The *Kadi II* Judgment of the General Court: The ECJ's Predicament and the Consequences for Member States[1]

Armin Cuyvers*

Kadi – Autonomy – Supremacy – EU legal order – Relationship between EU and UN – Terrorism – (National) Freezing Measures – Effects of annulment – Fundamental Rights – Right to effective legal protection – Right to property – Substantive versus formal hierarchy of norms – Comity – Relationship between Court of Justice and General Court – *Bosphorus* – *Solange* – Role and function of the Court of Justice

Introduction

It is rare for a sequel to live up to the original. Unfortunately for all those suffering from some *Kadi* fatigue, the *Kadi II* judgment of the General Court sets the scene for another legal blockbuster. The General Court starts with a sharp criticism of the *Kadi I* judgment of the Court of Justice, even if subsequently it *applies* that same judgment with a vengeance. Subjecting *Kadi*'s listing to a full review, the General Court finds that the procedure followed did not come close to the standard required by the EU legal order, and annuls the listing. Kadi himself still has to wait before he can access his accounts and use the accrued interest of almost eleven years to celebrate his string of legal victories. His assets will be kept frozen until at least after the appeal.[2] The judgment in that appeal will again be obligatory reading.

* Assistant Professor University of Leiden, departments of European law and Jurisprudence.

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[2] That is, of course unless Turkish Liras are accepted, considering that his listing has been annulled nationally by the Turkish State Council in 2006. *See* C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford, OUP 2009) p. 291.

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In the meantime, the Court of Justice again stands before the question of the proper balance between the judicial protection of fundamental rights and the objective of combating terrorism. And before the equally challenging question of who can, or should, strike that balance in an almost Escher-like legal reality of interacting and overlapping legal orders, seemingly defying, yet also relying on, linear logic.[3]

This contribution will analyse the history of the string of *Kadi* rulings so far and comment on the judgment of the General Court. It will then try to present the predicament of the Court of Justice, caught as it is between its own human rights rhetoric and the more formal and systemic arguments that it has so far relied on to support the autonomy and supremacy of EU law. Subsequently it draws attention to the legal effect a final annulment could have for the member states. Contrary to what is often assumed, such an annulment could limit their freedom to place or keep Kadi on a national list, and therefore their capacity to meet their individual obligations under the UN Charter.

Considering the importance of the legal and factual history for this most recent judgment it is good first to sketch the background of the case and the judgments in *Kadi I*.

Background of the *Kadi II* judgment in first instance

The *Kadi* cases concern the use of one of the instruments deployed to combat terrorism: the freezing of assets of those *suspected* of (supporting) terrorism. At the UN level a special Sanctions Committee has been set up that, based on information and requests of states, can place individuals on a blacklist. The Sanctions Committee is based on resolutions of the Security Council under Title VII of the UN charter.[4] As a result, decisions of the Sanctions Committee rank highly and bind all members of the UN to freeze any assets of listed individuals within their jurisdiction.

UN listings are implemented at the EU level.[5] Individuals and organizations placed on the UN list are directly placed on the EU blacklist by the Commission.

[3] *See* generally N. Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', *Int. J. Constitutional Law* (2008) p. 373, A. Von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law', *Int. J. Constitutional Law* (2008) p. 397, or S. Besson, 'European Legal Pluralism after Kadi', 5 *European Constitutional Law Review* 2009, p. 237.

[4] *See* amongst others Resolution 1904 (2009) and the earlier resolutions mentioned therein.

[5] *See* lastly Commission Implementing Regulation 317/2011 of 31 March 2011 amending for the 147th time Council Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban *OJ* [2011] L 86/63. These Commission decisions therefore implement

This EU list is part of a directly applicable regulation, so that from the moment of listing all financial assets of those listed must be frozen throughout the EU.[6]

In addition to copying UN listings, the EU has its own *autonomous* procedure for listing individuals.[7] When dealing with the case-law on terrorist listings one needs to keep this distinction between autonomous and UN-based listings in mind. Autonomous listings are a purely creatures of the EU legal order, and do not draw on the authority of the UN.[8] No risk of an authority conflict therefore attaches to such autonomous measures, reducing the complexity of their judicial review.

As the decision to list someone is often based on confidential information, and as prior notice of listing would often defeat the purpose of the freeze, since assets could be put to bad use or transferred to a safe haven, a tension exists between the freezing of funds and fundamental rights. The right to be heard, the right to effective judicial review and the right to have one's property respected all sit uneasily with a financial first strike. In the case of UN listings this tension is only increased by the very limited legal protection at the UN level and by the primacy claimed for resolutions of the Security Council. True UN primacy sits uneasily with any judicial review at the EU or national level.[9]

The *Kadi* case brought these tensions to the surface. On 17 October 2001 Kadi, a resident of Saudi Arabia, was placed on the UN list as he was suspected of supporting Al Qaeda. On 19 October he was added to the EU list. As of that moment, all his European assets were frozen. Neither the grounds, nor the evidence supporting his listing had been made known to Kadi for the sake of confidentiality of the sources and for the sake of public safety. Kadi had no possibility to challenge his listing at the UN level; instead he started an action for annulment against his EU listing before the then-Court of First Instance. He alleged violations of his fundamental rights to property, to a fair trial and to an effective remedy.

Regulation 881/2002, which in turn implemented, and brought into the old first pillar the sanctions envisioned by Council Common Position of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them *OJ* [2002] L 139/4. The new legal basis, introduced by the Lisbon Treaty in Art. 75 TFEU, now directly provides the competence to sanction individuals.

[6] *See* Regulation 881/2002 Art. 11 for the detailed geographic scope of the regulation.

[7] Council Regulation 2580/2001 of 27 Dec. 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism *OJ* [2001] L 344/70.

[8] The potential conflict between an autonomous EU listing and the fundamental requirements of a national legal order of course remains, but at least one additional legal order is kept out of the equation.

[9] *See* Arts. 25 and 103 UN Charter. In the case of terrorist listings these resolutions carry the additional weight of having been taken under title VII of the UN Charter. *See* further below for the preliminary question whether the EU should even be considered bound to UN law.

The judgments of the Court of First Instance and the Court of Justice

The Court of First Instance rejected his action.[10] In its view, decisions of the Security Council in principle overrule EU law.[11] As a consequence Union Courts are not allowed to test them against any norm of EU law, not even general principles or fundamental rights.[12] In a creative addition, the Court of First Instance did, however, find itself competent to '(…) check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens* (…).'[13] As no violation of this *jus cogens* had taken place, however, Kadi's listing was valid.

On appeal the Court of Justice took a diametrically opposed position.[14] Using powerful language the Court tried to defend both the autonomy of the EU legal order and the foundational position of fundamental rights within that order.[15] In paragraph 285 it held that

[10] Case T-315/01 *Kadi* v. *Council and Commission* [2005] *ECR* II-3649.

[11] A view largely based on Art. 351 TFEU (Art. 307 EC old) and Art. 103 UN Charter. *See* for discussion, among others, the case note by C. Tomuschat in 43 *CMLRev* (2006) p. 537, C. Eckes, 'Judicial Review for European Anti-Terrorism Measures: The Yusuf and Kadi Judgments of the Court of First Instance', *European Law Journal* (2008) p. 74 or M. Bulterman, 'Fundamental Rights and the United Nations Financial Sanction Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities', 19 *Leiden Journal of International Law* (2006) p. 753.

[12] *Kadi I* CFI, paras. 221-225.

[13] *Kadi I* CFI, para. 226. This particular, and often criticized, approach of the General Court was later confirmed in its rulings in Case T-49/04 *Hassan* [2006] *ECR* II-52, and Case T-253/02 *Ayadi* [2006] *ECR* II-2139. For a rather thorough deconstruction of this approach, *see* P. Eeckhout, 'EC Law and UN Security Council Resolutions: In Search of the Right Fit', 3 *European Constitutional Law Review* (2007) p. 194-197.

[14] Amongst the many interesting discussions of this judgment, *see* G. de Búrca, The European Court of Justice and the International Legal Order after Kadi, *Fordham Law Legal Studies Research Paper* No. 1321313 (2009); available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321313>; W.T. Eijsbouts and L. Besselink, '"The Law of Laws" – Overcoming Pluralism', 4 *European Constitutional Law Review* (2008) p. 395; S. Griller, 'International Law, Human Rights and the European Community's Autonomous Legal Order: Notes on the European Court of Justice Decision in Kadi', 4 *European Constitutional Law Review* (2008) p. 528; D. Halberstam and E. Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', 46 *CMLRev* (2009) p. 13; B. Kunoy and A. Dawes, 'Plate Tectonics in Luxembourg: The Ménage à Trois between EC Law, International Law and the European Convention on Human Rights Following the UN Sanctions Cases', 46 *CMLRev* (2009) p. 73.

[15] To a certain extent the need for autonomy evens seems to be *derived* from the need to protect these substantive rights. *See* further below for a further analysis of this potentially dangerous reasoning. For an analysis emphasizing the importance of the Courts approach for the hierarchy of fundamental rights, especially within the EU legal order, *see* N. Türküler Isiksel 'Fundamental Rights in the EU after Kadi and Al Barakaat', 16 *European Law Journal* (2010) p. 551.

