measures adopted against the defendants pursuant to the Security Council Resolutions, and doing so on the grounds that they violate fundamental human rights and protections applicable within the legal order of the EU. There, the gallows; *chez nous*, liberty.² Happy Ending.

It is so, however, only to those for whom outcomes are more important than process and reasoning. For, at a deeper level, *Kadi* looks very much like the European cousin of *Medellin*.

Let us rapidly engage in the following mental exercise: Imagine two identical *Kadi*-like measures within the European Legal Space – one entirely autonomous (i.e., not a measure implementing a Community measure) originating in a Member State and one originating in, say, the form of a Regulation from the Council of Ministers. Imagine further that they came up for judicial review before a national court. As regards the first, we would expect the national jurisdiction to follow the domestic process, apply the domestic substantive tests for legality and constitutionality, in the course of which they would also be engaging in an inevitable ‘balancing’ of the values of due process, natural justice, etc. against the security interests of the state. Both the factual, legal and, critically, the matrix of values at play would be, appropriately, those applicable in the Member State (which may of course be influenced by international norms to the extent that those are received by the domestic legal order, directly or indirectly). All this would be ‘*normale amministrazione*’. It would not be at all ‘*normale amministrazione*’ were the same court, in reviewing the *Union measure* (questions of Preliminary References apart), to pursue the very same process and set of values as it applied to the

¹ Even had the American legal system heeded the international imperative and given the convicts a review this, in all likelihood, would have merely delayed their grisly end. Their guilt in that case was not at issue.

² Here, too, we might be dealing with judicial gesture – the effects of the decision were stayed for three months to enable the Council (of the EU) to put its house in order and come up with a more solid basis which would actually allow the measure to be kept in place.

purely domestic measure as if it made no difference that in one case it was dealing with an entirely domestic situation and in the other with a communitarized measure implicating the geographical, political, and value system of the entire Union. We would consider that an aberration. Both the factual and the 'value' matrices would be entirely different – not those of a single Member State but those of the Union as a whole, with a far more complex set of considerations that would have to go into the balancing hopper. In a domestic context, it may be considered a correct balance between individual liberty and the fight against crime that any search and seizure be accompanied by a judge-signed search warrant. In the European context, it may be considered sufficient that when searching commercial premises a warrant signed by the Commission will suffice. If so, we would expect a national judge to understand the different factual and 'value' contexts and be willing in principle to uphold the European measure even if an identical domestic measure would be struck down.

Fast forward to *Kadi*: I have no quibble with the material outcome of the review by the ECJ (I am one of the few who found the decision of the Court of First Instance not without problems but very compelling at its core – for reasons which I may explicate elsewhere). But the process adopted by the ECJ is remarkably *Medellin*-type – a bold and unsophisticated assertion that once within its jurisdictional review, in effect the measures would be 'Europeanized' and in reality not treated any differently had they been autonomous measures adopted by the Council of Ministers rather than measures originating from the Security Council. I have seen commentators 'reading into the decision' a dialogical element reminiscent of the *Solange* jurisprudence. Such a reading is beauty that comes from the eye of the beholder, not from the text of the Decision. This cannot be the correct way in which supreme jurisdictions should interact with norms originating from the highest organs of the International Legal Order – withdrawing into one's own constitutional cocoon, isolating the international context and deciding the case exclusively by reference to internal constitutional precepts – a pristine page out of the US Supreme Court approach in *Medellin*. The European Court would not accept such from Member State courts when dealing with a norm originating from Europe. In the same way, it should not accept such from itself dealing with an international norm. To avoid any misunderstanding, I do not claim that the result was necessarily wrong, i.e. that one should give the Security Council a *carte blanche* – it is exactly on this point that the CFI acted with more judicial integrity (though somewhat crude in its review) – nor that the type of consideration appropriately to be applied to a Security Council mandate should be the same as that which a Member State court should apply to a regulation of the Council of Ministers; the contexts are different. But the double jurisdiction situation requires a different hermeneutic, something, it seems, both the US Supreme Court and the European Court are in need of understanding.

We will be publishing in our next issue a fuller analysis of *Kadi* and commentary thereon. We invite our readers to make their views known on that article and indeed on this Editorial on our new blog EJIL: Talk! (www.ejiltalk.org).

