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From the ECJ to the ECtHR and back again: The European Regime of restrictive Measures imposed by the UN Security Council

by

Mattia Ventura*

Abstract

(French version below)

This paper aims to demonstrate how the approach undertaken by the ECJ in the Kadi I judgment influenced the jurisprudence of the ECtHR on asset freezing measures imposed by the UN Security Council. This interaction produced a common approach that the two bodies are still adopting today with regard to the application of due process rights in Europe, even though this could mean the non application of some UN security Council binding resolutions. In fact, the solution of the ECJ Kadi I case is heavily relied upon by the ECtHR in the Nada case, which will be cited in turn by the ECJ in the Kadi II ruling, permitting to conceive this contamination as the successful result of a team work based on dialogue and mutual leverage.

Furthermore, this mutual influence should be considered in the perspective of the negative opinion issued by the ECJ on December 2014 about the accession of the EU to the ECtHR. In fact, while many scholars theorized a multi-level "constitutionalization" of the European legal protection of Human Rights systems in the perspective of accession, today there is no legal argument that can justify this vision anymore. The two courts, instead, are committed to guarantee the same level of human rights protection in Europe through the harmonization of their decisions, aiming at the higher level of safeguard of this kind of rights in Europe, without pursuing any verticalization or change in the European institutional framework. While doing so, the two judicial bodies kept the questions related to human rights at a supranational/international level, averting the hazard of the delivery of similar issues by national courts.

Keywords: ECtHR, ECJ, United Nations Security Council, Counter-terrorism, Sanctions, Restrictive measures, Asset freezing, Human Rights, Due Process

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Résumé

Ce document vise à montrer comment l'approche adoptée par la CJUE dans l'arrêt Kadi a influencé la jurisprudence de la Cour européenne des droits de l'Homme en ce qui concerne les mesures relatives au gel des avoirs imposées par le Conseil de sécurité des Nations unies. Cette interaction a encouragé une approche commune que les deux cours adoptent encore aujourd'hui en matière d'application des droits de l'homme concernant le droit à un procès équitable en Europe, même si cela pourrait signifier la non-application de certaines résolutions contraignantes du Conseil de sécurité des Nations unies. En réalité, la solution retenue dans l'affaire Kadi par la CJUE est prise en compte par la CourEDH dans l'affaire Nada, laquelle est à son tour mentionnée par la CJUE dans l'arrêt Kadi II, permettant ainsi d'envisager l'adoption de cette solution comme le résultat plutôt positif d'un travail d'équipe axé sur le dialogue et l'influence réciproque.

Par ailleurs, cette influence réciproque devrait être prise en considération dans la perspective de l'avis négatif rendu par la CJUE en décembre 2014 en ce qui concerne l'adhésion de l'UE à la Convention européenne des droits de l'Homme. En effet, alors que de nombreux spécialistes ont théorisé une « constitutionnalisation » multi-niveaux de la protection juridique à l'échelle européenne du système des droits de l'homme en ce qui concerne l'adhésion, il n'existe plus aujourd'hui le moindre argument juridique permettant de justifier ce point de vue. Les deux juridictions, au contraire, se sont engagées à garantir le même niveau de protection des droits de l'homme en Europe grâce à une harmonisation de leurs décisions, en vue d'assurer le meilleur niveau possible de protection de ce type de droits en Europe, sans pour autant produire aucune "verticalisation" ni aucun changement en ce qui concerne le cadre institutionnel européen. Ce faisant, elles ont circonscrit les questions ayant trait aux droits humains à l'échelle supranationale/internationale pour éviter le hasard de décisions similaires par les juridictions nationales.

Mots-clés : Cour européenne des Droits de l'Homme, Cour de justice de l'Union européenne, Conseil de Sécurité des Nations Unies, Antiterrorisme, Sanctions, Mesures restrictives, Gel des avoirs, Droits de l'Homme, Procès équitable

From The ECJ to the ECtHR and back again: The European Regime of restrictive Measures imposed by the UN Security Council

Introduction

Both the ECJ and the ECtHR have been called several times in recent years to rule on actions brought by individuals who complained about the violation of human rights committed by their national authorities in while implementing Security Council's resolutions[1]. Indeed, as known, these resolutions impose obligations upon the UN member States, but both the ECJ and, later, the ECtHR, have recalled their competence and autonomy in protecting human rights, even though this would imply a partial non-application of the mentioned UN resolutions, if not a violation of the UN Charter itself[2]. In fact, the jurisprudence of the courts on the matter, and especially of the ECJ, has to be considered in the framework of the EU law, in which human rights are protected as fundamental principles through constitutional guarantees. This is even more important if we consider that in the context of the UN there is no competence for any kind of institution to take into account a decision of the Sanctions Committees. Furthermore, even the delisting procedure conceived by the UN sanctioning system is far from ensuring the full protection of human rights, in particular of the right of access to a judge and to an effective jurisdiction, resulting non satisfactory in relation to the European standards.

Rather, the evolution of the jurisprudence of the two Courts toward a common position above the guarantees needed to allow the application of the cited resolutions under the respective Statutes was far from smooth[3]. After years of mutual leverage, and a distance dialogue which origins from the first steps of the *Kadi* judgement in front of the Court of

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[1] The reference is, in particular, to the United Nations Security Council sanctions imposed under the Resolution 1267 (1999) sanctions regime, UNITED NATIONS, SC Res. 1267 (Oct. 15, 1999), S/RES/1267 (1999), o. p. 4 (b). Subsequent SC resolutions which confirmed, and even deepened, the essence of Res. 1267, include in particular UNITED NATIONS, SC Res. 1333 (Dec. 19, 2000), S/RES/1333 (2000); SC Res. 1390 (Jan. 28, 2002), S/RES/1390 (2002); SC Res. 1455 (Jan,17, 2003) S/RES/1455 (2003); SC Res. 1526 (Jan. 30, 2004) S/RES/1526 (2004); SC Res. 1617 (Jul. 29, 2005) S/RES/1617 (2005); SC Res. 1735 (Dec. 22, 2006) S/RES/1735 (2006); SC Res. 1822 (Jun. 30, 2008), S/RES/1822 (2008); and SC Res. 1904 (Dec. 17, 2009) S/RES/1904 (2009).

[2] DE SENA Pasquale, VITUCCI Maria Chiara, "The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values", EJIL 2009, Vol. 20 no. 1.

[3] SABEL Charles, GERSTENBERG Oliver, "Constitutionalising an Overlapping Consensus: The CJEU and the Emergence of a Coordinate Constitutional Order", EurLJ 2010, Vol.16, Issue 5, pp. 511 – 550. For a general overview of the relationship between the two European Courts, see CRAIG Paul, DE BURCA Grainne, *EU law: Text, Cases and Materials*, 2011, 5th ed., 418-426 pp.

first instance[4], and which is still producing its effects, the ECtHR leaves its prior conservative positions to play the role of supreme protector of human rights in Europe together with the ECJ, as separate bodies acting on the basis of norms having the same purpose and content[5].

In fact, by giving a glance to the case law of the ECtHR before *Nada*[6], it becomes evident how, even though recalling the principle of equivalent protection[7], the Court always affirmed its own incompetence with regard to the obligations taken by its member States under the UN Charter[8]. But, on the one hand, the new approach undertaken by the Grand Chamber of the ECJ in the *Kadi I* decision of 2008[9], and, on the other, the risk that the national courts would have started to replace the ECtHR in protecting human rights, with a strong risk of fragmentation, persuaded the Court to move towards a more moderate position. From the case *Nada* on, in fact, the ECtHR established its jurisdiction to review the cases involving the UN smart sanctioning regime, even though using a particular anrgument which does not face directly the conflict between the two systems. Nevertheless, it is significant to note that, while arguing in such direction, the Court recalled the ECJ *Kadi I* judgement, and furthermore, in the *Kadi II* decision in 2013, the CJEU will consolidate this approach recalling *Nada* [10].

It has been argued by many scholars that this mutual leverage of the two courts on human rights protection within the borders of the European continent, was conceived in the perspective of the EU accession to the ECHR as to the new art. 6 of the Lisbon treaty[11].

[4] ECJ, case T-315/01, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005], ECR II-03649. Judgment of the Court of First Instance (Second Chamber, extended composition).

[5] For the relationship between the EU Treaties and the European Convention for the protection of Human RIghts and Fundamental Freedom see: BROUDE Tomer, SHANY Yuval, *Multi-Sourced Equivalent Norms in International Law*, Oxford, Hart Publishing, 2011; GRAGL Paul, *The Accession of the European Union to the European Convention on Human Rights*, Oxford, Hart Publishing, 2013; LOCK Tobias, "Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order", in CMLRev. 2011, Vol 48, pp. 1-33.; LOCK Tobias, "Will the empire strike back? Strasbourg's reaction to the CJEU's accession opinion",VerfBlog, 2015/1/30, available at http://www.verfassungsblog.de/en/will-empire-strike-back-strasbourgs-reaction-cjeus-accession-opinion.

[6] ECtHR, App. no. 10593/08 *Nada v Switzerland* [2012], ECLI:CE:ECHR:2012:0912JUD001059308.

[7] DE HERT Paul, KORENICA Fisnik, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights", GermanLJ 2012, Vol. 13 No. 07, pp. 874-895.

[8] ECtHR, App. Nos 71412/01 and 78166/01 *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, ECLI:CE:ECHR: 2007:0502DEC007141201.

[9] ECJ, joined cases C-402/05 P and C-415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v.Council of the European Union and Commission of the European Communities* [2008], ECR I-6351, [hereinafter *Kadi* I]. This case was preceded by case T-315/01 *Yassin Adullah Kadi v. Council of the European Union and Commission of the European Commmunities* [2005], ECR II-3649 (Sep. 21, 2005), and followed by case T-85/09 *Yassin Abdullah Kadi v European Commission* [2010], ECHR II-05177, and the joined cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission & the Council of the European Union v Yassin Abdullah Kadi* [2013], ECLI:EU:C:2013:518 [hereinafter *Kadi* II].

[10] ECJ, joined cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission & the Council of the European Union v Yassin Abdullah Kadi* [2013], cit.

