Defer and rule: The relationship between the EU, the European Convention on Human Rights and the UN

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Abstract

This paper starts with the respective judgments of the EU Court of Justice (ECJ) in Kadi and Al Barakaat and of the European Court of Human Rights (ECtHR) in Behrami and Saramati. Through this and subsequent case law the paper aims at analyzing and comparing the seemingly contradictory stands taken by the EU General Court, the ECJ and the ECtHR on the relationship between the regional European legal orders and the global UN legal order in matters relating to international peace and security.

In the later al-Skeini and al-Jedda judgments there are signs that the ECtHR is modifying its position with respect to the relationship between the European Convention on Human Rights and the UN legal order. It seems as if the ECtHR is getting closer to the ECJ’s approach, or at least is modifying its position in a way which is easier to reconcile with the ECJ’s approach. The recent judgment in Nada confirms the new turn.

The analysis of the trends in the case law of the three European courts will include a discussion of the possible effects that the approaching accession of the EU to the European Convention on Human Rights might have on the positions taken.
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1 Introduction

In the landmark cases Kadi and Al Barakaat in the European Court of Justice (ECJ) and Bebrami and Saramati in the European Court of Human Rights (ECtHR) certain ideas crystallized concerning the relationship between the two respective regional European legal orders and the global UN legal order.\(^1\)

These ideas – on the face of it – were largely contradictory which makes for an interesting picture of the intra-regional relationship between the two jurisdictions as well as of the extra-regional relationship of Europe to the global legal order.\(^2\)

The picture becomes even more complex when the judgment of the EU General Court (then Court of First Instance (CFI)) in Kadi and Al Barakaat is taken into account, promoting as it does a view of the relationship between the EU and UN legal orders which is diametrically different from the ideas promoted by the ECJ and wholly in line with the ideas of the ECtHR in Bebrami and Saramati.\(^3\)

The starting-point of this article is the platform laid by the respective judgments in Kadi and Al Barakaat and Bebrami and Saramati. Through this and subsequent case law it aims at analyzing and comparing the respective stands taken by the EU General Court, the ECJ and the ECtHR on the relationship between the regional European legal orders and the global UN legal order in matters relating to international peace and security.

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1 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, judgment of 3 September 2008 (hereinafter: Kadi and Al Barakaat); Application no. 71412/01 by Agim Bebrami and Bekir Bebrami against France and Application no. 78166/01 by Ruzhdi Saramati against France, Germany and Norway, decision of 2 May 2007 (hereinafter Bebrami and Saramati). The work with this article was made possible by a research grant from the Bank of Sweden Centenary Fund (Riksbankens Jubileumsfond). My thanks also go to Hanna Eklund for research assistance.


If put in hierarchical terms, which is not necessarily the best way in which to discuss the relationship between or even within regimes – as between the ECJ and the General Court within the EU regime – it could be a matter of who rules and who defers.\(^4\)

The relationship between the regime of the UN Charter on the one hand and on the other the two regional European legal orders included in this discussion is simultaneously more nuanced and more elusive than that and what actually happens in what seems to be taking place is far less clear. Through ingenious reasoning the ECJ and the ECtHR seem to be able to defer and rule at the same time.\(^5\)

The General Court defers to the ECJ albeit reluctantly. The UN Security Council for its part rules, or at least does not defer, but its rigidity and obstinacy might create a situation in which the European legal orders still rule.

The radically different positions taken by the ECJ and the ECtHR would seem untenable in the long run. In particular once the EU accesses to the European Convention on Human Rights.

In the latest case law of the ECtHR in *Al-Skeini* and *Al-Jedda* there are signs that the ECtHR is modifying its position taken heretofore with respect to the relationship between the European Convention on Human Rights and the UN legal order.\(^6\) It seems as if the ECtHR is getting closer to the ECJ’s approach, or at least is modifying its position in a way which is easier to reconcile with the approach of the ECJ. The recent judgment in *Nada* confirms the new turn.\(^7\)

The position of the General Court after *Kadi (II)* and in the light of the changing case law of the ECtHR will be studied in order to see how the General Court’s standpoints interact both with the

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\(^7\) Application no. 10593/08, *Nada v Switzerland*, judgment of 12 September 2012.
standpoints of the ECJ and with the changing standpoints of the ECtHR.8

Will the General Court remain a dissenter within its own legal system and increasingly so also vis-à-vis the legal system of the ECtHR given that the latter Court is abandoning its previous position?

