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# Kadi Justice at the Security Council?

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## I. Introduction

The decisions of the Court of First Instance (CFI) of the European Union, in September 2005, in the cases involving Messrs. Kadi and Yusuf highlight,[1] if nothing else, one of the more profound governance dilemmas. Should human rights be respected even at the (possible) expense of effective governance? Or should effectiveness of governance be preferred, even at the (possible) expense of the protection of individual human rights?

Messrs. Yusuf and Kadi, as is well known, somehow found themselves on a sanctions list adopted by the Security Council,[2] and transposed into EU law: they

* A slightly different version of this essay will appear in the proceedings of the 2007 Joint Hague Conference.

1) See Case T-306/01, *Yusuf and Al Barakaat v. Council*, 2005 E.C.R. II-3533; Case T-315/01, *Kadi v. Council*, 2005 E.C.R. II-3649.

2) The Security Council in resolution 1267 (1999) created the Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities. It is this committee that ultimately decides on listing and possible de-listing of individuals and entities, following a set of guidelines established by the Committee itself under instructions of the Council. *See* Guidelines of the Committee for the Conduct of its Work, Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, *available at* <www.un.org/sc/committees/1267/pdf_guidelines.pdf> [hereinafter Guidelines]. These Guidelines would appear to be fairly open-ended (perhaps inevitably so), citing as possible bases for listing not just participation in terrorist acts of supplying arms or recruiting, but also "otherwise supporting acts" and "other association." The latter two cast the net rather wide.



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were suspected of having some ties to possible terrorists in Afghanistan, and in the name of the war on terror their bank accounts were frozen. In order to obtain relief, they approached the Court of First Instance, the Security Council remaining effectively out of reach. The Court decided, famously, that it has some authority to review Security Council resolutions in case these violate jus cogens, but as the violations complained of by Messrs. Yusuf and Kadi did not involve jus cogens norms but merely the "lesser" norms of protection of property and the right to a fair trial, the Court was unable to provide the sought for relief, and at any rate found that the rights of messrs Yusuf and Kadi had not been violated, partly because in the balancing between their rights and the rights of the victims of terrorism, their rights did not weigh all that much.

A lot can be said about these decisions; a lot has already been said, and a lot will no doubt be said once the appellate stage has been decided by the Court of Justice.[3] This piece will not concentrate on those cases per se; instead, it will explore the underlying struggle between human rights protection and effectiveness of governance. More concretely, it will explore, inspired by the name of one of the applicants, whether the old idea of kadi justice, popularized (if that is the word) by Max Weber) can serve any mitigating function. In doing so, it takes a different route than, for instance, recent work by David Dyzenhaus. Where Dyzenhaus argues that in times of emergency, the law nonetheless possesses the resources to uphold the rule of law (black holes, in other words, are not part of the law), my argument will look outside the law, in particular towards virtue ethics.[4] I will use the term kadi justice as a shorthand for the idea that meaningful and just judgments need not always be based on the application of legal rules, but that justice may sometimes be equally well served by decisions based on the individual senses of right and wrong of those making the decisions, and that such a system may usefully complement the Rule of Law. [5]

In principle, the question outlined above – how to manage the tension between effectiveness and respect for individual rights – provokes two further analytical

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3) *See generally* Ramses A. Wessel, "The UN, the EU and Jus Cogens", 3 *Int'l Org. L. Rev*. 1 (2006). Advocate-general Maduro proposes that the European Court of Justice set aside the CFI decision, annul the specific EC regulation at issue in so far as it concerns mr Kadi, and repeal the underlying general regulation. See his opinion in case C-402/05 P, *Kadi v Council and Commission*, 16 January 2008, not yet reported.

4) *See* David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (2006). Incidentally, Dyzenhaus does end up suggesting that the rule of law in times of emergency owes much to the attitude and nerve of judges, which is in the end perhaps not all that far removed from my suggestion that responsible governance demands responsible governors.

5) For a very useful recent study, applying a thin substantive notion of the Rule of Law to sanctions regimes, *see* Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (2007).

questions. The first of these asks who should decide in cases of tension: should that be an international court? Should that be domestic courts?[6] Should that perhaps be someone or something else? The second question focuses, instead, on how the tension should be approached. I will concentrate, for starters, on this second question, but will get back to the first one as well, in full realization of the circumstance that the "who" and the "how" can only be separated for so long; at some point they collapse into each other. Before doing so, however, it is important to sketch the normative scenery to some extent: how has international law (and how have international lawyers) traditionally handled decisions of international organizations, such as the ones central to the Yusuf and Kadi cases?

