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Eckes, C.

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The Autonomy of EU Law vis-à-vis International Law: Kadi I and Kadi II

CHRISTINA ECKES

Case T-315/01, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, ECLI:EU:T:2005:332, delivered 21 September 2005; Case C-402/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, ECLI:EU:C:2008:461, delivered 3 September 2008; Case T-85/09, *Yassin Abdullah Kadi v European Commission*, ECLI:EU:T:2010:418, delivered 30 September 2010; Case C-584/10, *European Commission and Others v Yassin Abdullah Kadi*, ECLI:EU:C:2013:518, delivered 18 July 2013.

KEYWORDS

Autonomy – Sanctions – Restrictive measures – United Nations – Chapter 7 obligation – Right of access to justice – Right to property – Fundamental rights – Dualism – Protectionism – Counter-terrorism – UN Security Council – Security Council Resolutions – Pluralism.

I. INTRODUCTION

THE first *Kadi* case in 2005, delivered by the General Court,¹ resulted in a situation in which individuals targeted by counter-terrorist sanctions adopted by the United Nations Security Council (UNSC) remained subject to directly applicable EU measures without full access to justice. Their bank accounts were frozen. They could no longer travel to or from the EU. In 2008, the Court annulled on appeal large parts of that decision (*Kadi I appeal*).² The Court held that all EU measures, including those giving effect to UNSC resolutions, had to comply with the EU Treaties and the general principles of EU law, including the rights of access to justice and property.³ In *Kadi II*, both the General Court and, on appeal, the Court confirmed this position.

¹In 2005, the General Court was called the Court of First Instance (CFI).

²Joined Cases C-402/05 and C-415/05, *Yassin Abdullah and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461 (*Kadi I appeal*).

³*ibid* paras 283–85, 335, 355.

In the *Kadi I appeal*, Advocate General (AG) Maduro referred to the EU legal order as a ‘municipal legal order’⁴ and argued that the Court must ‘first and foremost ... preserve the constitutional framework of the [EU] Treat[ies]’.⁵ At the same time, he famously stated that ‘This does not mean ... that the [Union]’s legal order and the international legal order pass by each other like ships in the night’.⁶ *Kadi* brought a central dilemma of the EU as a non-state actor to the fore: how can the EU legal order protect both its autonomy and the fundamental rights of those affected by its actions while, at the same time, adhering to its own international law origin?

Because of the particular set of facts, the *Kadi* saga exposed tensions between several fundamental constitutional characteristics of EU law in an unprecedented, pressing manner: the autonomy of the EU legal order, its openness to international law and its required ability to protect fundamental rights. The *Kadi* cases became a bone of contention between legal scholars with an international law perspective and those with an EU law perspective. The former, from the perspective of international and national law, and the protection of fundamental rights, accused the Court of fostering parochialism and undermining the functioning of the international security system.⁷ The latter emphasised the central and crucial need of the EU to be able to protect its legal order as distinct from international law.⁸

This chapter will introduce these fundamental issues and controversies, and offer a reflection on the impact of the *Kadi* cases on the self-conception of the EU, its relationship with international law.

II. FACTS

UNSC counter-terrorist sanctions against private individuals suspected of supporting terrorism remain a very peculiar type of measure. The highest political organ of the most inclusive international organisation, charged with no less than preserving international peace and security, identifies individuals that do not hold public office as terrorist suspects and orders nearly all states in the world to freeze their assets and limit their travel. It remains highly exceptional that an institution dealing with high international politics reaches in such a direct manner into the legal sphere of individualised private persons.

In the *Kadi* cases, an international businessman of Saudi Arabian citizenship, Mr Kadi, found all of his financial funds within the EU frozen at a day’s notice, first by Regulation 467/2001,⁹ then by Regulation 881/2002 (contested in *Kadi I*).¹⁰ The freezing was ordered

⁴Opinion of AG Maduro, Joined Cases C-402/05 and C-415/05, *Yassin Abdullah and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:11 (*Kadi I appeal*), paras 21–22.

⁵ibid Opinion of AG Maduro, para 24.

