Articles

The UN, the EU, and the Kadi Case: A New Appeal for Genuine Institutional Cooperation

By Matej Avbelj[*] *& David Roth-Isigkeit*[**]

Abstract

While the Kadi affair has attracted a lot of attention, this Article approaches it from a rarely used contextual theoretical perspective of resolving institutional conflicts through reflexive sincere cooperation. The argument is short and simple: The institutional relationship between the EU judiciary and the UN Security Council should have been conducted not in strategic-pragmatic terms motivated by institutional power-plays, but rather by genuine pluralist institutional cooperation. The argument is preceded by an in-depth analysis of the theoretical and concrete practical shortcomings stemming from the lack of institutional cooperation between the UN and the EU in the Kadi affair. These shortcomings were not inevitable, as the EU and the UN legal and political systems are already connected with a whole set of bridging mechanisms. These should be, however, strengthened and their use should be made more common. In order to achieve that, the Article suggests an amendment to the Statute of the Court of Justice of the EU and further improvement of the safeguards in the UN Security Council sanctioning mechanisms procedures. There is no dilemma: Enhanced institutional cooperation between the institutions of the two systems will work to their mutual advantage as well as, most importantly, maintain the rights and liberties of individuals like Kadi.

[*] Associate Professor of European Law, Graduate School of Government and European Studies, Slovenia, contact: matej.avbelj@fds.si.

[**] Research Fellow, Normative Orders, Cluster of Excellence at Goethe University, Frankfurt am Main, Germany, contact: david.roth-isigkeit@normativeorders.net.

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A. Introduction

The notorious *Kadi* case[1] continuously attracted a lot of attention. In the seven years that have passed since the appellate decision in the first *Kadi* case, the theoretical landscape has witnessed some unexpected paradigm changes. The commenting scholarship roughly developed in three steps. Staying faithful to the proverbial approach of EU scholarship, which has always been predominantly event-driven, the first step took place in the form of meticulous case-notes which usually boiled down to either critical or approving normative conclusions.[2] This camp of normative conclusions also includes those analyses that scrutinized closely the actual conduct of trials, litigation strategies, and the contributions of different participants in these judicial procedures.[3] During the second step, the discussion centered on a more detailed analysis of the implications of the case for both the affected individual as well as the broader legal and political environment. In accordance with the normative preferences of their authors, these articles tended to travel in two directions: Some critiqued the EU judicial approach from the perspective of international law,[4] whereas others approved it from a perspective grounded in the EU constitutional order.[5] This debate moved along a discussion of three main concerns: The autonomy of either EU

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[1] Joined cases C-584/10 P, C-593/10 P and C-595/10 P, Eur. Comm'n & Others v. Yassin Abdullah Kadi (Mar. 19, 2013), http://curia.europa.eu/.

[2] *See, eg.*, Takis Tridimas & Jose A. Gutierrez-Fons, *EU Law, International Law, and Economic Sanctions Against Terrorism: The Judiciary in Distress?*, 32 FORDHAM INT'L L.J. 660 (2008); Paul James Cardwell et al., *European Court of Justice, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Joined Cases C-402/05 P And C-415/05 P) Judgment of 3 September 2008*, 58 INT'L & COMP. L.Q. 229 (2008); Stefan Griller, *International Law, Human Rights and the Community's Autonomous Legal Order—Notes on the European Court of Justice Decision in Kadi*, 4 EUR. CONST. L. REV. 528 (2008); Bjørn Kunoy & Anthony Dawes, *Plate Tectonics in Luxembourg: the ménage à trois between EC law, international law and the European Conventions on Human Rights following the UN sanctions cases*, 46 COMMON MKT. L. REV. 73 (2009); Enzo Cannizzaro, *Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi case*, 28 Y.B. OF EUR. L. 593 (2009); Hayley J. Hooper, *Liberty before Security: Case T-85/09 Yassin Abdullah Kadi v. Commission (No. 2) [2010] ECR 00000 (30 September 2010)*, 18 EUR. PUB. L. 457 (2012).

[3] For an overview of the literature concerning the first leg of the Kadi saga, see Sara Poli & Maria Tzanou, *The Kadi Rulings: A Survey of the Literature,* 28 Y.B. OF EUR. L. 533 (2009).

[4] *See generally* Katja S. Ziegler, *Strengthening the Rule of Law, But Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights*, 9 HUM. RTS. L. REV. 288 (2009); Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1 (2010); Bardo Fassbender, *Triepel in Luxemburg - Die dualistische Sicht des Verhältnisses zwischen Europa- und Völkerrecht in der Kadi-Rechtsprechung des EuGH als Problem des Selbstverständnisses der Europäischen Union*, 63 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 333 (2010); Gráinne de Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 105 AM. J. INT'L L. 649 (2011).

[5] Daniel Halberstam & Eric Stein, *The United Nations, the European Union and the King of Sweden*, 46 COMMON MKT. L. REV. 64 (2009); Lisa Ginsborg & Martin Scheinin, *You Can't Always Get What You Want: The Kadi II Conundrum and the Security Council 1267 Terrorist Sanctions Regime*, 8 ESSEX HUM. RTS. REV. 7 (2011).

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or international law,[6] the system of human rights protection,[7] and, finally, the effective fight against global security threats.[8]

The third step requires a contextual reckoning[9] in order to integrate the different threads of thought into a broader and less normatively-engaged theoretical approach.[10] This strand of scholarship is interested in the underlying causes about the institutional and scholarly positions taken, the reasons for agreements and disagreements among them, and means of threading the strands of debate into a better-fitted theory that would place not only scholarship, but institutional practices, in a better light and more practical shape.[11]

Most of the existing *Kadi* scholarship belongs to the first and second steps identified above. The third step remains less established as new practical developments in other areas of EU law take scholarly focus elsewhere. This does not mean, however, that everything has already been said about *Kadi.* More abstract, less normatively partisan, and meta-theoretical perspectives could be developed further. This Article contributes, even if modestly, towards that goal. It reconstructs *Kadi* as an example of an institutional conflict. It argues that this institutional conflict has been approached and carried out in an

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[6] Nikos Lavranos, *Protecting European Law from International Law*, 15 EUR. FOREIGN AFF. REV. 265 (2010); Giuseppe Martinico, *The Autonomy of EU Law, in* KADI ON TRIAL: A MULTIFACETED ANALYSIS OF THE KADI TRIAL (Matej Avbelj, Filippo Fontanelli, & Giusepe Martinico eds., 2014).

[7] *See, e.g.*, Erika de Wet, *From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions*, 12 CHINESE J. INT'L L. 787 (2013); Mehrdad Payandeh, *Rechtskontrolle des UN-Sicherheitsrats durch staatliche und überstaatliche Gerichte*, 66 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZaöRV) 41 (2006); Allan Rosas, *Counter-Terrorism and the Rule of Law: Issues of Judicial Control*, *in* COUNTER-TERRORISM: INTERNATIONAL LAW AND PRACTICE 83 (Ana-Maria Salinas et al. eds., 2012).

[8] *See* Larissa van den Herik & Nico Schrijver, *Eroding the Primacy of the UN System of Collective Security*, 5 INT'L ORG. L. REV. 330 (2008); Riccardo Pavoni, *Freedom to Choose the Legal Means for Implementing UN Security Council Resolutions and the ECJ Kadi Judgment*, 28 Y.B. EUR. L. 627 (2009); Thomas Biersteker, *Targeted Sanctions and Individual Human Rights*, 65 INT'L J. 99. Andrea Bianchi*, Fear's Legal Dimension: Counterterrorism and Human Rights*, *in* INTERNATIONAL LAW IN QUEST OF ITS IMPLEMENTATION—LIBER AMICORUM VERA GOWLLAND-DEBBAS 175 (Laurence Boisson de Chazournes & Marcelo Kohen eds., 2010).