[11] FABBRINI Federico, LARIK Joris, "Dialoguing for due process: Kadi, Nada, and the accession of the EU to the ECHR" 2013, Leuven Centre for Global Governance Studies Working Paper n.125, available at: https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp121-130/wp125-larik-fabbrini.pdf; FABBRINI Federico, LARIK Joris, "The Accession of the EU to the ECHR and its Effects: Nada v Switzerland, the Clash of Legal Orders and the Constitutionalization of the ECtHR", available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2334905. The same perspective is proposed by many other scholars, e. g. JACQUÉ Jean-Paul, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", CMLRev. 2011, Vol. 48, p. 995; VON BOGDANDY Armin, BAST Jürgen, *Principles of European Constitutional Law*, Bloomsbury Publishing, 2009, and in particular, in the same publication, MAYER Franz C., "Multilevel Constitutional Jurisdiction", p. 399; PETERSMANN Ernst-Ulrich, "Judging Judges: From 'Principal-Agent Theory' to 'Constitutional Justice' in Multilevel 'Judicial Governance' of Economic Cooperation Among Citizens", JInt Economic Law 2008, vol. 11 (4), pp. 827-884; and EECKHOUT Piet, "Human Rights and the Autonomy of EU

During the procedure of accession, which after different phases and evolution has finished with a negative opinion of the CJEU above the question[12], many authors were theorizing a constitutionalization of the European system of human rights protection[13], which was bringing to a rigid and pyramidal system of jurisdiction to grant the major protection conceivable to the citizens of the member States. Today, however, it is quite evident that this process has, at least, significantly slowed down, and that the common approach undertaken by the two bodies goes beyond that kind of formal evolution. In fact, this paper will demonstrate how the similarities between the latest judgements of the two courts regarding individual sanctions find their reason in a deeper knowledge and validity of the principles regarding the protection of human rights and fundamental liberties in Europe, more than in other parts of the world. In other words, the cultural legacy of the States who are members of the EU and of the ECHR imposes them to grant a deeper and more secure way of protection of human rights within their borders, and this reflects on the jurisprudence of the higher institutions conceived for this purpose. This is the reason why the ECJ and the ECtHR began to require higher standards of protection of the rights to defence and to a due process, even if this means a partial violation of what the UN Security Council is prescribing. The judges of Luxembourg and Strasbourg, far from anticipating a jurisdictional reform by conceiving a common jurisprudence, interpreted their duty to protect human rights within their jurisdictions as described, clearly because this is the role the respective Statutes impose on them. Moreover, considering the attitude of national courts to deny protection to the victims of human rights violations stemming from UN resolutions, the two European courts recalled their competence on the matter by condemning member States and overruling the measures. In this perspective, the two courts are stressing their determination in avoiding the fragmentation of human rights protection within their respective jurisdictions and, even more important, the impunity of member States which can *de facto* result from their national judiciaries.

Thus, it could be argued that the supreme interest of an equal protection of human rights in Europe is more important than the concept of international security, and even more than the one of the supremacy of the United Nations resolutions as to the article 103 of the UN Charter. However, Member States are finding themselves blocked in a particular situation

Law: Pluralism or Integration?" 2013 CLP, vol. 66 pp.169-202; WEILER Joseph H.H., The Transformation of Europe", YALE LJ 1991, vol. 100 pp. 2403-2483, describing the process of constitutionalization of the EU.

[12] ECJ, Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [2014], ECLI:EU:C:2014:2454.

[13] SCHIMMELFENNIG Frank, SCHWELLNUS Guido "The Constitutionalization of Human Rights in the European Union: Human Rights Case Studies and QCA Coding", available at: http://www.eup.ethz.ch/research/constitutional/fs-gs-dossier.pdf; VON BOGDANDY Armin, "Constitutionalism in International Law: Comment on a Proposal from Germany", Harv. Int'l LJ Vol. 47, number 1, pp. 223 ff.; VON BOGDANDY Armin, "The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty", JEur.L 2000, vol. 27, column 6 ; VON BOGDANDY Armin,'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union", CMLRev. 2000, vol. 37, Issue 6, pp. 1307–1338; and GREER Steven, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge, CUP 2006.

in which they are forced to choose what obligation not to respect, between the ones coming from the UN resolutions and those related to the EU law (or to the ECHR).

In order to clarify how this process has been consolidated, the proposed paper would proceed in three parts. At the beginning, it will demonstrate how the *Kadi* case radically changed the approach taken by the ECtHR until the *Al Jedda* judgement, making the Luxembourg Court more confident in adopting the same posture of Strasbourg in the jurisprudence following *Nada*. The second part will note how the *Nada* judgment influenced the CJEU in the last case of the *Kadi* saga, in which the court quoted the decision of the ECtHR to confirm that, despite the improvements in the UN structure for listing and delisting procedures regarding suspected terrorists, the UN Security Council still does not provide to sanctioned individuals "*the guarantee of effective judicial protection*". The third part will finally analyze how the consolidated point of view adopted by the two courts, respectively in the ECJ *Kadi II* case and in the ECtHR *Al Dulimi* ruling, is a strong evidence of how these bodies are pursuing the same objective: to ensure the identical level of protection of human rights in Europe, despite the duty for the Member States to comply with Security Council resolutions. The importance of this independence of the European courts towards the United Nations has some fundamental implications related with article 103 of the UN Charter: do Member States of the EU and of the Council of Europe have the right to interpret and, in case, to partially comply with those decisions of the UN which imply the overcoming of the basic human rights principles that are strongly pursued in Europe?

The proposed paper will conclude that this common approach in assessing the questions related to restrictive measures, has been adopted by both courts just to reach the higher level of protection of human rights possible in Europe, instead of finding its reasons in the perspective of the accession of the EU to the ECtHR. In fact, it can be argued that the common constitutional traditions of the European States, together with their membership to both the EU and the Council of Europe, stress them to protect human rights in the wider way possible, even by contravening some other international obligations. Both courts, indeed, made reference several times to these principles in their history, stressing the strict connection between the European constitutional traditions and a strong protection of human rights.

This innovative juridical development produces a stricter guarantee of the rights of persons in Europe than in any other part of the world, and the two courts are immediately committed in assuring it. Indeed, if their approaches have remained uncertain and conflictive, this kind of issues would have been addressed someway to national courts. This option, however, is still present, and the courts are still committed to avoid a loss of speech on the matter, which will produce new and more complex issues of fragmentation and de-legitimization of both ECJ and ECtHR. But, in this perspective, how should States act in the

event of a UN obligation conflicting with human rights protection standards as guaranteed by the EU or the ECtHR? Furthermore, what will be the solution to such a collision, both at normative and jurisditional level? Then, at last, what will be the condition of those individuals and entities which are removed from the lists of the EU, but still remain on those of the UN?

I. The *Kadi* revolution: evolutions and leverage in ECtHR jurisprudence

As known, the listing of a person or an entity by the 1267 Committee, implies a duty on each UN member to impose on it travel bans, assets freeze and arms embargo[14]. At the beginning, the individual had no right of access to a court or a quasi-judicial body at the UN level. UN blacklisting, thus, did not fit into the traditional pattern of due process. This caused considerable problems under human rights treaties, especially the ECHR, and those treaties which imply a deep protection of human rights, like the Lisbon treaty. As far as assets freezing was concerned, this raised issues primarily under ECHR Article 6 (access to court and fair trial), Protocol 1, Article 1 (protection of property) and Article 13 (effective remedies). Moreover, the ECtHR has always refused to accept that the access to the Court could be prevented for national security reasons or that the Court would be, for the same reasons, not able to settle the dispute on the merits[15].

Since its transformation through the 11th Protocol to the Convention[16], the ECtHR promptly established the principle of equivalent protection, under which, in accordance with the rules of international law regarding the incompatibility of treaties, if a State assumes some formal obligations, and subsequently concludes an international agreement that does not allow it to fulfil the commitments accepted by the previous treaty, it still commits an unlawful act for infringement of that treaty[17]. In other words, if a State Party to the ECHR was to conclude an international agreement which would place him in the condition of not

[14] On 15 October 1999 and 19 December 2000, the Security Council, under Chapter VII of the United Nations Charter, imposed sanctions upon the Taliban-regime in Afghanistan with resolutions 1267 and 1333 respectively. Resolution 1333 stressed states to freeze directly or indirectly controlled funds by Usama Bin Laden and individuals associated with the Al-Qaida terrorist organization. Following the developing of the armed attack against the Taliban regime, the Security Council adopted resolution 1390 of 16 January 2002, which renewed the Taliban - Al-Qaida blacklists, extending the sanctions provided to the listed persons to travel and arms embargo. Resolution 1390 is "open" so that, in contrast to earlier targeted sanctions, it involves a significative difference in that there is no binding connection between the targeted group or individual and any territory or state. Moreover, in Resolution 1455, of 17 January 2003, the Security Council reiterated the States' obligation to comply with the earlier resolutions and required the submission of updated reports of execution within ninety days. These resolutions have been reaffirmed and slightly modified subsequently by different resolutions, UNITED NATIONS SC Resolutions 1452, 20 December 2002 S/RES/1452 (2002); 1455, 17 January 2003 S/RES/1455(2003); 1526, 30 January 2004 S/RES/1526 (2004); and 1617, 29 July 2005 S/RES/1617 (2005).

[15] However, on the other hand, in both criminal and civil cases the ECtHR has accepted that the requirements of a fair trial may be modified in anti-terrorism matters, thus authorizing particular procedures and quasi-judicial bodies.

[16] COUNCIL OF EUROPE, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 28 August 2015]. For further comments see: LEANZA Umberto, "Il Protocollo 11 alla Convenzione europea dei diritti dell'uomo: nuove prospettive per la tutela internazionale dei diritti dell'uomo", *in* VV. AA., *Scritti in onore di Giovanni Maria Ubertazzi*, Milano, 1999, p. 357 ss.; NASCIMBENE Bruno, "La 'nuova' Corte europea dei diritti dell'uomo", Studium Juris 1999, Vol II, pp. 119 ff.

[17] ECtHR, Application no. 24833/94 *Matthews v United Kingdom* [1999], ECLI:CE:ECHR:1999:0218JUD002483394.; Application no. 43844/98, *T.I. v. United Kingdom* [2000], ECLI:CE:ECHR:2000:0307DEC004384498; Application no. 42527/98, *Prince Hans Adam II v. Germany* [2001], ECLI:CE:ECHR:2001:0712JUD004252798; Application no. 48321/99, *Slivenko v. Latvia* [2003], ECLI:CE:ECHR: 2003:1009JUD004832199.

complying with the Convention, it would be nevertheless considered as liable for any restrictions of the human rights guaranteed in it. In this sense, the decision of the Commission on Human Rights in the case *M. & Co.* is a true leading case[18]. It is known, however, that the theory of equivalent protection has been more fully developed by the European Court of Human Rights in the *Bosphorus* case[19]. In that case the Court of Human Rights confirmed, at first, the conclusions reached in *M. & Co.*, so that the Convention does not prohibit the Contracting States to transfer powers to international organizations which, not being parts of the Convention, can not be defendant before the Court of Human Rights, but also that they are responsible, under art. 1 ECHR, for all acts and omissions of their organs, no matter the distinction between the domestic or the international obligations that need to be fulfilled[20]. However, while balancing the need for international cooperation and the effectiveness of the European Convention, the Court held that the State action undertaken in accordance with its obligations arising from the participation in an international organization, is always justified insofar that organization protects fundamental rights, with regard to the substantive guarantees and the control mechanisms, in a manner which can be considered at least equivalent (or comparable) to that granted by the Convention on Human Rights[21]. After having confirmed that the EU ensures that kind of equivalent protection, it affirmed that it must be assumed that the work of government authorities complies with the ECHR. Such a presumption could be refuted only if it was shown that the protection of the rights guaranteed by the Convention was vitiated by a manifest failure.