> (…) 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, that respect constituting a condition of their lawfulness *which it is for the Court to review* in the framework of the complete system of legal remedies established by the Treaty.[16]

In this way the Court of Justice drafted fundamental rights to defend and justify that autonomy with a normative layer absent in the early, more formal reasoning supporting that autonomy: EU law must be autonomous if it is to be a bulwark for fundamental rights.[17] This is a substantive turn in the grounding of autonomy and supremacy that may have far reaching consequences, and in part sits uneasily with the more formal arguments relied on originally, as will be discussed further below.

At the same time, however, the Court of Justice tried to avoid too direct a conflict with the UN legal order. Emphasizing how EU law does respect UN law, it precluded any review of an UN resolution *itself*, even on the basis of *jus cogens*. Only the *EU implementing measure* can be reviewed, as this measure does not derive immunity from its UN background.[18]

The ECJ's approach stands on two legs. First, within the EU nothing outranks the fundamental rights and principles enshrined in the EU legal order. Secondly, all UN resolutions leave an implementing margin sufficient for these fundamental rights and principles to be respected. This must be assumed by the Court, albeit implicitly, as without such a margin any review of the EU implementation measure will directly amount to review, at least in substance, of the UN measures.[19]

In its *Kadi I* the Court of Justice did find several violations of Kadi's fundamental rights. For one thing, Kadi had not received any information regarding the grounds for his listing, not even after his assets had been frozen. Consequently he had not had a sufficient chance to defend himself.[20] Partially because of the

[16] My italics. For further illustrations of the hierarchically fundamental position of fundamental rights within the EU legal order *see* especially paras. 288, 290, 303, 304, 305, 308, 316 and 326. One could even wonder whether this language implies a (substantive) hierarchy of norms within primary law, perhaps even affecting the position of the 'masters of the Treaty.'

[17] Compare the reasoning of the Court in *Van Gend en Loos* and *Costa* v. *E.N.E.L.* focusing on effectiveness and the content of the Treaty. A focus on fundamental rights would also have been difficult, as the Court only started to embrace these now core values much later, via the concept of general principles, after its judgments in *Internationale Handelsgesellschaft*, *Nold* and *Baustahlgewebe*. *See* Case 26/62 *Van Gend en Loos* [1963] *ECR* 1, Case 6/64 *Costa* v. *E.N.E.L.* [1964] *ECR* 585, Case 4/73 *Nold* [1974] *ECR* 491, Case 11/70 *Internationale Handelsgesellschaft* [1970] *ECR* 1125 and Case C-185/95 P *Baustahlgewebe* [1998] *ECR* I-8417. *See* further below for discussion on the inherent tension between such formal and substantive arguments.

[18] *See* for instance paras. 287, 293 and 294 of *Kadi I*, ECJ.

[19] Paras. 298-299 *Kadi I* ECJ.

[20] Para. 352 *Kadi I* ECJ.

impossibility to defend himself, his right to property had been violated as well, as this right includes the procedural right of a reasonable opportunity to put one's case to the competent authorities.[21]

Considering these violations, the Court held that, in principle, Kadi's listing should be annulled. Shifting to a more pragmatic mode, it nevertheless decided to maintain Kadi on the list for a maximum period of three months.[22] This was because it could not '(…) be *excluded* that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified',[23] and because direct annulment might 'seriously and irreversibly' prejudice 'the effectiveness of the restrictive measures.'[24] Within this period of three months it was up to the Council and the Commission to see if they could adopt a new decision to list Kadi whilst respecting the minimum requirements of '*procedural* justice.'

Post-Kadi I *developments*

Since the judgements in *Kadi I* several changes have been made in the listing procedure both at the UN level and at the EU level, to improve the legal protection within the boundaries imposed by confidentiality and public security. When providing information to the UN Sanctions Committee, for instance, the state recommending the listing of an individual must indicate which information is confidential. All the other information is then published online and sent to the individual concerned, together with general information on blacklisting and the possibilities and procedures for requesting delisting.[25] In addition, the possibility for an individual to request such delisting via the 'focal point', which was created in 2007, has been enhanced by the appointment of an Ombudsman. This office, which has been established per 7 June 2010, can receive and investigate requests from individuals directly, and can bring its findings to the attention of the Sanctions Committee.[26] It is still, however, the Sanctions Committee alone that decides.[27]

[21] Paras. 368-370 *Kadi I* ECJ.

[22] On the tension between these different modes and the predicament of the Court of Justice also *see* further below.

[23] Para. 374 *Kadi I* ECJ.

[24] Para. 373 *Kadi I* ECJ.

[25] Perhaps taking it to far, but one could even wonder if this is not a violation of the privacy of the individual, as generally the information will not be very positive. One could therefore imagine that the individual needs to agree to on-line publication, although some individuals might be difficult to get a hold of.

[26] Additionally, following para. 25 of Resolution 1822 (2008) a comprehensive review of the UN List was completed in July of 2010. 24 individuals and 21 entities were de-listed in this review.

[27] *See* Resolution 1904 (2009). Seven complaints have been received so far by the *Ombudsman*, no recommendations have as yet been given.

In its recent 11th report the UN Analytical Support and Sanctions Implementation Monitoring Team finds that by now sufficient improvements have been made at the UN level and that

> the challenge now lies far more with Member State implementation than with refinements of the Committee procedures. The aim of the Security Council must now be to reassure the courts that the sanctions regime established (…) is fair and, with the increased support of Member States, reassert its original purpose of ridding the world of the threat of terrorism from Al-Qaida, the Taliban and their listed associates.[28]

The team notes that continued court challenges 'jeopardize Member State implementation of the measures.' It explicitly refers to the *Kadi I* decisions of the General Court and the Court of Justice.[29]

At the EU level the most important change has been that after being listed, the individual concerned receives a summary of the grounds supporting his listing, and is given a reasonable period to respond. Any response is then taken into consideration in subsequent decisions to either retain or remove a suspected individual. In addition, the Commission informs those listed of the possibility to bring an action for annulment before the General Court or to request delisting via the UN Ombudsman.

The renewed listing of Kadi and the Kadi II *judgment*

After the judgment of the Court of Justice, the Council and Commission indeed wished to retain Kadi on the list. Under the new procedure a summary of grounds was therefore published on the website of the Sanctions Committee on 22 October 2008. These amounted to a single page of text. On the same day the Commission sent a summary of grounds (the same one page) to Kadi, giving him until November 10 to react. After 'careful consideration' of his response, the Commission in a new decision kept Kadi on the list.[30] On February 26 Kadi then

[28] 11th report of the Analytical Support and Sanctions Implementation Monitoring Team of 22 Feb. 2011, p. 5, (S/2011/245) available at: <www.un.org/ga/search/view_doc.asp?symbol=S/2011/245>.

[29] Ibid., p. 13. It is recognized, however, that 'the *perception* that listed persons continue to lack an effective remedy may yet require the Security Council to take further action. The Team believes that if that is so, there is room to develop the Ombudsperson process, but this will also require acceptance from the courts and Member States that an acceptable and equivalent level of review can be achieved through a system unique to the Security Council that does not precisely emulate a national judicial system' (point 36, p. 15, my italics).

[30] Commission Regulation 1190/2008 of 28 Nov. 2008 amending for the 101st time Council Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban *OJ* [2008] L 322/25.

brought an action for annulment of this decision before the Court of First Instance, bringing us, and the EU courts, back to where this paper started.[31] Only this time, the Court of First Instance also had to take into account the full rejection of its approach in *Kadi I* by the Court of Justice.

In the resulting *Kadi II* judgment, the newly renamed General Court, after first questioning the wisdom of the *Kadi I* judgment of the Court of Justice, goes into a thorough review of Kadi's listing. Finding it more than wanting, and subtly highlighting some even bigger problems on the horizon, the General Court annuls his listing.[32]

Four points invite more detailed discussion. The first one is the candid and fundamental criticism the General Court levels at the *Kadi I* ruling of the Court of Justice. The second one is the full and strict review of the compatibility of the listing with fundamental rights required by the General Court, which inevitably leads to tensions between UN listings and the EU legal order. Third, there is the predicament in which the Court of Justice now finds itself, having to deal with the appeals that have been brought.[33] Fourth, and lastly, what will the consequences of a possible final annulment be for the member states? As UN members they will still be under an obligation to comply with UN law. Yet there is reason to believe that in some cases, even purely national freezing measures adopted to meet this UN obligation will come under the scope of EU law, and will have to comply with the general principles of EU law. Where the member states are not able to comply with the requirements these principles entail, as seems likely, this leaves them torn between two legal orders. Either they violate UN law, or they violate EU law.[34]

[31] In this regard it is interesting to note that the case was handled by the seventh chamber, and not by a grand chamber. Whether this is because the judgment was seen as mere application, or because it was intended to prevent too sharp conflict with the Court of Justice is unknown.

[32] It should be noted, however, that this is not the first application of *Kadi I* by the General Court. In its *Othman* and *Al-Faqib* judgments the General Court already applied *Kadi I* and annulled the UN-based listings concerned. As since then the UN system has not collapsed, the threat of an open conflict should perhaps also not be overestimated. *See* Case T-318/01, *Othman* [2009] *ECR* II-1627 and Case T-135/06-138/06 *Al-Faqib T-135/06* [2010] nyr.

[33] By an order from the President of the Court of 9 Feb. 2011 these appeals by the Commission, the Council and the United Kingdom in Cases C-584/10 P, C-593/10 P and C-595/10 P have been joined for the purposes of the written procedure, the oral procedure and the judgment.