[9] CHALLENGING ACTS OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS (August Reinisch ed., 2010); Martinico, *supra* note 6.

[10] HEIKO SAUER, JURISDIKTIONSKONFLIKTE IM MEHREBENSYSTEM (2010); ANTONIOS TZANAKOPOULOS, DISOBEYING THE SECURITY COUNCIL: COUNTERMEASURES AGAINST WRONGFUL SANCTIONS (2011). *See also* NICO KRISCH, BEYOND CONSTITUTIONALISM (2010).

[11] For some attempts, see Juliane Kokott & Christoph Sobotta, *The Kadi Case—Constitutional Core Values and International Law—Finding the Balance?*, 23 EUR. J. INT'L L. 1015 (2013).

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extremely unsatisfactory manner.[12] The institutional actors involved—the UN Security Council and the EU judiciary—were ostensibly promoting their respective core values: Collective security and human rights protection. The Court in *Kadi* preached mutual institutional respect, yet in reality it engaged in an institutional power play and strategic fostering of unstated common objectives that ultimately made the UN, the EU, but especially the aggrieved Mr. Kadi, losers rather than winners. Rejecting the described institutional power politics, this Article makes a case for a genuine and practical—not merely theoretical—framework for cooperation between the UN and the EU which, especially for latter's judiciary, could bring about the optimization of all the interests and principles at stake.

The argument is developed through the following Sections: The first Section provides a brief background to *Kadi*. This is followed by an explanation as to why the case should be best conceived of as an example of institutional conflict. Having conceptualized the case in those terms, the approach of the EU judiciary, as well as of the Security Council, will be analyzed. This analysis will reveal the extent of the theoretical and practical shortcomings stemming from the lack of institutional cooperation between the UN and the EU.

The next Section outlines factual and normative reasons in favor of the presently absent institutional cooperation, demonstrating its advantages over the prevailing strategic and unprincipled institutional behavior. Advocating enhanced institutional cooperation between the UN and the EU, the Article surveys the already available bridging mechanisms and suggests others that could be implemented. Here, a small, but important, amendment to the Statute of the Court of Justice of the EU, which would make institutional cooperation at minimum semi-mandatory, needs to be emphasized. Finally, the Article discusses potential improvements on the UN level and concludes in favor of institutional cooperation that should pervade the new and existing formal means of institutional cooperation and, above all, their practical implementation.

B. Introduction to the Kadi Case

Mr. Kadi's case began in October 2001 when his name was included on a list prepared by the UN Security Council's Sanction Committee. This list entailed a number of the so-called targeted sanctions, such as the immediate freezing of all funds and other financial assets belonging to a listed individual as well as a travel ban. The legal basis for this particular requirement was Security Council Resolution 1333 (2000), which was to be carried out by the UN Member States.[13] In the EU, the Member States decided to act through the Council,

[12] For a critique of the case along similar lines, see Joris Larik, *Two Ships in the Night or in the Same Boat Together: How the ECJ Squared the Circle and Foreshadowed Lisbon in its Kadi Judgment*, 13 Y.B. POLISH EUR. STUD. 149 (2010).

[13] S.C. Res. 1333 (Dec. 19, 2000).

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which adopted a regulation as an implementing act.[14] The list of names of targeted individuals was annexed to this regulation, and the Commission was authorized to add new names if need be.

It soon turned out that this mechanism suffered from significant legal shortcomings. The listing of individuals took place without any prior formal notice and justification. An individual, such as Mr. Kadi, had little recourse at the Council to make his case heard,[15] but he found himself administratively deprived of all of his assets, potentially for an unlimited period of time. Mr. Kadi therefore decided to bring his case against the EU implementing regulation before the Community courts. He argued that the Security Council mechanism effectuated in the EU amounted to a breach of his rights to a fair hearing, to respect for property, and to effective judicial review.[16] Initially he was unsuccessful; the then Court of First Instance confirmed that the rights Mr. Kadi relied on were protected under EU law, but refused to provide him with a remedy. The Court of First Instance reasoned that the remedy was precluded by the UN Charter's supremacy over EU law. Granting the remedy would entail the invalidation of the EU regulation, leaving the Security Council Resolution (SCR) unimplemented in the EU, and making the latter culpable of breach of its obligations under international law.[17] This conclusion could only be altered if the contested regulation was in violation of *jus cogens*, which the Court of First Instance denied existed in this case.[18]

Mr. Kadi appealed this ruling, and the Court of Justice consequently reversed it.[19] In confirmation of the patent violation of Mr. Kadi's rights, the contested regulation was invalidated, but the effects of the ruling were suspended for three more months.[20] This allowed the Commission to adopt a new implementing measure in order to keep Mr. Kadi on the list.[21] He was therefore forced to launch a new wave of proceedings starting at the

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[14] For an overview, see Matej Avbelj, *Security and the Transformation of the EU Public Order*, 14 GERMAN L.J. 2057 (2013).

[15] There was, in fact, a quite ineffective system in place—the focal point.

[16] Case T-315/01**,** Kadi v. Council & Comm'n, 2005 E.C.R**.** II-3649, ¶ 136.

[17] *Id*. at ¶ 204.

[18] *Id*. at ¶¶ 226, 292.

[19] Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council and Comm'n, 2008 E.C.R. I-6351, ¶ 380.

[20] *Id.*

[21] Implementing Regulation 933/2012, 2012 O.J. (L 278) (EC).

General Court. It ruled in his favor, but the case was quickly appealed to the Court of Justice. By that time, Mr. Kadi had been on the list for more than a decade. He was finally removed from it and his assets released, but it was not because of the final decision of the Court of Justice, even though it was in his favor,[22] but because he was politically delisted by the Security Council in October 2012.[23]

C. The Case of Mr. Kadi as Institutional Conflict

In the technical legal sense, the case of Mr. Kadi is an EU law case whereby an individual seeks the annulment of an EU regulation for violation of his rights under EU law. At first sight, there is not much that makes this case special, other than the protracted drama of an individual. A closer look, however, quickly reveals the complexity of the case. The case is set in an intricate international law environment. The EU regulation merely translates obligations of the UN Member States that arise according to a binding Chapter VII resolution issued by the Security Council into an operable legal system. The case is therefore interlinked with another institution, the UN, and follows an agenda in the fight against global terrorism that is not directly connected with the legal order under which Mr. Kadi's case arose.

Because the sanctions regime technically needs a translation into operable domestic law provisions, it is closely dependent on the decision that is taken in front of EU courts. If the measures that it specifies were not made applicable inside the European Union, the effectiveness of the sanctioning mechanism, as well as the overall global fight against terrorism, would be significantly undermined. The Security Council, therefore, needs the EU to implement its sanction list. Consequently, any EU decision on the merits in such cases bears an influence on the UN, as its institutional partner under international law. Cases like Mr. Kadi's not only clearly carry with them a potential of for institutional conflict, but also demonstrate that the conflict has actually occurred.