⁶ibid Opinion of AG Maduro, para 22.

⁷J Klabbers, *Treaty Conflict and the European Union* (Cambridge, Cambridge University Press, 2009) 219, criticising the Court for acting like an ‘ostrich’; G de Búrca, ‘The European Court of Justice and the International Legal Order after Kadi’ (2010) 51 *Harvard International Law Journal* 1, criticising the Court for expressing important parts of its reasoning in chauvinist and parochial tones.

⁸C Eckes, ‘Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?’ (2012) 18 *European Law Journal* 230.

⁹Council Regulation 467/2001/EC of 6 March 2001 prohibiting the export of certain goods and services to 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 337/2000/EC, [2001] OJ L67/1.

¹⁰Council Regulation 881/2002/EC of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation 467/2001/EC, [2002] OJ L139/9.

without any limitation of time or quantity and, above all, the Regulation did not provide any means for those sanctioned to prove that they were innocent of any wrongdoing. Mr Kadi asserted that he had never been involved in terrorism, nor financially supported terrorism in any form.

Mr Kadi was sanctioned as a consequence of the UN sanctions regime in the fight against terrorism. Following the attacks on the US embassies in Nairobi and Dar-e-Salaam in 1998, the UNSC had, in a series of resolutions,¹¹ requested the Taliban regime in Afghanistan to extradite Usama bin Laden to close all terrorist training camps and to cease providing sanctuary for terrorists on its territory. After the Taliban ignored all requests for cooperation, the UNSC unanimously approved Resolution 1267,¹² reinforcing those requests and calling, amongst other things, upon all states to freeze all financial and economic resources either directly belonging to the Taliban or from which they might benefit in any way. The resolution further established a Sanctions Committee,¹³ whose composition is identical to that of the Security Council. The Committee was tasked to manage and monitor the implementation of the sanctions imposed by Resolution 1267. One year later, Resolution 1333 was adopted as a response to the Taliban's continuous failure to respond to the demands of the Security Council.¹⁴ This resolution also ordered the immediate freezing of funds and financial resources belonging to or of any benefit to the Taliban, and instructed the Sanctions Committee to maintain an updated list of individuals and entities designated as associated with Usama bin Laden.

On 19 October 2001, the Sanctions Committee included Mr Kadi's name and city of origin on its list.¹⁵ Taking the view that action by the Union was necessary to comply with the Security Council resolutions adopted in the fight against terrorism, the Council adopted a series of legal instruments,¹⁶ including on 27 May 2002 Common Position 2002/402/CFSP and Regulation 881/2002. Both instruments contain an annex listing Mr Kadi's name and further details identifying him. Mr Kadi brought an action for annulment of the Regulation,¹⁷ arguing that the Council acted ultra vires in adopting the sanctions, and that the measures further infringed Article 249 EC (now Article 288 TFEU) and breached his fundamental rights.¹⁸

III. THE COURT

The General Court held in 2005 (*Kadi I*) that the contested regulation, because it gave effect to a UNSC resolution, enjoyed immunity from jurisdiction, save with regard to its compatibility

¹¹ UN Security Council documents S/RES/1189 (13 August 1998), S/RES/1193 (28 August 1998) and S/RES/1214 (8 December 1998).

¹² UN Security Council document S/RES/1267 (15 October 1999).

¹³ Now called Security Council Committee pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities.

¹⁴ UN Security Council document S/RES/1333 (19 December 2000).

¹⁵ However, seven days earlier (12 October 2001), the Office of the Coordinator for Counterterrorism of the US Government designated Mr Kadi as a new person on the Comprehensive List of Terrorists and Groups Identified Under Executive Order 13224 (the President Executive Order on Terrorist Financing of 23 September 2001). One cannot avoid the impression that the listing took place on the initiative of the USA.

¹⁶ For an overview of the instruments and actions brought against them, see I Tappeiner, 'The Fight against Terrorism: The Lists and the Gaps' (2005) 1 *Utrecht Law Review* 97.

¹⁷ Initially against Regulation 467/2001, then redirected to Regulation No 881/2002, repealing the former.