However, it has to be mentioned that the theory of equivalent protection, as an interpretative mean conceived to resolve conflicts between two sets of rules, was confined exclusively to the relationship between European Union law and the European Convention[22]. In fact, even though the ECtHR has often recalled the doctrine of equivalent protection[23], the Court never clearly expressed itself on the relationship between the ECHR and the obligations imposed by the UN. This matter especially relates to the obligations contained in the resolutions of the Security Council, which the Court initially faced with deference, thus

[18] ECtHR, Application no. 13258/87 *M.&CO. v The Federal Republic of Germany* [1990], ECLI:CE:ECHR:1990:0209DEC001325887. In this decision, the Commission, after reaffirming its lack of jurisdiction in receiving complaints against the European Communities, clearified that the national judicial authorities, even when they are acting in the EU regulations framework, are not acting in the quality of comunitary bodies, escaping so the control of the Convention, but still as internal organs and, as such, in the exercise of their jurisdiction under Article 1 of the ECHR. Moreover - the decision is clear - "*the Convention does not prohibit to Member States to transfer powers to international organizations. However [...] a transfer of powers does not necessarily exclude the responsibility of a State under the Convention on the exercise of the transferred powers. Otherwise, the guarantees provided by the Convention could be deliberately limited or excluded and thus be deprived of their binding nature. [...] The transfer of powers to an international organization is not therefore incompatible with the Convention, provided that in that organization fundamental rights receive an equivalent protection*".

[19] The case oncerned the alleged liability of Ireland for violation of property rights, protected by art. 1 of Protocol No. 1 to the ECHR, following the adoption of a measure of seizure imposed by a Community regulation which, in turn, gave effect to a resolution of the Security Council. See: ECtHR, Application n. 45036/98 B*osphorus ava ollari urizm e icaret Anonim ir eti v Ireland* [2005], ECLI:CE:ECHR:2005:0630JUD 004503698.

[20] ECtHR, *Bosphorus*, cit., paras. 152-153.

[21] *Ibidem* par. 155.

[22] Until the *Al-Dulimi* decision.

[23] This already occurred during the period of the European commission on human rights, e. g.: EUROPEAN COMMISSION OF HUMAN RIGHTS, Application no. 235/56, *X v. Federal Republic of Germany* (1958), Yearbook II (1958-1959). For subsequent calls, see also: EUROPEAN COMMISSION OF HUMAN RIGHTS, Application no. 788/60 *Austria v. Italy* (1961), Yearbook IV (1961); and Application no. 11123/84, *Tête c. France* (1987), DR 54 (1987).

feeding further uncertainty. In account of this, ECtHR jurisprudence on the matter, at a first glance, may appear as wavering and uncertain, having alternated demonstrations of clear self-restraint and deference to the United Nations[24], a prudent use of interpretative tools that would exclude a rigid opposition between rules on fundamental rights and those held as collateral to international peace and security[25], backings[26], and new solutions more distinctly respectful of civil liberties[27]. But this first impression can change under an evolutive perspective.

This paper aims to show how the initially shy approach the Court developed with regard to UN obligations under Chapter VII of the Charter, slightly changed through a sequence of argumentations that gradually made the jurisprudence of the ECtHR more aligned with the one of the ECJ after *Kadi*. This process has developed through two pillars: the systematic reference to its own prior jurisprudence as a basis for a further argumentation, and the reference to the ECJ case law.

In the cases *Berhami* and *Saramati*, the Court gave a significant interpretation of the main objective of the UN, the one of maintaining peace and international security, as "imperative", thus implying that the operations established or authorized by resolutions of the Security Council under Chapter VII of the Charter, being designed for this purpose, can not in any way be subject to scrutiny by the Court, since the effectiveness of the same activity of the Council would be impaired[28]. In addition to the formal aspect, however, the Court pointed out how the nature of the obligations assumed by States under the Charter of the United Nations was in any case fundamentally different from that arising from the commitments due to the participation in other international organizations, being the UN "*an organization of universal jurisdiction fulfilling its imperative collective security objective*"[29]. The Court went on to find the cases of *Behrami* and *Saramati* to be clearly different from its earlier judgment in the *Bosphorus* case, on which the applicants were founding their requests. It was, at first, different in terms of the responsibility of the respondent States under Article 1 and of the Court's competence *ratione personae*[30]. The *Bosphorus* case, then, was different because there was a fundamental distinction between the international organisation at issue in the *Bosphorus* case and those at issue in *Berhami* and *Saramati*: UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully

[24] ECtHR, Applications nn. 71412/01 and 78166/01, *Behrami and Behrami v. France* and *Saramati v. France, Germany e Norway* [2007], ECLI:CE:ECHR:2007:0502DEC007141201. In this joint decision the Court gave a significant interpretation of the main objective of the UN, the one of mantaining peace and international security, as "imperative", (par. 148), thus implying that the operations established or authorized by resolutions of the Security Council under Chapter VII of the Charter, being designed for this purpose, can not in any way be subject to scrutiny by the Court, since the effectiveness of the same activity of the Council would be impaired. (Par. 149).

[25] ECtHR, Application no. 27021/08, *Al-Jedda v United Kingdom* [2011], ECLI:CE:ECHR:2011:0707JUD002702108; ECtHR, Application no. 10593/08, *Nada v Switzerland* [2012], ECLI:CE:ECHR:2012:0912JUD001059308.

[26] ECtHR, Application no. 65542/12, *Stichting Mothers of Srebrenica and Others v Netherlands* [2013], ECLI:CE:ECHR:2013:0611DE C006554212.

[27] ECtHR, Application no. 5809/08, *Al-Dulimi and Montana Management Inc. v Switzerland* [2013], ECLI:CE:ECHR:2013:1126JUD000580908.

[28] ECtHR, Applications nn. 71412/01 and 78166/01, *Behrami* and *Saramati,* cit., paras. 148 e 149.

[29] *Ibidem* para. 151.

[30] In fact, the impugned acts and omissions of KFOR and UNMIK could not be attributed to the respondent States and, furthermore, these acts or omissions did not take place on the territory of those States or on the basis of a decision of their authorities.

delegated under Chapter VII of the Charter by the UNSC. Thus, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its afore-mentioned imperative collective security objective. In this perspective, the Court may appear deferent to the UN system of sanctions, in a way that permits to Member States not to comply with the Convention on the basis of an obligation arising from the UN Security Council. In light of that conclusion, the Court considered that it was not necessary to examine the remaining submissions of the parties on the admissibility of the application, and doing so it wisely avoided, once again, a direct involvement in the issue of qualifying and determine the terms of the relation between the UN and the Convention.

However, even if this position has been recalled many times by the Court[31], the *Al Jedda* decision in 2011 makes a turn in the interpretative evolution of the Court, reaching some partially different conclusions[32]. In fact, likewise in *Behrami* and *Saramati*, in this circumstance, the Court had to preliminarily determine whether the conduct complained[33], was attributable to the United Kingdom or to the United Nations, who had authorized the force to use "*all necessary means*" to contribute to the maintenance of security and stability in Iraq[34]. The Court was also called to determine the possible prevalence of the resolutions of the Security Council on the rules of the ECHR under Article 103 of the Charter.

By assessing the first question, the Grand Chamber excluded that in this case the United Nations had effective control or authority and the final check on the acts or omissions of the multinational force and that, therefore, the detention was entirely attributable to the United Kingdom[35]. This made a substantive analysis of the alleged violation of Article 5 of the Convention (right to liberty and security) possible for the Court, unlike the case *Behrami* and *Saramati*. In this regard, the British government stated that the conduct in question were to be included among the obligations imposed by the Security Council to the States of the international coalition in Iraq under the resolution 1546 (2004)[36]. Accordingly, any violation of the Convention would not be punishable as the respondent State, acting under

[31] Similar Conclusions to those reached in the case *Behrami* and *Saramati* are reached in ECtHR, Application no. 6974/05, *Kasumaj v Greece*, [2007]; Application no. 31446/02,*Gajic v Germany* [2007]; Appeals nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121 / 05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05, 25496/05 *Berić and Others v Bosnia - Herzegovina*, [2007], ECLI:CE:ECHR:2007:1016DEC003635704 (on which see. L. GRADONI, "L'Alto rappresentante per la Bosnia-Erzegovina davanti alla Corte europea dei diritti dell'uomo", Rivista di Diritto Internazionale, RDI 2008, XCI p. 621-668); Appeals nos. 45541/04 and 16587/07, *Bilbija and Kalinic v Bosnia - Herzegovina* [2008], ECLI:CE:ECHR:2008:0513DEC004554104.

[32] ECtHR, Application no. 27021/08, *Al-Jedda v United Kingdom*, cit. For general comments on the decision, see MILANOVIC Marko, "Al-Skeini and Al-Jedda in Strasbourg", Eur.JIL 2012, p. 121 ss.; PAPA Maria Irene, "Le autorizzazioni del Consiglio di sicurezza davanti alla Corte europea dei diritti umani: dalla decisione sui casi Behrami e Saramati alla sentenza Al-Jedda", Diritti umani e diritto internazionale 2012, p. 229 ss., p. 237 ss.

[33] An internment suffered by the applicant in the detention centre of Basra by the British contingent forming part of the multinational force deployed in time Iraq.

[34] UNITED NATIONS, SC Resolutions. 1511 (2003) of 16 October 2003, para. 13 and n. 1546 (2004) of 8 June 2004, para. 10, respectively S/RES/1511 (2003), and S/RES/1546 (2004). In this last Resolution the Council, while integrating the authorization previously granted, referred to the letters addressed to the interim Iraqi Prime Minister by the US Secretary of State of June 5, 2004. In these letters, which should therefore form integral part of that resolution, it said that, among the means at its disposal to secure Iraq, the force may resort to "*internment where this is Necessary for mandatory Reasons of security*".

[35] ECtHR, Application no. 27021/08, *Al-Jedda,* cit., paras. 84-86.

[36] See *supra*, footnote n. 14.

the terms of that resolution, would thus fulfil an obligation under the Charter of the United Nations which prevails over any other international obligation under Article 103.

