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## The *Kadi* Saga as a Tale of ’Strict Observance’ of International Law: Obligations Under the UN Charter, Targeted Sanctions and Judicial Review in the European Union


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# THE *KADI* SAGA AS A TALE OF 'STRICT OBSERVANCE' OF INTERNATIONAL LAW: OBLIGATIONS UNDER THE UN CHARTER, TARGETED SANCTIONS AND JUDICIAL REVIEW IN THE EUROPEAN UNION

**by Joris Larik**[*]

1. Introduction: Kadi and the conundrum of compliance
2. Discerning discourses: The parochial saviour of universal rights
3. Retracing reality: 'Strict observance' throughout
4. Conclusion: The triumphant tribunal

## Abstract

*This article addresses the question whether the European Union defaulted on the 'strict observance' of international law and 'respect' for the UN Charter, which are now express objectives of the EU following the Lisbon reform, in the course of the famous* Kadi *cases. With the final appeals judgment having been handed down by the Court of Justice of the European Union in July 2013, this question can now be conclusively answered in the negative. Despite the general tension these legal challenges created between EU law and international law, the EU managed, in the course of twelve years, to weave a seamless coat of compliance with international law. The article contrasts this finding with the general academic discourse on this case law, which tends to depict* Kadi *as a 'sacrifice' of compliance with international law for the benefit of fundamental rights (as well as the autonomy of the EU legal order). By retracing the entirety of this string of cases, the article demonstrates that, all rhetoric aside and for all practical purposes, the EU courts and other institutions managed to avoid any violations of international legal obligations towards the UN Security Council in this matter. The EU discontinued its own sanctions against Mr Kadi only after he had been delisted by the UN by means of a political decision, not by virtue of judicial intervention.*

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## 1. INTRODUCTION: *KADI* AND THE CONUNDRUM OF COMPLIANCE

The *Kadi* saga, next to the important constitutional questions it raises for the European Union,[1] shines the spotlight on the question of the 'tormented'[2] relationship between the EU and international law, in particular the United Nations. In the by now famous Opinion preceding the 2008 *Kadi* judgment, Advocate General Miguel Maduro noted that the legal order of the EU and international law do not 'pass by each other like ships in the night'.[3] He continued by asserting that, on the contrary, the EU has 'traditionally played an active and constructive part on the international stage'.[4]

This traditional sentiment of seeing the EU as *völkerrechtsfreundlich* (a German term meaning 'friendly towards international law')[5] has now found prominent expression in the EU Treaties, following the entry into force of the Treaty of Lisbon. The 'strict observance and the development of international law, including respect for the principles of the United Nations Charter'[6] is now one of the codified objectives of the Union.[7] Indeed, the UN Charter commands 'respect'

1. These concern, on the one hand, the competence of the EU to adopt sanctions against individuals under the EU Treaties preceding the Lisbon reform, and on the other, the safeguarding of fundamental rights within the EU in this particular context. See, from among the vast amount of literature, respectively, M. Cremona, 'EC Competence, "Smart Sanctions", and the *Kadi* Case', 28 *Yearbook of European Law* (*YEL*) (2009) p. 559; and E. Cannizzaro, 'Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the *Kadi* Case', 28 *YEL* (2009) p. 539; and discussing both aspects, 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 *CML Rev.* (2009) p. 13 at pp. 36-61.

2. J. Wouters, 'The Tormented Relationship between International Law and EU Law', in P. Bekker, R. Dolzer and M. Waibel, eds., *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge, Cambridge University Press 2010) p. 198.

3. Joined Cases C-402/05 P and C-415/05 P *Kadi* v. *Council and Commission*, Opinion of Advocate General Poiares Maduro [2008] *ECR* I-06351, para. 22.

4. Ibid.

5. See in this vein, e.g., F. Hoffmeister, 'The Contribution of EU Practice to International Law', in M. Cremona, ed., *Developments in EU External Relations Law* (Oxford, Oxford University Press 2008) p. 37; and C. Timmermans, 'The EU and International Public Law', 4 *EFA Rev.* (1999) p. 181; contesting this sentiment, J. Klabbers, '*Völkerrechtsfreundlich*? International Law and the Union Legal Order', in P. Koutrakos, ed., *European Foreign Policy: Legal and Political Perspectives* (Cheltenham, Edward Elgar 2011) p. 115.

6. Art. 3(5) Treaty on European Union (TEU); note also Art. 21(1), first subpara., TEU, which highlights 'respect for the principles of the United Nations Charter and international law' as founding principles of the EU and guidance for its external action; and Art. 21(2)(b) and (c) TEU, according to which the EU shall 'consolidate and support … the principles of international law' and 'preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, …'.

7. This is part of a wider trend of the 'dynamic internationalization' of EU primary law, which can also be observed in many national constitutions, see J. Larik, 'Shaping the International Order as an EU Objective', in F. Amtenbrink and D. Kochenov, eds., *The European Union's Shaping of the International Legal Order* (Cambridge, Cambridge University Press 2013) p. 62.

given that it situates itself at the apex of all international agreements, stipulating that whenever states face a conflict between their obligations 'under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.[8] The obligations include compliance with the resolutions adopted by the UN Security Council (UNSC) as the primary organ for the safeguarding of international peace and security.[9]

The entire *Kadi* saga, which has preoccupied the EU, the UN and legal scholarship for more than a decade, has become emblematic of the EU being torn between being compliant with the international law, on the one hand, and upholding fundamental rights as enshrined in its own legal order, on the other. This saga was – finally – concluded in July 2013, when the Court of Justice of the European Union (CJEU, before the Lisbon Treaty known as the European Court of Justice (ECJ)) handed down its appeals judgment, commonly known as *Kadi II*. Already in October 2012, however, Mr Kadi had been taken off the UN 'blacklist'. The EU had followed suit shortly thereafter by taking him off its respective list (see *infra* 3).