¹⁸ In particular, their right to a fair hearing, their right to respect for property and their right to effective judicial review.

with *jus cogens*. As a result, the General Court upheld the sanctions against Mr Kadi because it could not establish a breach of the bare requirements of *jus cogens*. On appeal, the Court came to a diametrically opposed position on the point of jurisdiction. It explained that a review of whether the implementation measures adopted by the EU are compatible with EU fundamental rights standards did not legally challenge the validity of the UN listings that lie at their origin, nor ‘entail any challenge to the primacy’ of the underlying UNSC resolution.¹⁹ The Court consequently reviewed the measures and found that the applicant’s fundamental rights were infringed.²⁰ It annulled the sanctions with regard to Mr Kadi, but maintained the effects of the annulled measure.

The Court may not have ruled directly on the legality of the UNSC resolution. However, it is hard to deny that the *Kadi* cases challenged the legitimacy of the UN sanctioning practice. The Court found that ‘the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were *patently not respected*’ (emphasis added).²¹ The evidence allegedly justifying the sanctions against Mr Kadi was withheld both from the appellants themselves and from the EU courts; and the Court could ‘do no other than find that it is not able to undertake the review of the lawfulness of the contested regulation’.²²

Subsequently, the Council adopted a new set of sanctions targeting the same individuals following a different procedure aimed at better safeguarding Mr Kadi’s rights. Mr Kadi challenged the new sanctions before the General Court, which annulled them in 2010 (*Kadi II*), in a ruling that is exceptional in its critical tone towards the Court.²³ The annulment was confirmed by the Court in 2013 (*Kadi II appeal*).²⁴

IV. THE IMPORTANCE OF THE CASE

The importance of the *Kadi* cases can hardly be overstated. This is also reflected in the exceptional academic attention that *Kadi I* in particular received.²⁵ In *Kadi I*, both the General Court and the Court had to address the relationship between the EU legal order and international law in a head-on manner that raised many and different concerns with regard to the protection of fundamental rights and the existence and functioning of the EU.

A. The Attitude of the Court to International Law: When is the EU Too Autonomous?

The relationship between the ‘[EU] legal order’ and the ‘international legal order under the [UN]’²⁶ is the issue on which the General Court and the Court disagreed most essentially.

¹⁹ *Kadi I appeal* (n 2) para 288.

²⁰ *ibid* para 370.

²¹ *ibid* para 334.

²² *ibid* para 351.

²³ Case T-85/09, *Yassin Abdullah Kadi v Commission*, ECLI:EU:T:2010:418 (*Kadi II*). For a discussion of the ruling, see C Eckes, ‘Controlling the Most Dangerous Branch from Afar: Multi-layered Counter-terrorist Policies and the European Judiciary’ (2011) 2 *European Journal of Risk Regulation* 505.

²⁴ Case C-584/10, *European Commission and Others v Yassin Abdullah Kadi*, ECLI:EU:C:2013:518 (*Kadi II appeal*).

²⁵ See below for a selection.

²⁶ *Kadi I appeal* (n 2) para 249.

The General Court found that Union acts implementing obligations under the UN Charter fell as a matter of principle outside of the scope of its jurisdiction. It took what could be characterised as a monist perspective, and conferred on UNSC resolutions a supra-constitutional status within the EU legal order, capable of justifying departure from primary European law, including the general principles. As a result, it argued in *Kadi I* that the hierarchical status of UNSC Resolutions (at least those adopted under Chapter VII) excluded the review of the domestic measures within the light of primary European law and general principles of EU law.