The analysis of the trends in the case law of the three European courts concerning their view of the relationship between the regional and global legal orders will include a discussion of the possible effects that the approaching accession of the EU to the European Convention on Human Rights might have on the positions taken.

The discussion will concern the positions taken in substance by the courts on the relationship between their respective regional order and the global order of the UN Charter as these positions appear either explicitly or implicitly from their judgments or decisions.

The accession by the EU to the ECHR would seem almost necessarily to lead to a modification of either court’s standpoints. From the formal point of view the modification of the standpoints of the ECJ would seem most likely. At least the accession should have some effect on the future development of the case law. Again, it is difficult to picture the ECJ and the ECtHR maintaining diametrically opposed positions once the ECJ becomes party to the European Convention.

The modification seems to have begun even without the accession by the EU to the European Convention and so far, it is in the case law of the ECtHR that the changes are taking place. Nevertheless, the formal accession by the EU to the European Convention cannot be ignored when discussing the till now completely differing attitudes of the ECJ and the ECtHR towards the UN Security Council.

The Common Foreign and Security Policy (CFSP) is a developing policy area within the EU which is likely to provide the ECJ and the ECtHR with further cases relating to international peace and security, potentially relating to the relationship between the European legal orders and the UN Charter. Both Kadi and al Bara-

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kaat as well as Bebrami and Saramati find themselves in this policy area from the point of view of substance.

If the EU and its member states become increasingly active in the external security and defence field, and presuming that the link with the UN will remain in matters of measures taken, the result is likely to be an increased caseload in both the ECJ and the ECtHR concerning matters of international security and defence in general and in particular the relationship of measures decided by the UNSC and the European legal system(s).

The ECJ is prevented under the European Union Treaty (EUT) from taking up cases relating to the CFSP, but the ECtHR is not, at least not formally.9

After the accession of the EU to the ECHR, the ECtHR will still have no limitations to its jurisdiction ratione materiae whereas the ECJ in principle will still lack jurisdiction over the field of the CFSP.

What will change, however, after the accession by the EU to the European Convention is the fact that the ECtHR will thenceforward be able to try cases against the EU as such, including for actions taken within the CFSP.10

The EU might thus be tried by the ECtHR in matters relating to the CFSP which field in principle is excluded from the jurisdiction of the ECJ. This would seem to lead to homogenous judicial decision-making considering that only one and not two regional European Courts will be involved.

Despite the fact that the ECJ in principle is excluded from the CFSP this field we have seen quite some case law relating to matters involving international peace and security relating to economic sanctions under the CFSP. Also, there are many requirements which must be fulfilled before the EU as such will be considered the right entity to sue ratione personae before the ECtHR in con-


trast to individual member states. Therefore there will be limits to how homogenized the case law relating to the CFSP will be between the ECtHR and the ECJ due to the accession by the ECJ to the European Convention.

However, a certain superiority of the ECtHR and thus the European Convention on Human Rights to the ECJ and EU law within the European regional sphere is hinted by the mere judicial institutional set-up in the field of the CFSP.

The UN as such will never be tried either before the ECtHR or the ECJ.

The prospect of having an international organization on trial before an international Court at all in the politically sensitive field of international peace and security is novel and interesting. The issue of the relationship between the global and regional legal orders in this field is bound to arise under all circumstances.

The article starts with the Kadi and Al Barakaat and Bebrami and Saramati cases and traces the developments in the case law of the respective courts since these decisions. The way the courts go about in linking and adjusting their respective legal orders, or not, to the foreign competing and conflicting legal order of the UN will be investigated. A tendency to defer and rule at the same time is observed in the case law of both the ECJ and the ECtHR.

The potential conflict between the legal orders ratione materiae is most pronounced in the regional-global relationship, but there is competition also on the intra-European level.

The regional-global relationship is hierarchical in that Article 103 in the UN Charter stipulates the superiority of the UN Charter over all other international agreements.