Bruno Simma once remarked *en passant* on the *Kadi* judgment of 2008: 'I cannot avoid the impression that, maybe, once the dust has settled, the decision will share the reputation of quite a few ECJ leading cases of being grandiose on principles without being of much help to the individual claimant.'[10] With Mr Kadi having been delisted, the *Kadi* cases off the docket in Luxembourg and the dust having settled, this article revisits this seminal string of case law in light of one straightforward question: All 'grandiose' rhetoric aside, did the EU at any point violate its, or its Member States', international obligations towards the United Nations? Regardless of causing a considerable scholarly stir, instead of passing by each other 'like ships in the night', did EU and international law actually graze each other in the course of these events? The answer provided here is, for all practical purposes, 'no'. Even though the discourse has come to celebrate the judgments of the CJEU as a valiant defence of fundamental rights and the rule of law through judicial review in the EU, it is argued here that for the past twelve years, the EU was in fact living up to its objective of observing its international legal obligations, thus sewing a seamless coat of compliance with international

8. Art. 103 UN Charter. Note in this respect also Art. 30(1) Vienna Convention on the Law of Treaties (VCLT); Art. 30(6) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO); further on the special significance of this provision for the international legal order, A. Paulus and J. Leiß, 'Article 103', in B. Simma, et al., eds., *The Charter of the United Nations: A Commentary*, Vol. 2, 3rd edn. (Oxford, Oxford University Press 2012) p. 2110 (and at pp. 2131-2132 in particular on its effect on the EU and its Member States).

9. Art. 25 UN Charter. That the supremacy of Art. 103 extends to Security Council resolutions was confirmed in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)*, Provisional Measures, Order of 14 April 1992, *ICJ Reports* (1992) p. 3, para. 42.

10. B. Simma, 'Universality of International Law from the Perspective of a Practitioner', 20 *EJIL* (2009) p. 265 at p. 294, fn. 122.

law. This fabric remains under considerable strain, with numerous questions on the interaction between the UN and EU levels still unresolved. It may yet tear in future litigation. In the *Kadi* cases, however, the EU institutions, including the CJEU, certainly ensured that it stayed intact.

In order to elaborate on this argument, this article first sketches out the mainstream discourse regarding *Kadi* and the EU's compliance with international law. It subsequently confronts the main sentiments from this discourse with the incontrovertible fact, as retraced here, that the EU did actually comply with its international duties. It concludes with a note of caution as to rhetoric and reality, as well as with a reflection on the real winners and losers in the *Kadi* saga.

## 2. DISCERNING DISCOURSES: THE PAROCHIAL SAVIOUR OF UNIVERSAL RIGHTS

Ever since the CJEU was called upon to rule on Mr Kadi's legal challenges against the sanctions imposed against him by virtue of UNSC resolutions, which were implemented faithfully by the EU, the Court was very closely followed by scholarship as well as by the UN. Two principal sentiments run through the ensuing academic commentary and the reports of the responsible UN monitoring body: Either that compliance with international law is being sacrificed for the, arguably more noble, cause of safeguarding fundamental rights and the rule of law in the EU; or that a regional court is on the brink of casting the EU and its Member States into a state of non-compliance with obligations under the UN Charter, which potentially may undermine the UN and its system of collective security as a whole.

Regarding the UN, the latter sentiment, unsurprisingly, is the prevalent one. The Monitoring Team set up under the UNSC to keep track of the implementation of its targeted anti-terror sanctions regime has always kept a close watch on the *Kadi* litigation. Following the 2005 decision of the Court of First Instance (CFI, after the Lisbon reform renamed the General Court), which was the first judgment by an EU court in these cases, it noted in its report to the relevant Security Council Committee that while the court had 'denied all the applicants' claims and upheld the sanctions, as well as the primacy of the Security Council when acting under Chapter VII of the Charter of the United Nations', it had 'also ruled, apparently for the first time, that courts could review Security Council decisions to ensure that they comply with internationally recognized fundamental norms of human rights from which neither Member States nor the United Nations may derogate'.[11]

Subsequently, in reaction to the Opinion of Advocate General Maduro in early 2008, the Monitoring Team report remarked that if the CJEU was to follow him

11. Letter dated 8 March 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), 4th report of the Monitoring Team, 10 March 2006, S/2006/154, p. 46, para. 5.

in its appeals judgment 'there is a real possibility that the regulation used by the 27 member States of the European Union to implement the sanctions will be held invalid'[12] and that, furthermore, this would in all likelihood 'trigger similar challenges that could quickly erode enforcement'.[13] The Monitoring Team perceived the risk that 'the precedent of a decision that invalidated the sanctions, especially one affecting so many States, might lead to similar problems in other States outside the European Union'.[14] On the *Kadi I* judgment as such, the Team remarked that it represented 'arguably the most significant legal development to affect the regime since its inception'.[15] The report acknowledged, though, that despite the judgment, the measures against Mr Kadi continued to be implemented (see further *infra* 3), noting also that new legal challenges may arise in the future.[16]

Such a challenge took shape in the *Kadi II* series of cases. Commenting on the judgment of the General Court of September 2010, the Monitoring Team report stated that here the former Court of First Instance now maintained the position of the Court of Justice, that being in the words of the report 'that European Union law is distinct and equal in authority to Chapter VII resolutions adopted by the Security Council'.[17] This, according the Monitoring Team, 'challenges the legal authority of the Security Council in all matters, not just in the imposition of sanctions'.[18]

In awaiting the final appeals judgment in *Kadi II*, the Monitoring Team continued to refer to the ruling of the CJEU as one of the 'outside factors [which] might upset' the 'stable, if temporary, equilibrium with respect to due process issues' which the sanction regime was said to have reached after reforms effected up to that point in time.[19] The Monitoring Team seemed to have had a brief moment of hopefulness following Advocate General Bot's Opinion in *Kadi II*, which was overall more deferential to the UN level. Given that he acknowledged changes that had been effected in the UN sanctions regime in the course of time (see further *infra* 3), notably the work of the Office of the Ombudsperson,[20] the report

12. Letter dated 13 May 2008 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), 8th report of the Monitoring Team, 14 May 2008, S/2008/324, p. 17, para. 40.

13. Ibid. (footnote omitted).

14. Ibid.

15. Letter dated 11 May 2009 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), 9th report of the Monitoring Team, 13 May 2009, S/2009/245, p. 10, para. 19.

16. Ibid., p. 11, para. 20.

17. Letter dated 13 April 2011 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), 11th report of the Monitoring Team, 13 April 2011, S/2011/245, p. 14, para. 30.

18. Ibid.

19. Letter dated 31 December 2012 from the Chairman of the Security Council Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), 13th report of the Monitoring Team, 31 December 2012, S/2012/968, p. 9, para. 17.