In fact, the Court did not at all made clear whether and to what extent the Convention should be subject to the UN Charter, simply because it felt no subsisting conflict between them, judging therefore irrelevant the clause of prevalence. By reviewing in part the analysis conducted in *Behrami* and *Saramati*, in which the "imperative" qualification of the objective of maintaining peace and international security seemed not to be subject to any exception, the Court have stated that this aim of the United Nations has to be some way balanced with the achievement of international cooperation in promoting and encouraging the respect for human rights and fundamental freedoms, as affirmed in article 2, paragraph 3, of the Charter. Having said that, the Strasbourg Court held that the interpretation of the resolutions of the Security Council must be conducted in the way that these do not intend to impose on Member States any obligation to violate the "*fundamental principles of human rights*", unless it is used a clear and explicit lexicon[37]. This was the first time the ECtHR formulated the presumption of compatibility between the two systems, with so starting to develop its new approach in regard of UN Resolutions. In the event of resolutions formulated in ambiguous terms, the interpreter has therefore to prefer the more consistent interpretation with the ECHR, trying to avoid any kind of conflict between the obligations of the Convention and those of the Charter. As noted by some scholars, this presumption has been applied quite extensively by the Court, despite the text of the resolution[38]. In light of these considerations, the Court found an unjustified violation of personal freedom by the United Kingdom.

The ECtHR, perhaps mindful of the criticism raised by the cases *Behrami* and *Saramati*, and in the wake of the *Kadi* judgment of the EUCJ, with the aim of better protecting the Convention, seems to have reached a diametrically opposite result to that of a few years before in the same context. It has to be mentioned, however, that, while doing so, the Court still tries to enhance the role of the United Nations in the promotion of human rights rather than their responsibilities in ensuring peace and international security. In this view, the Court is still trying to reconcile under the same scope the different purposes of the two systems, through a harmonious interpretation of the obligations implying both of them[39].

Being the decision of July 2011, the pull of the *Kadi* Case at the ECJ was already strong, considering how this decision of 2008 has been deeply significant even for the United Nations themselves. In fact, in that occasion, as known, the Court of Justice stated that the impossibility to rule over the resolutions of the Security Council does not imply the impossibility to assess the validity of the enforcement activities of those ones under Community

[37] ECtHR, Application no. 27021/08, *Al-Jedda,* cit., para. 102.
[38] MILANOVIC Marko, *Al-Skeini and Al-Jedda*, cit., p. 138.
[39] ECtHR, Application no. 27021/08, *Al-Jedda,* cit. para. 102: "*In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations*".

law and its general principles, including, in particular, human rights[40]. By using this argument, the Court has bravely faced the relationship between the UN and the EU system, solving the matter by reaffirming its competence in assessing the validity of those EU acts conceived to enforce UN decisions. This pluralist view of the relation between the commitments imposed by the UN and the prerogatives of the Community on the issue of human rights, boosted the ECtHR with more confidence in getting through its prior limits, giving it even the juridical mean to claim its autonomy towards the Security Council. However, in *Al Jedda* this assertion of autonomy still remains between the lines, while in the case *Nada*, in 2012, the Court is completely confident in asserting its competence on deciding whether the application of Security Council's Resolutions by Member States has been implemented by not violating human rights, although without any reference to the relation between the two systems. It has to be recalled, indeed, the fact that the ECtHR always cautiously kept itself at a distance from the direct settlement of the competence matter.

The described transition is far from being the result of political or constitutional considerations[41], but has to be explained in the perspective of a growing and mutual consensus and recognition on jurisprudence and juridical reasoning between the two Courts, the ECtHR and the ECJ, both playing the same role in protecting the *"the constitutional traditions common to the Member States*" from limitations or reduction in the perspective of international peace and security. Passing from the harmonious interpretation in *Al Jedda*, to the coordination through a margin of appreciation in *Nada*, the ECtHR will complete the transition and, even if starting from different considerations, will consolidate its position next to, and in the same direction of, the one of the ECJ in assessing the issues related to restrictive measures.

II. From *Al Jedda* to *Nada* through *Kadi I*: a cross-referenced case law

In the *Kadi* case[42], the Luxembourg Court precisely outlines the relations between Community law and the international legal system and, in particular, deals with the delicate question of the effects that the resolutions of the Security Council have inside the borders of the Union. The judges observed that the European Community is a community of law, so that even the United Nations and its institutions are subject to the control of conformity of their

[40] See CANNIZZARO Enzo, "Sugli effetti delle risoluzioni del Consiglio di sicurezza nell'ordinamento comunitario: la sentenza della Corte di giustizia nel caso *Kadi*", Rivista di diritto internazionale (RDI) 2008, p. 1075 ss. The same conclusions of the *Kadi* case are assumed by the ECJ in ECJ, joined cases C - 584/10 P, C -593 /10 P and C -595 /10 P, *Commission, the United Kingdom and the Council v Kadi* [2013], cit. See also ECJ, joined cases C - 399 / 06 P and C - 403 / 06 P *Hassan and Ayadi v Council and Commission* [2009], ECR I-11393, paragraphs 69-75; case C - 548 / 09 P *Bank Melli Iran v. Council* [2011], ECR I-11381, para. 105; case C - 335 / 09 P, *Poland v. Commission* [2012], ECLI:EU:C:2012:385 par. 48; case C - 239/12 P, *Abdulrahim v. Council and Commission* [2013], ECLI:EU:C:2013:331. See also UNITED NATIONS HUMAN RIGHTS COMMITTEE, *Nabil Sayadi and Patricia Vinck v. Belgium* [2008], communication n. 1472/2006, for an overview of the initial reception at the UN level of the *Kadi* judgement.

[41] Like has been argued by many, e. g.: TEN NAPEL Hans-Martien, "The European Court of Human Rights and Political Rights: The Need for more Guidance", ECLRev. 2009, Vol. 5, n. 3, pp 464-480; LUKYANOVA Anastasia, FOGELS Yury, "Political uncertainty as a consequence of the policentricity of the system in international courts (on the cases of ECHR and ECJ)", available at: http://www.icpublicpolicy.org/conference/file/reponse/1434197009.pdf.

[42] ECJ, Case C–402/05 P and C–415/05, *P. Kadi and Al Barakaat*, cit.

acts with respect to the Treaty, which has established a complete system of legal remedies[43]. The Court, however, specifies that, in any case, an international agreement cannot affect the ascription of responsibilities as it is set out in the Treaty, or the autonomy of the legal order of the Community itself[44]. In support of this dualist view of the mutual relations between the UN System and the Community, the Court reiterates the role played by fundamental rights within the principles of law which act as a legality parameter of Community acts[45]. On the basis of these statements, the Court therefore finds that the requirements imposed by an international order can not in any way compromise or undermine the constitutional principles of the Treaty, one of which is certainly the principle that all Community acts must respect fundamental rights[46].

This ruling imposed an important rethinking of the UN sanctioning machinery, which brought to the institution of the Ombudsperson in the framework of the 1267 Sanctions Committee, having the task of receiving the appeals of the persons targeted by the sanctions and assuring them the right to defence, and moreover the access to information related to their listing ad de-listing procedures[47]. In fact, initially, in December 2006 the UN Security Council adopted the Resolution 1730 (2006) which introduced the so-called Focal Point to receive de-listing applications. However, the Focal Point was merely transmitting the requests for de-listing to the *Al Qaida* sanctions committee and could not amend in any way the decision-making procedure within the UN sanctioning machinery. The most meaningful qualitative improvement in this sense has been indeed the introduction of the Ombudsperson, who replaced the Focal Point for the *Al Qaida* sanctions committee, through UN

[43] *Ibidem*, para. 281.
[44] *Ibidem*, para. 282.
[45] *Ibidem*, paras. 283-285.
[46] Contrary to the finding of the Court of First Instance, therefore, the Court - noting that the regulation in question does not ensure any individual legal protection against disqualifications and allows at the same time, a disproportionate interference with the enjoyment of the right to property - states that the fundamental rights invoked by the applicant were actually violated.
[47] The case, as known, is related to economic sanctions against individuals. UN Security Council Resolution 1267 (1999), cit., established a "Sanctions Committee" responsible in particular for designating the funds or other financial resources which all States must freeze in order to ensure that those funds or financial resources are not made available to, or for the benefit of, the Taliban or any undertaking owned or controlled by the Taliban. In Resolution 1333 (2000), cit., the UN Security Council instructed the Sanctions Committee to maintain an updated list of the individuals and entities designated as associated with Osama bin Laden, and held that States must freeze funds and other financial assets of these individuals and entities. In order to implement this resolution, the Council of the EU adopted, inter alia, the contested Council Regulation 881/2002 on the basis of Articles 60, 301, and 308 TEU, Regulation No. 881/2002 of the Council of the European Union, 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 (EC) No 467/2001 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, OJ N. L 139/9, 29 May 2002. This Regulation provided that all funds and economic resources shall be frozen that belonged to, or were owned or held by, a natural or legal person, group, or entity designated by the Sanctions Committee and listed in Annex I.[8] Mr. Yassin Abdullah Kadi and the Al Barakaat International Foundation, whose names were mentioned in Annex I, brought actions seeking annulment of the Regulation, alleging, in particular, breaches of the right to be heard, of the right to respect for property, and of the right to effective judicial review. In its judgments, the CFI dismissed the actions for the reason that it had no jurisdiction to review the lawfulness of the decision of the EU institution in question. Due to the fact that the mere purpose of the Regulation was to put into effect a resolution of the UN Security Council, they acted under "*circumscribed powers, with the result that they had no autonomous discretion*." Any review of the internal lawfulness of EU law, especially with regard to the protection of fundamental rights, would imply that the Court was to consider, indirectly, the lawfulness of the UN Security Council resolutions. Such jurisdiction would be incompatible with the undertakings of the Member States under the UN Charter, especially Articles 25, 48, and 103. Nevertheless, the CFI found that it was empowered to check, indirectly, the lawfulness of the resolutions of the UN Security Council with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law. This includes the bodies of the UN, from which no derogation is possible. The CFI determined that there was no violation of *jus cogens* and consequently dismissed the actions in their entirety.

Security Council Resolution 1904 (2009)[48]. Later, in 2014, the resolution 2161 brought some important reforms in terms of information to the recurrents and to the listing and de-listing procedures, but it still did not provide an effective legal protection, leaving the final decision to the UN Security Council[49]. However, despite the undisputed relief that these conscientious efforts have brought to those de-listed, the ultimate decision for de-listing remains a political one in the hands of the sanctions committee and the Security Council[50].

This transformation is a direct consequence of the 2008 *Kadi I* decision, which overruled the Tribunal of First Instance's decision regarding the de-listing of Mr. *Kadi* and the *Al-Barakaat International Foundation* from the list contained in Regulation 881 (2002)[51]. In the Judges' vision, in fact, the principle of the primacy of the Charter was intended as a rule ensuring coordination between international treaties, instead of the superiority of one rule (UN) on the other (EU). Therefore the Court ruled that the principle of primacy enshrined in art. 103 of the Charter can not entail, as a corollary, the immunity from jurisdiction of any act of the Community intended to implement the decisions of the Security Council[52].