Georgia

I have read in the blogosphere and received emails myself claiming that the events in Georgia require a rethinking and rewriting of the laws governing the use of force

and the acquisition of territory. I am rather sceptical but would welcome articles arguing the opposite. To me, it is a case of '*plus ça change, plus ça reste la même chose*'.

But let us first address the depressing politics – this time demoralizing world politics perfectly personified by some celestial Central Casting.

First, the breathtakingly cerebrally challenged Saakashvili, whose every move, including throwing the match into the dry tinder by his own power move, has militated against his desired entry of Georgia into NATO. The conspiracy-minded may well claim that he was a Russian agent. His one redeeming feature was manifest in his blustering sophomoric news conferences which supplied relief to a very serious situation – comic relief, that is, provided by the squirming dignitaries forced to stand, *ex officio*, by his side and suffer each of his 'I told you so...!'

Then we were treated to a rather new scary spectacle – US officials palpably and transparently aware of their real and perceived weakness, also of their lack of credibility, speaking loudly whilst carrying a broken reed. It is a photo-finish as to which America gives us more of a shiver – blustering, over-confident, but strong, or blustering, under-confident, and weak. Let us hope that an Obama administration will change all that.

And then there was the redoubtable Sarkozy and Merkel (and a noticeably absent Solana...!) making all the right noises of 'engagement diplomacy', but unable to paper over the deep internal divisions within the Union, and therefore manifesting again Europe's long inability to translate its economic might into political and military capital. So what's new? And does anyone think that the Lisbon Treaty will fix that? Only Putin comes out entirely in control – hopefully, in the long run, a Pyrrhic victory.

The Russians will not withdraw from the two rump entities any time soon and no one will push them either. Have the Superpowers not been somewhat more equal than everyone else for some time now? That does not make the invasion any more legal than that of, say, Turkey into Cyprus. And the status of the rump 'statelets' is indeed likely to remain more like that of Northern Cyprus than that of Bangladesh. This may not be the time for talking of 'shifting paradigms' (a less elegant phrase might be 'koshering the pig') but perhaps it is rather even more important to hold fast to the old ones oft consecrated in their breech. But I am sure there are other views out there and *EJIL* or *EJIL:Talk!* (www.ejiltalk.org) would welcome hearing them.

In this Issue

We end the year *Marking the Anniversary of the UDHR* with an intellectual bang. As indicated in an earlier Editorial we resisted the temptation to publish a piece on The Life & Times of the Declaration, let alone a biography of the Declaration, authorized or unauthorized. Instead, I asked *Jochen von Bernstorff* of the Max Planck Institute in Heidelberg to write a Review of Reviews – a decidedly different and in some respects more interesting exercise – on the reception of the Declaration over the decades by commentators and reviewers. His article opens the continued Symposium on the UDHR Anniversary in this issue, and is entitled 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law.' From time to time, *EJIL* publishes speeches when it considers that the credentials of the speaker and the content of the speech both add to the intellectual stature and academic

quality of the Journal (see, e.g., the speech of Pascal Lamy in Volume 17:5). In this issue, and still part of our UDHR Anniversary celebration, we publish a speech which amply meets these criteria by *Mary Ann Glendon* commenting on the very important address of *Pope Benedict XVI* on Human Rights to the General Assembly.

We also use the occasion of the UDHR Anniversary to introduce a new rubric to this journal, *EJIL: Debate!*, this time with one comment and one exchange on two pieces which appeared in the Human Rights Symposium published in Volume 19:4. *Paolo Carozza* replies to *Christopher McCrudden* (on ‘Human Dignity and Judicial Interpretation of Human Rights’), and *Robert Howse* replies to *Ulrich Ernst Petersmann* who rejoins (on ‘Human Rights, International Economic Law and Constitutional Justice’). Academic debates in general fall into two broad categories. Some debates follow the Wisest of Men in Ecclesiastes 9:17 ‘*The words of wise men are heard in quiet ...*’ Other debates light the fires of the passions – notably the passion for truth. The Talmud (Avot II:10) is apposite: *Warm yourself before the fire of the sages, but be heedful of their glowing coals for fear that you be burned, for their bite is the bite of a jackal and their sting the sting of a scorpion and their hiss the hiss of a serpent, and all their words are like coals of fire.*

Our inaugural *EJIL: Debate!* has examples of both categories. One way or the other, we, the readers, are the beneficiaries.