Still, the regional European Courts both seem to have found a way of ruling while both ostensibly deferring.

The way the accession of the EU to the ECHR may affect the attitudes of the regional courts’ attitudes to the global UN order in matters of international peace and security will be discussed. It seems as if the accession as such may not have a major influence on this issue; changes are taking place in practice already independently of any accession of the EU to the ECHR.
2 How does the ECJ view the relationship between the European legal order and the UN Charter?

In *Kadi and Al Barakaat* it is obvious that the ECJ views the relationship between the EU legal order and the UN Charter as one between two equal legal systems.\textsuperscript{11}

The ECJ views the relationship as horizontal. The ECJ maintains a dualistic stance towards the UN legal order and insists that while the EU is bound by the resolutions adopted by the UN Security Council under Chapter VII of the UN Charter and will do its utmost to carry out its obligations towards the UN – the way the obligations are transformed into legal measures within the EU legal system is for the ECJ ultimately to decide.\textsuperscript{12}

This constitutes a rather straightforward defer-and-rule manoeuvre. All legal acts adopted by EU institutions, including regulations executing binding decisions of the UN Security Council on the freezing of the assets of individuals suspected of supporting terrorism, must be subjected to a full review under the EU treaty.\textsuperscript{13}

This, of course, may have as a result that some of the obligations emanating from the UN Charter through the resolutions of the Security Council will not be realized within the EU.

The obligation to freeze the financial assets of *Kadi and Al Barakaat*, for instance, will not be realized until the EU regulation and the procedure by which the regulation is adopted is considered by the ECJ to fulfil all necessary procedural and substantive human rights requirements.

Although the Vienna Convention on the Law of Treaties is not directly applicable to the relationship between the UN and the EU

\textsuperscript{11} *Supra* note 1.


and, furthermore, in *Kadi and Al Barakaat* it is not a treaty that is at issue but a resolution of the UN Security Council, Article 27 of the Vienna Convention comes to mind stating that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.\(^{14}\)

Making an analogy from the principle underlying the rule in the Vienna Convention one could claim that the EU should not be allowed to invoke a provision in its own “domestic” regional law as an excuse not to realize its obligations towards the UN.

Whether one considers such an analogy apposite depends in part on one’s view of the relationship between the UN Charter and the EU legal order in terms of equality or hierarchy. It also depends on whether one considers the relationship between the two organizations at all comparable to the relationship between international law and domestic law in a conventional sense.

Of course, the ECJ would not agree that it is using provisions in the EU law in order to help the EU evade its obligations vis-à-vis the UN. The ECJ maintains that the EU is indeed implementing its obligations under the UN Charter within the EU legal system, it is just that the EU is doing it its way.\(^{15}\) The ECJ adds for safety’s sake that the validity of the international legal agreement in question is not at issue.\(^{16}\)

Lock comments that the emphatic way in which the ECJ guards the EU legal order against the UN is interesting in light of the insistence of the ECJ on the massive inflow of EU law in the EU member states.\(^{17}\)

Klabbers comments from a slightly different perspective that not only actual but even potential influences of international law on the EU legal order are guarded against.\(^{18}\)

\(^{14}\) There is a corresponding provision in Article 27 (2) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (of 1986) adding that an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.

\(^{15}\) *Kadi and Al Barakaat*, supra note 1, at para. 298.

\(^{16}\) *Ibid*, at paras. 286-288.


Several commentators claim that the adequate reference point for the *Kadi and Al Barakaat* judgment is the early case law of the ECJ laying down the fundamental characteristics of the EU (then EC) legal order. The exclusiveness of the EU legal order, according to the ECJ, works both in relation to the domestic legal orders of the member states and in relation to other international legal orders including the UN Charter.

This connects to another issue that has been widely discussed in connection with the *Kadi and Al Barakaat* case namely whether it is the status of the EU legal order as such – and that of the ECJ – that the ECJ strives to promote in *Kadi and Al Barakaat* or whether it is human rights.

In contrast to what many authors have pretended, the ECJ never states that human rights is the over-arching value from which the conclusion in *Kadi and Al Barakaat* necessarily follows. It is the position of primary law as such in the EU legal order, and vis-à-vis all other possibly competing legal systems which is important to the ECJ.