This revolutionary approach of the ECJ could not be established without some serious consequences both on the side of the jurisprudence of other international courts, mainly the ECtHR, and on the side of the UN institutions[53], that tried to avoid the repetition of similar decisions in the future by changing, in part, the listing and de-listing procedures.

As described, the ECtHR still keeps a restrained approach in *Al Jedda*, even though overcoming the prior deference to the UN. The caution implemented by the ECtHR shows how this Court still felt the need of observing the international reaction to the *Kadi* approach, so giving a decision which remains between the full implementation of the UN resolution, and the extreme annulment of the measures imposed to its applicants. More recently, and together with the *Kadi II* decision, the presumption of compatibility developed

[48] The Ombudsperson can receive information from petitioners and States, assess the information and make observations to the sanctions committee about de-listing. For further information about the mandate of the Ombudsperson, see the updated version of 2014: UN, Security Council, S/RES/2161 (2014), 17 June 2014.

[49] UN, Security Council, S/RES/2161 (2014), 17 June 2014.

[50] See DE WET Erika, "From Kadi to Nada: Judicial techniques favoring human rights over United Nations Security Council Sanctions", Chinese JIL 2013, Vol. 12, n. 4, pp. 787-808. This is the same even after the reform of resolution 2161 (2014), which introduces the phases of information gathering, dialogue and report, but at the end is still oriented to a definitive decision of the Security Council. UN, Security Council, S/RES/2161 (2014), 17 June 2014, cit.

[51] See, for the developents foreseen after te judgement, SIKSEL N. Türküler, "Fundamental rights in the EU after *Kadi and Al Barakaat*." Europ.LJ 2010, vol.16, pp.551–577.

[52] The reasoning of the court may be summarized as follows: the International and the EU polities are independent and distinct; despite the primacy of the UN Charter, the European authorities retain a measure of discretion in the activity of implementation of the UN resolutions and must respect the fundamental principles of the EU, as the obligations imposed by an international agreement can not have the effect of prejudicing those principles; the EU legislation, even the mere implementation of the Security Council's decisions, far from enjoying forms of immunity from jurisdiction, can not escape the review of legality which, in a community of law, constitutes a constitutional guarantee; the yardstick is not constituted by international *jus cogens* but by the constitutional principles of the EU Treaty, with particular reference to fundamental rights; the Court's control is not related to the resolution of the Security Council, but to the act producing its effects into the EU, then the fear that the supremacy of the decisions of the UN in international law would be compromised by judicial review is unjustified.

[53] LARIK Joris, "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", Netherlands International law Review 2014, vol. 61, n. 14.

in *Al Jedda* was subsequently applied, and reversed, when the European Court of Human Rights, in the *Nada* decision, ruled for the first time on the compatibility between the Convention and the individual sanctions placed by the resolutions of Security Council. Unlike the authorization to use force, indeed, the resolutions adopted by the Council regarding the fight against international terrorism seem, in fact, to more expressly require Member States to act through conducts potentially injurious to human rights. Significantly, however, if on the one hand the Grand Chamber on this last occasion condemned Switzerland for violating the right to respect for private and family life (Article 8 ECHR) and the right to an effective remedy (Article 13 ECHR) of a person registered in the blacklist, on the other hand it used a reasoning somehow lacking of linearity. The Court, at first, determined that the alleged violations were attributable to Switzerland and not the UN, similarly to the *Bosphorus* case, considering that those were measures taken by the State under national law and, therefore, in the "*exercise of its jurisdiction*"[54]. The ECtHR confirmed, then, its efforts in trying to harmonize as much as possible, any conflicting international obligations undertaken by the Member States pursuant to UN Security Council's resolutions, citing the judgment in *Al Jedda*[55].

Both the *Kadi* and *Nada* decisions ruled in the sense of favouring human rights' protection above UN obligations, but these decisions reach the same conclusions by applying very different reasoning.

Indeed, the *Kadi* case radically changed the approach taken by the ECtHR until the *Al Jedda* judgement, being a sound incitement for the Strasbourg Court to be more confident in adopting the same posture of Luxembourg with regard to the UN system[56]. This change of position undertaken by the ECtHR is due to the consideration that the due process' rights must be guaranteed to every human being, even those targeted by UN Sanctions, and, moreover, that the protection of human rights under the ECHR needs to be established directly by the Strasbourg court instead of national authorities. In fact, without the intervention of the ECtHR, and ECJ, domestic judges would have developed its own jurisprudence, bringing risks of fragmentations, lack of protection, and inequality, but, more important, a broad immunity for Member States.

However, since in this case the Resolution 1390 (2002), at paragraph 2, explicitly called on all States to prevent individuals included in the *blacklist* to enter or transit through their own territory, the presumption of conformity with the resolutions of the Security Council to obligations related to human rights had to be considered surpassed[57]. In other words, if in the *Al Jedda* case the judges were before the hypothesis of a resolution which could be interpreted so as to harmonize the obligations imposed by the Convention and the conduct

[54] ECtHR, App. no. 10593/08 *Nada v Switzerland* [2012], cit., paras. 120-122.
[55] *Ibidem*, paras. 170-171.
[56] This is interpretation is confirmed in the *Al Dulimi* case, which will be mentioned in the next section.
[57] *Ibidem,* para. 172.

required by the Security Council - harmonization which in that circumstance had not been made from the UK - in the *Nada* case the language requirements have been so explicit and clear to leave no doubt about their opposition to the ECHR. But what has to be noticed, according to the judges of Strasbourg, is not so much the source of international obligations, nor that they are explicitly expressed in a manner contrary to the human rights guaranteed by the Convention, but the way in which they were performed within the Member State. The Court noted, in fact, that the UN Charter does not indicate to Member States how to implement the resolutions of the Security Council adopted under Chapter VII. Thus, without altering the mandatory nature of those resolutions, the Charter, imposing an obligation of result, would leave them free choice as to the possible means by which give effect to those obligations within their national jurisdiction. For this reason, the Court considered that Switzerland enjoyed an "*admittedly limited but nevertheless real*" measure of discretion in carrying out the relevant resolutions of the Security Council[58].

This margin of appreciation has been assessed on the merits by the Court to decide above the legitimacy of the restrictive measures imposed on Mr. *Nada*[59]. And in fact, despite being taken to pursue legitimate ends, such as the national security and the prevention of crimes, to the Grand Chamber the measures against *Nada* constitute a concretely disproportionate interference[60]. The Court, therefore, considering the special nature of the ECHR as a "*treaty for the collective enforcement of human rights and fundamental freedoms*", argued that Switzerland could not merely assert the binding nature of the Security Council resolutions, but it would have to demonstrate that they have adopted, or at least tried to take all possible actions to adapt the sanctions regime to the specific situation of the appellant[61]. This is surely a step forward in the interpretation of the nature of international obligations arising from the UN, but it has to be mentioned that, however, since the respondent State has not proved its

[58] *Ibidem,*paras. 176-180.

[59] Under Art. 8 para. 2 ECHR, an interference in the free exercise of the right to private and family life can be justified only if provided by law and in the only case it constitutes, in a democratic society, a measure which is necessary to national security, public safety or to the economic well-being of the country, to the defense of order and to the prevention of crime, for the protection of health or morals, or the protection of the rights and freedoms of others.

[60] This is the conclusion the Court reached after having evaluated: the delay in the Swiss authorities information to the Sanctions Committee about the closure of investigations initiated in the meantime at national level (both in Switzerland and in Italy), and that they had revealed groundless suspicions terrorism against the applicant; the age and health conditions of the same; the particular geographical situation of the city of residence; the considerable duration of the restrictive measures (8 years); the failure to offer assistance from Switzerland to Mr. Nada in order to obtain an exception to the sanctions regime established by Resolution n. 1390 (2002), para. 2 (b), cit.; the non- solicitation against Italy so that it, as the State of nationality of the applicant, would have required the radiation of the applicant from the Sanctions Committee.

[61] ECtHR, App. no. 10593/08 *Nada v Switzerland* [2012], cit., para. 196. As properly highlighted by the judges Bratza, Nicolau, Yudkivska and Malinverni in their dissenting opinions (pp. 65-70), the fact that the resolution n. 1390 (2002) leaves a margin of appreciation to Member is at least debatable. The text of par. 2 (b), in fact, it is explicit - as also admitted by the Court - in imposing on states to prevent the entry into or transit through their territories of individuals included in the list referred to in Resolution No. 1267 (1999). This prohibition is peremptory and undergoes exceptions only in the case of citizens of the same State that adopts those restrictions, of persons who will undergo legal proceedings or, finally, should the entry into or transit, according to the concrete circumstances, be considered justified by Sanctions Committee. In this sense, it is unclear how an obligation, although clearly against human rights according to the Court, may enable the State to act in accordance with the Convention. Moreover, even if it is accepted that Switzerland retained some discretion in implementing the resolution of the Security Council, it can not be understood how the proportionality of the restrictions will be assessed taking into account not so much of the measures in itself, but rather the attitude subsequently held by the Swiss authorities against the Sanctions Committee or Italy, the only State entitled to activate the process of de-listing (at least until the resolution no. 1730 (2006) of 19 December 2006).

efforts to harmonize two just apparently conflicting obligations, the Grand Chamber considered once again unnecessary to rule on the relationship between the Convention and the United Nations Charter, maintaining its distance from the core question.

The most important fact of the *Nada* decision is that the ECtHR directly makes reference to the *Kadi I* judgement at the ECJ, arguing that the Security Council Resolutions leave a margin of discretion in the reception phase[62]. In fact, in the case *Nada*, the ECtHR distinguished the case from *Behrami and Behrami*, noting that here "*the impugned acts and omissions of KFOR, whose powers had been validly delegated to it by the Security Council under Chapter VII of the Charter, and those of UNMIK, a subsidiary organ of the UN set up under the same Chapter, were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective [...]. In the present case, by contrast, the relevant Security Council resolutions, [...] required States to act in their own names and to implement them at national level*"[63]. In this way, the ECtHR squarely established its jurisdiction to review the case, and moved to assess Mr. *Nada*'s claim on the merits. Here the ECtHR outlined the general principles which would guide its reasoning[64], re-calling its decision in *Al Jedda*, and introducing a presumption of compatibility between the resolutions of the UN and the ECHR. However, "*having regard to the clear and explicit language [of UN resolution 1390 (2002)], imposing an obligation to take measures capable of breaching human rights*", the ECtHR rejected the presumption of compatibility between the ECHR and UN law[65].