Private Armies – A Symposium

At the core of this issue we publish the very topical Symposium entitled ‘Private Military Contractors and International Law’. In this Symposium, there are five selected articles chosen from a broader range of contributions to a conference on this topic: *Nigel D. White and Sorcha MacLeod* turn to ‘EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility’, *Carsten Hoppe* deals with ‘State Responsibility for Private Military Companies’, *Chia Lehnardt’s* piece is concerned with ‘Individual Liability of Private Military Personnel under International Criminal Law’, *Cedric Ryngaert* investigates the ‘Litigating Abuses Committed by Private Military Companies’, and *Simon Chesterman* finally declares: ‘We Can’t Spy ... If We Can’t Buy!’, exploring ‘The Privatization of Intelligence and the Limits of Outsourcing “Inherently Governmental Function”’. I refer the reader to the Introduction written by *Francesco Francioni* of the Board of Editors, who was the Symposium Editor and to whom we express our profound gratitude for conceiving, executing and editing the Symposium.

Last but not least: In this issue we publish an article entitled ‘Softness in International Law: A Self-Serving Quest for New Legal Materials’ by *Jean D’Aspremont*, who refreshes and modernizes, without repeating, the classic positivist objection to soft law, and produces a new account of softness in law. By identifying various agendas underlying different kinds of soft law, he reminds – and provokes – us international lawyers to reflect on our own behaviour and practice with regard to soft law as a concept of the international legal order. In the Book Reviews Section, you will find a review essay by *Maksymilian Del Mar*, discussing ‘Jurisprudence on the Frontline’ through a review of *Scott Veitch, Law and Irresponsibility: On the Legitimation of Human Suffering*.

Outside this Issue

EJIL:Talk! – our new Blog is now live: Take a peek: (www.ejiltalk.org).

EJIL itself already has a homepage www.ejil.org, the autonomous website of the *European Journal of International Law*. Our website was a pioneer long before publishers such as our current publisher, OUP, moved into digital journal publishing, and it is distinct from all other mainline journals of which we are aware. Not only is a sizeable portion of current content made free to the reader, but *all* content becomes free one year after publication – the scholarly world’s Napster! I say all this to indicate that we are not *parvenus* to the notion of digital internet publishing.

The decision to experiment with a blog – and an experiment it is – was decidedly not a bandwagon effect – they all have it, so should we. It is the result of serious reflection of the Editorial Board, with our Scientific Advisory Board, on the evolving relationship between traditional and digital forms of scholarship and publishing. In its first 20 years, *EJIL* from time to time made huge efforts to provide ‘services’, e.g., the now defunct service on decisions of the ECJ on matters of International Law or our running commentary on decisions of the WTO Appellate Body of importance to public international lawyers. That, for the most part, has become a redundant and futile exercise rendered such by the power of ‘search engines’ and the ubiquity of primary sources on the internet. *EJIL* also tried to be ‘topical’ by, for instance, trying to hold symposia on recent decisions of the ICJ, or an ILC Report, or on a certain ‘incident’ as soon as possible after the event! In the old days a time lag of six to nine months was considered very topical. That too has become laughable – our production process, even at its best, is a tortoise to the internet hare.

And yet, there is, we think, an *EJIL* sensibility – with, say, its panache for the theoretical article, for aggressively bringing in younger scholars, for its intellectually diverse modes of analysis, realism mixed with doctrine, a strong appeal to, and interest in, history, to mention but a few. (To some Europeans, too Americanized; to some Americans, too European – we take comfort in that debate ...). If our new Blog *EJIL:Talk!* is successful, it will continue to reflect those *EJIL* sensibilities on the internet but enable us to effect a certain mutation in the identity of *EJIL* itself: We will give increasing preference to articles which deal with the fundamentals, with First Things, which look at an ‘Incident’ or ‘decision of a Tribunal’ with a view to exploring wide systemic meaning; in short, to articles which we predict will have lasting value – that will be interesting for four or five or more years after publication. If you feel that your submission will lose its importance if not published as soon as possible, it is probably not the right piece for *EJIL*. We will become more lenient with longer articles (see, e.g., Christopher McCrudden’s piece in Volume 19:4). *EJIL:Talk!* and *EJIL* may thus complement each other. Note, we hope it does not provoke just short off the cuff academic gossipmentary, but short, incisive, even well-researched pieces which should simply be thought of as a different genre of writing, not unlike the difference between an article and a book.

Please help make *EJIL:Talk!* a successful blog and, indirectly, *EJIL* an even more successful Journal.

JHHW November 2008