The manner in which the ECJ expresses itself hints a superior position of human rights within the EU legal order, but does not clearly and definitively lay this down.

Thus, in another case the ECJ might just as well attach more importance to some other value included in the primary law of the EU at the expense of the protection of human rights.

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20 See among others Klabbers 2009, p 228.

21 *Kadi and Al Barakaat*, supra note 1; paras. 304-305, 307-308.

22 “Article 307 EC [now Article 351 of the Treaty on the Functioning of the European Union (TFEU)] may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which [emphasis added] is the protection of fundamental rights, including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights” (*Kadi and Al Barakaat*, supra note 1, para. 304); “That primacy of the United Nations Charter at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental principles form part” (*Kadi and Al Barakaat*, supra note 1, para. 308).

23 Cf. among others Klabbers 2011, at p 297.
As far as the relationship between the ECJ and the case law of the ECtHR is concerned, the ECJ in *Kadi and Al Barakaat* considered it necessary to somehow take account of a case with a problematique partly similar to the one in *Kadi and Al Barakaat* which had been decided by the ECtHR before the ECJ was to decide the *Kadi and Al Barakaat* case. The case in question before the ECtHR was the *Behrami and Saramati* case, which will be discussed more closely in the following section.\(^{24}\)

The *Behrami and Saramati* case in its turn had been preceded by the judgment of the Court of First Instance (now General Court) judgments in the respective *Kadi* and *Yusuf and Al Barakaat* cases (which might hypothetically have affected the stance taken by the ECtHR in *Behrami and Saramati*).\(^ {25}\)

The problem for the ECJ was that whereas the ECtHR in *Behrami and Saramati* had dealt with a problematique similar in some respects to the one with which the ECJ was to deal in *Kadi and Al Barakaat*, the ECtHR had reached a conclusion arguably opposite to the one the ECJ wished to arrive at. Thus, the ECJ had to relate to the *Behrami and Saramati* judgment, but at the same time dismiss it. This is what the ECJ did, in a not so convincing manner.\(^ {26}\)

As if the ECJ itself was not entirely convinced by its own reasoning, it added on the subject of the undeniable existence of the *Behrami and Saramati* judgment, that “[i]n addition and in any event, the question of the Court’s [i.e. the ECJ’s] jurisdiction to rule on the lawfulness of the contested regulation has arisen in fundamentally different circumstances”,\(^ {27}\) which was to be proved.

The line of reasoning of the ECJ in *Kadi and Al Barakaat* on the relationship between the UN and the EU legal orders, among other things, was maintained by the ECJ in *Hassan and Ayadi* decided the year after *Kadi and Al Barakaat*.\(^ {28}\)

In the case concerning criminal proceedings against E and F although it concerned the financing of terrorism and ultimately originated from resolution 1373 of the UN Security Council, the relationship between UN and EU law was not at issue.\(^ {29}\) The ECJ,

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\(^{24}\) *Behrami and Saramati*, supra note 1.

\(^{25}\) *Kadi* and *Yusuf and Al Barakaat* cases, supra note 3.

\(^{26}\) *Kadi and Al Barakaat*, supra note 1, paras. 311-314.

\(^{27}\) Ibid, at para. 315.


\(^{29}\) Case C-550/09, Criminal proceedings against E and F, judgment of 29 June 2010.
however, did make some statements of indirect relevance to that relationship.

The ECJ reiterates that the EU is based on the rule of law and that the acts of its institutions are subject to review by the ECJ of their compatibility with EU law and, in particular, with the TFEU and the general principles of law.\(^{30}\) Then comes the pronouncement also made in the _Kadi and Al Barakaat_ judgments that the TFEU has established a complete system of legal remedies and procedures designed to confer on the judicature of the EU jurisdiction to review the legality of acts of the institutions of the EU.\(^{31}\)

The indirect relevance of these statements to UN law is that, as we saw in _Kadi and Al Barakaat_, the ECJ is prepared to review also acts of the institutions of the EU originating from UN Security Council resolutions.