The usual strategy of how to deal with conflicts that stretch beyond the reach of one single legal order is the incorporation of conflict rules that determine how decisions between them ought to be made. On the one hand, from the perspective of the Charter system, the legal authority remains with the Security Council. Article 103 of the Charter stipulates that the law of the Charter prevails against any other international agreement.[24] Article 25

[22] *Kadi*, *Cases C-584/10 P, C-593/10 P and C-595/10 P*.

[23] *See* Press Release, Security Council, Security Council Al-Qaida Sanctions Committee Deletes Entry of Yasin Abdullah Ezzedine Qadi from its List, U.N. Press Release SC/10785 (Oct. 5, 2012); Implementing Regulation, *supra* note 21.

[24] *See* U.N. Charter art. 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

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requires members of the United Nations to comply with Security Council decisions.[25] On the other hand, the European judiciary has a formal jurisdiction over the case. This judiciary has long held, supported by influential academic voices, that it partakes of the EU legal order, which is autonomous and indeed constitutional.[26] On this basis, some have even found support in the EU law to question the binding character of the Security Council decisions.[27]

The strategy to operate with conflict rules, however, does not provide clear guidance because both lines of argument have their related counterclaims. From the viewpoint of the UN Charter SCRs have supremacy over EU law, its alleged constitutional or autonomous character notwithstanding.[28] Articles 25 and 103 are unequivocal on this point. In contrast, from the EU vantage point one could claim that even if Article 25 of the UN Charter binds states, this must be read in conjunction with the competences of the Security Council.[29] If the Council acts outside its competences (*ultra vires*), SCRs are not legally binding—but rather null and void.[30] As the Charter would not provide for quasi-legal measures in the war against terror, SCRs could not bind states.[31] Objectively, there is no reason to prefer one construction over the other, so the conflict law is not helpful for a solution to the conflict.

Mapping the theoretical options in this case, however, the Court of Justice has the following choice: It can take either a self-referential or an extra-referential decision. Either the court decides on the basis of the law of its own legal order and produces a conflict with

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[25] *See* U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

[26] *Kadi & Al Barakaat*, *supra* note 19, at ¶¶ 316–317. For an example of these academic voices supporting the judiciary, see also Kunoy & Dawes, *supra* note 2.

[27] That was a point where the European Court of First Instance struggled in its argument. *See* Piet Eckhout*, Kadi and Al Barakaat: Luxembourg is not Texas—or Washington D.C.*, EJIL Talk! (Sept. 25, 2009), http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/.

[28] Andreas von Arnauld, *UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz*, 44 ARCHIV DES VÖLKERRECHTS 201 (2006).

[29] Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/65/258, para. 57 (Aug. 6, 2010). *See also* Ginsborg & Scheinin, *supra* note 5, at 10.

[30] The *ultra-vires* debate exists since the 1960's when Security Council Sanctions were subject to intense debates. *See* Mary Ellen O'Connell*, Debating the Law of Sanctions*, 13 EUR. J. INT'L L. 63, 64 (2002).

[31] Report of the Special Rapporteur, *supra* note 26, at ¶ 58.

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the "foreign" legal order that views the case under its own jurisdiction. Or, the Court of Justice decides, with reference to the "foreign" legal order, and has a conflict with its own legality with the criteria of validity of its original legal system.[32] Neither of the two outcomes is truly satisfactory.

There are pragmatic and philosophical reasons against such an either/or decision.[33] The pragmatic point is that cooperation brings advantages when we have competing normative values. Assuming that people allocate specific importance to different values, for example, that some values are more important than others, then there are "gains from trade" in acting communicatively. If you are willing to take my core values into account, I will respect your core values. We both gain when we only have to give up some peripheral preferences. The liberal answer is that even though legal provisions in their own legal order convey a specific normative message, there is nothing that could show us that our solution is better than the other one. There should be incentives to avoid a black or white decision.

On a practical level, when faced with apparently conflicting normative positions between different legal orders, a certain kind of balancing might be put in place. It is not a secret that the Court of Justice and the Security Council have different understandings of how to balance individual due process rights and collective security. The Security Council's primary responsibility is global security; the Court of Justice prefers the rule of law. Whereas a too-complex procedure would potentially limit the ability of the Security Council to react quickly to changed circumstances and to make political deals in complex negotiation contexts, maintaining complete political deliberation in taking decisions would potentially put individual rights at risk.

In between these extremes, the literature suggests several options on how to balance due process rights and collective security via implementation of procedures and institutions.[34]

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[32] *See also* Oliver Diggelmann, *Targeted Sanctions und Menschenrechte: Reflexionen zu einem ungeklärten Verhältnis*, SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES RECHT 301 (2009).

[33] For a detailed analysis of the different perspectives, see David Roth-Isigkeit, *Promises and Perils of Legal Argument—A Discursive Approach to Normative Conflict between Legal Orders*, 2 REVUE BELGE DE DROIT INTERNATIONAL (2014). *See also* Julio Baquero Cruz*, Legal Pluralism and Institutional Disobedience in the European Union, in* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 249–68 (Jan Komarek & Matej Avbelj eds., 2012).

[34] The 2006 Watson Report evaluates options from mere Monitoring Team to formal judicial review by looking at criteria like independence, accessibility, transparency, and power. The report concludes that an Ombudsperson is the recommended option for the Security Council. *See* THOMAS BIERSTEKER & SUE ECKERT, STRENGTHENING TARGETED SANCTIONS THROUGH CLEAR AND FAIR PROCEDURES 48 (2006). For an evaluation of which due process rights had to be safeguarded by the Council, see Bardo Fassbender, *Targeted Sanctions Imposed by the UN Security Council and Due Process Rights—A Study Commissioned by the UN Office of Legal Affairs and Follow-Up Action by the United Nations*, 3 INT'L ORG. L. REV. 437 (2006).

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The main point of the next two sections of this Article is to illustrate that neither the Court of Justice nor the Security Council were engaged in this kind of balancing. Neither of the institutions seemed willing to acknowledge the balancing need—and what is commonly celebrated as an institutional dialogue was not more than a clash of stubbornness. We will start with discussing the series of Kadi judgments in the light of engagement with the sanctions regime and, after that, come to a discussion of the real changes in due process considerations by the Security Council.

D. The Court of Justice

How did the Court of Justice live up to the standard of pluralist balancing? Rhetorically, it acknowledges the primacy and importance of the Security Council as a guardian of peace and security. But when it comes to a decision on the merits, that principled acknowledgment evaporates. It uses its considerable power as a last arbiter on EU law to effectively reverse that declaration. The great respect notwithstanding, the Court of Justice applied a standard of due process protection that is dogmatic. First, the *equal protection* standard combined with full review. Next, the claim that the rhetorical commitment to the United Nations is not translated into practice is further strengthened when we demonstrate that the European Courts do not take into account any changes on the Sanctions Committee's internal review mechanism, the Ombudsperson. Finally, the whole story becomes paradoxical when we consider the court's order: Even though it used fundamental rights rhetoric, the Court of Justice did not grant relief to Mr. Kadi.

I. Equal Protection

When Mr. Kadi applied to the Court of First Instance in September 2005, the Security Council's due process protection was still rudimentary. While the Security Council acknowledged in 2002, in its Resolution 1390, that binding rules of procedure were necessary to protect individual rights,[35] not much was done until 2005.[36] Still, Mr. Kadi lost his case at the Court of First Instance because the sanctions system as a whole was granted immunity from judicial review in EU courts. This section illustrates in which argumentative steps this initial finding based on a formal interpretation of international law was subsequently reversed by the Court of Justice. In the appeal, in rejecting the approach of

[35] S.C. Res. 1390, ¶ 5 (Jan. 28, 2002).