Through this evolution, the ECtHR develops the principle of the presumption of compatibility in *Al Jedda*, and then, having considered the results of the *Kadi* saga in the international framework, it deepens its investigation to the point of conceiving in a restrictive way the principle of harmonious interpretation, in the case *Nada*, by referring directly to the ECJ *Kadi I* decision, and making reference to the margin of discretion in the application

[62] ECtHR, App. no. 10593/08 *Nada* cit., paras. 83- 87 and 212, where it is affirmed that the Court would further refer to the finding of the ECJ that "*it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations*" (see ECtHR *Kadi I* judgment, cit., para. 299). The Court holds the opinion that the same reasoning must be applied to the present case, more specifically to the review by the Swiss authorities of the conformity of the Taliban ordinance with the Convention. It further finds that there was nothing in the Security Council Resolutions "*to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those Resolutions*". Thus, expressing itself once again in favour of a harmonious interpretation of the different tools that States are called simultaneously to comply with, the Court stated that Switzerland had acted in breach of the ECHR, since it had not reconciled its own international obligations under the Charter and the Convention.

[63] ECtHR, App. no. 10593/08 *Nada* cit., para. 120, referring to ECtHR, Application No. 71412/01, *Behrami & Behrami v.France* [2007], cit., para. 151.

[64] On the one hand, the ECtHR restated its consolidated case law, mainly represented by *Bosphorus*, according to which "*a Contracting Party is responsible under Article 1 ECHR for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations*". On the other hand, the ECtHR expressed its concern for the phenomenon of the fragmentation of international law, and stated that "*where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them*". ECtHR, App. no. 10593/08 *Nada* cit., paras. 120 ff.

[65] *Ibidem*, para. 172. It has to be reported, however, the Concurring opinion of Judge Malinverni, which is critical under differnet points of view, but maily because the Nada solution was not linear nor logic in terms of juridical resaoning and, more important, beacuse it did not directly face the question of the relation between the two orders, and the necessary clash of competences between the Court and the Sanctions Committee.

phase on which the Court keep its jurisdiction[66]. While doing so, it is clear that the jurisprudence of the ECtHR on the matter is far from being contradictory, but it has to be analysed in the perspective of a conceptual evolution of principles of interpretation that needed to consolidate through years and cases to be strongly established[67]. It has been argued that, "*In the final analysis, the techniques for interpretation applied in both the Nada and Kadi sagas ultimately shifted the resolution of the norm conflict back to the political arena. The overriding message from the CJEU and the ECtHR is that extensive reform is required in relation to all the de-listing procedures of those sanctions committees that engage in direct listing and de-listing*"[68]. Indeed, this evolution is confirmed by the following judgements of the ECtHR related to sanctions, the most important of which is the *Al Dulimi* ruling. Without a "legislative" solution, the clash will become a constant in the relations between the UN, on the one side, and the EU-Council of Europe, on the other, which may bring to an open contrast of positions. But will the Security Council undertake such a reform even after the resolution of 2161 of the Security Council[69], or will it continue issuing restrictive measures that violate some rights protected by the ECJ and the ECTR without providing an effective legal protection to targeted subjects?

III. 3. From *Nada* to *Kadi II* and to *Al Dulimi*: building a common approach on UN sanctions

Not only in the *Kadi I* and *Nada* case, the mutual quotes of the two Courts show a common feeling and effort of the judges to validate each other, in contexts which are often characterized by significant political pressure. In fact, this mutual legitimization, far from being one sensed, is mutual: The *Nada* decision cites expressly the *Kadi I* ruling, and the ECJ Grand Chamber's decision in the *Kadi II* case is relied upon some contribution of the *Nada* judgement.

In fact, following the 2008 ECJ *Kadi* decision, which annulled the EC Regulation implementing the 1267 sanctions regime against Mr. *Kadi* and the *Al Barakaat Foundation*, *Kadi* was almost immediately re-listed by the Council of the EU in a new Regulation[70]. This subjected him again to the restrictive regime of Security Council Resolution 1267, and most recently SCR 1904 (2009). Though, almost immediately, *Kadi* brought a new challenge against that Regulation before the EU Court. On 30 September, the General Court rendered its decision in *Kadi II*.

[66] *Ibidem,* paras. 211-212.
[67] See e. g., PALOMBELLA Gianluigi, "The Principled, and Winding, Road to Al-Dulimi. Interpreting the Interpreters", QIL-QDI 2014, pp. 15-30, available at: http://www.qil-qdi.org/the-principled-and-winding-road-to-al-dulimi-interpreting-the-interpreters/.
[68] DE WET Erika, "From Kadi to Nada", cit, p. 19.
[69] UN, Security Council, S/RES/2161 (2014), 17 June 2014, cit.
[70] 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 N. L 322, 2 December 2008, pp. 25–26.

In its judgment of 18 July 2013, the General Court of the EU rejected the appeals against the decision of 30 September 2010[71], and confirmed the annulment of the Commission regulation re-listing Mr. *Kadi* for violation of due process rights[72]. In its ruling, the ECJ cited the decision of the ECtHR in *Nada* only once[73], but significantly, and the influence of it in the reasoning of the Luxembourg Court is steadily verifiable. However, how it has been pointed out "*the reference to Nada is the only reference the CJEU actually made to a judgment by a court outside the EU*"[74], showing how the mutual leverage between the two courts is a sort of juridical "special relationship" aiming at consolidating itself. Furthermore, the ECJ explained that the task of EU Courts is to verify that the decisions on sanctions are "*taken on a sufficiently solid factual basis*" and that "*it is for the Courts of the EU, in order to carry out that examination, to request the competent EU authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination*"[75]. On this basis, in paras. 133 and 134, the ECJ assessed the necessary improvements of the committees' procedure provided by the *Kadi I* decision. The Court declared that a control after the *Kadi II* decision was inevitable, providing that the improvements to the cancellation procedure and the institution of the Ombudsperson are still not offering an effective legal protection to the subjects concerned[76]. It is sigificant to note that, in this regard, the ECJ based its argument on the ECtHR *Nada* case, thus confirming the non-responsiveness of the UN reformed system with the european standards of human rights protection.

Even if it has been argued by many that this mutual citation system has been adopted in the view of the accession of the EU to the ECHR, which would have permitted the ECtHR to rule over acts of the EU institution, after the negative opinion of the EUCJ about this accession this perspective has no justification anymore[77]. This, besides, even because the two courts are continuing to influence and make reference to each other in other rulings, even after these two cases[78]. Following the perspective of the ECJ in *Kadi II*, for instance,

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[71] ECJ, case T-85/09 *Yassin Abdullah Kadi v European Commission* [2010], cit.

[72] Regulation No 1190/2008 of the Commission, 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 L 322/25, 2 December 2008. ECJ, joined cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission & the Council of the European Union v Yassin Abdullah Kadi* [*Kadi* II], cit.

[73] ECJ, *European Commission & the Council of the European Union v Yassin Abdullah Kadi* [*Kadi* II], cit., para. 133 where the Court affirms: *"[...] in particular after the adoption of the contested regulation, the procedure for delisting and ex officio re-examination at UN level they (the restrictive measures) do not provide to the person whose name is listed on the Sanctions Committee Consolidated List and, subsequently, in Annex I to Regulation No 881/2002, the guarantee of effective judicial protection, as the European Court of Human Rights, endorsing the assessment of the Federal Supreme Court of Switzerland, has recently stated in paragraph 211 of its judgment of 12 September 2012, Nada v. Switzerland (No 10593/08, not yet published in the Reports of Judgments and Decisions)".*

[74] FABBRINI Federico, LARIK Joris, "Global Counter-Terrorism sanctions and European due process rules, the dialogue between the CJEU and the ECtHR", *in* Matej Avbelj, Filippo Fontanelli,Giuseppe Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial*, Routledge, 2014, p. 155.

[75] *Ibidem.*

[76] A dissenting opinion was issued by the Advocate General Bot, which suggested to overrule the decision asserting that the improvements applied by the UN were enough to guarantee the correct balance between the interest in collective security and the protection of human rights. ECJ, *Opinion of Advocate General Bot*, delivered on 19 March 2013, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission, Council of the European Union, United Kingdom of Great Britain and Northern Ireland v. Yassin Abdullah Kadi*, Joined Cases C-402/05 P and C-415/05 P [2008] ECR I-6351.

[77] ECJ, Opinion 2/13 [2014]., ECLI:EU:C:2014:2454. Opinion of the Court (Full Court) of 18 December 2014.

[78] DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS, CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS, *Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights*, Brussels 2012 pp. 97 ff.

the EU judiciary system has to maintain an in depth supervision on counter-terrorism sanctions, as "*such a judicial review is indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned [...] those being shared values of the UN and the European Union*"[79]. Thus, the ECJ transposes the rule "*either disclose or delist*" so reaffirming, even implicitly and without expressly quoting it, the *ratio decidendi* of the ECtHR in *A. v United Kingdom*[80], stating that secrecy and confidentiality of the material cannot serve as a general excusatory clause for the Member States or institutions to refuse it. In fact, the matter of the balance between the collective interest to security and the individual right to judicial review, and more broadly to the protection of human rights, is the core of the question. With regard to the notification to the applicant of the evidence adduced before the Court of the Union, it is necessary to balance, on the one hand, the right to effective judicial protection of the applicant and, on the other, the security of the Union or its Member States. The ECJ tried to assess this issue, in addition to *Kadi* and *A. v United Kingdom,* in the ZZ case in 2013 concerning a decision refusing a citizen of the European Union admission to a Member State on public security grounds[81]. In this case, the Court, by recalling many times its prior statements in the *Kadi* saga, stated that "*the Member State concerned must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle*"[82]. Thus, meeting these requirements could mean, for example, the delivery of a summary of the information or the evidence elements in question to the applicant. This is what the EU obtained through the new article 105 of the Rules of Procedure of the General Court[83], and what UN system tried to put in practice trough the Security Council Resolution 2161 (2014), through the institution of the dialogue and report phase, conceiving a cooperation between the Ombudsperson, the Sanctions Committee, the Designating State, the States of Nationality or Residence the Monitoring Team, a group of experts which assists the Committee, and other relevant states or UN bodies[84].