## II. International Organizations: Contending Perspectives

Traditionally, the modus operandi of international organizations has been functionalism: international organizations, so the prevailing theory went (and possibly still goes), were creatures set up by states, with a view to exercising certain functions. Those functions typically would consist of things that states alone were unable to do on their own (for example, providing peace and security, and protecting the environment), or perhaps were unwilling to do on their own (for example, opening up markets). Either way, what mattered was the general notion that organizations, big and small alike, political and technical alike, universal and regional alike, were set up with a view to exercising a specific function, or set of functions. Its functions would determine the sort of things the organization could do, and also, importantly, determine the limits of what organizations could do. "Functional necessity" became the key phrase in issues as diverse as the granting of privileges and immunities and the extent of organizational powers, and could even have a bearing on the legal personality of international organizations.[7]

This functionalism attained near-paradigmatic status amongst international lawyers, and, as far as academic theories go, had one thing going for it: it had a fairly large dose of explanatory force. It could help explain, for instance, how

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6) For a useful discussion of (in particular) domestic implementation, *see generally* Andrea Bianchi, "Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion", 17 *Eur. J. Int'l L.* 881 (2006).

7) Much of the theoretical basis is provided in a short piece by Virally. *See generally* Michel Virally, "La notion de function dans la théorie de l'organisation internationale", *in Mélanges offerts à Charles Rousseau: la communauté internationale* 277 (Suzanne Bastid et al. eds., 1974). Arguably, the main centre of functionalism was the University of Leiden Law School, where under guidance of the late Henry Schermers many functionalist works have seen the light, crowned by what is undoubtedly the leading general treatise in the field, Henry G. Schermers & Niels M. Blokker, *International Institutional Law* (4th rev. ed. 2003).

sovereign states could entrust their futures to international organizations without losing any of their sovereignty. They could do so because sovereignty and functions can be neatly separated; it is an attribute of sovereignty, to paraphrase the World Court, to delegate the exercise of certain functions to others.[8] Functionalism could also help explain the extent of powers of organizations: no more than would be necessary for their functioning – and nothing less either. Functionalism could also be instrumental, albeit in an open-ended sort of way, in delimiting the scope of privileges and immunities of organizations. The explanatory force would reach its limits though with the EU which, after all, cannot be explained in any meaningful way as the delegation of functions by sovereign states: it needs a different explanation, something functionalism implicitly recognized by labeling the EU, meaningfully yet also meaningless, as *sui generis*.[9]

For all its explanatory potential though, the one thing functionalism lacks is a normative dimension: it does not indicate what constitutes acceptable behaviour, and what is unacceptable. It is, in a sense (and like so much international law), form without substance. Functionalism suggests that whatever states want their creatures to do is fine, even if those creatures would have the ambition of conquering the world.[10] The one and only limit functionalism can present is the limit of functioning, but that is dependent on the wishes of political masters, not on any normative consideration. In other words, every political act can, potentially, be justified under functionalism as being necessary; and for a long time, pretty much every political act was so justified. The normative climate prevailing in the post-Second-World-War world held that organizations could do no wrong. In the words of prominent international lawyer Nagendra Singh, organizations

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8) The PCIJ famously determined in the *Wimbledon* case, in 1923, that treaty-making was not contrary to sovereignty but was, instead, an attribute of sovereignty. *See* Jan Klabbers, "Clinching the Concept of Sovereignty: Wimbledon Redux", 3 *Austrian Rev. Int'l & Eur. L.* 345 (1998) (providing a discussion of this point).

9) Note however that functionalism says nothing very specific about the specific modalities of delegating functions and powers; on this, the leading work is by Sarooshi. *See* Dan Sarooshi *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (1999); Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (2005). Nor does functionalism have much to say about processes by which organizations may end up expanding their mandates. On this, bureaucracy theory may be more helpful, as noted by Barnett and Finnemore. *See generally* Michael Barnett & Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (2004).