[36] At the time of *Kadi-I*, precisely because under S.C. Res. 1452 (Dec. 20, 2002) individuals can apply for a minimum living standard to avoid severe humanitarian consequences such as starvation or homelessness. In S.C. Res. 1526 (Jan. 30, 2004) and S.C. Res. 1617 (July 29, 2005) the listing criteria were specified. S.C. Res 1526 required certain standards for the proof of preconditions leading to the listing decision. S.C. Res. 1617 specified the *associated-with* standard to some extent and stipulates procedural details.

the Court of First Instance, the Court of Justice held that the Community courts "must, in principle, ensure the full review of the lawfulness of all community acts."[37] This decision was grounded in the constitutional character of the EC Treaty: "[T]he obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty."[38]

The Court of Justice distinguished clearly between a review of the SCR and the Regulation 881/2002 that translated the obligation into EU legal order.[39] Because there was discretion on domestic implementation, a review did not challenge the Resolution directly.[40] This meant that the hierarchy of the Charter did not imply immunity from fundamental rights review in the process of their implementation.[41] As due process rights formed the basis of constitutional guarantees in EU law, they could not be suspended with reference to a SCR.[42] The Court of Justice established what later has been read as the *Solange*-logic.[43] After having outlined that the mechanisms in place "cannot give rise to generalized immunity from jurisdiction within the internal legal order of the Community,"[44] it remarked in the next paragraph that "such immunity . . . appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection."[45] This passage was interpreted in the light of what it didn't say: The Court of Justice would abstain from review if sufficient safeguards for due process protection would be in place on the UN level.[46]

What constitutes, then, a sufficient standard for due process protection on the UN level? In the *Kadi-II* judgments we can see how the European judiciary unfolds the *equal protection* claim. The General Court had the task to review the Regulation 1190/2008 that amended

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[37] *Kadi & Barakaat*, *Cases* C-402/05 *P and* C-*415/05 P* at ¶ 326.

[38] *Id*. at ¶ 285.

[39] *Id*. at ¶ 286.

[40] *Id*. at ¶¶ 288, 299.

[41] *Id*. at ¶ 305.

[42] *Id*. at ¶ 290, 316–17.

[43] *See also* Antonios Tzanakopoulos, *Judicial Dialogue in Multi-Level Governance: The Impact of the Solange Argument*, *in* THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW 208 (Ole Fauchald & André Noellkaemper eds., 2012).

[44] *Kadi & Barakaat*, *Cases* C-402/05 *P and* C-*415/05 P* at para. 321.

[45] *Id*. at para. 322.

[46] *See also* Kokott & Sobotta, *supra* note 11, at 1019.

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the original Regulation 881/2002. Against the background of the Court of Justice judgment requiring "in principle full review," it construed the requirement of "full review" as meaning that the particularities of the matter as stemming from a SCR should not be taken in regard.[47] This amounted to a formalistic understanding of due process requirements and now, finally, to a complete redefinition of the relationship between Charter and EU law. Whereas in *Kadi-I* the Court of First Instance had found itself bound by the constitutional nature of the Charter, the General Court interpreted the Court of Justice judgment as if the mechanism would be completely and formally subordinated to the law of the EU, stating that there was no immunity and conducted full review "in accordance with the powers conferred on it by the EC treaty."[48]

In his final opinion to the appeal of *Kadi-II* at the Court of Justice Advocate General (AG), Yves Bot argued that the General Court erred when it interpreted the applicable standard of review. [49] As outlined above, the General Court interpreted the Court of Justice in *Kadi-I* requiring it to carry out "in principle [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."[50] Bot argued that the formulation "in principle full review" was intended to respond to the Court of First Instance judgment in *Kadi-I*.[51] The "in principle" was meant to express the vagueness of the review standard, suggesting that there may be exemptions from review when other principles are concerned.[52] AG Bot thus concluded that the General Court misinterpreted the Court of Justice when it defined its standard of review.

In *Kadi-II* the Court of Justice rejected AG Bot's approach supporting the view of the General Court that sanctions have to be subjected to full review by EU courts.[53] Undertaking that full review, it found the listing of Mr. Kadi in the Annex I to Regulation

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[47] Case T-85/09, Kadi v. Comm'n, 2010 E.C.R. II-5177, ¶ 123.

[48] *Kadi & Barakaat*, *Cases* C-402/05 *P and* C-*415/05 P* at ¶ 326.

[49] Opinion of Advocate General Bot, Cases C-584/10 P, C-593/10 P and C-595/10 P, Comm'n & Others v. Yassin Abdullah Kadi (Mar. 19, 2013), http://curia.europa.eu/juris/documents.jsf?num=C-584/10.

[50] *Kadi*, *Case T-85/90* at ¶ 135.

[51] Opinion of Advocate General Bot ¶ 58, Cases C-584/10 P, C-593/10 P and C-595/10 P, Comm'n & Others v. Yassin Abdullah Kadi (Mar. 19, 2013), http://curia.europa.eu/juris/documents.jsf?num=C-584/10.

[52] *Id*. at ¶ 61.

[53] *Kadi*, Cases C-584/10 P, C-593/10 P and C-595/10 P at ¶ 97.

881/2002 not in accordance with due process rights and hence dismissed the appeal.[54] The Court of Justice maintained that judicial review of the regulation did not disregard international law since it would not attack the primary responsibility of the Security Council in the matter of collective security, nor question the primacy of the UN Charter.[55] It acknowledged that there was a certain need for balancing. That balancing, however, would not prevent full review.[56]

Full review means that judicial control extends to the facts on which the listing was based. The Court of Justice found that it was required to substitute the decision located in another legal order by a self-referential decision. Doing that, it adopted one of the extreme solutions which was considered problematic above. With incorporating the decision whether and how far the Ombudsperson system, as specified by Resolution 1989, is in accordance with EU fundamental rights, and thus, presupposing a particular standard of due process arising from the tradition of its own doctrine, it relocated a global conflict in a regional setting. It did acknowledge that because SCRs were conceptualized as being directly binding on States, without leaving space for contextual interpretation by the parties, its review amounted to a direct interference with the UN legal order.[57] The Court of Justice thus reserved the right to take a decision on the merits, without due regard to the efforts made by the Security Council to mitigate the problem. This is mainly because it set the applicable standard of review as equal as in its constitutional framework. The Court of Justice thus shielded the constitutional argument against the specific role of the Security Council. By doing that, it turned the Court of First Instance judgment upside down: No immunity and full review instead.

II. No Assessment of the Ombudsperson Mechanism

The whole conflict has thus arisen against the background of insufficient due process procedures on the level of the Security Council. But what we subsequently read in the judgments is a neglect of the actual state of these procedures when the Court of Justice refers schematically to their insufficiency to respect basic standards of human rights. There are no judgments after *Kadi-I* in which we find a careful assessment of the structural changes that have taken place as a reaction to that judgment. This section discusses the changes effectuated as a reaction to *Kadi-I* and the passages in the *Kadi-II* judgments that relate to these changes.

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[54] *Kadi*, Cases C-584/10 P, C-593/10 P and C-595/10 P at ¶ 165.

[55] *Kadi*, Cases C-584/10 P, C-593/10 P and C-595/10 P at ¶ 67.