[34] Cf para. 303 of *Kadi I* ECJ, finding that member states cannot rely on Art. 351 TFEU to escape these very foundations of the EU legal order.

Candid judicial discourse and the hierarchy between the EU courts

The General Court rather openly criticises the position of the Court of Justice, and makes it quite clear that it remains more convinced of its own approach in *Kadi I*. The Eurocentric stance of the Court of Justice is found to conflict both with international law and with EU law. The UN Charter itself claims primacy, certainly for Security Council Resolutions under Chapter VII. Under Article 351 TFEU (Article 307 EC), furthermore, such primacy should also be accorded to the pre-existing obligations under the Charter. By *de facto* placing the EU (and itself) above the UN Charter, the Court of Justice challenges the very same international legal order the EU forms a part of.[35]

The view that it is only the EU implementing act that is reviewed, and not the UN resolution itself, is rejected by the General Court. As the decisions of the Sanctions Committee leave no discretionary margin whatsoever, reviewing their implementation 'necessarily amounts to a review, in the light of the rules and principles of the Community legal order, of the legality of the resolution thereby implemented.'[36] Indeed the Court of Justice in *Kadi I* did end up directly reviewing, and rejecting, some of the gaps in the legal protection at the UN level when assessing the EU implementing measure. See for instance paragraph 117 of *Kadi I* ECJ. Formally, of course, the Court of Justice only assesses the validity of the EU measure there, yet the content of its review directly and unavoidably engages with the adequacy of the legal protection offered at the UN level.[37]

The General Court drapes the thinnest of veils over its criticisms. Formally it only reiterates the objections of other, external commentators that happened to agree with it. In paragraph 115, for instance, it states that 'doubts may have been voiced in legal circles (…).' Any possible doubt as to the position of the General Court itself is dispelled by paragraph 121: 'the General Court acknowledges that those criticisms are not entirely without foundation.' Furthermore, the criticism of *Kadi I* is first carefully prepared by an overview of the central importance of the UN in paragraphs 3 to 9, and a 23-paragraph reproduction of the pleadings of the Commission and the Council, arguing the central importance and necessity of upholding a certain primacy of UN law to prevent undermining the entire UN system.[38] This is a plea that is implicitly supported in paragraph 113.

[35] Paras. 13-21 *Kadi II* GC.

[36] Para. 116 *Kadi II* GC.

[37] Additionally *see* the 11th report of the Analytical Support and Sanctions Implementation Monitoring Team, p. 13, point 17 clearly perceiving the *Kadi* judgments as a review of the UN procedure.

[38] *Kadi II* GC paras. 88-111.

Such direct, and rather fundamental, criticism is rare, if not unique, and clearly of interest for the relationship between the two courts.[39] Of additional interest is the fact that the General Court refers to two judgments by national courts, the United Kingdom Supreme Court and the Swiss *Tribunal fédéral de Lausanne*, each of which supports its own *Kadi I* approach. On the other hand, only one national court was found to support the view of the Court of Justice, the Federal Court of Canada.[40] Apparently, national decisions may carry weight when interpreting EU law and shaping the EU legal order, even those from non-EU states.[41]

In any event, the General Court mounted a full defence of its own *Kadi I* judgment, thereby engaging the Court of Justice in a dialogue to such an extent that it might even be considered an unofficial party in the appeal.[42] Despite its unusually open and far-reaching criticism, and despite the explicit reminder that it is technically *not bound* by a judgment of the Court of Justice,[43] the General Court nevertheless chose to subsequently apply the *Kadi I* approach of the Court of Justice in full. It thus acknowledges its *de facto* subordination to the Court of Justice. As the General Court itself puts it:

> The appellate principle itself and the hierarchical judicial structure which is its corollary *generally* advise against the General Court revisiting points of law which have been decided by the Court of Justice. That is *a fortiori* the case when, as here, the Court of Justice was sitting in Grand Chamber formation and clearly intended to deliver a judgment establishing certain principles.[44]

It would have been somewhat contradictory if the General Court had ignored the internal EU hierarchy to defend formal hierarchy in the international legal order at large.

[39] *See* for the classical example of a disagreement between the two courts, albeit with a distinctly milder tone, the judgments in Cases T-177/01 *Jégo-Quéré* [2002] *ECR* II-2365, Case C-50/00P *Unión de Pequeños Agricultores* [2002] *ECR* I-6677, and Case C-263/02P *Jégo-Quéré* [2004] *ECR* I-3425. It is of course additionally interesting that the General Court reserved this critique for the second *Kadi* case, and did not go into it in its earlier applications of *Kadi I*, such as in *Othman*.

[40] *Kadi II GC* para. 122. This should be a hopeful development for those committing to judicial dialogue as (part of) the solution to the questions raised by overlapping legal orders. Even if in this case such references may have an element of opportunism to them, they nevertheless may contribute to a discourse of dialogue between national and EU courts.

[41] Additionally the nature of the question also lends itself to comparative exercises, i.e., which effect do other legal systems grant UN law within their own legal orders.

[42] *See* for instance para. 123 of *Kadi II* GC.

[43] Para. 112 *Kadi II* GC.

[44] Para. 121 *Kadi II* GC.

The strict application of *Kadi I* and the conflict between EU and UN law

Precisely the vigorous application of *Kadi I*, including a full review of Kadi's listing against the fundamental rights standards of the EU legal order, forms the second element of our analysis. Having expressed its reservations, the General Court sets to work with an enthusiasm that brings to mind, at least from the perspective of the Court of Justice, the old saying 'be careful what you wish for, as you might get it.'

As it was clear after *Kadi I* that the EU courts would conduct some form of review, the arguments of the Commission, the Council and most member states were largely aimed at keeping this review as marginal as possible. The EU courts were invited, for instance, to restrict their review to the procedural requirements, without going into substantive questions such as evaluating the available evidence. The General Court rejected such restrictions. Referring to *Kadi I* it holds that a 'full review' is required, at least until the UN procedure guarantees the level of fundamental rights protection demanded by the EU standard.[45] Implicitly the General Court thereby alludes to a sort of 'Bosphorus' approach, as did the Court of Justice in *Kadi I*. Under this approach, which the European Court of Human Rights (ECtHR) precisely developed to determine its relation to the EU, one legal order is relieved from the obligation to review every individual legal act from an 'interacting' legal order against its own fundamental norms as long as this other legal order generally guarantees an 'equivalent' level of protection.[46]

Even after the establishment of the Ombudsman, however, the General Court finds that the legal protection at the UN level does not come close to the level required by EU law. There is no independent judicial authority that can review listings, and there is no guarantee that an individual will receive sufficient information to be able to effectively defend himself. Consequently it falls to the EU courts to provide the required level of legal protection through a full review that 'should extend not only to the apparent merits of the contested measure but also to the evidence and information on which the findings made in the measure are based.'[47]

These considerations lead the General Court to an important conclusion: the EU courts must provide the same effective legal protection in the case of UN-based listings as they do in the case of autonomous EU listings. The same standard of review should be applied to both. Effectively this means that the UN pedigree of a listing *has no effect on the level of legal protection* which the EU legal order should guarantee the individual.[48] Even where a listing is required by a binding UN

[45] *Kadi II* GC, para. 125. Also *see Kadi I* ECJ, para. 326.
[46] *See Bosphorus* v. *Ireland* ECtHR 30 June 2005, Appl. No. 45036/98, EHRC 2005/98.
[47] Para. 135 *Kadi II* GC. Also *see* Case C-550/09 *E and F* [2010] (nyr).
[48] Paras. 138-139, 187 *Kadi II* GC.

resolution, all requirements established by the case-law on autonomous listings must be complied with before an individual is placed on the EU list.

This case-law, especially the leading *OMPI* judgments of the General Court, indeed requires far more than a marginal review.[49] Although the *OMPI* framework leaves a wide discretion to the member states, Commission and Council, [50] it remains up to the EU courts 'to review the *interpretation* made by that institution of the relevant facts.'[51] Such review includes *inter alia* the question of whether 'the evidence relied on is factually accurate, reliable and consistent', and whether 'it is capable of substantiating the conclusions drawn from it.'[52]

The required level of review also means that the EU court should have *full access to all evidence relied on*, and that a listing may not be based on evidence not communicated to the Court, confidentially if need be.[53] Additionally, the individuals concerned need to receive sufficient information to enable them to effectively defend themselves. Information may only be denied the individual concerned where this is necessary to secure a higher aim such as national security. Denying access on such grounds to the Court, however, will be very hard to justify, as the EU courts are assumed to be secure and trustworthy enough to handle sensitive and confidential evidence.[54]

It should also be noted that the General Court creates a duty to produce a *result*, not an obligation for the competent institutions to try to the best of their capabilities. The Courts' role is thereby not just to guarantee some formal procedural safeguards, but to offer effective legal protection in each individual case. Crucially, however, this means that to provide an equivalent level of legal protection for UN-based listings, the EU courts must play a *bigger role in UN cases*, and

[49] Case T-228/02 *People's Mojahedin Organization of Iran (OMPI)* [2006] *ECR* II-4665, Case T-256/07 *OMPI II* [2008] *ECR* II-3019, Case T-284/08 *OMPI III* [2008] *ECR* II-3487, as well as Case T-47/03 *Sison* [2009] *ECR* II-1483, Case T-341/07 *Sison II* [2009] *ECR* II-3625, Case T-348/07 *Al-Aqsa* [2010] nyr. *Also see* Case T-229/02 *PKK* v. *Council* [2008] *ECR II-45*, following the appeal in Case C-229/05 P *PKK and KNK* v. *Council* [2007] *ECR* I-439.