10) Reportedly, Mussolini presented a draft treaty in the 1930s, to be concluded by Europe's four major powers with the aim of bossing Europe's smaller states around. *See* Remco van Diepen, *Voor Volkenbond en Vrede: Nedwerland en het Streven Naar een Nieuwe Wereldorde 1919-1946* 143 (1999).

contribute to the "salvation of mankind."[11] As a result, the very idea of exercising judicial review over international organizations never really presented itself, and when it did, it was immediately shot down – witness the explicit rejection by the ICJ in its *Namibia* opinion.[12]

The growing scope of activities of international organizations (which nowadays engage in such activities as territorial administration), the re-awakening of the mechanisms of peace and security accompanying the end of the Cold War (not just the Security Council, but NATO too, and even the Western European Union (WEU) arose from its slumber to be devoured by a newly ambitious EU[13]), and the collapse of the International Tin Council during the mid-1980s all suggested that organizations are, in the end, run by humans, and that humans are error-prone. Moreover, with the liberal social-democratic welfare state in retreat and national public authority being eyed suspiciously, it was only to be expected that international organizations too would come to be regarded with suspicion. After all, much as they may present themselves as independent from their member states and have a separate identity, they are also, from a different angle, emanations of their member states and themselves exercising public authority.[14]

Hence, it should not come as a surprise that slowly a different set of ideas is taking hold, which conveniently is lumped together under the heading of constitutionalism. The collapse of the International Tin Council spurred a flurry of activity into analyzing issues of responsibility of international organizations.[15] The Security Council's decisions regarding the bombing of an airplane over Lockerbie created a renewed interest in judicial review.[16] The open-ended nature of the func-

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11) Nagendra Singh, *Termination of Membership of International Organisations*, at vii (1958).

12) *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 89 (June 21) ("Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned.").

13) On the latter, *see generally* Ramses A. Wessel, "The EU as Black Widow: Devouring the WEU to Give Birth to a European Security and Defence Policy", *in The EU and the International Legal Order: Discord or Harmony?* 405 (Vincent Kronenberger ed., 2001).

14) Elsewhere I suggest that much of the law of international organizations finds its origins in this tension between the organization and its member states. *See generally* Jan Klabbers, *An Introduction to International Institutional Law* (2002); Jan Klabbers, "Two Concepts of International Organization", 2 *Int'l Org. L. Rev*. 277 (2005) (providing a more detailed theoretical elaboration).

15) *See generally* Romana Sadurska & Christine Chinkin, "The Collapse of the International Tin Council: A Case of State Responsibility?", 30 *Va. J.Int'l L*. 845 (1990).

16) *See e.g.,* Geoffrey Watson, "Constitutionalism, Judicial Review, and the World Court", 34 *Harv. Int'l L. J.* 1 (1993); Jan Klabbers, "Straddling Law and Politics: Judicial Review in International Law", *in Towards World Constitutionalism* 809 (D.M. Johnston & R.St.J.MacDonald eds., 2005).

tional necessity doctrine in relation to organizational privileges and immunities was questioned.[17] Organizations came to be involved in human rights failures, either by omission (think Rwanda[18] and Srebenica) or by commission.[19] Courts started to find that the powers of international organizations were not unlimited.[20] Functionalism therewith slowly came to be accompanied by constitutionalism. The notion would remain somewhat vague and open to different interpretations, and much of it would be inspired by not always appropriate direct comparisons with domestic versions of constitutionalism, but nonetheless, the message was clear: the boundless freedom of maneuver that international organizations had enjoyed was coming to a close. Somehow, the insight had taken hold that there might be merit in exercising control over international organizations.

As far as normative developments go, the rise of constitutionalism was thoroughly understandable, but as an academic theory it lacks explanatory force. Constitutionalism can help explain limits to organizational activities, but has fairly little relevance for explaining other aspects of the functioning of international organizations. Constitutionalism may help explain why the UN, when administering East Timor or Kosovo, should behave well, but cannot help explain why the UN can administer territory to begin with. For this, functionalism is still the stronger theory.

Moreover, constitutionalism cannot deliver on its promises all by itself, and to some extent is bound to reproduce the same anxieties a pre-constitutional doctrine saw itself confronted with.[21] For one thing, not everything can be captured in rules, constitutional or otherwise: think only of the difficulties international law has encountered in trying to define such key notions as aggression, terrorism, or genocide. More important though for present purposes, inasmuch as ordinary rules can usually be circumvented if the actors involved feel circumvention is somehow necessary in view of a certain goal, so can rules of a constitutional nature. An ample illustration is formed by the Emergency Aid decision of the European Court of

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17) *See* Michael Singer, "Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns", 36 *Va J. Int'l L.* 53 (1995).