[56] *Kadi*, Cases C-584/10 P, C-593/10 P and C-595/10 P at ¶ 97.

[57] *Kadi*, Cases C-584/10 P, C-593/10 P and C-595/10 P at ¶ 87.

The SCR 1904 replaced the *focal point* for those designated in the 1267 regime with the position of an Ombudsperson.[58] It stipulates that an *Office of the Ombudsperson* "shall assist the Committee when considering delisting requests" for an initial period of eighteen months.[59] She prepares, in cooperation with the Monitoring Team, a comprehensive report to the Committee about the decision to delist. If the request to delist is rejected, the report should include information as to why, as far as confidentiality restrictions would allow. The SCR improved due process in comparison to the focal point in terms of accessibility and clarity of timeframes. However, the Ombudsperson was constrained to a mediating role. She did not have decision-making power and her recommendations were not formally binding on the Committee.

Still, at the time, the Sanctions Committee had not overturned a single recommendation. Formally, there was no decision-making power in the Ombudsperson, but empirically the Committee had respected her authority in all cases. Despite the experts' assurances that the informal mechanism was as effective as a formal one,[60] the General Court in *Kadi-II* was nevertheless unwilling to take that into account. It simply held that the situation regarding due process protection would not have significantly changed with the Ombudsperson mechanism after SCR 1904.[61] It thus resorted to a legal-formalistic solution, dogmatically called *equivalent protection*, without referring to the underlying rationalities.

In so doing, the General Court required full disclosure of evidence used by the Community institutions, subject to review in the court proceedings.[62] It concluded that

> The [Community institutions] cannot therefore merely reuse a summary of allegations made by the United Nations, in a recycled version of allegations made by the United States, but must themselves present the '*serious and credible evidence,*' '*precise information or material,*' and '*actual and specific reasons*' that justify the maintenance of the freeze of funds. They must also

[58] In all other sanction regimes the focal point remains active.

[59] S.C. Res. 1904, ¶ 20 (Dec. 17, 2009).

[60] BIERSTEKER & ECKERT, *supra* note 34, at 48.

[61] *Kadi*, Case T-85/09 at ¶ 128.

[62] *Id.* at ¶ 157.

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> give the person concerned *'full knowledge of the relevant facts,'* the facts and circumstances justifying the freeze of his assets, the evidence and information on which it is based, and sufficient information to determine whether there has been a material error of fact.[63]

The pressure resulting from *Kadi-II* led to another round of changes in the due process mechanisms. On the occasion of the renewal of the mandate after the initial period of eighteen months, in SCR 1989 (2011), the Security Council took the opportunity to amend another procedure. Now, the Ombudsperson can issue recommendations on whether to keep the petitioner listed or not.[64] In cases of recommendations to keep the list entry, the procedure of SCR 1904 applies.[65] SCR 1989 stipulates a reverse veto procedure:

> [The Security Council] [d]ecides that the [listing] shall terminate . . . where the Ombudsperson recommends that the Committee consider delisting, unless the Committee decides by consensus . . . in cases where consensus does not exist, the Chair shall, on the request of a Committee Member, submit the question of whether to delist . . . to the Security Council . . . .[66]

This paragraph is interesting in two different ways. While the Ombudsperson's recommendations remain formally unbinding subject to the reverse consensus rule, which is difficult to achieve, the procedure strengthens the recommendations' legal force significantly, turning them into quasi-binding legal instrument. As the second part of the paragraph stipulates, however, in case of disagreement among the members of the Committee, the Security Council decides, following its standard rules of procedure which includes a veto for the five permanent members.

AG Bot discusses these changes in the merits of the appeal to *Kadi-II*. In his view, both aspects "strengthen the case for tailoring the judicial review according to the international context."[67] In defining this context, he addressed the different roles of the EU and the UN,

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[63] *Id*.

[64] S.C. Res. 1989, ¶ 21 (Jun. 17, 2011).

[65] *Id*. at ¶ 22.

[66] *Id*. at ¶ 23; also described as the "sunset clause." Dire Tladi & Gillian Taylor, *On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunsetting*, 10 CHINESE J. OF INT'L L. 771, 784 (2011).

and relying on Article 24 of the Charter of the United Nations, he comes to the conclusion that the Security Council has the primary responsibility ensuring peace and security. He believes that "[a]n intensive judicial review, such as that advocated by the General Court in the judgment under appeal, could be performed without encroaching on the prerogatives of the Security Council in defining what constitutes a threat to international peace and security and the measures necessary to eradicate that threat."[68] From this, AG Bot derived a limited discretion of EU institutions: "[T]he primary responsibility held by the Security Council in the area in question must not be undermined and the Union must not be made a forum for appeals against or reviews of decisions taken by the Sanctions Committee."[69]

AG Bot acknowledged the changes of the Ombudsperson mechanism and stressed that it has become more than a diplomatic and intergovernmental procedure, which provides for sufficient safeguards to ensure correct reasoning and updated information.[70] This equally meant a re-definition of the review standard:

> [S]ince the listing and delisting procedures in the Sanctions Committee allow for a careful examination of whether listings are justified and whether or not it is necessary to maintain them, the EU courts should not adopt a standard of review which would require the EU institutions to examine systematically and intensively the merits of the decisions taken by the Sanctions Committee, on the basis of evidence or information available to that body, before giving effect to them.[71]

He suggested that the Court of Justice differentiate between external and internal lawfulness.[72] Externally, courts could review the formal and procedural lawfulness of the

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[67] Opinion of Advocate General Bot ¶ 70, Cases C-584/10 P, C-593/10 P and C-595/10 P, Comm'n & Others v. Yassin Abdullah Kadi (Mar. 19, 2013), http://curia.europa.eu/juris/documents.jsf?num=C-584/10.

[68] *Id*. at ¶ 71.

[69] *Id*.

[70] *Id*. at ¶ 82.

[71] *Id*. at ¶ 86.

[72] *Id*. at ¶ 96.

act. Internally, the Court of Justice should accept decisions on the merits of the case unless they are manifestly deficient.[73]

In *Kadi-II,* the Court of Justice did not maintain that the judicial review of the regulation disregarded international law. It did not attack the primary responsibility of the Security Council as to collective security and neither did it question the primacy of the UN Charter.[74] It acknowledged that there is a certain need for balancing. That balancing, however, would not prevent the full review.[75] Given the full review standard, because there is no reference to the Ombudsperson whatsoever in *Kadi-II* apart from the arguments of the parties, the Court of Justice must have simply assumed that this protection could not exist on the UN level. Both elements turn the case in a problematic direction with regard to the relationship between both institutions. The Court of Justice sets high standards for review and is not willing to review the compatibility of an external mechanism against these high standards.

III. No Relief for Mr. Kadi

The considerations of the European judiciary show a commitment to human rights at the expense of effective collective security instruments. It conveys a clear and important message: There are human rights limits in the fight against terrorism. Curiously, if we have a look at the material effects of the judgments of the European judiciary, this commitment seems to have ceased. In all judgments aimed at individual protection, the Court of Justice had impressive rhetorical figures in place, but when Kadi left the courtroom the sanctions remained in place—the assets frozen and the travel ban still enforced.[76] The paradoxical, but little appreciated, element of the *Kadi*-saga is that the Court of Justice did not live up to what it said: It communicated publicly a protection of individual rights while, at the same time, giving preference to collective security through the backdoor.