In account of this positive contamination, it has been argued that " *The stand of the ECtHR contributed to 'lock-in' the CJEU, preventing it from lowering in Kadi II the standard of protection it had*

[79] ECJ, *European Commission & the Council of the European Union v Yassin Abdullah Kadi* [*Kadi* II], cit., para 131.
[80] ECtHR, Application No. 3455/05, *A. and Others v United Kingdom*[2009], ECLI:CE:ECHR:2009:0219JUD000345505.
[81] ECJ, Case C-300/11, *ZZ v Secretary of State for the Home Department*, ECLI:EU:C:2013:363. It has to be noted that, in this regard, when conceiving the article 105 of the Rules of Procedure of the General Court of the EU, the preparatory works for it were based on the system coming from the joint reading of the three cited decisions: Kadi I, ZZ, and Kadi II. Art. 105 of the new statute, in fact, is entitled, "*Treatment of information or material pertaining to the security of the Union or of its Member States or to the conduct of their international relations*", it is the first norm of the new chapter 7 of the statute, and reflects the attention of the Court to the new developments on the matter. See Art. 105, Rules of Procedure of the General Court, OJ N. L 105, 23 April 2015 pp. 1-68. See also the preparatory works and positions, where is clarified that "*Chapter 7 is new. It embodies the General Court's intention to make categories of highly sensitive information or material subject to very specific treatment by laying down a special procedural regime for situations in which the security of the Union or of its Member States or the conduct of their international relations is at issue*", Council of the European Union, Draft Rules of Procedure of the General Court, EU Doc. N. 7795/14, Brussels, 17 March 2014 p. 101.
[82] *Ibidem*, para. 57.
[83] Rules of Procedure of the General Court, cit.
[84] UN, Security Council, S/RES/2161 (2014), 17 June 2014, cit.

set up in the Kadi I judgment of 2008", in the perspective of the future accession, so to not produce conflicts of interpretation once the accession would be accomplished[85], but this argument has no legal basis anymore. So, how is it possible that the Two courts continue in constantly adopting the same dualist approach, even though starting from two different points of view, after the Court's Advisory opinion[86]?

In fact, reading the *Al Dulimi* judgement of 26 November 2013, the dualist approach of the ECtHR since here reported continues to be a constant, and consolidated[87]. Thus, the Grand Chamber accepted in *Nada* that the UNSC had left States a certain scope of discretion. Similarly, the Court of Justice of the EU had held earlier in the *Kadi* case that such discretion existed in relation to the implementation of the targeted sanctions. In *Al Dulimi*, finally applying completely the principle of equivalent protection to the UN, the ECtHR repeats its commitment to protect human rights even against UN resolutions[88]. At a first analysis, becomes evident how, in this decision, *"because the UN sanctions regime did not guarantee "equivalent protection", the Bosphorus-presumption that the States' implementing measures are in conformity with the European Convention of Human rights (ECHR) did not apply"*[89], so determining the non conformity of the measures imposed on *Al Dulimi* with the ECHR. Moreover, by affirming the full responsibility of ECHR members for violations of the Convention, independently from their "*strict*" obligations under Security Council resolutions, it has been argued that the Court stabilized the so called "catch-22-situation"[90]. Indeed, the issue of contradictory rules between the UN sanctioning machinery and the protection of human rights within the borders of States which are Members of the EU and of the Council of Europe, with so signatories of the ECHR, persists. Furthermore, the tendency to reform of the Security Council

[85] FABBRINI Federico, LARIK Joris, "Global Counter-Terrorism sanctions and European due process rules", cit., p. 155.

[86] The ECJ made constant reference both to ECtHR, e. g. in case T-256/11, *Ahmed Abdelaziz Ezz and Others v Council of the European Union* [2014], ECLI:EU:T:2014:93, parr. 76, in which the Court Expressly makes reference to ECtHR, Application No. 19359/04, *M. v. Germany* [2009], ECLI:CE:ECHR:2009:1217JUD001935904, para. 120, and to its prior jurisprudence in the *Kadi I* and *Kadi II* judgements, which imply some connection, as described supra, with the ECtHR jurisprudence. See ECJ, joined cases C-478/11 P to C-482/11 P *Gbagbo and Others* v *Council* [2013], ECLI:EU:C:2013:258, Joined cases C-539/10 P and C-550/10 P*Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, ECLI:EU:C:2012:711; case T-190/12Johannes Tomana and Others v Council of the European Union and European Commission [2015],ECLI:EU:T:2015:222; joined cases T-208/11 and T-508/11, *Liberation Tigers of Tamil Eelam (LTTE) v Council of the European Union* [2014], ECLI:EU:T:2014:885; case C-376/10 P *Tay Za* v *Council* [2012], ECLI:EU:C:2012:138; and judgment of 13 March 2012 in case C-380/09 P, *Melli Bank* v *Council* [2012], EU:C:2012:137, paragraph 55.

[87] For further commentary on the decision in question, MARCHEGIANI Maura, "Le principe de la protection équivalente dans l'articulation des rapports entre ordre juridique des NU et CEDH après l'arrêt Al-Dulimi", QIL-QDI 2014, vol. 6, p. 3; ARCARI Maurizio, "Forgetting Article 103 of the UN Charter? Some Perplexities on 'Equivalent Protection' after Al-Dulimi", QIL-QDI 2014, vol. 1(6), pp. 31-41.

[88] And even though the Grand Chamber should overrule the Courts decision, it is unlikely that the ECtHR would refold to the positions held in *Behrami* and *Saramati.*

[89] PETERS Anne, "Targeted Sanctions after Affaire Al-Dulimi et Montana Management Inc. c. Suisse: Is There a Way Out of the Catch-22 for UN Members?", EJIL Analysis, available at: http://www.ejiltalk.org/targeted-sanctions-after-affaire-al-dulimi-et-montana-management-inc-c-suisse-is-there-a-way-out-of-the-catch-22-for-un-members/.

[90] *Ibidem*. Joseph Heller coined the term in his 1961 novel Catch-22, which describes absurd bureaucratic constraints on soldiers in World War II, see HELLER Joseph, *Catch 22*, 1961. Strictly speaking, a "Catch-22" is a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule, a paradoxical situation from which an individual cannot escape because of contradictory rules.

after the institution of the Ombudsperson seems to remain blocked in the political tangle[91]. So how should States act with regard to some simultaneous conflicting obligations?

In the merits of the *Al Dulim*i decision, the ECtHR firstly underlined, as already did in *Nada*, that the apparently conflicting obligations imposed by the UN Charter on the one hand, and the ECHR on the other, must be as far as possible harmonized and reconciled[92]. Secondly, the ECtHR recalled its famous *Bosphorus*-presumption: States' measures implementing obligations imposed on the basis of their membership in other international organisations can be presumed to be in conformity with the ECHR, but only if the organization guarantees an "*equivalent protection*" to human rights as the Convention itself [93]. However, the State remains completely responsible without any presumption of conformity with the ECHR, if taking measures which are not strictly required by the international organisation, in particular "*when it enjoys a leeway and has exercised discretion*",[94] which is the margin of appreciation[95]. In account of this, following the Courts' reasoning, every UNSC resolution would leave States a scope of discretion. However, in the instance of the *Al-Dulimi* case, the Court accepted that the UNSC left no such scope. Thus, on the basis of these considerations, the Strasburg Court found that the Iraq sanctioning regime, even after the establishment of the Focal Point, did not offer equivalent protection to the ECHR[96]. Consequently, it referred to the UN special rapporteur on the protection of human rights in combating terrorism[97], along with whom it affirms even that the Resolution 1267 regime with its Ombudsperson procedure fails to satisfy minimal international human right guarantees. *A fortiori*, said Strasbourg, the Resolution 1483 regime, which does not possess any Ombudsperson, is deficient, and does not offer equivalent protection to the ECHR. Furthermore, this procedural deficiency cannot be compensated by the domestic judicial procedure, because the Swiss Federal Tribunal had refused to scrutinize the merits[98]. This means that the *Bosphorus* presumption of conformity with the ECHR was not applicable to Switzerland in this case, and so in turn, the ECtHR will have to scrutinize in full if the Convention had been respected or not.

On the basis of these findings, the Court distinguished *Al Dulimi* from the *Nada* case, and it did not further clarify how it arrived at that determination. It only considered that such a difference exists. Thus, the decision by the Second Section of the ECtHR in *Al Dulimi* is

[91] Resolution 2160 (2014), S/RES/2160 (2014), which is just a formal renewal of the priors, does not add nor remove anything from the described regime, demonstrating how the Security Council is not paying enough attention to the tendency of the european supranational jurisprudence.
[92] ECtHR, Application no. 5809/08, *Al-Dulimi and Montana management Inc. v Switzerland*, cit., paras. 111-112.
[93] *Ibidem* para 114.
[94] PETERS Anne, "Targeted Sanctions", cit.
[95] ECtHR, Application no. 5809/08, *Al-Dulimi*, cit., para 114.
[96] *Ibidem* para. 118.
[97] DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT, *Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights,* cit., pp. 97 ff.
[98] ECtHR, Application no. 5809/08, *Al-Dulimi,* cit., para. 120.

another example after *Nada* and *Kadi* that the European judiciary is not going to draw back and that it is continuously attempting some confrontation with the Security Council.

This obviously is putting member States in a very difficult situation, the above mentioned "Catch 22" one. They are under two conflicting international obligations, which are very difficult to harmonize, despite the existence of the principle of harmonious interpretation expressed from *Al Jedda* on. Moreover, it has to be pointed out that when an individual or entity is de-listed from the lists of the EU, or from the ones of the Member States condemned by the ECtHR, they usually remain on the UN Sanctions Committee lists. This matter relates to the uniform application of human rights globally and, moreover, to legal certainity and coherence of the international obligations. So, even though a reform at the UN level is more than desirable even after the efforts of Resolution 2161 (2014)[99], the States involved have to manage a difficult situation, the more direct consequence of which is, unfortunately, to partially not comply with one of the two conflicting juridical orders. In other words, States facing this situation are committed to act in violation of one obligation between the UN and the ECHR or, on the other hand, the EU. In this context, individuals and entities targeted by sanctions may find their protection in the EU, or in the ECHR system, being able to access judges to remove their names form the lists, but they still remain on the UN lists, bringing uncertainity. Finding themselves in this trape, States will probably comply with the juridical order that can put into practice an effective protection, and an effective reaction to violations, of human rights. On the basis of this consideration, it is more than possible that States will comply with their obligations under the ECHR and the EU, instead of applying the UN resolutions. This simply because the two European systems have effective jurisdiction upon their Member States, which permits them to act immediately, and through concrete and executive measures, in order to guarantee the uniform application of the respective legal system, while the UN is not provided with this kind of power.

However, considering the fact that the pluralist approach of the two bodies is now consolidated, even though through different arguments and logic paths as reported, the European Member States of the UN are now facing a multilevel dimension of human rights protection that is far from one-sensed or, even less, conceived in the perspective of the accession of the EU to the ECtHR. Today, on the basis of Article 218 (11) TFEU *"three options are open: the option not to accede to the ECHR, the option to amend the Draft Accession Agreement, or the option to amend the EU Treaties"*[100]. But which one of the three will the EU institutions undertake? Leaving aside that doctrinal speculation that try to foresee which will the path preferred by

[99] UN, Security Council, S/RES/2161 (2014), 17 June 2014, cit.
[100] BESSELINK Leonard, CLAES Monica, REESTMAN Jan-Herman, "A Constitutional moment: Acceding to the ECHR (or not)", in European Constitutional LR 2015, vol. 11, n. 01, pp, 2 - 12. Published online: 04 August 2015, p. 3.

the EU, the Council of Europe, and the UN, both from the political and juridical, or "constitutional" perspective, this work is focused on the current situation after two years from the *Kadi II* and the *Al Dulimi* decisions.