20. The Office of the Ombudsperson was established in late 2009 by virtue of UN Security Council Res. 1904 (2009), S/RES/1904, 7 December 2009, para. 20.

of the Monitoring Team saw this as 'potentially paving the way for the European Court of Justice to accommodate the Al-Qaida sanctions regime from a due process perspective'.[21] However, these hopes remained unfulfilled, as the Team noted in its subsequent report, in commenting on the *Kadi II* decision, that the CJEU had not been 'persuaded by arguments that improvements to delisting procedures since 2008 diminished the need for such searching review by European courts'.[22] The report looked to the future by noting in vague and inconclusive terms that the Monitoring Team 'will continue to engage with European Union officials on listing challenges at the European Union level and on due process issues more broadly'.[23]

In terms of scholarly appraisal, the *Kadi* saga has spawned a substantial amount of literature.[24] This is not least due to the fact that the case is situated at the intersection of both the relationship between EU and international law as well as the balance between pursuing international security and the safeguarding of individual rights and due process, both topics being prone to great academic popularity. Hence, unsurprisingly, each stage of this case law was extensively scrutinized and commented upon by academic observers.

Overall, according to a survey conducted by Sara Poli and Maria Tzanou, the 2005 judgment of the CFI 'has been considered disappointing since the Court has chosen to defend fundamental rights as being protected by *jus cogens* rather than applying the higher standard of protection guaranteed within the EC legal order'.[25] Moreover, the assertion of this court that the (then) European Community was bound by the UN Charter because it had succeeded in the obligations of the Member States much in the same way as it happened with the GATT was met with fierce criticism.[26]

The scorn that this judgment received from a human rights perspective was not compensated by praise from general public international lawyers. On the contrary, given the rather strange manner in which the Court construed the notion of *jus cogens*, the judgment was deemed to 'add to the argument that national and regional courts are in fact *not* the proper place for the review of Security Council

21. Letter dated 2 August 2013 from the Chairman of the Security Council Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), 14th report of the Monitoring Team, 2 August 2013, S/2013/467, p. 12, para. 29.

22. Letter dated 22 January 2014 from the Chairman of the Security Council Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), 15th report of the Monitoring Team, 23 January 2014, 22 January 2014, p. 12, para. 28.

23. Ibid., p. 12, para. 29.

24. See, e.g., S. Poli and M. Tzanou, 'The *Kadi* Rulings: A Survey of the Literature', 28 *YEL* (2009) p. 533; and the collection of references in R. Streinz, 'Does the European Court of Justice Keep the Balance between Individual and Community Interest in *Kadi*?', in U. Fastenrath, et al., eds., *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford, Oxford University Press 2011) p. 1118 at p. 1121, fn. 21.

25. Poli and Tzanou, *supra* n. 24, p. 548.

26. Ibid., pp. 548-549.

measures'.[27] The fact that the Court of First Instance had introduced a standard of review according to which it deemed itself competent to rule on the lawfulness of the contested measures was considered to have the potential of 'undermining the system of collective security' of the UN,[28] as it gave domestic courts the power of 'ordering the state to act contrary to the sanctions committee's lists'.[29] In this way, it really seemed to combine the worst of both worlds: Throwing overboard the protection of individual rights guaranteed in the EU legal order as well as the supremacy of the UN Charter in international law. As I argued in an earlier article, by trying to please all, the CFI ended up being a 'false friend' of international law,[30] and indeed became quite unpopular with the academic community.

In 2008, in contrast, it was the moment for those emphasising the importance of human rights as well as the autonomy of the EU legal order to rejoice. It has been observed that 'overall positive assessments were more conspicuous than those on the CFI's ruling'.[31] Some commentators, such as Martin Scheinin, argued that there was even support in the judgment also from an international law perspective: 'On the whole, and also in respect of institutional United Nations law, the CJEU did the right thing in *Kadi.*'[32] Praise even came from Strasbourg in the form of a Concurring Opinion by Judge Malinverni of the European Court of Human Rights (ECtHR) in the *Nada* v. *Switzerland* case.[33] The Judge described the judgment 'as historic, as it made the point that respect for human rights formed the constitutional foundation of the European Union, with which it was required to ensure compliance, including when examining acts implementing resolutions'.[34] For him, the CJEU is clearly the trailblazer, raising the question whether the ECtHR 'as guarantor of respect for human rights in Europe, [should] not be more

27. L. van den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual', 20 *Leiden JIL* (2007) p. 797 at p. 801 (emphasis in the original). Note also J. D'Aspremont and F. Dopagne, '*Kadi*: The ECJ's Reminder of the Elementary Divide between Legal Orders', 5 *IOLR* (2008) p. 371 at p. 378, who call the judges' application of international law in this case 'adventurous'.

28. Van den Herik, *supra* n. 27, p. 801.

29. Ibid., p. 799.

30. J. Larik, 'Two Ships in the Night or in the Same Boat Together? Why the European Court of Justice Made the Right Choice in the Kadi Case', College of Europe EU Diplomacy Paper No. 3/2009, June 2009, p. 6, available at <https://www.coleurope.eu/system/files_force/research-paper/edp_3_2009_larik.pdf?download=1>, visited 17 January 2014.

31. Poli and Tzanou, *supra* n. 24, p. 540.

32. M. Scheinin, 'Is the ECJ Ruling in *Kadi* Incompatible with International Law?', 28 *YEL* (2009) p. 637 at p. 650.

33. Note that the ECtHR also quoted from *Kadi* approvingly in the judgment, in *Nada* v. *Switzerland*, Appl. No. 10593/08, 12 September 2012, para. 212. Further on the interaction between the two European courts in matters of targeted sanctions, F. Fabbrini and J. Larik, 'Dialoguing for Due Process: Kadi, Nada, and the Accession of the EU to the ECHR', Leuven Centre for Global Governance Working Paper No. 125, November 2013, available at <http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp121-130/wp125-larik-fabbrini.pdf>.