[50] In para. 142 of *Kadi II* restrictively formulated as 'some latitude.'

[51] *Kadi II*, para. 142, cf further *OMPI I*, para. 138, *OMPI II*, para. 55, and *Sison* v. *Council*, para. 98.

[52] *Kadi II* GC, paras. 142-143, where it is further added that 'However, when conducting such a review, it is not its task to substitute its own assessment of what is appropriate for that of the competent Community institution.'

[53] *Kadi II* GC, para. 145. *Also see* paras. 73-78 of *OMPI II* for a more detailed discussion of these requirements.

[54] *See* especially *OMPI I*, para. 134 a.o. The repeated refusal to grant such access to the EU courts has been one of the central irritants, especially for the General Court. *See* in this regard the scathing tone of the General Court in *OMPI III*, as it delivered its judgment *one day* after the oral hearing. A proper procedure to enable the Courts to review the evidence relied on might solve some of these problems, although a mismatch probably would remain between the standards used in the intelligence community and those used by the EU Courts.

provide more legal protection themselves, than they do in the case of autonomous EU listings.

This conclusion might seem odd, yet follows from the difference in procedures between the two types of listing. For autonomous EU listings, the national information underlying the listing must come from a 'competent authority', which has to be a *judicial* authority, or otherwise an authority with an equivalent authority.[55] This information, furthermore, has to be based on 'serious and credible evidence or clues.'[56] Only where such national information is available can the Council decide to place an individual on the list. As soon as the national basis for the listing disappears, for instance due to an acquittal, an individuals listing may not be prolonged. With autonomous EU listings, therefore, the individuals concerned already have a degree of legal protection at the national level, meaning the legal protection at the EU level is largely *supplementary* and aimed at reviewing the EU phase of the listing.[57]

None of this national protection is available for a UN listing. Consequently it would not do to only apply the limited substantive review required for autonomous EU listings[58] to UN listings where no national legal protection exists.[59] Instead of providing supplementary protection only, in UN cases it is therefore solely up to the EU courts to provide *complete legal protection* by fully reviewing and safeguarding fundamental rights. At least this remains the case as long as the protection at the UN level is, or is considered to be, too low to justify a more supplementary role of EU courts in UN cases as well.

Kadi's renewed listing did not come close to meeting these requirements. The General Court finds that 'the applicant's rights of defence have been "observed" only in the most formal and superficial sense (…).'[60] It added that 'the procedure followed by the Commission, in response to the applicant's request, did not grant him even the most minimal access to the evidence against him', whilst 'the few pieces of information and the imprecise allegations in the summary of reasons appear clearly insufficient to enable the applicant to launch an effective challenge to the allegations against him.'[61]

Due to his limited access to the evidence, Kadi did not have an effective opportunity to defend himself, neither before the Commission, nor later before the

[55] Art. 1(4) of Council Common Position of 27 Dec. 2001 on the application of specific measures to combat terrorism [2001] *OJ* L 344/93.

[56] *OMPI I*, paras. 116-117.

[57] *OMPI I,* para. 119.

[58] *OMPI I*, paras. 121 and 126.

[59] *Kadi II GC*, para. 187. *Also see* already *OMPI I*, para. 125.

[60] *Kadi II GC*, para. 171.

[61] *Kadi II GC*, paras. 172 and 174. Interestingly the General Court thereby explicitly refers to the recent case-law of the ECtHR on access to evidence in *A* v. *United Kingdom,* ECtHR 19 Feb. 2009, No. 3455/05, EHRC 2009/50.

General Court. This violated both his rights of defence, and his right to an effective judicial review. Kadi's right to effective judicial review had been additionally violated by the fact that the General Court had not received access to the evidence, as this prevented it from exercising proper review.[62]

An ever-widening gap?

The strict review by the General Court illustrates the impressive gap that already exists between the current standard of legal protection in the EU and the reality of UN listings. Considering the substantial duration of most listings, however, the General Court also wonders aloud whether the time has not come to take these demands *one step further*.

The *Kadi* and *OMPI* frameworks are both based on the assumption that an asset freeze is a temporary measure of a preventative nature.[63] Kadi's assets have now been frozen for more than ten years. This raises the question of whether by now, the freezing measures should not be equated with confiscation, and therefore with a more severe violation of his right to property than a 'mere' freeze. The General Court also asks itself whether such a long and invasive measure should still be qualified as preventative, or whether by now it should qualify as a punitive sanction.[64] Were the asset freeze to be qualified as a punitive sanction, however, the level of the legal protection offered would have to be augmented accordingly, further widening the gap between UN listings and EU requirements.

Taking into account the significant impact and seemingly permanent duration of freezing measures, this question of the General Court appears more than justified.[65] All the more so where listings are predominantly based on events from the past, which more than likely will not change. For anyone challenging their listing, this argument therefore seems a sensible and reasonable one, and at least worth repeating.

Leaving it at a warning, however, the General Court maintains the qualification of freezing as a temporary measure. The warning nevertheless remains clear: perhaps even as a light threat that fits the interesting dual character of this judgment. For on the one hand, the General Court defends the legal protection of individuals

[62] *Kadi II* GC, paras. 179 and 181.

[63] Para. 358 *Kadi I* ECJ.

[64] *Kadi II* GC, paras. 149-150. *Also see* for a discussion of this point Eckes, *supra* n. 2, p. 164-165.

[65] *See* for a particularly problematic effect of this preventative qualification para. 374 of *Kadi I* ECJ, where the three months suspension of the annulment was partially justified by the fact that the procedural defects in his listing also did not prove he was innocent. Obviously all the procedural requirements in the world are of little value where listing is justified unless the individual proves he is innocent. For a further discussion *also see* J. Godinho, 'When Worlds Collide: Enforcing United Nations Security Council Asset Freezes in the EU Legal Order', 16 *European Law Journal* (2010) p. 67.

with ardour. Undoubtedly it does so out of conviction, and perhaps even with relief that the *Kadi I* judgment of the Court of Justice allows it to do so. After all, the General Court has actively striven to provide protection in the case of autonomous EU listings as well.[66] It has shown conviction and clear irritation, for instance by speeding up its judgments, where the institutions in its opinion continued to frustrate that objective.[67] On the other hand, the General Court does not seem to mind confronting the Court of Justice with the potentially problematic consequences of its own *Kadi I* judgment either.[68] By forcefully providing a high level of legal protection, and grounding it in the same fundamental rights (or rhetoric, depending on one's view[69]), as the Court of Justice, the General Court exposes one of the weakest links in *Kadi I*: its assumption that the UN resolutions allow sufficient discretion to allow full compliance with fundamental rights requirements.[70] But can these rights be respected where the required information is, for instance, not even available within the EU legal order? Or can a refusal to list ever comply with UN obligations.[71]

Based on the violations found under its full review the General Court annuls Commission Regulation 1190/2008 in so far as it concerns Kadi.[72] No three-month period is granted to the Council and Commission to (again) re-list Kadi in a manner that meets all procedural requirements. Kadi is nevertheless not removed from the list immediately. Under Article 60 of the Statute of the Court of Justice, a decision from the General Court to annul a regulation only takes effect after expiration of the two-month term for appeal, or after a dismissal of the appeal.[73]

[66] C. Eckes, 'Sanctions against Individuals – Fighting Terrorism within the European Legal Order', 4 *EuConst* (2008) p. 205-224, p. 205.

[67] In addition to *OMPI III*, *also see* Case T-86/11 *Bamba* v. *Council* [2011] nyr, where under an expedited procedure the request for annulment of a freezing measure was received on 14 Feb. and the judgment, annulling the listing, was given on 8 June already. The apparent disregard, and perhaps even disrespect, for the annulments by the EU Courts, furthermore, are remarkable by themselves, and may even raise questions as to a violation of Art. 266 TFEU and Art. 4(3) TEU, as well as potential liability for such violations.

[68] *See*, for instance, para. 151 of *Kadi II* GC.

[69] For the cynical interpretation of the use of fundamental rights by the ECJ *see* especially de Búrca, *supra* n. 14.

[70] *Also see* Eckes, *supra* n. 2, p. 252.

[71] For national Courts following the same approach only in the EU context, i.e., claiming to only review the national implementation and purposely ignoring the indirect assessment of EU law this implies, *see* for instance the decision of the Hungarian Constitutional Court in Decision 17/04 (V.25) AB, available at: <www.mkab.hu/admin/data/file/672_17_2004.pdf> or the famous decision of the *Bundesverfassungsgericht* in the arrest warrant case: *Re Constitutionality of German Law Implementing the Framework Decision on a European Arrest Warrant* [2006] 1 *CMLR* 16.

[72] *Kadi II* GC, para. 195.

[73] In a sense this also made the decision to annul somewhat easier for the General Court than it will be for the Court of Justice, seeing it did not directly 'unfreeze' all of Kadi's assets, thereby car-

As appeals have already been brought by the Commission, the Council and the United Kingdom, Kadi will remain on the EU list at least until after the Court of Justice hands down its second judgment.[74]

In this second judgment, the Court of Justice will once more have to grapple with the complexities and perhaps incommensurables at play in *Kadi*. Its plight brings us to the last two questions to be addressed in this contribution: further delineating and disentangling the predicament of the Court of Justice, and assessing how a final annulment would affect the capacity of the member states to list Kadi nationally.