18) An excellent discussion of the UN's inactivity in Rwanda is contained in Barnett & Finnemore, *supra* note 8.

19) *See* Frédéric Mégrét & Florian Hoffmann, "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities", 25 *Hum. Rts. Q.* 314 (2003).

20) *See generally* Jan Klabbers, "The Changing Image of International Organizations", *in The Legitimacy of International Organizations* 221 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

21) *See generally* Jan Klabbers, "Constitutionalism Lite", 1 *Int'l Org. L. Rev.* 31 (2004).

Justice in the early 1990s, in which the Court set aside the strong rules on decision-making within the EU without, so it seems, there being a proper justification.[22]

In a word, responsible governance requires responsible governors; it demands people in positions of power who resist hubris and who resist the temptation to have the ends justify the means. Functionalism by its very nature is unable to provide this; if anything, it invites hubris, by its inability to posit any normative limits. Constitutionalism alone cannot close the gap, but needs to be accompanied (not replaced) by something else, a constitutional mindset,[23] if you will, and this may well be inspired not so much by deontological, rule-based philosophy,[24] but rather from virtue ethics – the sensibility to do the right thing, to act on proper motives.[25]

## III. Weber on Kadi Justice

While there are probably as many versions of virtue ethics as there are virtue ethicists, a (formerly) well-known expression thereof was embedded in the notion of kadi justice, made famous by Max Weber (and others). To the extent that kadi justice is written about these days, it is usually with a pejorative undertone: somehow, it is thought of (if at all) as the impoverished cousin of true justice. True justice, so we tend to think, has something to do with the Rule of Law and, whatever its contents, has to be rule-based. The Kantian legacy exercises a strong hold on legal and philosophical minds alike. Kadi justice, by contrast, is explicitly not rule-based, and therewith considered somehow less useful in our day and age.

This is a double mistake. First, Weber himself was never pejorative about kadi justice. To him, kadi justice accompanies an ideological interest in substantive justice: justice with respect to outcomes, that is, rather than otherwise. By contrast, formal justice insists on things like stability and predictability, and is therefore often associated with the development and maintenance of capitalism, and with the Rule of Law. Kadi justice, so Weber held, entails decisions "reached on the basis of concrete, ethical, or political considerations or of feelings oriented toward

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22) *See* Cases C-181/91 & C-248/9, *European Parliament v. Council and Commission*, 1993 E.C.R. I-3685 (the ECJ characterizing a measure to grant emergency aid to Bangla Desh as a collective decision taken by the member states, despite the measure involving the Community institutions to a fairly large extent, rather than as a Council act).

23) The term is borrowed from Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization", 8 *Theoretical Inquiries in Law* 9 (2007).

24) This is the foundation for the argument made by Dyzenhaus, *supra* note 4.

25) *See generally Virtue Ethics* (Roger Crisp & Michael Slote eds., 1997).

social justice."[26] An historical example would be the form of justice prevailing in ancient Athens; more current examples include trial by jury, or the work of justices of the peace.[27] These represent, as Weber put it, "a softening of rationality in the administration of justice."[28]

Second, dismissing kadi justice out of hand is mistaken because doing so would fail to take context into account. Put differently, formal justice (what we typically refer to as the Rule of Law) is inextricably linked to the development and maintenance of capitalism.[29] Already the Romans had realized that in order to have a well-functioning economy, what is required is not so much substantive justice (doing the right thing), but rather a rational, quick, effective procedure for dispensing with disputes. As Weber maintains, what we borrow from Roman law is not so much linked to substance,[30] but relates to trial procedure and the need to have trials executed by people with legal training. As Weber wrote, "This necessity arose from the increasing complexity of legal cases and the demands of an increasingly rationalized economy for a rational procedure of evidence rather than the ascertainment of the truth by concrete revelation or sacerdotal guarantee which everywhere was the primeval means of proof."[31] And elsewhere he was even more explicit: while of course something resembling capitalism (private trade relations) could also develop in systems where forms of justice such as kadi justice prevailed, nonetheless modern capitalism cannot accept kadi justice. Modern capitalist enterprises, "with their fixed capital and precise calculations, are much too vulnerable to irrationalities of law and administration."[32]

The main lesson to draw from all this, then, is not so much that kadi justice is by definition a bad thing, the lesser cousin of our Rule of Law. Quite the contrary, Weber suggests that our heralded Rule of Law, often cherished for its own sake, is

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[26] *See* Max Weber, *Economy and Society* 813 (Guenther Roth & Claus Wittich eds., 1968). Later, he briefly defined kadi justice as "adjudication according to the judge's sense of equity or according to … other irrational means of law-finding …". *Id.* at 1395. For a useful discussion, *see* David M. Trubek, "Max Weber on Law and the Rise of Capitalism", *Wis. L. Rev.* 720 (1972).