34. ECtHR 12 September 2012, *Nada* v. *Switzerland*, Appl. No. 10593/08, Concurring Opinion of Judge Malinverni, para. 18.

audacious than the European Court of Justice … when it comes to addressing and settling the sensitive issue of conflict of norms that underlies the present case'.[35] Faced with such conflict and charged with upholding human rights, according to Judge Malinverni, requires the recasting of the primacy of the UN Charter, or at least the Security Council resolutions adopted under its authority, 'in relative terms'.[36]

Others, however, abhorred the fact that the CJEU had arrogated to itself the power to question the full implementation of UNSC resolutions by the EU. From a scholarly perspective focussed on the UN, the judgment was seen as 'a hardly veiled threat to use quasi-constitutional principles of the law of the European Union to disregard the obligations of EU Member States under the UN Charter'.[37] Most vocally, Gráinne de Búrca criticized the CJEU for what she called the 'chauvinist and parochial tones' of its judgment.[38] According to De Búrca, the Court adopted 'a strongly pluralist approach which emphasized the internal and external autonomy and separateness of the EC's legal order from the international domain', and went on to compare the judgment to that of the United States Supreme Court in *Medellin*.[39] In doing so, she noted that the CJEU not only provided

> 'a striking example for other states and legal systems that may be inclined to assert their local constitutional norms as a barrier to the enforcement of international law, but more importantly it suggests a significant paradox at the heart of the EU's relationship with the international legal order, the implications of which have not begun to be addressed.'[40]

The 2010 judgment, in which Mr Kadi challenged the follow-up measures adopted against him in the wake of the *Kadi I* judgment, can be seen as a judicial endorsement by the General Court (the former Court of First Instance) of the approach adopted by the Court of Justice. Even though the Court did not fail to highlight that its reasoning had arguably received some support elsewhere,[41] it did align itself with the 'in principle full review' standard of the Court of Justice.[42]

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35. Ibid., para. 20.
36. Ibid., para. 22.
37. Paulus and Leiß, *supra* n. 8, p. 2113.
38. G. de Búrca, 'The European Court of Justice and the International Legal Order after Kadi', 51 *Harv. ILJ* (2010) p. 1 at p. 4.
39. *Medellin* v. *Texas*, 552 US 491 (2008). This case concerned a Mexican citizen on death row in Texas, his consular rights under the Vienna Convention of Consular Relations, the application of that convention as well as decisions of the International Court of Justice in the US legal order.
40. De Búrca, *supra* n. 38, p. 49. Less outspoken, but raising the concern of the fragmentation of international law, K. Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights', 9 *Human Rights L Rev.* (2009) p. 288.
41. Case T-85/09 *Kadi* v. *Commission* [2010] *ECR* II-5177, paras. 112-22.
42. Ibid., para. 126. See further A. Cuyvers, 'The *Kadi II* judgment of the General Court: The ECJ's Predicament and the Consequences for Member States', 7 *EuConst* (2011) p. 481 at p. 509.

Even if, according to one observer, 'an international legal meltdown' is not impending,[43] he concludes that the General Court put the Court of Justice under pressure 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'.[44] Another commentator lauded the 'clear and welcome presumption in favour of a broad, entitlements-based conception of liberty over deference to considerations of security in the judgment of the General Court'.[45] Overall, one could say that the 2010 judgment is seen as cementing a victory for human rights, protected by the EU and its courts, over international security, as pursued by the UNSC.

In the 2013 *Kadi II* judgment, which concludes this series of legal challenges, the CJEU confirmed the annulment of the measures due to persisting violations of fundamental rights (see further *infra* 3).[46] As Niamh Nic Shuibhne notes, 'while the Court rejected aspects of the reasoning applied by the General Court, it upheld the annulment of the contested Regulation on the grounds that the rights of the defence protected under EU law had not been adequately respected'.[47] Thus far, the scholarly assessment of this decision seems to continue the overall series of praise as standing up for human rights and the rule of law. According to Filippo Fontanelli, the value of the judgment resides 'in its systemic impact, as it incarnates the idea that certain fundamental rights cannot be silenced under the cover of generic security concerns, or of knee-jerk deference to the UN Security Council's action'.[48] Notes of caution, nonetheless, continue to be issued as well with regard to other, less beneficial 'systemic' consequences. Erika de Wet, for instance, stresses that 'the approach of the CJEU carries with it the risk of the devaluation of international human rights law, as well as of legal uncertainty'.[49] According to her, this 'fuels the perception that an irreconcilable norm conflict exists between a UNSC sanctions regime and domestic or regional regimes that value the protection of human rights',[50] with a possible ensuing 'fragmentary effect on the unified system foreseen in the United Nations Charter for the maintenance of international peace and security'.[51]

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43. Cuyvers, *supra* n. 42, p. 501.
44. Ibid., p. 510.
45. H.J. Hooper, 'Liberty before Security: Case T-85/*09 Yassin Abdullah Kadi v. Commission (No. 2)* [2010] ECR 00000 (30 September 2010)', 18 *European Public Law* (2012) p. 457 at p. 469.
46. Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom* v. *Kadi (Kadi II)*, judgment of 18 July 2013, not yet reported.
47. N. Nic Shuibhne, 'Being Bound' (Editorial), 38 *European L Rev.* (2013) p. 435 at p. 436. See extensively on the *Kadi II* judgment, M. Avbelj, F. Fontanelli and G. Martinico, eds., *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment* (London, Routledge, forthcoming 2014).
48. F. Fontanelli, 'Kadieu: Connecting the Dots – From Resolution 1267 to Judgment C-584/10 P – The Coming of Age of Judicial Review', in M. Avbelj, F. Fontanelli and G. Martinico, eds., *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment* (London, Routledge, forthcoming 2014).
49. E. de Wet, 'From *Kadi* to *Nada*: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions', 12 *Chinese JIL* (2013) p. 787 at p. 799.
50. Ibid.
51. Ibid.

In sum, an overarching and prevalent theme of the *Kadi* saga was the disruptive potential of the decisions of the EU Courts regarding compliance with international law, more particularly obedience to resolutions of the UNSC, adopted under the UN Charter as the supreme document of the international legal order. Consequently, in the various scholarly assessments of this case law, criticisms were directed at the CJEU for disrespecting obligations under international law. In the watchful eyes of the Monitoring Team of the Security Council, this carried a disconcerting threat for overall compliance with UN targeted sanctions around the world. Praise, by contrast, was framed in academic commentary in terms of defending human rights and judicial review against an overzealous Security Council. Such defiance was then acknowledged as condoning non-compliance, yet cast as a worthwhile cause. Respect for international law was sacrificed for the sake of an arguably 'higher end'. Yet others then even attempt to justify the reasoning of the CJEU by reference to breaches by the UNSC of its own obligations under international law.[52] There is, however, another way to look at this case law, which corresponds to the actual compliance of the EU and its Member States with international law.