The Court, by contrast, took a dualist perspective and proposed in *Kadi I* to rank the UN Charter, including obligations under its Chapter VII (if they were binding on the Union), the same way as any other international agreements. They ‘would occupy’ a rank between primary and secondary EU law.²⁷ Moreover, the Court granted a special status to the ‘very foundations’ of the EU legal order as expressed in Article 6(1) TEU, based on their content and not on the status of their author.²⁸

Six years later, in *Opinion 2/13* on the EU’s accession to the European Convention on Human Rights (ECHR), the Court confirmed its position that it is not willing to compromise the autonomy of the EU legal order.²⁹ However, there is one core difference between the *Kadi* cases and *Opinion 2/13*, namely what they mean for fundamental rights protection. In the former cases, the EU infringed fundamental rights by giving effect to an international legal obligation of the Member States, and the Court stepped in and upheld those rights. In the latter case, the Court made it all but impossible for the EU to submit to a widely recognised external mechanism of fundamental rights protection (the ECHR). At the same time, *Opinion 2/13* directly flows from and further develops the autonomy conception as the Court had set it out in the *Kadi I appeal*, arguably based on earlier cases.³⁰

The Court considers autonomy to be an essential feature of the EU legal order in its self-conception as a domestic legal order. Arguably, autonomy is both the result of and the precondition for this domestic conception of the EU legal order. It is also essential for the particular EU law characteristics of primacy and direct effect. The term ‘essential’ is used consciously in this context.³¹ The point is that in the absence of an essential element, namely EU law’s claim to autonomy, EU law would no longer function in the way that it does now. If EU law were directly dependent in its validity and interpretation on national and international law, the Court would no longer be in the position to filter and determine the precise effects of national and international law within the EU legal order. As a consequence, EU law would no longer enjoy the same effectiveness vis-à-vis national law. By definition, this is a thesis that excludes the opposite claim, that is that the very nature of EU law would not change in the absence of a contested but in and of itself logically valid claim of autonomy. Arguing that the formal autonomy claim of the Court is essential also entails that it cannot be compromised in face of other considerations. This is the position of the Court, most visibly in *Kadi* and *Opinion 2/13*.

However, this does not take away from the fact that the EU is legally committed to comply with and give effect to international law.³² Usually, the EU courts resolve tensions between

²⁷ *ibid* para 305. See also C Eckes, ‘International Sanctions against Individuals: A Test Case for the Resilience of the European Union’s Constitutional Foundations’ (2009) 15 *European Public Law* 351, 366–67.

²⁸ *Kadi I appeal* (n 2) paras 303–04.

²⁹ *Opinion 2/13*, re EU Accession to the ECHR, ECLI:EU:C:2014:2454. See this volume, ch 70.

³⁰ See, eg *Opinion 1/91*, EEA, ECLI:EU:C:1991:490. See this volume, ch 20.

³¹ C Eckes, ‘The Autonomy of the EU Legal Order’ (2020) 4 *Europe and the World: A Law Review* 1.

³² See notably Art 3(5) TEU.

Union law and international law by interpreting the former in the light of the latter (consistent interpretation), so avoiding open conflict between the two.³³ In the *Kadi* cases, this was not possible. The peculiar set of facts excluded consistent interpretation. Member States' obligations under the UN Charter were so specific (freeze specific assets of individuals singled out) that the possibility of consistent interpretation did not exist.³⁴ The Court had to choose either to allow the Union to give effect to these very specific obligations, even if they breached fundamental rights (as the General Court did), or to annul the measures and put Member States in a situation where they fail to comply with their obligations under the UN Charter. The Court's choice for the latter triggered, as mentioned above, quite some criticism, and was portrayed as undermining the UN system for protecting international peace and security. Arguably, the discussion of whether the Court's conception of the autonomy of the EU legal order threatens the EU's ability to pursue a leading role in promoting the international rule of law and multilateralism for international relations has continued since *Kadi*. In particular, *Opinion 2/13* and *Opinion 1/17* have shed new light on and raised new concerns about the EU's relationship with international law.³⁵

B. Protecting Fundamental Rights from External Interference: Autonomy as a Shield with Reflective Effects

Mr Kadi powerfully argued that

[s]o long as the law of the [UN] offers no adequate protection for those whose claim that their fundamental rights have been infringed, there must be a review of the measures adopted by the Community in order to give effect to resolutions of the Security Council.³⁶

The Court agreed, and construed in the *Kadi I appeal* a fundamental element of the 'Union of law', namely the protection of constitutional guarantees under EU law from interference from the outside.³⁷ It confirmed that no international law obligations, not even UNSC resolutions under Chapter VII, can justify blatant fundamental rights violations within the EU legal order.