[27] *See* Weber, *supra* note 25, 813-14.

[28] *Id.* at 891. Horwitz adds the example of the classic distinction between law and equity, without explicitly calling equity kadi justice. *See* Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* 17 (1992).

[29] *See also* Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 97 (2004) (summarizing Weber in a single sentence as holding that "capitalism requires a formal rule-oriented legal system in order to provide the security and predictability necessary for market transactions").

[30] *See* Weber, *supra* note 25, at 977 ("In fact, all legal institutions specific to modern capitalism are alien to Roman law and are medieval in origin," as he put it with some aplomb).

[31] *Id.* at 977.

[32] *Id.* at 1395.

best seen as instrumental, in particular in relation to the development of modern capitalism. The Rule of Law, following Weber, would have perhaps a contingent relation with justice, but its main point was to facilitate the rise and maintenance of capitalism. The point of the Rule of Law would be to create the sort of certainty conducive to the development of intense economic relations between private actors, regardless perhaps of the precise content of the legal rules thus created. What matters is that there are legal rules and a system for settling disputes in a predictable manner so that private actors know what to expect. The upshot would be then that there might be a role to play for kadi justice in those circumstances where the Rule of Law is absent or, alternatively, in those circumstances where there is no instrumental connection to the capitalist world economy and its needs.

## IV. Kadi Justice Implemented?

The Sanctions Committees established by the Security Council typically decide on the basis of often classified information, following rather open-ended guidelines and upon proposals by state representatives.[33] No independent investigation takes place before an individual is blacklisted, and the procedure for being de-listed is equally troublesome. Judicial review within the UN system is non-existent, and outside the system it is highly doubtful whether judicial review, be it by domestic courts or by an entity such as the Court of First Instance (CFI) of the EU, can be meaningful.

This then would seem to cry out for an analysis in terms of the Rule of Law, and indeed, normatively speaking, many would agree on the desirability of subjecting the Security Council to the Rule of Law, both as far as substance goes (in that the Rule of Law would entail limits on the freedom of the Council to do as it pleases) and in relation to procedure. Under the Rule of Law, however precisely conceptualized, it would be plausible to think of procedural restraints on the Security Council.[34]

However, if Weber was correct in establishing the connection between the Rule of Law and the emergence and maintenance of capitalism, then it would seem that as an instrumental matter, there is no particular need to insist on the Rule of Law as controlling the Security Council. Given that the Security Council has, as yet, fairly little to do with the emerging globalized system of capitalism (beyond the abstract proposition that peace and security may be conducive to business

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33) *See* Guidelines, *supra* note 2.

34) The leading account of what the Rule of Law might entail is T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001).

transactions generally[35]), there is no particular instrumental need to insist on the Rule of Law. This takes nothing away from the normative desirability of installing the Rule of Law; it merely opens up space to explore other, alternative mechanisms and conceptions of justice.

In these circumstances, there might be some merit in considering whether some form of kadi justice might not be a useful alternative. In fact, the circumstances might be eminently suitable for purposes of kadi justice, as at issue is not so much the semi-automatic application of an established body of law, but rather the constant balancing, in each and every case, of effectiveness and human rights protection. The very circumstances involving sanctions might not be all that suitable for formal justice to begin with. However, that does not mean that no substantive justice needs to be done in individual cases.

Hence, installation of a system of kadi justice might be appropriate. It would not need to go under this name perhaps; it is more common, also in international affairs, to appoint panels of wise men (or women) to decide on issues where a strict application of legal rules might be awkward or, more often perhaps, lead to awkward results.[36] Such panels would have two main characteristics. First, they would be composed of trusted individuals, people of high moral standing and authority. Second, they would decide not on the basis of an accepted set of rules, but rather on the basis of their own sense of equity, or justice, or fairness. Hence, it might be best not to entrust lawyers with the task, as lawyers are bound to fall back on the rule-book fairly quickly, and for the same reason, trained moral philosophers and theologians might be less than ideal candidates.[37]

One risk, of course, in installing a system of kadi justice is the risk that once the "lesser" is in place, the "better" (i.e. the Rule of Law) stands no chance of being installed anymore. This is, however, a risk of debatable dimensions. For one thing, chances for the Rule of Law at the UN appear slender at any rate: as long as individuals close to the US government can characterize the plight of people like

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35) It is no coincidence that the traditional law school curriculum, geared to accommodate 19th century laissez faire capitalism, included criminal law among its core topics, along with contract, torts, property, and civil procedure. *See generally* Duncan Kennedy, "Legal Education and the Reproduction of Hierarchy", 32 *J. Legal Educ*. 591 (1982).