## 3. RETRACING REALITY: 'STRICT OBSERVANCE' THROUGHOUT

Compliance with international law is a cherished principle in the EU. There is long-standing case law of the CJEU on the Union being bound by general international law and on giving preference to interpretations of its own laws that are consistent with international law.[53] After the Lisbon reform, the 'strict observance' of international law has been enshrined as a general objective of the EU in the primary law.[54] The CJEU, subsequently, has taken cognizance of this textual foundation.[55]

Nevertheless, the preparedness of the EU to abide by international law is not boundless.[56] As a matter of principle, the *Kadi* case law clarified that while the

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52. Scheinin, *supra* n. 32, pp. 650-653; for an elaborate framing of non-compliance with such resolutions as legitimate countermeasures against the UNSC see A. Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford, Oxford University Press 2011).

53. See, e.g., Case C-286/90 *Poulsen and Diva Navigation* [1992] *ECR* I-6019, para. 9; Case 104/81 *Kupferberg* [1982] *ECR* 3641; and Case 181-73 *Haegeman* [1974] *ECR* 449; and reiterated in *Kadi*, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* v. *Council and Commission* [2008] *ECR* I-6351, para. 291. See further extensively E. Cannizzaro, P. Palchetti and R. Wessel, eds., *International Law as Law of the European Union* (Leiden, Martinus Nijhoff 2012).

54. Art. 3(5) TEU.

55. Case C-366/10 *The Air Transport Association of America and Others* [2011] *ECR* I-13755, para. 101.

56. See Klabbers, *supra* n. 5.

EU is ‘beholden to’[57] international law, within its autonomous legal order, ‘constitutional’ principles such as effective fundamental rights protection through judicial review trump compliance with international law. This is after all what prompted the general tenor of scholarly commentary referred to above: The CJEU drew the line on where compliance with international law should end and beyond which it would defend human rights as part of EU law against any outside threats.[58] Even in times of global emergencies such as international terrorism, according to the common narrative, Luxembourg spoke up for individual rights, the rule of law and judicial review.

But now that the *Kadi* saga has been concluded, it is worthwhile to take a step back and ask: Did the CJEU at any point put the EU or its Member States in a real state of non-compliance with international law? By carefully retracing this case law and the institutional responses to it, the answer must and can only be: *No*.

It is undeniable that in *Kadi* the CJEU asserted the autonomy of the EU legal order and its constitutional credentials. It furthermore professed itself to be the guarantor of fundamental rights and the rule of law, standing up against the ‘Kafkaesque’[59] sanctions machinery at the UN. What it carefully avoided for more than a decade, however, was to violate international law, i.e., not to practice the ‘strict observance’ of international law under Article 3(5) TEU. Even though Mr Kadi had been successful thrice in a row with his judicial challenges at the EU Courts ever since his first appeal (i.e., in 2008, 2010 and 2013), the measures deemed unlawful by the CJEU were only effectively annulled *after* he had been delisted by the UN and subsequently by the European Commission concerning the implementation of these sanctions in the EU. His financial assets, therefore, were unfrozen by virtue of a political decision, and with the help of the Office of the Ombudsperson at the UN ‘1267 Sanctions Committee’. They were not undone by judicial intervention, which took place only after that fact.

Let us rewind the story and go back to the beginning. On 17 October 2001, the UNSC added Mr Kadi to a so-called ‘blacklist’, requiring his assets to be frozen in view of his suspected involvement in the financing of international terrorism.[60] On 19 October 2001, the EU responded by implementing the measures of the Security Council by adding Mr Kadi to its own list and thus subjecting him to restrictive measures within the EU.[61] Mr Kadi subsequently lodged an action for

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57. *Kadi* v. *Council and Commission*, Opinion of Advocate General Poiares Maduro, *supra* n. 3, para. 21.

58. See N. Lavranos, ‘Protecting European Law from International Law’, 15 *EFA Rev.* (2010) p. 265. Wouters, *supra* n. 2, p. 221 notes that in *Kadi*, ‘the ECJ adopted a strongly dualist vision of the relationship between EC/EU law and international law, emphasising the autonomy, authority and separateness of the EC legal order’.

59. I. Ley, ‘Legal Protection Against the UN-Security Council Between European and International Law: A Kafkaesque Situation?’, 8 *German LJ* (2007) p. 279.

60. ‘Security Council Committee concerning Afghanistan issues a further addendum’, Press Release SC/7180, 19 October 2001, available at <www.un.org/News/Press/docs/2001/sc7180.doc.htm>, visited 15 January 2014.

61. Commission Regulation (EC) No. 2062/2001 of 19 October 2001 amending, for the third time, Council Regulation (EC). No 467/2001 prohibiting the export of certain goods and services to

the annulment of these measures before the EU courts on grounds of violations of his fundamental rights as well as lack of competence.[62]

Four years later, the General Court 'discovered' in its 2005 judgment a *jus cogens* standard which allowed it to review the EU implementing measures as well as, vicariously, UNSC measures. It concluded, however, that against such a standard no fundamental rights breaches could be detected and rejected Mr Kadi's challenge. In view of this dismissal, the measures, of course, stayed in effect. As controversial as the reasoning of the CFI was (see *supra* 2), it certainly maintained the Union in a state of 'strict observance' of international law. While the *jus cogens* argument was in conflict with mainstream international legal opinion, a conflict with the UN Charter was not created.

Subsequently, Advocate General Maduro, in his Opinion of January 2008, employed a very different approach by departing from the autonomy of the Union legal order and emphasizing the effective protection of fundamental rights. In the Opinion, he avowed himself to be fully aware that such an approach, if followed through to its logical conclusion, would lead to violating obligations under international law. This, however, would be international law's problem, according to the Advocate General:

> 'To the extent that such a ruling would prevent the Community and its Member States from implementing Security Council resolutions, the legal consequences within the international legal order remain to be determined by the rules of public international law.'[63]

Even though, he continued, this may 'inconvenience the Community and its Member States in their dealings on the international stage',[64] the application of such constitutional principles by the Court of Justice within the autonomous legal order of the EU 'is without prejudice to the application of international rules on State responsibility or to the rule enunciated in Article 103 of the UN Charter'.[65] Had the Court of Justice followed him all the way, this would have led to the 'zero hour' of non-compliance with international law.

The Court of Justice, in its landmark judgment of September 2008, followed the Advocate General in terms of reasoning, in particular with regard to the autonomy of the Union legal order, the paramount nature of fundamental rights and

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Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan and repealing Regulation (EC) No. 337/2000, *OJ* 2001, L 277/25.

62. On the intricate question of (pre-Lisbon) EU competence to adopt such targeted restrictive measures, see Cremona, *supra* n. 1. The Lisbon reform has resolved this issue, as Art. 215(2) Treaty on the Functioning of the European Union (TFEU) now grants the EU such an explicit power.