The *Kadi I appeal* may therefore be seen as the beginning of the Court's autonomy conception as protecting the Union's *core substantive values*. In particular, in *Kadi*, the protection of fundamental rights and judicial protection became closely intertwined with the autonomy of the EU legal order. The autonomy of the EU legal order from international law is understood for the first time in *Kadi* as a necessary precondition for the Union to be in a position to ensure that individuals enjoy in practice the constitutional guarantees under EU law. Only by declaring the EU legal order autonomous could the Court submit the actions of the EU institutions to fundamental rights review. The Court pursues this understanding and line of reasoning

³³ See, eg Case C-310/06, *FTS International*, ECLI:EU:C:2007:456; M Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case-Law on the WTO and Beyond' [2008] *Journal of International Economic Law* 885.

³⁴ C Eckes, *EU Counter-terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford, Oxford University Press, 2009) 247 et seq.

³⁵ *Opinion 2/13* (n 29); *Opinion 1/17*, ECLI:EU:C:2019:341. See this volume, ch 88.

³⁶ *Kadi I appeal* (n 2) para 256.

³⁷ *ibid* paras 285, 316.

further in its more recent rulings on the protection of the rule of law. In particular, the developments in Poland³⁸ are characterised as a threat to the Union of law.³⁹

However, the Court arguably went further than protecting Mr Kadi's fundamental rights: it examined and commented in detail on the UN listing procedure.⁴⁰ The Court's conception of autonomy as a normative shield hence also has reflective effects carrying beyond the EU legal order. The Court considered the UNSC's actions in light of generally accepted rights of the defence of individuals and strongly criticised the UN procedure. This could either be read as potentially undermining the work of the UNSC or as a legitimacy check that led to or at least strengthened demands for reform of a peculiar procedure, in which perhaps the highest political body in the world directly singles out and sanctions individual persons.

Even 11 years after the *Kadi I appeal*, it is not easy to demonstrate that the Court's pushback harmed the UN peace and security system or the EU's credibility within that system. What can be shown is that, in 2009, the UN established the office of an Ombudsperson to offer those sanctioned at least some possibility of being heard and having their case examined.⁴¹ Many considered this as related to the Court's pushback and the difficulties of the Member States after *Kadi I* to give effect to the UN counter-terrorist sanctions.

C. Within the EU Legal Order: Primacy Over Pluralism?

While asserting the role of a single international actor, the Union remains internally and externally a complex and compound structure in which numerous actors participate and struggle for visibility. Power is shared between the EU institutions and the Member States, who are sometimes subordinated to each other and sometimes act as equals, but who ultimately have different, and (to a certain extent) independent, legal foundations and practical preferences.⁴²

Frictions between the different European actors seldom surface with the same clarity as in cases concerning individual sanctions. Individual sanctions combine two factors that have led to the outburst of usually well-contained normative frictions. First, the particular combination of international, European and national rules with overlapping personal, material and territorial scope is unique. Individual sanctions are exceptional in that nearly identical rules that directly restrict the rights of specific individuals are adopted at all three levels.

The 'so long as' terminology used by Mr Kadi⁴³ raised a parallel to the position of national constitutional courts vis-à-vis the primacy of EU law. The 'so long as' doctrine as originally developed by the German Federal Constitutional Court (GFCC)⁴⁴ could be crudely summarised

³⁸ On the independence of the judiciary in Poland, see Case C-619/18, *Commission v Poland*, ECLI:EU:C:2019:531; Joined Cases C-585/18, C-624/18 and C-625/18, *AK and Others v Sąd Najwyższy*, ECLI:EU:C:2019:982; Joined Cases C-558/18 and C-563/18, *Miasto Łowicz*, ECLI:EU:C:2019:775.

³⁹ See fundamentally U Everling, 'Das Maastricht-Urteil des Bundesverfassungsgerichts und seine Bedeutung für die Entwicklung der Europäischen Union' (1994) 17(3) *Integration* 165: 'Die Gemeinschaft ist Rechtsgemeinschaft; nur als solche kann sie bestehen.'