Between a moral rock and a hierarchical hard place

The judgment of the General Court puts the Court of Justice in a predicament, with very few easy or cost-free exits.

To follow the General Court would further bring it into a – by now – high-profile conflict with the UN Security Council.[75] In addition, it would undermine almost all past and future UN listings. After all, the UN procedure itself is found to fall short of EU standards, and the EU Courts will generally not be able to provide the required legal protection themselves.[76] This might lead to a rise of actions for annulment. Also it would, or should, make it difficult for the Commission and Council to cooperate with most future listing requests. Clearly all of this this the Court would rather avoid.

Apprehension at the UN level should, furthermore, not be underestimated. The Analytical Support and Sanctions Implementation Monitoring Team considers the *Kadi* rulings as an open challenge, as these rulings assert: '(…) that European Union law is distinct and equal in authority to Chapter VII resolutions

rying responsibility if these disappear during the appeal, and even worse can later be traced back to a specific terrorist act. Cf also paras. 98 and 99 of Case T-318/01, *Othman* [2009] *ECR* II-1627.

[74] *See supra* n. 33.

[75] One could of course deny this dilemma by claiming that formally the EU is not even bound to UN resolutions as it is not a member. Even if technically correct however, either from the perspective of international or EU law, such a conclusion does not remove the factual dilemma that the UN requires these people to be listed and that the EU, acting on behalf of 27 members of the UN, is not complying. In addition, the relevant Security Council Resolutions are also addressed to 'all international and regional organisations.' In any case the Court of Justice found in paras. 296-297 of *Kadi I* that 'due account' must be had for such Resolutions. Nevertheless there may be some space for constructive compromise here, seeing that the way in which the EU is bound may differ from the way its members are bound. *See* on this point already Eeckhout, *supra* n. 13, p. 191. For the question whether member states can list individually after an EU annulment *see* below.

[76] Compare on this point also the fear of such a general effect from the Analytical Support and Sanctions Implementation Monitoring Team on p. 14 of its 2011 report regarding the UK rulings.

adopted by the Security Council. *This challenges the legal authority of the Security Council in all matters*, not just in the imposition of sanctions.'[77]

In addition, there is the real concern that a future terrorist act could be traced back to a delisting by the Court. This is a risk that only illustrates to what level *de facto* responsibility for fundamental rights protection is being offloaded, or at least disproportionately placed, onto the Courts. This is worrying trend, especially if the Courts are simultaneously attacked politically for actually providing that protection. Despite the intrinsic importance of upholding fundamental rights, which to an extent comes with the judicial function and only ever becomes relevant where they are threatened, the EU courts could wonder if they can and should singlehandedly shoulder that responsibility.

Lastly, there is an inherent tension within *Kadi I* that the Court might not wish to continue to rely on, let alone deepen. Ultimately the Court based *Kadi I* on both the substantive hierarchy of fundamental rights and on the autonomy of the EU legal order. On the one hand UN law, or EU law with a direct UN pedigree, could not be granted immunity from review because the autonomy of the EU legal order itself prevents such immunity. This is a formal justification relying on the notion of autonomy *per se*. On the other hand, the Court relied on the normative supremacy of fundamental rights to reject such primacy or immunity of UN law: even the UN Security Council should not be allowed to violate fundamental rights. This is a substantive argument, relying on the value and importance of fundamental rights in and of themselves. Now on one level one could see these two grounds as mutually reinforcing: the autonomy of the EU legal order is especially justified, and required, where this autonomy safeguards the supreme value of fundamental rights. Ultimately, however, these two lines of argument underlying *Kadi I* are contradictory, at least if taken to their logical absolutes. Any hierarchy based on the substance of fundamental norms, as a modern form of natural law, undermines the very idea of an autonomous legal order in which hierarchy is based on formal criteria. This consequence of relying on such substantive hierarchy is clearly illustrated by the way *national* courts justify reserving ultimate judgment over the EU, and reject the ultimate supremacy claim of EU law.[78] This claim was,

[77] 11th report of the Monitoring Team, p. 14, point 30, my italics.

[78] Cf. Para. 340 of the *Lissabon-Urteil*: '(…) There is therefore no contradiction to the aim of openness to international law if the legislature, exceptionally, does not comply with international treaty law – accepting, however, corresponding consequences in international relations – provided this is the only way in which a violation of fundamental principles of the constitution can be averted (…). The Court of Justice of the European Communities based its decision of 3 September 2008 in the Kadi case on a similar view according to which an objection to the claim of validity of a United Nations Security Council Resolution may be expressed citing fundamental legal principles of the Community (…) The Court of Justice has thus, in a borderline case, placed the assertion of its own identity as a legal community above the commitment that it otherwise respects.'

furthermore, based on the formal logic of the EU being an autonomous legal order, and the necessary legal consequences of supremacy and direct effect that flowed from this autonomy. In no way was *Costa* v. *E.N.E.L.* based on the normative superiority of EU law over national law, for instance in protecting fundamental rights, as it clearly could not be. Externally this superiority *may* exist, for now, yet relying on this substantive argument does undermine the formal arguments underlying internal supremacy. The conceptual price for maintaining absolute supremacy through human rights *externally* might, therefore, very well be to weaken it *internally*.[79]

Adding the semi-official appeal of the General Court itself to the problems listed above one could, therefore, think of several reasons for the Court to modify its *Kadi* line.

On the other hand the ECJ's powerful and fundamental rhetoric in *Kadi I* sits uneasily with reducing its protection now. The Court did declare, after all, that 'there can be no derogation from the principles of liberty, democracy and respect

[79] Compare on this point also Besson, *supra* n. 3, p. 256 et seq. Even the so far highly compliant Dutch Courts can seemingly be inspired by the Kadi logic to elevate the hierarchical status of fundamental rights over EU law. Although one judgment does not a revolution make, the judgment of the Court of Appeal in The Hague (*gerechtshof*) of 26 April 2011, Case HA ZA 09-1192, No. 200.063.360/01 is highly interesting in this regard. Especially in para. 5.5 where, with an explicit reference to *Kadi I* the primacy of both UN and EU law is at least weakened, and implicitly even denied: 'Even where Resolution 1737 would require discriminating between individuals of Iranian nationality and individuals with other nationalities, the governments plea would not succeed. After all the fact that the [Dutch] sanction regulation respectively implements a resolution of the UN Security Council and a Common Position under art. 29 TFEU does not mean that the [Dutch] sanction regulation cannot be reviewed against the fundamental rights enshrined in the ECHR and Community law, including the principles of equality and the prohibition on discrimination based on nationality. The European Court of Justice has decided in its Kadi judgment of 3 September 2008 (…) that the Community legislator should review, in principle fully, the legality of all Community action, including Community actions aimed to implement resolutions of the Security Council adopted under chapter VII of the UN Charter, against the fundamental rights that form part of the general principles of Community law. A fortiori it is open to the court to test the Dutch sanctions regulation against these fundamental rights. The District Court (*Rechtbank*) has mistakenly ruled otherwise (…) by considering that, had resolution 1737 compulsory prescribed how the [Dutch] state should design its sanctions regulation, such review of the [Dutch] sanctions regulation against fundamental rights would not have been possible because it follows from art. 103 of the UN Charter that resolutions of the Security Council are of a higher order than other treaty provisions.' (My translation and italics. At points [Dutch] has been added to prevent confusion.) In addition, the Court of Appeal also does not disagree with the more explicit denial of EU primacy by the District Court that: 'In so far as the plea of the government is based on the Common Position it also fails. (…). Furthermore the fact is that the way in which EU requirements are implemented in national legislation must a fortiori be reviewed by the national court against directly effective treaty provisions (*een ieder verbindende verdragsbepaling*).' These provisions include inter alia the ECHR and the ICCPR. *See* para. 4.7. a.o of the judgment of the District Court of The Hague (*Rechtbank*) of 3 Feb. 2008, case LJN BL1862.

for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union.'[80] This was a conclusion for which the Court even reversed some of its earlier case-law.[81]

If it nevertheless still wanted to uphold Kadi's listing, the Court would seem limited to two unattractive options. It could rule that the new listing procedure complied with EU standards, yet this would be rather implausible considering its rejection of the UN procedure in *Kadi I*, *Hasan* and *Ayadi*. Alternatively it could accept that a lower level of legal protection should be accepted in the case of UN listings, which would mean reversing, or at least rolling back, its stance in *Kadi I* as well.

Both options could harm the credibility of the Court. In a worst-case scenario it could even trip up the *Solange* and *Bosphorus* tripwires which block any retreat from the Courts commitment to fundamental rights.[82] Even if not likely, this surely is a risk that the Court of Justice will take into account.[83] Last, and not least, there is of course the principled, substantive argument itself that indefinitely freezing funds without proper legal protection is simply wrong, and that fundamental rights should always be protected – at least if they are truly to be fundamental and not just 'rhetoric on stilts.'[84]

Reducing the drama …

At the same time the dilemma should not be exaggerated. To start with, one could say that the Court of Justice already crossed the Rubicon in *Kadi I*. Despite the conciliatory words on the importance of international law and the pragmatic

[80] *Kadi I* ECJ, para. 303. *Also see* para. 304, whereas additional examples of fundamental statements are not hard to find.