How can we make sense of this behavior? In substantive terms, it could be understood as concession to the Security Council's approach if one oversees the general trend balancing of security concerns with rights in the EU.[77] With the suspension of the judgments' effects, the Court of Justice paradoxically overrode its own approach: Mr. Kadi's destiny was

[73] *Id*. at ¶ 106.

[74] *Id*. at ¶ 87.

[75] *Kadi*, Cases C-584/10 P, C-593/10 P and C-595/10 P at ¶ 97.

[76] *Kadi & Barakaat*, Cases C-402/05 P and *C*-415/05 P at ¶¶ 342–44.

[77] Avbelj, *supra* note 14, at 2057.

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subordinated to larger security concerns. What is more, it shows that the Court of Justice used the human rights argument in an instrumental manner. Functionally, the strict human rights rhetoric serves to foster an institutional struggle with the Security Council against which substantive concerns had to step back. The Court of Justice uses its institutional power as guardian of the treaties not to enforce its central logic—human rights—but rather to position itself comfortably against other institutions.

E. Security Council

We have argued that the Court of Justice engaged in an institutional struggle rather than in a balancing of values. In this section we will give two examples where the very same logic applies to the Security Council. The Council engaged in fundamental rights rhetoric without being concerned with the protection of an individual. This is exemplified when we put the strategic changes in the 1267 regime in perspective with the overall context of targeted sanctions. There, the reluctance to extend the due process mechanism to other sanction regimes and cases of immediate relisting after delisting shows the true attitude of the Security Council.

F. Lack of Protection in Other Sanction Regimes

Often overlooked in the debate about appropriate due process protection is the overall framework of targeted sanction regimes. Currently, there are sixteen sanction regimes in place—twelve of them have the function to levy sanctions against individuals and entities.[78] Still, in only one sanction is there due process protection available to individuals. The informal argument to justify the different standard of protection is that the contexts of regional and sectorial sanctions regimes vary. The regional sanctions regimes exist in a very complicated negotiation context within diverse domestic power structures. An implementation of third-party review might limit the flexibility in which political decisions—deals—can ensure cooperation to safeguard collective security. Whereas in the universal sanctions system the overlap consists of different normative positions, the overlap into the Afghan or Somali systems could impede political strategies that are required to effectively advance the resolution of conflict in a country.

Still, this argument again completely neglects the human rights dimension. In principle, any listed individual has the same right to remedies. This problem became particularly apparent when the former Al Qaeda/Taliban list was split up. Whereas the non-territorial

[78] A list of the sanction regimes is available at https://www.un.org/sc/suborg/en/sanctions/information. One of the sanction regimes is for Lebanon which authorizes individual sanctions, but the Security Council has not yet named anyone.

Al-Qaeda sanctions had remedies available, the new Afghanistan-list did not provide for any protection whatsoever, which reduced the level of due process protection for the latter group.[79] Even though there may be considerable differences between country-specific and global sanctions mechanisms, these differences cannot deprive the targeted individuals from any kind of due process protection at all. Another mechanism other than a third-party review might be more appropriate. Again, if the Security Council is unwilling to even consider options of protection, it can easily be inferred that it is not human rights but the effectiveness of the sanctions the court is concerned with. It suggests that the Security Council deems it necessary to respond to due process considerations only in response to a challenge of its effectiveness. This redundant attitude shows the same strategic action as we found in the judgments of the Court of Justice. Substantively relevant but formally untouched, the question of due process protection in sanction regimes other than the 1267-list is ignored by both institutions.

G. Procedural Deception: Immediate Relisting after Delisting

Another example of this strategic attitude can be found in the interplay of the different sanctions mechanisms, for example, the strategic use of other sanction regimes to avoid the delisting consequence. The case of *Jim'ale* is very instructive in that regard.[80] Ali Jim'ale is a Somalian citizen who was suspected to be one of the main financiers of the Al-Shabaab in Somalia. The Ombudsperson recommended his delisting and, in accordance with the procedures specified by Resolution 1989, he was deleted from the 1267-list. On the very same day however, his name was put on the targeted sanction regimes of Somalia and Eritrea—regimes that do not have due process procedures in place.[81]

This case demonstrates the considerable influence of the institutional conflict with the Court of Justice on the procedures of the Council. Apparently, the individual was delisted even against the will of the Council—which constitutes an important proof for well-functioning due process procedures. Still, the Security Council did not delist Jim'ale because it substantively accepted the importance of human rights over collective security. Rather, it acted in the strategic spirit that indicates a factual neglect of the importance of human rights.

In the same way that the Court of Justice jeopardizes its credibility with the paradoxical suspension of the judgments, the Security Council openly exposes its strategic considerations when it comes to human rights claims. This might be irrelevant in the

[79] Tladi & Taylor, *supra* note 66, at 784.

[80] *See* Press Release, Security Council, Security Council Committee on Somalia and Eritrea Adds One Individual to List of Individuals and Entities, U.N. Press Release SC/10545 (Feb. 17, 2012).

[81] *Id.*

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context of the *Kadi*-saga. Challenges to the regional sanction regimes might be out of reach looking at the legal landscape today. But still, even if domestic and regional courts cannot directly challenge these measures, we have seen that judgments and challenges to Security Council decisions are a choice of the court to interpret the law as the circumstances demand it. Before *Kadi*, the 1267-regime was as solid as the regional sanctions are today.

H. The Case for Genuine Institutional Cooperation

What the two sections demonstrate is that there is a large share of political strategy between the institutions that ultimately lead to problematic outcomes for the rhetorical object—the individual. Mr. Kadi was more than a decade on the list while institutions had unproductive struggles about their relationship. The reluctance to engage in balancing of values seems particularly odd since it is the same national states that take leading roles in the establishment of both legal orders. What we therefore have to ask in the remainder of this Article is how one could strengthen the point of cooperation instead of merely pursuing strategic behavior.

The preference for cooperation rests on two pillars—factual and normative. The UN's objective of ensuring collective security is, as a matter of fact, unobtainable if the UN Member States do not comply with its resolutions. In case of Mr. Kadi, the invalidation of the EU implementing act deprived, de facto, the SCRs of any effect and thereby also undermined its very character of law as well as impinged on the UN capacity of providing for collective security. Similarly, but from the EU perspective, the EU's objective of ensuring a high level of human rights protection cannot be achieved in practice if EU law has to effectuate the SCRs—with no comparable standards of human rights protection. As a matter of fact, with regard to the fulfillment of their objectives, the UN and the EU are inextricably connected and interdependent. In normative terms this translates into an obvious requirement of cooperation—of perceiving each other as part of the shared common whole, of traveling in the same boat, as it were. This normative requirement is even more pertinent in view of the epistemic pluralism of the fact that the UN and the EU are distinct epistemic sites[82]—different systems of knowing and understanding of concepts which might be nominally shared.

Collective security and human rights protection are only two examples of such concepts that are semantically present in both systems; but both can have different meanings because the two are distinct. Assuming that meaningful dialogue is possible between different epistemic sites—with the awareness of their epistemic difference—genuine participation in the common whole for the maximization of the separate and shared

[82] Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 361 (2002).

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objectives requires, as part of an explicitly normative mandate, a deep dialogical engagement between the UN and the EU. Without this institutional dialogue, which is an expression of a commitment to the common whole, epistemic pluralism as a default position would result in an increasingly exclusive self-referentiality, producing systemic closure, dismantling the common whole, and defeating the achievement of the said objectives. It is for these factual and normative reasons that a deep mutual engagement between the two legal and political systems on the basis of an elaborated set of bridging mechanisms is called for.[83] In what follows, the Article surveys the bridging mechanisms that are already available as well as identifies others that are presently still lacking.