The review may result in the finding that the EU act is illegal under EU law and this in its turn constitutes an indirect finding of illegality of the UN resolution, at least it renders the realization of the UN resolution within the EU legal system more difficult or even impossible.

The indirect relevance to UN law of the pronouncements of the ECJ in the case of criminal proceedings against E and F is further that the ECJ again asserts its own strong position in the EU legal system and the strong position of the EU legal system in relation to the UN Charter system.

Although neither directly nor, on the face of it, indirectly relevant to the relationship between EU law and UN law, the ECJ also made some pronouncements still worth mentioning here on the duty of the EU Council to provide reasons for the inclusion of the Kurdish organization at issue in _criminal proceedings against E and F_ on the list of terrorist organizations to which Council Regulation 2580/2001 as it were would apply.\(^{32}\)

The reasoning of the ECJ on the duty to state reasons for such a listing will reappear in other cases which are of more direct relevance to the relationship between EU and UN law.\(^{33}\) None of the provisions at issue in the case of _criminal proceedings against E and F_ had been accompanied by an adequate statement of reasons the

\(^{30}\) _Ibid_, at para. 43.

\(^{31}\) _Ibid_, at para. 44.

\(^{32}\) _Ibid_, at para. 53 \textit{et seq}.

\(^{33}\) See for instance _Kadi II_, supra note 8, paras. 157, 177.
ECJ stated, in particular as concerned the existence of a decision taken by a competent (national) authority designating the organization in question as terrorist and as concerned an explanation of the actual and specific reasons for which the Council considered that the inclusion of the Kurdish organization at issue in E and F on the list was justified, and remained so.34

Still, the ECJ wished to make a point of the fact that in criminal proceedings against E and F precisely criminal proceedings were at issue whereas Kadi and Al Barakaat concerned a measure freezing the applicants’ assets for preventive reasons.35 The crimes concerned in E and F, furthermore, were punishable by custodial sentences.36

It seems as if the ECJ by its emphasis on the fact that the domestic proceedings from which the reference for a preliminary ruling originate are criminal, would affect the rule of law aspects of the case and would imply even stronger demands on the EU Council to state reasons than would be the case if the case had “only” concerned the freezing of the applicants’ assets.

This particular aspect of the Court’s reasoning in E and F does not reappear later in the judgment, although it is indeed emphasized by the Court at the outset. Judging from the line of cases relating to the “mere” freezing of the assets of suspected terrorists, similarly strict demands are upheld on the competent authorities (ultimately the UN SC with respect to cases originating ultimately from UN Security Council resolution 1267) to state reasons for the listing of individuals and entities also in the latter cases.

Thus, it does not seem as if in practice such a big difference is made by the ECJ between criminal proceedings and other kinds of proceedings relating to measures against listed suspected terrorists after all.

The case of Bundesrepublik Deutschland v B and D concerned two persons who just as in the case of criminal proceedings against E and F above had been sympathizers of Kurdish organizations which had

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34 Case C-550/09, Criminal proceedings against E and F, supra note 29, para. 55 (referring to para. 20 listing all the relevant Council decisions).
36 Ibid.
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been listed by the EU Council as terrorist organizations under EU legal acts adopted pursuant to UN SC resolution 1373.\textsuperscript{37} The question at issue was among others whether these persons could be granted asylum under national German law despite the fact that under the relevant EU directive on refugees and persons otherwise in need of international protection they were excluded from refugee status.\textsuperscript{38}

The relationship of EU law to the law of the UN Charter did not come up in this case. A rather neutral reference was made to international refugee law by the ECJ without any indication whether the ECJ would prioritize EU law or international law if matters were brought to a head.\textsuperscript{39}

Before answering the questions referred for a preliminary ruling, the ECJ stated that the EU refugee directive must be interpreted in a manner consistent with the 1951 Geneva Convention and other relevant treaties.\textsuperscript{40} As is apparent from the directive itself, the ECJ continues, the directive must also be interpreted in a manner consistent with the fundamental rights and the principles recognized, in particular, by the Charter of Fundamental Rights of the EU.\textsuperscript{41}