[81] Paras. 301 and 302 *Kadi I* ECJ. *Also see* A. Gattini, case note to Kadi in 46 *CMLRev* (2009) p. 225.

[82] *See* especially *Solange II* (Re Wuensche Handelsgesellschaft), *Bundesverfassungsgericht* 22 Oct. 1986 [1987] 3 CMLR 225, 265, and *Bosphorus* v. *Ireland* ECtHR 30 June 2005, Appl. No. 45036/98, *EHRC* 2005/98. Both create a falsifiable presumption that the EU provides a sufficient degree of fundamental rights protection. If this presumption is falsified, however, it opens up the path to review of EU acts by the German *Bundesverfassungsgericht* and/or the European Court of Human Rights. Cf. Kunoy and Dawes, *supra* n. 14, p. 73 et seq.

[83] For the leeway granted by the ECtHR itself to actions 'covered by UNSC Resolutions', and its refusal to 'imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself', *see* its ruling in ECtHR *Behrami* and *Saramati* (2007) 45 EHHR 10, Appl. Nos. 71412/01 and 78166/01, especially para. 149. For a more dire forecast were the Court to reduce its fundamental rights protection *see* Gattini p. 233, arguing that upholding the listing would 'have presented a major backlash, a major risk, and a major inconvenience.'

[84] Freely after Benthams famous rejection of fundamental rights outside, or even above, the positive legal order as 'nonsense on stilts.'

compromise of keeping Kadi listed for three more months, the fundamental choice for autonomy and fundamental rights was made. A choice, furthermore that has been repeatedly followed already. Post-*Kadi I,* the General Court annulled all three UN listings it was invited to rule on.[85] The Court of Justice itself has already annulled two other UN listing in *Hasan* and *Ayadi*, both times without granting a three-month period.[86] Since *Kadi I*, therefore, UN annulment actions have had a perfect success rate.

As far as autonomous EU listings are concerned, the General Court has so far rejected the request for annulment in three cases.[87] Two of these, however, were atypical in the sense that in *Morabit,* the claimant had already been removed from the list, and in *Kongra-Gel* the action was rejected on a point of admissibility.[88] In the eight other terrorist-listing cases it annulled the listing, although it should be kept in mind that three of these concerned the People's Mojahedin Organization of Iran (PMOI), whereas Sison and Al-Aqsa both have two annulments under their belt.[89]

Even though this often led to relisting (and sometimes re-annulment), several UN listings have therefore been annulled already. Law as such has survived, and the UN is still standing. Both appear fortunately able to accommodate quite some conflict and incoherency. In addition the effect of the EU delistings should not be exaggerated either, especially not in light of the overall problems with effectiveness of individual sanctions.[90]

[85] Case T-318/01 *Othman*, Case T-135/06-138/06 *Al-Faqib*, and *Kadi II* GC. It rejected the first four actions for annulment it received (*Kadi I, Yusuf, Ayadi and Hassan*), but only because it applied its pre-*Kadi I* framework in which it accorded primacy to UN law.

[86] Joined Cases C-399/06 P and C-403/06 P *Chafiq Ayadi* and *Faraj Hasan* [2009] *ECR* I-11393.

[87] Case T-49/07 *Fahas* v. *Council* [2010] nyr, Case T-37/07 and T-323/07 *El Morabit*, [2009] *ECR* II-131, and Case T-253/04 *Kongra-Gel* [2008] *ECR* II-46. This is disregarding its atypical judgments on other sanction regimes such as against Myanmar and Iran (although these last ones are certainly of interest on the requirement for a statement). *See* especially Case T-390/08 *Bank Melli Iran* v. *Council* [2009] *ECR* II-3967, and joined Cases T-246/08 and T-332/08 *Melli Bank* v. *Council* [2009] *ECR* II-2629, both with appeals pending.

[88] For the interesting inroad into primary law that was made to ensure legal protection in he linked case of the PKK *see* A. Cuyvers, Case note to cases T-229/02 and C-229/05P: The PKK and the *KNK* v. *the Council*, 45 *CMLRev* (2008) p. 1487.

[89] Case T-228/02 OMPI I, Case T-256/07 *OMPI II*, Case T-284/08 *OMPI III*, Case T-229/02 *PKK* v. *Council*, Case T-327/03 *Al-Aqsa*, Case T-348/07 *Al-Aqsa II*, Case T-47/03 *Sison*, Case T-341/07 *Sison II*. Most recently it also annulled a listing related to the situation in Ivory Coast, though applying the framework developed in the terrorist cases, *see* Case T-86/11 *Bamba* v. *Council* [2011] nyr.

[90] *See* for an overview Eckes, *supra* n. 2, p. 72-77, including the many authors cited there giving an extremely critical assessment of the effectiveness of individual freezing measures.

Also, no wave of annulment actions has yet reached the General Court. At the time of writing seven cases are pending.[91] A number that, if not negligible, is modest in comparison to the amount of listings: for where 'only' 25 persons and 29 groups and entities are enumerated on the autonomous list,[92] the UN list is over 72 pages long and contains many more names. One can even wonder why not more of these have requested annulment at the EU level. Interesting hypothetical explanations range from the reassuring assumption that these listings are justified and based on sufficient evidence, to the more cynical hypotheses that the freeze is so ineffective their objects do not feel the need to have it annulled, or that most of them would find it difficult to legally challenge their listing without getting arrested. In any case one conclusion might have to be that the daily practice of listing is not too seriously affected by the judicial 'rebellion' in the EU.

… yet appreciating the stakes

Even if an international legal meltdown is not immanent, however, the decision of the Court of Justice remains of importance. One could imagine that another annulment, especially in such a high profile case, could at least spark actions for annulment to a level that can no longer be absorbed or ignored by the member states or the UN. Fully accepting the current *Kadi II* judgment would also make it very difficult to accept any future UN listings. As we saw above, furthermore, the UN is closely watching, and disagrees with the Court of Justice, as does the General Court. In addition to the relation with the Security Council and the General Court, the Court of Justice has to take into account its relation to the Council, the Commission, and the member states, and any form of executive comity it might want to grant them.[93] These parties have all pleaded before the General Court to alter, or at least soften, the *Kadi I* approach.

Most importantly, the *Kadi* case has become one of the central cases on the nature of the EU legal order, the position of fundamental rights within that order, and the place of this order in the international arena. As such, the Court's defence of fundamental rights has earned it quite some approval, with many applauding the firm stand for justice. Some sensible criticism on the closed, dualist approach underlying this firm stand has been formulated as well. Mostly this points to the

[91] Action brought on 1 Sept. 2010 – *Maftah* v. *Commission* (Case T-101/09), Action brought on 1 Sept. 2010 – *Elosta* v. *Commission* (Case T-102/09), Action brought on 23 July 2010 – *Yusef* v. *Commission* (Case T-306/10), Action brought on 6 April 2010 – *Ayadi* v. *Commission* (Case T-527/09), Action brought on 14 Aug. 2009 – *Al-Faqih and MIRA* v. *Council and Commission* (Case T-322/09), Action brought on 7 Jan. 2010 – *Al Saadi* v. *Commission* (Case T-4/10), Action brought on 15 April 2009 – *Abdulrahim* v. *Council and Commission* (Case T-127/09).

[92] As last updated by Common Position 2009/1004, updating Common Position 2001/931.

[93] Something that applies even more so for France and the United Kingdom as permanent members of the Security Council.

danger of shutting international law out rather than striving to become an integral and constructive part of it. Were the EU to isolate itself, this might obstruct the development of that same international legal order, perhaps preventing it from achieving a level where we would no longer need to shut it out.[94] In addition, the Lisbon Treaty has in the meantime entered into force, incorporating the Charter of Fundamental Rights and turning the former CFSP objective of 'strict observance and the development of international law, including respect for the principles of the United Nations Charter' into a general EU objective.[95] All of these developments raise the question if and how they should affect the reasoning and eventual choices made in *Kadi I*.

The *Kadi II* case, therefore, leaves the Court of Justice in a difficult spot. It contains the invitation, and perhaps even the obligation, to further develop its position on these issues. Although the Court clearly has the option of treating *Kadi II* as a clone case by deciding it in a regular chamber and simply copying *Hasan and Ayadi*, this might not be convincing. Yet no easy alternatives suggest themselves either. If it decides not to treat *Kadi II* as a clone, the Court needs to find some coherent position between the two extremes set out above. A challenging task, especially where the Court is forced in a simultaneous game of political, legal and practical chess at the UN, EU, and national level: a chessboard that truly mirrors the Escher-like reality of globalised law described earlier. In the words of Halberstam and Stein, furthermore, 'the stakes – both systemic and individual – are high', especially so in the longer run.[96]

At the same time the size of these stakes point to another dimension in the Courts' predicament, or perhaps even to one factor underlying the predicament outlined so far: the role it is asked to play and the nature of the ruling it is asked to provide.

[94] Cf. also the need described by J. Habermas in 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society', 15 *Constellations* (2008) p. 444.

[95] Art. 3(5) TEU. *Also see* in this regard Art. 21 TEU which lists as external objectives of the EU: 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.' Note that both fundamental rights and respect for international law are mentioned, though fundamental rights and values are mentioned first.