⁴⁰ See in particular *Kadi I appeal* (n 2) paras 323–25.

⁴¹ See www.un.org/securitycouncil/ombudsperson. The office was established by UNSC 1904 (2009).

⁴² C Eckes, 'Disciplining Member States: EU Loyalty in External Relations' (2020) 22 *Cambridge Yearbook of European Legal Studies* 85.

⁴³ *Kadi I appeal* (n 2) para 256.

⁴⁴ GFCC, BVerfGE 37, 271 of 29 May 1974 (*Solange I*). BVerfGE 73, 339 of Decision of 22 October 1986, 2 BvR 197/83 (*Solange II*).

as follows: so long as the Court sufficiently protects fundamental rights, the GFCC will not step in to review EU law and rulings of the Court. Since the GFCC's early judgments that coined this phrase, the GFCC has continuously confirmed this line and even explicitly agreed to exercise jurisdiction in response to an alleged individual infringement, rather than only a structural lowering of the fundamental rights protection offered by the Court.⁴⁵

The 'so long as' parallel between *Kadi* and the case law of the GFCC has been used to support diametrically opposed conclusions. On the one hand, it can be argued that if the Court had failed to protect fundamental rights from external interference, as it did in *Kadi*, this would have led national constitutional and supreme courts to challenge the primacy of European law in order to ensure an acceptable fundamental rights protection within their own legal order. National courts, and in particular the GFCC, are an autonomous judicial force within the EU that the Court needs to reckon with. The Court does not have hierarchical jurisdiction over their actions and cannot repeal their rulings. It must ensure their cooperation through other means. It is also fair to say that the pressure by national courts on the Court has again intensified in the years following the *Kadi I appeal*.⁴⁶

On the other hand, the Court's 'so long as' logic vis-à-vis international law has been criticised for being seemingly contradictory. The Court demands in its settled case law that national courts accept the primacy of EU law and so stifles pluralism, while at the same time refusing to defer to 'supreme' obligations under the UN Charter.⁴⁷ This was feared to give national courts an (additional) argument to reject the primacy of EU law. Indeed, the GFCC referred in its Treaty of Lisbon decision to the *Kadi I appeal* and argued that the Court took a view 'similar' to its own by placing 'the assertion of its own identity as the legal community above the commitment that is otherwise respected'.⁴⁸

Despite certain communalities, good arguments speak, in my view, in favour of distinguishing the Court's position in the *Kadi I appeal*, denying a UNSC resolution effects within the EU legal order based on the GFCC's 'so long as' logic. Both courts are concerned with the effects of legal norms originating external to their own legal order. However, while the Union is committed to being a Union of law, offering review by an independent judiciary in the light of widely recognised fundamental rights, the UNSC sanction practices result in a blatant disregard of the most basic fundamental rights of individualised persons. They directly deprive individuals of their rights without offering, even after the introduction of the Ombudsperson, basic procedural rights or review by an independent judge who is in a position to annul the measures in question. The Court hence reasonably took in the *Kadi I appeal* the position of the GFCC in its first 'so long as' decision, when the GFCC still structurally reviewed EU law because at the time the EU did not yet offer an adequate (judicial) protection of fundamental rights. This is now different. Therefore, the GFCC's use of the *Kadi I appeal* to justify reviewing EU law seems unconvincing.

⁴⁵ GFCC, decision of 15 December 2015, 2 BvR 2735/14, www.bundesverfassungsgericht.de. The facts were similar to the decision in Case C-399/11, *Melloni*, ECLI:EU:C:2013:107 at the Court.

⁴⁶ Czech Republic (CCCR), *Slovakian pension* Case (Pl. ÚS 5/12), holding Landtová C-399/09 ultra vires; Danish Supreme Court (DSC), *Ajos* Case, No 15/2014 of 6 December 2016, holding Dansk Industri C-441/14 ultra vires; GFCC, *OMT-judgement*, of 21 June 2016; GFCC, *PSPP* case of 5 May 2020.