63. *Kadi* v. *Council and Commission*, Opinion of Advocate General Poiares Maduro, *supra* n. 3, para. 39.

64. Ibid.

65. Ibid.

the necessity of judicial review. Recalling its ruling in *Les Verts*,[66] it underlined that the EU

> 'is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.'[67]

Consequently, it deemed it to be incumbent on itself to 'ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights',[68] including those acts which 'are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations'.[69]

Crucially, however, it did not go as far as to invalidate the challenged EU measures right away. Even though it concluded that the measures ought to be annulled given their inconsistency with fundamental rights as protected within the Union legal order, the Court acknowledged that annulment with immediate effect 'would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures'.[70] In other words, since it did not know whether Mr Kadi actually deserved to be blacklisted as a financier of terrorism, unfreezing his funds was deemed imprudent. Instead, the Court ruled that the effects of the contested measures should be maintained 'for a period that may not exceed three months running from the date of delivery of this judgment'.[71] This should then allow the European Commission to remedy the situation from the point of view of protecting fundamental rights. As the judgment was rendered on 3 September 2008, compliance with international law was thus assured at least until 3 December 2008.

In the wake of the judgment, the Commission sent Mr Kadi a letter containing a brief summary as to why it thought he should remain blacklisted. Having awaited a reply from Mr Kadi, in which the latter unsurprisingly again contested his listing, the Commission decided to re-list him nonetheless by virtue of a new implementing measure in the form of a Commission regulation.[72] This regulation would 'enter into force on 3 December 2008',[73] i.e., exactly on the day when the previous measures were effectively annulled in accordance with the judgment of

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66. Case 294/83 *Les Verts* v. *Parliament* [1986] *ECR* 1339.
67. *Kadi and Al Barakaat* v. *Council and Commission, supra* n. 53, para. 281.
68. Ibid., para. 326.
69. Ibid.
70. Ibid., para. 373.
71. Ibid., para. 376.
72. Commission Regulation (EC) No. 1190/2008 of 28 November 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-Qaida network and the Taliban, *OJ* 2008, L 322/25.
73. Ibid., Art. 2(1).

the CJEU. Compliance, regardless of the Court's clamorous decision and thanks to the Commission's well-timed 'recycling' of implementing measures, hence remained intact.

Mr Kadi went on to challenge the new measure before the General Court, thus launching the *Kadi II* line of cases. After aligning itself with the reasoning of the Court of Justice in its 2010 judgment, the General Court now found in favour of Mr Kadi, ruling that the Commission had only paid heed to fundamental rights considerations 'in the most formal and superficial sense'.[74] It, too, now seemed to take his rights more seriously, including *vis-à-vis* the compliance with international law. The General Court stressed that the UN level had nothing to offer in terms of judicial protection, given that even the newly established Office of the Ombudsperson 'cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee'.[75] It furthermore acknowledged that by that point in time 'the applicant's funds and other assets have been indefinitely frozen for nearly 10 years'.[76] This prompted the Court to openly doubt the Security Council, which had always emphasized the temporary and preventive (i.e., non-penal) nature of the sanctions.[77] Hence, it appears that as time had passed, the patience of this court to comply with international law at all cost had now run out. Therefore, it concluded that the new measures, too, should be annulled.

Did this create an actual state of non-compliance? The answer is still 'no'. Mr Kadi remained on the list, thanks to the timely appeal lodged by the Commission, the Council and the United Kingdom against the judgment. According to the Statute of the CJEU, a decision of the General Court which declares a regulation void does not take effect, if an appeal has been brought in good time against that decision, until the dismissal of the appeal.[78] Hence, any violations of international law, any real conflict with the UN Charter, had to wait until after the CJEU had held hearings, heard another Opinion of the Advocate General, deliberated and eventually delivered its judgment in *Kadi II*.

While these proceedings ran their course in the hallowed halls of the CJEU in 'the fairyland duchy of Luxembourg',[79] in far-away New York City, on 5 October

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74. *Kadi* v. *Commission*, *supra* n. 41, para. 171.

75. Ibid., para. 128.

76. Ibid., para. 149.

77. Ibid., para. 150. The General Court refers here in particular to UN Security Council Res. 1822 (2008), S/RES/1822, 30 June 2008, in which one of the clauses from the preamble states that such sanctions 'are preventative in nature and are not reliant upon criminal standards set out under national law'.

78. Art. 60(2), Protocol No. 3 on the Statute of the Court of Justice of the European Union. See also 'The General Court annuls the regulation freezing Yassin Abdullah Kadi's funds', Press Release No. 95/10, 30 September 2010, available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-09/cp100095en.pdf>, visited 15 January 2014, which notes this rule at the end of the document; and Cuyvers, *supra* n. 42, p. 496.

79. E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 *AJIL* (1981) p. 1 at p. 1.

2012, i.e., almost eleven years after Mr Kadi's initial listing, the UNSC removed him from the UN list, 'after concluding its consideration of the delisting request submitted by this individual through the Ombudsperson'.[80] One week later, the EU followed suit and took Mr Kadi off its anti-terror list as well.[81] For all practical purposes, this is the end of Mr Kadi's challenges against his sanctions as far as their implementation in the EU is concerned. The admittedly non-judicial procedure at the UN had finally yielded to his requests. With Mr Kadi's name disappearing from the UN 'blacklist', so vanished the obligation under international law – under the UN Charter no less – for the Member States and vicariously for the EU to apply the sanctions. Ever since the two days it took the EU to implement the UN listing in 2001, there was no moment in time when Mr Kadi was off the EU's list while remaining on the UN list.

His delisting in early October 2012 notwithstanding, the hearings for the *Kadi II* appeal took place at the CJEU in mid-October 2012. Subsequently, Advocate General Yves Bot delivered his Opinion in the spring of 2013,[82] in which he referred explicitly to the provisions in the TEU urging the EU to comply with international law and to contribute to international security.[83] He highlighted furthermore the progress made at the UN level, in particular the establishment of the Office of the Ombudsperson, which he attributed directly to the judicial pressure exerted by the CJEU through its *Kadi* case law.[84] These developments at the UN prompted him to argue for more self-restraint by the Court in the intensity of its judicial review, noting also the importance of effectively pursuing international security and the need to respect international law. While he did not dispute the dictum of the CJEU that no acts of the EU enjoy immunity from jurisdiction simply because they were adopted with a view to implementing UNSC resolutions, this particular context should nonetheless lead to 'an adaptation of the judicial review conducted' by the Court.[85] Applying such a 'security sensitive' and 'international law friendly' approach to the case at hand, he advised the Court to set aside the General Court's judgment and to dismiss Mr Kadi's challenge.