[96] Halberstam and Stein, *supra* n. 14, p. 70.

Between settling a dispute and structuring the global legal system: the institutional predicament of the Court

Except for with regard to its namesake, it can safely be said that the *Kadi* case has become about something very different than settling a concrete conflict between an individual and an EU institution. Instead, the Court of Justice is almost operating as a constitutional legislator. It must not just construe the nature of the very constitutional order it is based on, but also rule on the hierarchical relation of that order to other legal systems and the place that fundamental rights should generally play in this question of hierarchy. Furthermore, the ordinary relation of comity between the judiciary and the executive, which may enable a court to delimit its role and share responsibility with the executive, is problematic here. As the UN executive and the EU judiciary operate in different legal systems, this already complex relation is infused with questions of autonomy and primacy.

Obviously, highest courts often play a role in constitutional development, and the line between constitutional adjudication and lawmaking is notoriously thin. Also, a constitutional role for the Court of Justice is nothing new, having rocket-propelled itself to constitutional significance ever since *Van Gend & Loos*. The role now placed on, or claimed by, the Court may nevertheless exceed even rather wide conceptions of its function in the EU legal order. Moreover, the specific problems concerned might not lend themselves to constructive judicial solutions.[97]

General debates on the proper role of the Court of Justice aside, this constitutional and structuring role also adds to the predicament of the Court in another way. The grand principles involved, as well as its apparent need to prove its *bona fides* as a guardian of fundamental rights, appears to restrict its use of the more pragmatic and incremental methods of judicial decision making courts often turn to in hard cases. After all, where the road ahead is obscured and lined with pitfalls, courts often seem to prefer small steps, and to only pragmatically deal with the concrete conflict at hand.

This predicament can perhaps best be described by envisioning one such pragmatic alternative, and the difficulties it would run into. Assume, for instance, that the Court decides to uphold the annulment, yet tries to do so in a manner that creates some flexibility for future decisions. If it chooses such a path there are of course several ways in which the Court could design a potential softening of *Kadi I*, and it will be up to the Court to find the best way amongst the myriad of factors it needs to take into account. One hypothetical solution would be to uphold the firm line formulated in *Kadi I*, yet at the same time set the scene for a *future* sof-

[97] Also note the risk discussed above of the executive 'off-loading' its own responsibility onto the courts.

tening via some variation of the *Bosphorus* approach.[98] Both as a lure and a warning for the UN, the Court could, for instance, accept the possibility that future improvements in the legal protection at the UN level might allow the EU Courts to switch to a more supplementary review.[99] Within the future application of such a *Bosphorus* test, the UN claim to authority could then discreetly be taken into account, allowing the Court to balance this claim against the ideal level of legal protection.[100]

Such an opening would not directly undermine the right to review that EU courts claim.[101] Nevertheless it would ultimately create a distinction between the review of autonomous and UN based listings. A distinction that on the level of principle is difficult to accept. Why should one's legal protection depend on the origin of the freezing measure? Even creating a limited future possibility of reducing fundamental rights protection may be seen as surrendering such fundamental principles. Both the intensity of decisions at the constitutional level and the purity of the principles involved, therefore, sit uneasily with pragmatic solutions or compromises. Reducing the absoluteness and purity of the rights and principles involved, furthermore, would also undermine the justification of review itself. As discussed above, it largely is the imperative importance of fundamental rights that is relied on to warrant judicial review by EU courts. Yet upholding that purity may come at a hefty price, and trap the Court in too absolutistic and rigid a stance.

The Court needs to reconcile its role of 'great legislator' with that of a pragmatic conflict resolver. The tension between these two roles is clearly visible in

[98] The *Bosphorus* references already present in the judgments of the Court of Justice in *Kadi I* and the General Court in *Kadi II* would provide clear starting points for such a softening. *Kadi I* ECJ para. 326, *Kadi II* GC para. 125.

[99] This could, for instance, include an increased role in practice of the Ombudsperson, as evidenced by the Security Council generally respecting his recommendations. This Ombudsperson would *vice versa* probably be empowered by a finding of the EU Courts that they will apply a lower level of review where the Ombudsperson has thoroughly reviewed and approved a listing, whilst applying increased scrutiny where the Ombudsman recommends delisting, yet the Security Council maintains the listing. *See* in this regard the call from the UN monitoring team: 'The Team believes that if that is so, there is room to develop the Ombudsperson process, but this will also require acceptance from the courts and member states that an acceptable and equivalent level of review can be achieved through a system unique to the Security Council that does not precisely emulate a national judicial system' (11th report, point 36, p. 15).

[100] Cf. *also* Eeckhout, *supra* n. 13, p. 205-206 and his suggestion for a comparable 'So Lange approach.' The approach suggested here deviates, however, as it explicitly sees the two levels of protection as communicating vessels: EU protection can be gradually reduced over time, as UN protection is gradually increased. It is in assessing these grades that – essential and justifiable – wiggle room lies for the Court of Justice.

[101] Cf. in this regard the *Honeywell* decision (*Mangold II*) of the *Bundesverfassungsgericht*, expanding the pragmatic margin for the mistakes the EU legal order may make, yet reserving the fundamental right and capacity to overrule EU law where even this '*Fehlertoleranz*' is exceeded. *Bundesverfassungsgericht* Second Senate, 6 July 2010, 2 BvR 2661/06, especially para. 66.

Kadi I when one contrasts the principled paragraphs on the 'very foundations of the legal order' with the pragmatic decision in the end to allow the violation of these foundations to continue for three more months.[102] It is a decision that can indeed be criticized from the principled point of view and seen as wise from the more pragmatic perspective. In addition to the complex problems already raised by the *Kadi* case, the predicament of the Court is consequently deepened by its increasing, and partially self-chosen, role as a constitutional legislator, and the need to combine this with its institutional function as a practical conflict solver and avoider.

The possibility of national listings after annulment

After a potential final annulment Kadi will be removed from the EU list, and this basis for freezing his funds will disappear.[103] For member states that rely on the EU regulation to implement freezing measures, this will mean an immediate thawing of Kadi's funds. These states will have to decide whether to adopt *national* freezing measures to meet their UN obligation, perhaps even before the appeal has been decided. This raises the question if EU law would allow them to do so. For those states who already have Kadi on their national lists, the question will be whether EU law allows them to *maintain* this listing or not. If an annulment would indeed block the possibility of member states to adopt, or maintain, purely national measures, however, a direct conflict would arise between the member states' obligations under EU and UN law. Since the Court of Justice ruled in *Kadi I* that member states cannot rely on Article 351 TFEU to escape fundamental principles of EU law, this conflict would be a serious one.[104]

Naturally one can wonder how many member states would want to relist after an annulment by the European Courts on grounds of a fundamental rights violation. National courts will probably not look kindly on these listings, and the ECtHR could eventually be asked to rule on them. On the other hand, member state governments have had little difficulty in unanimously voting OMPI, Sison and Kadi back onto the list after scathing judgments of the EU Courts. They might continue this line nationally. Within certain national systems, furthermore, a national listing may derive some form of immunity from its UN pedigree, preventing national courts or the ECtHR from exercising any review.[105] The question

[102] Paras. 303 and 374 of *Kadi I.*

[103] At least for the period of time a potential relisting will take. Considering the track record of re-listings in other cases such a relisting does not seem out of the question, although the General Court does frown on such actions, and re-annulments also speed up. *See* especially *OMPI IIII* in this regard.

[104] Para. 303 of *Kadi I* ECJ.

[105] This would, for instance, be the case in the Netherlands, where primacy would be granted to the UN act, even though the recent judgment of the Court of Appeals in The Hague on the liabil-

whether an annulment would stand in the way of national freezing measures therefore remains both legally and factually relevant.

Two ways in which EU law could limit member state competence can thereby be envisioned. First, national measures could fall under the *scope* of EU law. Second, the *duty of loyal cooperation* might limit the freedom of member states to act,[106] even where a national listing would not fall under the scope of EU law.[107] A detailed assessment of these possibilities falls outside the scope of this contribution, yet one specific way in which an annulment would restrict member states needs to be pointed out, especially as it is often assumed that no such restrictions will flow from an annulment.[108] For the fact is that national measures will sometimes fall under the scope of EU law, restricting their capacity to adopt national freezing measures, and further complicating the Court's decision.

National freezing measures may fall within the scope of EU law

Outlining the scope of the general principles of EU law is far from straightforward, particularly as recent case-law of the Courts seems to have significantly broadened, and blurred, that scope.[109] Two situations where member state action falls within the scope of EU law, however, are well established.[110] The first one is where a

ity of the Dutch state for three victims of the Srebrenica massacre may signal a decline in deference in this regard. Judgment of 5 July 2011, LJN BR0133, *see also supra* n. 79.

[106] *See* Art. 4(3) TEU as well as *Opinion 1/03* [2006] *ECR* I-1145, para. 119, and Case C-459/03 *Commission* v. *Ireland* [2006] *ECR* I-4635, para. 174. *Also see* C. Hillion, 'Mixity and Coherence in EU External Relations', in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited* (Oxford and Portland, Hart 2010) p. 91.