In fact, without quite any perspective of accession at present, the convergent jurisprudence of the two courts still keeps opening a process that is not reversible anymore. In this paper's view, the full application of the principle of the equivalent protection in *Al Dulimi*, once again, demonstrates how the ECtHR is now confident in standing some opposition to the full immunity of the UN acts inside its territorial jurisdiction, keeping to walk along with the ECJ, which, on the other side, continues making reference to Strasbourg as frequently as it can[101]. This common attitude is intended to consolidate a core of values that are protected even at the cost of non respecting other universal obligations, despite Article 103 of the UN Charter and the dangerous consequences its violations may bring for States and, as poined out, for individuals and entities involved. This shared standing has been undertaken by the Courts because of two main reasons: first, the legal value of the respective system would have dramatically decreased, together with their role in the application and interpretation of their own sources. Second, and more important, without opposing any limit to the application of restrictive measure on their territorial jurisdiction, the two Courts would have progressively witnessed a loss of authority and competence on the issue in favour of the national judiciaries. This circumstance, as can be foreseen keeping in mind the judgements of both courts mentioned above, would lead in turn at two consequences: a fragmentation of the protection of human rights at the European level, with annexed lost of authoritativeness, and a preponderance of judgements that will discharge Member States from their responsibilities. Therefore, it can be stated that the judges of Strasbourg and Luxembourg acted the described way simply because was their own duty to decide in that sense: confirming their competence, controlling the uniform application of their systems and, more important, ensuring a higher level of protection to human rights compared both to Member States, and the UN. In this perspective, one can conclude that, about restrictive measures imposed over individuals in Europe, the multi-level protection of human rights reached its objective: the higher protection conceivable of human rights[102]. This multi-level protection of human rights reached higher standards than the one provided by both Member States and the UN, and this is a positive result of this development, but many questions keep staying on the table.

However, it has to be pointed out that, at present, the principle of equivalent protection has been applied completely and directly by the ECtHR to the UN only in the case of *Al-*

[101] PELC Krzystof J., "The Politics of Precedent in International Law: A Social Network Application", American Political Science Review 2014, vol. 108, pp 547-564; DRYWOOD Eleanor, 'Who's in and who's out? The Court's emerging case law on the definition of a refugee' (2014), CMLRev. 2014, vol. 51 n. 4, pp. 1093–1124; RATNER Steven R, "Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law", *Am. JIL 2008*, vol. 102 n. 3, pp. 475-528.

[102] In fact, Without the judgements of Luxembourg and Strasbourg, the rights of the applicants in the reported cases would remain violated, or under-protected.

Dulimi. This judgement, indeed, came to emphasize the inadequacy of protection still offered by the UN for persons targeted by individual sanctions adopted by the Security Council and the consequent responsibility, under the European Convention, of the States Parties not complying with the ECHR. Even though the judgement is now under the Grand Chamber, that could even review the prior judgement, the *Al Dulimi* case marked a significant path. Even if the Court will change its position in the *Al Dulimi* case, the concept that the ECtHR, and the ECJ, can decide over the application of UN sanctions in their respective jurisdiction has been established. Thus, the two judiciaries are now aware that the application of UN resolutions related to sanctions can be suspended or nullified, and the States which applied them can be condemned, through a decision of one of the two bodies.

So, whether the EU institutions will keep trying to find a way to access the ECHR or not, the current situation of States does not change, they still must choose which international or supranational norm they have to break, and they are often oriented in claiming their lack of responsibility when applying UN Resolutions *tout-court*. This is why the ECtHR and the ECJ, each one on its part of jurisdiction, insist on the value of the respect of procedural and defence guarantees to ensure a correct harmonization of the international system with the regional and national ones.

IV. Conclusions

At this stage, considering the uncertain situation in which the States Members of the EU, of the Council of Europe, and of the United Nations find themselves when implementing UN Security Council's Resolutions under Chapter VII of the UN Charter, some clarification is due about the reasons why the ECJ and the ECtHR have developed the described common approach. Founding themselves upon the pillars of the *Kadi* saga and the *Al-Jedda-Nada-Al Dulimi* evolution, the two Courts are still building, citing this path at every occasion[103], a core of fundamental values for the European community of States which cannot be reduced under any need, nor if a universal one. Moreover, facing the threat of National Courts asserting the non responsibility of States in favour of a general accountability of the International Organization not being part of the Union, or of the Convention, like it already happened in UK and Switzerland as mentioned above, the ECJ and the ECtHR played a shared role in protecting that core of values. Considering the fact that these two bodies are composed by high-level jurists, it can be difficult to deny that the Courts pursued the objective of a uniform protection of human rights in each area of their jurisdiction, more than the one of protecting themselves from the conflict of future jurisprudence following the EU accession to the ECHR. Such a perspective, indeed, will reduce the Courts as the last

[103] See, as already recalled, ECJ, joined cases C-478/11 P to C-482/11 P *Gbagbo and Others* v *Council* [2013], ECLI:EU:C:2013:258, Joined cases C-539/10 P and C-550/10 P *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa* [2012], ECLI:EU:C:2012:711; case T-190/12 *Johannes Tomana and Others v Council of the European Union and European Commission* [2015],ECLI:EU:T:2015:222; joined cases T-208/11 and T-508/11, *Liberation Tigers of Tamil Eelam (LTTE) v Council of the European Union* [2014], ECLI:EU:T:2014:885; case C-376/10 P *Tay Za* v *Council* [2012], ECLI:EU:C:2012:138; and judgment of 13 March 2012 in case C-380/09 P, *Melli Bank* v *Council* [2012], EU:C:2012:137, paragraph 55.

resort of international politics, and this view is in no way acceptable. Without prejudice to the Courts' role towards the Security Council, in fact, it can be easily affirmed that the ECJ and the ECtHR are maintaining their nature of means of last resort in the European continent to protect human rights within its border, no matter what evolution will the process take in the future. The conduct of the two bodies, though, can be immediately defined as a juridical deterrence, towards both Member States and the United Nations, that demonstrates how, in this case, the multi-level protection of human rights resulting from the interaction between States, the UN, and the two Courts, highly payed off. In fact, these judicial bodies are ensuring a level of protection which is deeper and more effective than any other in this framework.

Indeed, this attitude could be easily described as the result of a fluid teamwork in a volley match: the ECJ and the ECHR playing in the same team against the UN Security Council. In this match, the role of the two regional organizations' judiciaries is so well co-ordinated that can arrange to block the power of a universal institution like the UN. This occurred, mainly, because the survival of the protection of human rights in Europe depends from the jurisprudence of these two distinct but anyway connected bodies, and the judgements that consolidated this view constitute, to-day, the basis of, hopefully, a deeper and even more effective protection of core human values within the borders of the European continent. An argument raised by the ECJ, passes to the ECtHR and comes back to the ECJ, just before hitting the United Nations' system where it hurts: the supremacy of the UN commitments under Article 103 of the Charter. It is mainly for this reason that is unlikely that the Security Council will undergo a new round of negotiations to reform the sanctioning mechanism: from its perspective, enough has already been done with resolution 2161, even though the ECJ on the basis of the *Kadi II* decision will continue to develop its control over human rights standards. Yet, something more has to be developed, following the example of the EU on the matter. Even if its difficult that the UN could establish, in the framework of the Sanctions Committees, a judicial body able to reach the standards of both the ECJ and the ECtHR, it tried at least to reconcile the need for security with the one to respect the respondent's judicial rights[104]. It is positive to note that, in the same sense, even the EU reformed the Statute of the General Court, at Article 105, on the basis of the lessons learned by the Kadi I and II, and by the ZZ cases, introducing some balance between the right of the respondent to be informed about the charges and the secrecy of investigations related to restrictive measures[105]. But, still, what is lacking in the UN sanctioning system is the

[104] See UN, Security Council, S/RES/2161 (2014), 17 June 2014, cit.

[105] "*Where (...) a main party intends to base his claims on certain information or material but submits that its communication would harm the security of the Union or that of one or more of its Member States or the conduct of their international relations, he shall produce that information or material by a separate document. The information or material thus produced shall be accompanied by an application for confidential treatment thereof, setting out the overriding reasons which, to the extent strictly required by the exigencies of the situation, justify the confidentiality of that information or material being preserved and which militate against its communication to the other main party*. Art, 105, Rules of procedure of the General Court, cit.

effective legal protection of the rights of the recurrent, because, at last, the final decision of de-listing relies on the Security Council, which is everything but a judiciary.

On the other side of the net, however, Europe remains jealous of it principles and its traditional respect for human rights, and it is shown by the recalled jurisprudence, that keeps consolidating a dualistic, and restrictive, approach to UN obligations. So, what will be the choice of Member States? Will they fully comply with the UN obligations, or will they apply them just when they grant an effective protection of human rights as requested by the two European courts? Answering these questions may appear difficult, but it worth mentioning that while the violation of UN obligations does not bring immediate consequences for Member States, the ones descending from the judgements of both ECJ and ECtHR are always characterized by enforcement measures. Thus, in this perspective, it is likely that Member States will be tempted to non comply with the UNSC resolutions instead of being sanctioned directly by one of the two Courts.

In this context, those individuals and entities which obtained a favorable decision from the European Courts are the ones affected by more uncertainity: they keep being listed in the UN Sanctions Committees' blacklists, but those measures are not applicable to them in the EU or in the Member State of the ECHR condemned by the Strasbourg Court. Thus, even after the efforts in each system to improve the sanctioning machinery, a co-ordination between the different multi-level orders is more than needed to solve this last question, which directly affects individuals and entities and, thus, should be a priority for national, and international, institutions.

* * *

List of abbreviations

ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
SC	Security Council
UN	United Nations

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Useful Internet Links

Considering that today the full legislation of national and international bodies is available on the internet, here will follow a list of the main sites on which it is possible to find all the normative sources cited in the paper:

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ECtHR - http://hudoc.echr.coe.int

EU legislation - http://eur-lex.europa.eu/homepage

UN General Assembly's Resolutions - http://www.un.org/documents/resga.htm

UN Ombudsperson - https://www.un.org/sc/suborg/en/ombudsperson

UN Security Council Sanctions Committees - https://www.un.org/sc/suborg/

UN Security Council's Resolutions - http://www.un.org/en/sc/documents/resolutions

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