⁴⁷ Supreme because of Art 103 UN Charter.

⁴⁸ GFCC, BVerfGE 123, 267 of 30 June 2009 (*Lisbon Treaty decision*) para 340.

D. Normalising the Common Foreign and Security Policy or Law Ever-Expanding?

Foreign policy is traditionally the realm of (executive) politics rather than law. The political nature of foreign policy decisions is preserved either by formally limiting the jurisdiction of courts⁴⁹ or by judicial self-restraint. This is often referred to as the ‘political question doctrine’.⁵⁰

One core issue in *Kadi I* was whether the EU Court had jurisdiction to review the EU’s sanctions measures. The Council, the Commission and the UK contended that EU sanctions giving effect to UN lists of terrorist suspects do not lend themselves to judicial review.⁵¹ AG Maduro, in his Opinion in the *Kadi I appeal*, opined that it is ‘untenable’ that ‘even the most humble degree of judicial interference would be inappropriate’.⁵² He argued that despite the high importance of maintaining international peace and security, it is ‘the duty of the courts to assess the lawfulness of measures that may conflict with other interests that are equally important’ (such as human rights).⁵³ The Court agreed.

The contested measures in *Kadi* were EU regulations rather than CFSP decisions. However, the listings in these EU regulations were identical to the listings in CFSP decisions that formed pursuant to ex-Article 301 TEC (now Article 215 TFEU), the basis for the adoption of the former. By reviewing specific listings in EU regulations that are identical to those in CFSP decisions, the *Kadi* cases have also indirectly contributed to expanding judicial review into CFSP and so normalising this policy area.⁵⁴

In general, individual sanctions were the trigger for introducing a specific exception to the exceptional exclusion of CFSP from the Court’s jurisdiction. Since the entry into force of the Treaty of Lisbon, Article 275 TFEU, second paragraph establishes the jurisdiction of the Court over individual sanctions adopted in CFSP decisions. In October 2020, the Court has continued to normalise the CFSP in the context of individual sanctions by accepting jurisdiction for actions for damages for wrongful listings.⁵⁵

Generally, the assertion by the Court of jurisdiction over matters of foreign policy in general and individual sanctions in particular forms part of a broader trend towards the judicialisation and legalisation that we can witness all around. On the one hand, this trend contributes to protecting fundamental rights and avoiding arbitrariness. On the other hand, it may result in an overreach of law into the terrain of pure politics that may undermine the former’s relevance and ability in framing politics. However, individual sanctions single out identified persons as terrorist suspects. Such specific measures cannot benefit from a limitation of judicial review over general foreign policy.

⁴⁹ Art 275(1) TFEU.

⁵⁰ See T Franck, *Political Questions/Judicial Answers* (Princeton, Princeton University Press, 1992); G Butler, ‘In Search of the Political Question Doctrine in EU Law’ (2018) 45 *Legal Issues of Economic Integration* 329.

⁵¹ See *Kadi I appeal* (n 2) Opinion of AG Maduro (n 4) para 33.

⁵² *ibid* Opinion of AG Maduro (n 4) para 34.

⁵³ *ibid* Opinion of AG Maduro (n 4) para 34.

⁵⁴ On the normalisation of CFSP more broadly, see C Eckes, ‘Common Foreign and Security Policy: The Consequences of the Court’s Extended Jurisdiction’ (2016) 22 *European Law Journal* 492; R Wessel and J Larik (eds), *EU External Relations Law: Text, Cases and Materials*, 2nd edn (Oxford, Hart Publishing, 2020) ch 9.

⁵⁵ Case C-134/19, *Bank Refah Kargaran v Council*, ECLI:EU:C:2020:793; C Eckes, ‘Constitutionalising the EU Foreign and Security Policy: The ECJ Accepts Jurisdiction over Claims for Damages under the Common Foreign and Security Policy (CFSP)’ (*VerfBlog*, 18 October 2020) www.verfassungsblog.de/constitutionalising-the-eu-foreign-and-security-policy/. See this volume, ch 91.

V. ADDITIONAL READING

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