[107] The external link present is obviously far removed from the more standard external situation covered by the duty of loyal cooperation, and it is not clear which actual objective of the Union, for the purpose of Art. 4(3) TEU, would be impeded by a national listing. No proposals for concerted external action have been submitted for instance, nor has a decision been adopted authorizing the Commission to negotiate an agreement on this point on behalf of the EU. Cf. Case 804/79 *Commission* v. *United Kingdom* [1981] *ECR* I-1045, para. 28 or case C-266/03 *Commission* v. *Luxembourg* [2005] *ECR* I-4805, para. 60. Nevertheless the broad interpretation and application of loyal cooperation by the Court might provide some arguments here to assume a duty to refrain from national freezing measures that would violate the EU general principles. *See* especially in this regard Case C-246/07 *Commission* v. *Sweden* [2010] nyr.

[108] Cf. for instance Eckes, *supra* n. 2, p. 244, Besson, *supra* n. 3, p. 257, or Eeckhout, supra n. 13, p. 192: 'Annulment could by no means mean that the member states are *prohibited* from freezing the assets of persons listed by the UN.'

[109] *See* Case C-144/04 *Mangold* [2005] *ECR* I-9981and especially Case C-555/07 *Kücükdeveci* [2010] nyr, as well as the editorial comments on 'The Scope of Application of the General Principles of Union Law: An Ever Expanding Union?', 47 *CMLRev* (2010) p. 1589.

[110] *See* generally T. Tridimas, '*The General Principles of EU Law*' (Oxford, OUP 2006) p. 36 et seq., and K. Lenaerts and J.A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law', 47 *CMLRev* (2010) p. 1639.

member state is *exercising* powers conferred by the Treaties or *implementing* EU law.[111] Importantly, this category covers all currently existing national listings that give effect to the EU freezing regulation.[112] All of these national measures will certainly be affected by an annulment. This also means, furthermore, that such national measures that might have been kept in force after earlier annulments were likely in violation of EU law as well.

Second, justified *derogations* on a Treaty obligation fall under the scope of EU law.[113] This second possibility is especially relevant here. Any national freezing of funds would in all likelihood form a restriction on the free movement of capital, limit the right to establishment, and restrict the free provision of financial services.[114] Even where these restrictions can be justified, this brings such national freezing measures within the scope of the general principles of EU law, which would vitiate any measure that is found to violate these principles by the Court of Justice.

Interestingly, the impact of national measures on free movement was explicitly discussed by the Court of Justice in *Kadi I*, although in the discussion on the legal basis:

> If economic and financial measures such as those imposed by the contested regulation, consisting of the, in principle generalised, freezing of all the funds and other economic resources of the persons and entities concerned, were imposed unilaterally by every Member State, the multiplication of those national measures might well affect the operation of the common market. Such measures could have a particular effect on trade between Member States, especially with regard to the movement of capital and payments, and on the exercise by economic operators of their right of establishment. (…).[115]

National freezing measures, however, will only fall under the scope of EU law in this manner where the individual concerned can rely on an EU right, and if such a right is also restricted in the specific circumstances of the case. Especially for third-country nationals who cannot derive any right from EU law this may not be the case, although the broad scope of the free movement of capital might be useful in this regard. Generally, therefore, to bring a national freezing measure under the scope of EU law via this second category those affected by a freezing

[111] *See*, for instance, Case 5/88 *Wachauf* [1989] *ECR* 2609 or joined Cases C-20 & C-64/00 *Booker Aquaculture* [2003] *ECR* I-7411.

[112] This is so even if such national measures predate the EU freezing regulation but have been maintained to give effect to it, as well as where they *also* give effect to the UN resolution or an independent national listing decision.

[113] Case C-368/95 *Vereinigte Familiapress* [1997] *ECR* I-3689.

[114] Arts. 49, 56, and 63 TFEU.

[115] *Kadi I* ECJ, paras. 230 and 235.

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measures must be able to derive some rights from EU law, be it for instance as an EU citizen, a family member having rights under Directive 2004/38, or under an association agreement.[116] In addition, of course, they must create some kind of cross-border element, although this will not be too hard to do in the case of financial services. Where a listed individual is restricted in an EU right, however, this restriction, even if justified in itself, will bring the national measure under the scope of EU law, and therefore under the scope of the general principles.

Obviously the applicability of the general principles will not be a problem where the national listing procedure can and does meet the standards required by the general principles. Where a member state has the relevant information and is prepared to provide sufficient access this might indeed be the case. Nevertheless it seems rather unlikely that this will often be the case. It is difficult to see, for instance, how one member state will be able to provide the required legal protection, including access to the evidence relied on, where all member states jointly were not able or willing to provide that protection at the EU level. Where member states will be unable to remedy the shortcomings of an EU listing nationally, however, they cannot adopt national measures as they are bound by the same principles and requirements that will have vitiated the EU measure. This also means that a final annulment by an EU court would equally disqualify a comparable national listings falling under the scope of EU law, even if indirectly.[117] Say, for instance, that after a final annulment, the Netherlands would immediately decide to place Kadi on a national list, providing him only with the same page of information the Commission did, and without being able to grant the Dutch courts access to the relevant evidence. If this listing falls under the scope of EU law, and therefore under the scope of the general principles, it would be rather difficult for a Dutch court, once seized with the matter, not to follow the conclusion of the Court of Justice, and consequently annul the listing.[118]

Although it is not sure if the Court would bring national measures under the scope in this way, or apply the general principles as strictly in the context of a justification of a restriction, it does seem like a logical application of this category. The consequence, of course, would be to prevent member states from meeting their UN obligations by taking new national measures to replace the annulled EU measure.

[116] Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states *OJ* [2004] L 158/77.

[117] *See* amongst many others for instance Case C-260/89 *ERT* [1991] *ECR* I-2925, Case C-159/90 *SPUC* v. *Grogan* [1991] *ECR* I-4685, or Case C-112/00 *Schmidberger* [2003] *ECR* I-5659.

[118] Not doing so might perhaps even lead to a form of liability along the Köbler line. Case C-224/01 *Köbler* [2003] *ECR* I-10239.

The (im)possibility of national measures and the Pilate approach

Considering these potentially far reaching consequences for member states and listed individuals, as well as the uncertainty and complexity that surrounds the scope of EU law, it will probably be welcomed if the Court of Justice could explicitly address this issue. This would not only provide clarity, and increase the legal certainty of those listed, but perhaps could also prevent further preliminary references, including the additional waiting they entail for those listed.

Explicitly ruling that national measures would *not* be blocked by a final annulment, furthermore, could be interesting for the Court itself, as it might offer a way out of the conflict with the UN. From an international law perspective, the EU is only acting on behalf of the states anyway, and the member states remain ultimately responsible for ensuring compliance with UN listings. So why not simply step out and hand back that responsibility to the member states? Holding that the EU will not execute the listings, but will not prevent its member states from doing so outside the scope of EU law either, could pragmatically remove the sting from the conflict with the UN. The net effect would be to shift the ultimate responsibly back to the member states again, simply by declaring that national measures fall outside the scope and jurisdiction of EU law. This could be called the Pontius Pilate option. As the Court would formally only be ruling on the scope of EU law, moreover, it would not be refusing to uphold fundamental rights *within* that legal order. Such a ruling would, therefore, not directly violate any *Solange* or *Bosphorus* presumption, allowing the Court to wash its hands clean of any national violations. Obviously it would remain rather cynical to allow national measures to undermine the fundamental rights protection that was so ostentatiously extended at the EU level.[119] Part of that blame, however, would also land on the doorstep of the member states willing to continue listing.

Conclusion

The *Kadi II* judgment of the General Court illustrates the fascinating complexities that arise when legal systems, especially ones still trying to define themselves, start to affect each other. By challenging the reasoning of the ECJ's *Kadi I* judgment, yet vigorously applying its logic, the General Court forces the Court of Justice straight back into the Kadi predicament. The ECJ will once more have to deal with the different questions this case raises, including the relation between the substantive hierarchy of fundamental norms and the formal hierarchy deriving from the idea of a legal system itself on which the Court traditionally relied. Can,

[119] Except, again, where the national listing procedure would satisfy the requirements as set out in *Kadi II* GC, meaning no violation of fundamental rights would occur.

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or should, supremacy be based on the ultimate precedence of fundamental rights? This time, furthermore, the Court of Justice will have to deal with these fundamental issues in an even more high profile context, whilst living up to the challenge from the General Court and its own strong language in *Kadi I*. It will have to find a balanced approach that does not escalate the conflict with the UN but also does not backpedal its commitment to fundamental rights too much, or too visibly. Again, not an easy task considering the level of review required by the EU legal order, the realities of the UN listing procedure, and the problematic assumptions bridging the gap between these two in *Kadi I*. The constitutional, structuring role in which the Court increasingly finds, or places, itself further complicates this task, as it restricts the Courts' access to some traditional pragmatic solutions for dealing with such hard cases, and rather locks the Court into a discourse that might not be constructive.

At the same time the Court may also consider giving further guidance on the freedom of member states to take national freezing measures against individuals whose listing has been annulled at the EU level. Contrary to what is often assumed, a final annulment might very well restrict member states from taking such measures, leaving them in an undesirable conflict between UN and EU obligations. And that is a conflict that all parties involved have an interest in avoiding, including the Court of Justice, as it might not like the way some member states would solve it.[120]

[120] *See* in this regard also the – pre ECJ *Kadi I* – assessment of Eeckhout, giving prevalence to the UN obligation in such a situation: Eeckhout, *supra* n. 13, p. 191.

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