I. EU Bridging Mechanisms for Enhanced Cooperation with the Security Council

Despite a very early and deliberate separation from international law, the EU has always considered itself deeply committed to international rules, principles, and values. This is reflected in its founding treaties that postulate as one of its constitutive values the strict observance and development of international law—in particular the respect for the principles of the UN Charter.[84] As a matter of value—for example, of a deeply normative, principled choice—the EU has, at least formally, committed itself to the larger environment of international law beyond itself. It recognizes that within the system of international law the UN has a special role to play, which is to be facilitated by the EU's own contribution to peace and security in the world.[85] This EU value choice is elaborated further as a matter of policy in the field of competences relating to external action. Article 21 TEU thus, *inter alia*, prescribes that "the Union's action on the international scene shall be guided . . . by respect for the principles of the UN Charter and international law."[86] The EU's common security and defense policy shall be conducted in accordance with the principles of the UN Charter as well.[87]

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[83] Neil Walker, *Legal Theory and the European Union*, EUI WORKING PAPERS LAW 2005/16, at 10, http://cadmus.eui.eu/bitstream/handle/1814/3761/WPLAWNo.200516Walker.pdf?sequence=1.

[84] *See* Consolidated Version of the Treaty on European Union art 3., ¶ 5, Oct. 26, 2012, 2012 O.J. (C 326) [hereinafter TEU post-Lisbon], http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012M/TXT&from=EN.

[85] TEU post-Lisbon art. 3, ¶ 5.

[86] TEU post-Lisbon art. 21, ¶ 1.

[87] TEU post-Lisbon art. 42, ¶ 1. *See also*, Consolidated Version of the Treaty on the Functioning of the European Union, art. 215, ¶¶ 2–3, Dec. 10, 2012, 2012 O.J. (C 326) [hereinafter TFEU] (providing a legal basis for targeted sanctions in the EU and explicitly subjects them to legal safeguards).

This commitment is, however, not merely declaratory; it is made legally binding in virtue of Article 220 TFEU.[88] The Article stipulates explicitly that "the Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialized agencies . . . ."[89] This provision stipulates that the EU is legally bound, as a matter of its own law, to full cooperation with the UN. This conclusion is reiterated by Article 351 TFEU, which ring-fences the international obligations incurred by the Member States prior to their membership in the Union from the influence of EU law.[90] As the UN Charter is doubtlessly among such international obligations, it shall thus enjoy a special, perhaps even legally privileged status with regard to EU law. This again comes as a consequence provided for in the EU law itself, rather than because of the UN Charter's supremacy clause.

On the basis of this cursory overview of the Treaty regulation of the relationship between EU law and international law, it is apparent that EU binds itself as a matter of value-choice, principle, and law to full compliance with its own and with its Member States' international obligations—among which those stemming from the UN are awarded a special place. But having said that, how could the Court's relatively reserved, and even unfriendly, attitude towards international law in *Kadi* be explained? Why has the Court of Justice, as explained above, resorted to such a self-referential stance, rather than opening up to international law, as is required not only by the latter, but obviously by the EU's law itself?

It is certainly not the case that the Court of Justice was unaware of its legal obligations towards international law. Even before AG Bot, mentioned above, it was AG Maduro who explicitly insisted on them in his opinion: "The Court should be mindful of the international context in which it operates and conscious of its limitations. It should be aware of the impact its rulings may have outside the confines of the Community."[91]

In other words, the Court of Justice must be institutionally cognitively open, must be able to see the bigger picture in which it participates, and must be committed to ensuring the viability of this bigger picture—of the common whole. We live in a pluralist world

[88] TFEU art. 220.

[89] TFEU art. 220.

[90] TFEU art. 351.

[91] Opinion of Advocate General Maduro at ¶ 44, Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat v. Council and Comm'n (Jan. 16, 2008 and Jan. 23, 2008), http://curia.europa.eu/juris/documents.jsf?num=C-402/05 (Kadi), http://curia.europa.eu/juris/documents.jsf?num=C-415/05 (Al Barakaat).

composed of many legal orders: At least national, supranational, and international, which, do not and cannot exist as self-contained entities in mutual isolation; they are intertwined. *Kadi* is the best proof of that. Therefore, Maduro was correct to stress that:

> The Court cannot always assert a monopoly on determining how certain fundamental interests ought to be reconciled. It must, where possible, recognize the authority of institutions, such as the Security Council, that are established under a different legal order than its own and that are sometimes better placed to weigh those fundamental interests.[92]

Yet, it appears that Maduro failed to convince the Court of Justice. The Court of Justice was more concerned with sustaining the autonomous nature of the EU's legal order than with strengthening its relationship with international law.[93] It is in the Court's pronounced desire to protect the EU law's own autonomy may explain why it exaggerated self-referentiality. The excessive concern for autonomy could be understood as a reflection of the EU legal order's relative immaturity, which prompts the Court of Justice to press the point of autonomy more than it would be necessary in a statist, well-entrenched legal order. The protection of the EU legal order's autonomy has been decisive, particularly against international law. If EU law assimilated under the general international law, all other constitutional doctrines that develop separately from international law could come under attack. This could even open the door to the constitutional disintegration of the EU.

To minimize this possibility, the Court of Justice feels called upon to protect the autonomy of its own legal order against the so-called external encroachments, which can be exemplified not only by the EU–UN relationship at stake in *Kadi* but also in the protracted accession of the EU to the European Convention of Human Rights (ECHR). A UN claim to supremacy naturally accentuates the concerns for autonomy and strengthens self-referentiality on behalf of EU law. But the opposite is also true. A potential detraction from the long recognized supremacy of the UN Charter by EU law also leads to the UN's strengthening of its supremacy claim. In practice, one extreme feeds the other, making the EU and the UN drift farther apart while attempting to strive towards shared objectives.

Only an intentional shift from strategic monistic self-referentiality to reflexive sincere cooperation can break this kind of a vicious circle. The question is how. Despite the plethora of abstract legal provisions in the Treaties which laid down the principles of

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[92] *Id*.

[93] Martinico, *supra* note 6, at 164.

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optimizing the relationship between EU law and international law of the UN, the Court of Justice in *Kadi* made little reference to and even less use of them. This might suggest that the abstract legal principles are insufficient to bring about a reflexive, sincere dialogical cooperation between the two legal orders in practice; instead, a new more concrete legal instrument would better bind the institutions of these legal orders.

While this concrete legal instrument could be conceived of with a relative wide sweep—using not just institutions of law, but also political institutions—we will, by limiting ourselves to the particularities of *Kadi*, focus exclusively on the judicial proceedings before the Court of Justice. The Court of Justice should develop a reflexive, sincere co-operation with the Security Council, if it is required, in cases like *Kadi*, to hear and respond to arguments directly. Presently, there is no legal basis for a possible Security Council participation either in the Court's Statute or in its Rules of Procedure. Pursuant to the Statute of the Court, only the following private or legal entities can participate in the proceedings before the Court of Justice: Parties, interveners, witnesses, and expert witnesses.