36) An example is the panel of wise men installed by the EU to verify whether the election of a right-wing regime in Austria was at all reconcilable with some of the principles the EU is said to be based on. Likewise, the creation of the Badinter commission by the EU during the Yugoslavia crisis owed much to similar considerations.

37) By way of hypothetical example, how about a panel composed of Nelson Mandela, former football star Ruud Gullit, and pop icon Madonna? Or one consisting of the Dalai Lama, Gro Harlem Brundtland, and Mary Robinson?

Mr. Yusuf and Mr. Kadi as "public relations" problems, one is best advised not to hold one's breath when it comes to the full-fledged Rule of Law.

Second, it is by no means self-evident that kadi justice is the lesser version. As mentioned, Weber never thought of it in pejorative terms, and its continued manifestation in the form of trial by jury would suggest that given the right circumstances, kadi justice too has something going for it. The one thing to realize, of course, is that kadi justice is far less suitable for facilitating global capitalism than the Rule of Law is, but that says more about the Rule of Law perhaps (and some of its less thoughtful proponents) than about kadi justice.

That said though, and referring back to the earlier discussion of functionalism and an emerging constitutionalism in the law of international organizations, even a full-fledged Rule of Law would offer no airtight guarantees. Even full-fledged constitutions can be, and often enough are, circumvented. Within international institutional law, a concept of kadi justice would serve not so much as a substitute for the Rule of Law, but rather as a complement; its inspiration, after all, resides in virtue ethics as a complement to constitutionalism, precisely so as to help constitutionalism to overcome its internal paradoxes and weaknesses. Responsible governance, after all, requires responsible governors, and establishing kadi justice might be one way of ensuring that those who govern (the Sanctions Committees) behave responsibly.

There is an additional consideration why kadi justice, in this context, cannot be a substitute but must be seen as a complement. The fight against terror, whatever the plausibility of its justifications, tends to stimulate a general climate of lawlessness. As the philosopher Giorgio Agamben puts it, it serves as a veneer for governance in a continuous state of exception, where law (the Rule of Law, no less, to the extent it exists to begin with) is continuously suspended; a situation is being created "in which the emergency becomes the rule, and the very distinction between peace and war (and between foreign and civil war) becomes impossible."[38]

Agamben here explicitly addresses the United States (the name of President Bush precedes the quote just given), but the argument is capable of wider application: within the Security Council too, it seems that law is a matter, continuously and constantly, of living on a knife's edge: there is no law, there are only decrees, to be applied by the powers that be. However disputed the precise contents of the Rule of Law may be (and they are, of course, constantly open to debate), nonetheless the UN cries out for installation of some conception of the Rule of Law, normatively

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38) *See* Giorgio Agamben, *State of Exception* 22 (Kevin Attell trans., University of Chicago Press 2005) (2005).

if not instrumentally. Kadi justice may stop the bleeding, but cannot be expected to heal the wounds.

## V. By Way of Conclusion

There is one final irony here: the very emergence of constitutionalism, with its emphasis on the control of international organizations, means that organizations are perhaps less likely to be considered the harbingers of peace and welfare or otherwise involved in the salvation of mankind. The more member states control and direct their organizations (and it seems reasonably clear that the Security Council is dominated by the US), the more those organizations end up doing the dirty work of states. Constitutionalism thus, however inadvertently, contributes to the "running wild" of international organizations – not "running wild" because of too little control, but "running wild" due to too much control. If anything, this illustrates that the law of international organizations is to a large extent a matter of the precise links between two dominant conceptions: those of the organization, functionalism, and a managerial mindset on the one hand, and those of the member states, constitutionalism, and a more deliberative mindset on the other hand. In this potential minefield littered with theories, conceptions and approaches but fairly little law, a conception of kadi justice may well prove to be of some use. And that too is not without irony.