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80. UN Security Council, 'Security Council Al-Qaida Sanctions Committee deletes entry of Yasin Abdullah Ezzedine Qadi from its list', Press Release SC/10785, 5 October 2012, available at <www.un.org/News/Press/docs//2012/sc10785.doc.htm>, visited 15 January 2014.

81. Commission Implementing Regulation (EU) No. 933/2012 of 11 October 2012 amending for the 180th time Council Regulation (EC) No. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al Qaida network, *OJ* 2012, L 278/11.

82. Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom* v. *Kadi (Kadi II)*, Opinion of Advocate General Bot of 13 March 2013, not yet reported.

83. Ibid., para. 73, referring to Arts. 3(5) TEU, 21(1) and 21(2)(c) TEU.

84. Ibid., para. 83: 'As the Ombudsperson has acknowledged, the judgment of the Court of Justice in *Kadi* led to the establishment of the Office of the Ombudsperson, which has made it possible to raise the quality of the list considerably. It would be paradoxical if the Court failed to take account of the improvements to which it has directly contributed, even though the Office of the Ombudsperson is not a judicial body [footnote omitted].'

85. Ibid., para. 52.

The judgment of the Court of Justice, delivered on 18 July 2013, however, did not follow the Advocate General. Instead, it clarified the ways in which the EU courts are to handle classified information. In essence, it endorsed the principle of 'disclose or delist',[86] which puts the onus of furnishing the Court with probative information on the institutions that implemented the restrictive measures at issue.[87] Thus, in addition to its assertion of fundamental rights and the autonomy of the EU legal order, in this final judicial episode of the *Kadi* saga, the CJEU elaborated on the procedures to be followed to safeguard such rights in practice in judicial proceedings. In the case at hand, after correcting the General Court on points of law concerning this aspect,[88] it confirmed its conclusion, i.e., the annulment of the measures.[89] Hence, the annulment already issued by the General Court, given that the appeal was dismissed, became effective on the day of the *Kadi II* judgment of the CJEU.

The annulment itself had no practical legal impact on Mr Kadi. Of course, clarifying issues pertaining to the treatment of classified information is of general relevance and useful regarding future cases. As Advocate General Bot rightly pointed out, the fact that Mr Kadi had been delisted 'after the present appeals were lodged, does not … remove the interest in bringing proceedings on the part of the Commission, the Council and the United Kingdom or that of Mr Kadi in the context of his application for annulment'.[90] For future sanctions-related cases, it will certainly be interesting to observe how the EU institutions will manage to provide sensitive information to the courts. This remains a quintessentially multilevel problem, as such information will need to be obtained from the UNSC, which in turn relies on classified information furnished by UN members.[91]

With regard to Mr Kadi, however, the annulment came too late in terms of serving as an 'effective remedy' to unfreeze his assets, which had been – as had been confirmed by the courts several times – unlawfully frozen for all these years. The right to an effective legal remedy is a general principle of EU law,[92] and finds

86. See for a more in-depth explanation of the operation of this rule, F. Fabbrini, 'Global Sanctions, State Secrets and Supranational Review: Seeking Due Process in an Interconnected World', in D. Cole, et al., eds., *Secrecy, National Security and the Vindication of Constitutional Law* (Cheltenham, Edward Elgar 2013) p. 284 at pp. 299-300.

87. *Commission, Council and United Kingdom* v. *Kadi (Kadi II)*, *supra* n. 46, paras. 111 et seq.

88. Ibid., paras. 135-149. Essentially, contrary to what the General Court had found, the CJEU actually deemed most of the reasons based on which Mr Kadi had been listed to be detailed and specific enough. The violations of fundamental rights were, according to the CJEU, due to an insufficient substantiation of these reasons.

89. Ibid., para. 164.

90. *Commission, Council and United Kingdom* v. *Kadi (Kadi II)*, Opinion of Advocate General Bot, *supra* n. 82, para. 42.

91. The Court stressed in *Kadi II* the need for EU authorities to cooperate with the UN Sanctions Committee and other UN members in this respect, *Commission, Council and United Kingdom* v. *Kadi (Kadi II)*, *supra* n. 46, para. 115, referring to Art. 220(1) TFEU, according to which the EU 'shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies'.

92. Starting with Case 222/84 *Johnston* [1986] *ECR* 1651; and reiterated later in, among others, Case C-50/00 P *Unión de Pequeños Agricultores* [2002] *ECR* I-6677.

expression in the Charter of Fundamental Rights of the EU.[93] It is inspired by Article 13 of the European Convention on Human Rights. In the words of the ECtHR, effectiveness signifies

> 'not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.'[94]

Of course, Mr Kadi could avail himself – repeatedly – of the remedies offered in the EU legal order. Eventually, he prevailed over the Commission and the Council and he successfully had the measures imposed against him annulled. However, his successive victories in court were all rather theoretical in the end. As was shown in this section, in 2008 and 2010, the judgments ruling that the measures adversely affecting him should be annulled did not have the result of effectively delisting him. In 2013, the effects of the measures had already ceased to apply by the time the Court of Justice intervened. From this vantage point, the *Kadi II* judgment was not the *grand finale* of the saga, but rather an epilogue, a postscript. For the EU institutions, on the contrary, the avenues of judicial recourse offered in EU law (especially their appeal against the 2010 judgment of the General Court) were quite useful, as they kept Mr Kadi on the EU blacklist, not as a matter of theory but of practice. In doing so, they effectively maintained compliance with international law.

## 4. CONCLUSION: THE TRIUMPHANT TRIBUNAL

After having, firstly, sketched out the general sentiments in the scholarly discourse on the *Kadi* saga as the legal epitome of the EU's implementation of targeted sanctions hailing from the UNSC, and, secondly, having retraced this string of cases from the point of view of actual compliance with international law, the following conclusions emerge. The clamour on the autonomy of the Union legal order and the majesty of human rights aside, in reality, the EU and its Member States successfully cloaked themselves in a seamless coat of compliance with their international obligations, covering the entire period from October 2001 until Mr Kadi's delisting. While vocally upholding human rights as constitutional principles of the EU legal order, also against attacks from the UNSC bolstered by the supremacy of the UN Charter, what the institutions of the EU achieved in fact was living up, all this time, to the objective of strictly observing international law as stipulated in Article 3(5) TEU.