Parties to the case are always determined by the legal action filed. Cases like *Kadi* emerge on the basis of a direct action for annulment brought by an individual against the EU institution that has adopted the disputed act. The aggrieved individual is the plaintiff, while the defendant is exclusively the law-making EU institution. Because the Security Council is not an EU institution, it can never have standing before the Court of Justice. This was not even possible in *Kadi*, where the plaintiff challenged an EU act that implemented a SCR that left so little discretion to implementation that the legal challenge was *in effect* against the SCR directly. Nevertheless, we are not suggesting that this rule should be changed. Making the UN a party before the Court of Justice is most likely not in the UN's interest; in general, this idea runs against the principle of immunity of the UN and its organs and is also a disproportionate means for the objective sought.

At the same time, it would be insufficient—indeed even inappropriate—to involve the Security Council merely as a witness or as an expert witness in such cases. A witness is a person who is able to provide important information about the case separating her own interest from the outcome of the case. It is the same with an expert witness who provides unbiased expertise that the Court of Justice needs to render a judgment. Unlike witnesses, the Security Council has an interest in the outcome of the case. It wants to see the EU implementing act upheld, so as to ensure the effectiveness of its resolutions. Thus, it follows that the UN has an interest in the outcome of the case but technically does not meet the requirements of a party. This might qualify it as an intervener. The Court of Justice's rules on intervention in *Kadi*-type cases provide that the intervention is open to Member States, EU institutions, bodies, offices, and agencies, as well as to any other person who can establish an interest in the result of a case submitted to the Court of

Justice.[94] According to the letter of the law, the Security Council obviously can file a motion for intervention in the cases pending before the Court of Justice.

Qualifying the UN as a possible intervener would be an appropriate means to engender a reflexive and sincere cooperation between the Court of Justice and the Security Council. In fact, the application for the intervention on behalf of the UN in *Kadi*-like cases is not merely the right of the UN but an occasion that the Court of Justice would need to raise on its own motion. In other words, whenever the Court of Justice seizes a dispute in which a party effectively, even if indirectly, challenges the SCR or another act, the Court of Justice should *ex offo* invite the Security Council to join the case as an intervener. Accordingly, our proposal finally boils down to a minimal, but important amendment to Article 40 of the Statute of the Court, to which the following provision should be added: "Where the legal acts of an international organization are being indirectly challenged through the action of annulment against the EU implementing acts, the Court shall invite on its own motion the organs of such international organizations to intervene in the case."

What advantages do we hope to see emerging from this newly introduced semi-mandatory intervention rule? The idea is simple; there is no better way of ensuring sincere cooperation between the institutions of the EU and the UN than by including them directly and on equal footing in concrete judicial proceedings. In fact, it is only in this way that a meaningful dialogue becomes possible. Until now, the position of the Security Council was available to the Court of Justice only indirectly through written evidence, or it was mediated through the EU institutions and the intervening Member States. Even if they could be seen as making a direct case for the Security Council, this view would be mistaken. The intervening EU Member States are indeed simultaneously the Member States of the UN, but the UN is—as an international organization—more than the sum of its parts and therefore not only deserves, but clearly requires, its own representation in front of the Court of Justice.

Moreover, the direct inclusion of the Security Council by way of intervention would not only facilitate in procedural terms the desired reflexive and sincere cooperation, but the inclusion would also contribute to the merits of the case—potentially to the satisfaction of both parties involved. It shall be recalled that the contested regulation was, *inter alia*,

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[94] Article 40 of the Statute of the Court of Justice:

> Member States and institutions of the Union may intervene in cases before the Court of Justice. The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court . . . .

TEU post-Lisbon Protocol No. 3, art. 40.

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invalidated because of the violation of Mr. Kadi's right to defense. Due to the lack of sufficient evidence and information produced by the Sanctions Committee, the Court of Justice could not find the reasons for listing well founded.[95] However, had the Sanctions Committee chosen to intervene in the case, it would have had a chance to substantiate its grounds for the listing. The latter would get an opportunity to respond in his defense and the Court of Justice could have, after the right to defense had been heeded, decided on the merits being more fully informed. Justice would be, thus, ideally done to Mr. Kadi and the Sanctions Committee, depending on the amount of evidence either of the sides could produce. Simultaneously, the objectives of the fight against global terrorism and of ensuring a high degree of collective security would not be threatened by these judicial proceedings as they could also take place behind closed doors.[96]

J. UN Bridging Mechanisms towards the EU: Changing the Rules or Just the Practice?

While this change in procedure would be a major communicative improvement on the Court of Justice level, there are some minor improvements available on the United Nations level as well. Even though there have already been a considerable number of changes in the due process procedures of the Security Council—notably in the institution of the Ombudsperson—in order to present a comprehensive strategy and a non-political commitment to human rights, two further adjustments might be appropriate.

First, consider eliminating the reverse-consensus rule. As argued above, the reverse-consensus rule effectuates a quasi-binding decision on the merits by the Ombudsperson. Only a consensus in the Sanctions Committee, unlikely in a political negotiation context, could reverse the effect of a delisting recommendation. Courts have taken this as a caveat against a full recognition of an independent review mechanism. If, in reality, overruling the Ombudsperson is highly unlikely, why not abolish this provision altogether? This would provide for a more efficient review system that is also more likely to be recognized at the domestic level. Eliminating this provision promotes the objective of legal certainty for the sanction regimes and is in the interest of both institutions.

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[95] Opinion of Advocate General Bot ¶ 137, Cases C-584/10 P, C-593/10 P and C-595/10 P, Comm'n & Others v. Yassin Abdullah Kadi (Mar. 19, 2013), http://curia.europa.eu/juris/documents.jsf?num=C-584/10.

[96] Article 31 of the Statute of the Court of Justice: "The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons." TEU post-Lisbon Protocol No. 3, art. 31.

Second, the Security Council should prove its commitment to balance by providing a certain standard of review for all sanction regimes. The restriction of due process protection to the 1267 system is a major shortcoming that must be mitigated. Arguably, the standard for review might be complex to assess because of different political negotiation contexts, but this difference does not justify exposing individuals to the sanction regimes without any legal remedies available. The Security Council has, perhaps as a result of institutional pressure, already effectuated many meaningful changes to its mechanisms for individual protection. Some additional steps, beyond what is proposed in this Article, might be appropriate to show a sincere willingness for cooperation and a concern for individuals.

K. Conclusion

Our proposal is not a cure for all ills. It is a procedural mechanism that promotes reflexive and sincere cooperation between the EU and the UN. Regardless, they are still—and will remain—different epistemic sites. In substantive terms, cases can still emerge when, even after obtaining all possible evidence in favor of the Sanctions Committee listing decision, the Court of Justice might still need to strike down the EU implementing regulations. AG Maduro made this more than clear in his Opinion:

> Respect for other institutions is meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them. Consequently, in situations where the Community's fundamental values are in the balance, the Court may be required to reassess, and possibly annul, measures adopted by the Community institutions, even when those measures reflect the wishes of the Security Council.[97]

Despite these limits, epistemic pluralism requires the EU and UN to share an understanding of these values and—especially in practice—commit to protecting them. It would be an important step towards meaningful pluralism if both institutions would use the tensions present in their relationship to promote a culture of communicative cooperation and fruitful dissent. The possibility to meet each other in an institutional setting would be a promising start to make this happen.

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[97] Opinion of Advocate General Maduro at ¶ 44, Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat v. Council and Comm'n (Jan. 16, 2008 and Jan. 23, 2008), http://curia.europa.eu/juris/documents.jsf?num=C-402/05 (Kadi), http://curia.europa.eu/juris/documents.jsf?num=C-415/05 (Al Barakaat).