By the same token, a conflict with the UN Charter was avoided. At no point in time did the EU Member States face opposing obligations, with the UN demand-

93. Art. 47 Charter of Fundamental Rights of the EU.
94. ECtHR 13 May 1980, *Artico* v. *Italy*, Appl. No. 6694/74, para. 33.

ing one thing and the EU requiring the opposite. Only in a rather unworldly retrospective sense, with the annulment of the 2008 regulation being effective thanks to the dismissal of the appeal in the 2013 *Kadi II* judgment, could Mr Kadi be conceived of as not having been on the EU's list, while he remained on the UN list. In the words of the CJEU, 'the contested measure is retroactively erased from the legal order and is deemed never to have existed'.[95] However, bearing in mind the preventive nature of the sanctions regime, the historical fact remains that Mr Kadi's assets were frozen during this entire period, even though we now know in hindsight that they should not have been, according to EU law. While this conjures up a retroactive conflict between obligations, for all practical purposes, the EU, including its courts, did cover this period in this seamless coat of compliance with international law, which was only lifted once the obligation under international law had already lapsed.

This prompts a final reflection as to the real winner in this legal marathon. For Mr Kadi, certainly, his repeated victories in court retain a Pyrrhic character. He had to wait almost twelve years before his judicial successes became effective. Now that the dust has indeed settled, Bruno Simma's prescient words could not ring truer in that *Kadi* is among the cases of the CJEU which are 'grandiose on principles without being of much help to the individual claimant'.[96] However, an option that remains open to Mr Kadi is to lodge a claim for damages against the EU under Article 340 TFEU. Such a claim, the success of which is not entirely unlikely,[97] would turn his thus far rather Pyrrhic victory into a more tangible one.

For the Council and the Commission, as well as the EU Member States, the end of the *Kadi* saga may well be the beginning of new legal battles. While a conflict between the EU Treaties and the UN Charter was avoided in this particular series of cases, the principles established by the CJEU therein are prone to place them in a difficult situation in the future. According to the *Kadi II* decision, while the Union institutions did not fail to satisfy the duty to state reasons, the crux is the burden of proof, which now unequivocally rests on them to furnish the substantiating information justifying the blacklisting of targeted individuals in EU courts. Whenever the institutions have to defend their acts and legislation in Luxembourg, it has become clear that justifications based solely on 'the Security Council said so' are clearly not good enough in a Union 'based on the rule of law'.[98]

How they can achieve that remains, for the time being, an unresolved issue. There exists thus far no agreement between the EU and the UN to the effect of sharing sensitive information for the purpose of court proceedings in the area of targeted sanctions. Already at the UN level, including after recent reforms, it is difficult to obtain such information. States are merely encouraged, not obliged,

95. *Commission, Council and United Kingdom* v. *Kadi (Kadi II)*, *supra* n. 46, para. 134.
96. Simma, *supra* n. 10, p. 294, fn. 122.
97. See Fontanelli, *supra* n. 48.
98. *Kadi and Al Barakaat* v. *Council and Commission*, *supra* n. 53, para. 281.

'to provide all relevant information to the Ombudsperson, including providing any relevant confidential information'.[99] Hence, as Scheinin and Ginsborg observe, 'access to information by the Ombudsperson still depends on the willingness of States to disclose information' which 'may still choose to withhold any information which they deem appropriate to safeguard their security or other interests'.[100] In order to avoid future conflicts, the EU and the Member States (not least France and the UK as permanent members of the Security Council) will have to do their utmost to help obtain such information, its sensitive and classified nature notwithstanding, and continue to work on an arrangement to give courts sufficient access to such information.

A less obvious winner, but still a winner, is the UNSC. Despite all the judicial questioning and second-guessing from Luxembourg, it saw its targeted sanctions being applied against Mr Kadi throughout until it, through its '1267 Committee', decided to delist him. Instead of creating an immediate conflict, the judgments from Luxembourg, together with other vocal criticisms of the UN targeted sanctions regime,[101] gave the UN time to adapt. Even though a judicial remedy at the UN level remains wanting for blacklisted individuals,[102] as the case of Mr Kadi shows, the Ombudsperson now contributes to an effective delisting. In this respect, it is disappointing that the CJEU all but completely ignored the impact of the work of the Office of the Ombudsperson in its *Kadi II* decision. For the future, if the Security Council wants to remain on the winning side, it should strongly consider facilitating the provision of information justifying the sanctions to its members, lest courts in the EU put a spoke in the wheels of its sanctions machinery after all.

The most unequivocal winner, however, can only be the CJEU. While keeping the UNSC and its monitoring body in a constant state of alert, and while being celebrated as the brave and ultimate guardian of fundamental rights by many in legal scholarship, in *Kadi* it also asserted the autonomy of the EU legal order, over which it looms as the supreme judicial body. As the retracing of this remarkable legal saga has shown, this assertion of its power, largely perceived as a norma-

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99. UN Security Council Res. 1989 (2011), S/RES/1989, 17 June 2011, para. 25. Note also UN Security Council Res. 2083 (2012), S/RES/2083 (2012), 17 December 2012, which welcomes 'national arrangements entered into by Member States with the Office of the Ombudsperson to facilitate the sharing of confidential information'.

100. L. Ginsborg and M. Scheinin, 'You Can't Always Get What You Want: The Kadi II Conundrum and the Security Council 1267 Terrorist Sanctions Regime', 8 *Essex Human Rights Rev.* (2011) p. 7 at p. 12.

101. Such as B. Fassbender, 'Targeted Sanctions and Due Process', Study commissioned by the United Nations Office of Legal Affairs, 20 March 2006, available at <www.un.org/law/counsel/Fassbender_study.pdf>, visited 17 January 2014; I. Cameron, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, Report commissioned by the Council of Europe, 6 February 2006, p. 4, available at <www.coe.int/t/dlapil/cahdi/Source/Docs%202006/CAHDI%20_2006_%2022%20E%20Cameron%20report.pdf>, visited 17 January 2014.

102. Ginsborg and Scheinin, *supra* n. 100, pp. 11-12.

tively desirable state of affairs, came at a very small price. Throughout the entirety of the *Kadi* cases, the Court of Justice achieved this feat while successfully avoiding any breach of the kind of law from which it endeavours to set EU law apart so ferociously: international law.