In The Queen, on the application of M and Others v Her Majesty’s Treasury, at issue were sanctions against sympathizers of Usama bin Laden, the Al-Qaeda network and the Taliban adopted pursuant to the same line of UN Security Council resolutions and EU legal acts as in Kadi and Al Barakaat.\textsuperscript{42}

The question referred for a preliminary ruling concerned whether the spouses of listed persons could receive social security or social assistance benefits. The issue of the relationship between EU law and UN Charter law as such never came up during the proceedings. However, in order to interpret the relevant EU regulation the ECJ held that account must be taken of SC resolution

\textsuperscript{37} Joined Cases C-57/09 and C-101/09, Bundesrepublik Deutschland v B and D, judgment of 9 November 2010.

\textsuperscript{38} EC Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

\textsuperscript{39} Joined Cases C-57/09 and C-101/09, Bundesrepublik Deutschland v B and D, supra note 37, para. 78.

\textsuperscript{40} Ibid.

\textsuperscript{41} Ibid.

\textsuperscript{42} C-340/08 The Queen, on the application of: M and Others v Her Majesty’s Treasury, judgment of 29 April 2010; beginning with UN Security Council resolution 1267.
1390 without, as it seems, having anything against letting the UN SC resolution have an influence on the interpretation of the EU legal act. Differently put, the ECJ had nothing against deferring to the intentions of the UN SC in interpreting the EU regulation in this case.43

It might have eased the interpretation by the ECJ of the EU legal act in question in light of the SC resolution, that the substance of the SC resolution could be used in order to somewhat narrow the potential reach of the EU sanctions regime this time.

3 How does the European Court of Human Rights view the relationship between the European legal order and the UN Charter?

In Behrami and Saramati the ECtHR decidedly viewed the relationship between the European Convention and the UN Charter as one between the superior UN Charter and the inferior European Convention. The relationship between the two legal orders is vertical in the view of the ECtHR. At least in the field of international peace and security and when the UN Security Council is acting under Chapter VII of the UN Charter.

The ECtHR itself defines the issue in Behrami and Saramati as one of “the relationship between the Convention and the UN acting under Chapter VII of its Charter”. The ECtHR, however, arrives at its conclusion not through an analysis in terms of superiority and inferiority but through an analysis in terms of the different functions of the two organizations of which, one must conclude, the peace and security function of the UN is the most important one.44

The Court states that ensuring respect for human rights, as is done under the legal order of the European Convention, also represents an important contribution to achieving international peace – indeed, the Court could have added, the fundamental free-


44 Behrami and Saramati, supra note 1, para. 146.
Defer and rule: The relationship between ... doms laid down in the Convention are the foundation of justice and peace in the world, according to the very Preamble to the Convention – but, states the Court, the UN Security Council has the primary responsibility for international peace and security, according to the UN Charter.45

Thus the UN Charter precedes the European Convention.

This reasoning of the ECtHR in substance seems to be given priority over the formal argument which is also pursued by the Court in Behrami and Saramati that the UN Charter is superior to the European Convention due to Article 103 of the UN Charter.

The previous important Bosphorus case also derived its origins from (economic) sanctions adopted by the UN Security Council under Chapter VII of the UN Charter.46

In the Bosphorus case, arguably, the ECtHR had considered the relationship between the UN Charter and the European Convention on human rights as one not of subordination of one organization to another, but of two equal international legal orders.

True, at issue in Bosphorus case was the relationship between the European Convention and the EU, more than the relationship between the European Convention and the UN Charter, but nothing in Bosphorus indicates that the ECtHR would bow automatically to the UN Security Council.

Judging from the way the ECtHR approached the EU legal order one would rather have thought that the ECtHR would apply the same approach to other international organizations.47 The ECtHR found that it could try the member states’ actions under EU legal acts, but that it would abstain from doing so on condition that the general level of protection of human rights was satisfactory in the EU in the case at hand.48 Such reasoning could easily be applied equally to other international organizations.49

46 Application no. 45036/98 Case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, judgment of 30 June 2005 (hereinafter Bosphorus).
48 Bosphorus, supra note 46, paras. 155-156.
49 Cedric Ryngaert, op. cit. note 47, at p 1002, hints that the ECJ presumes all international organizations to provide equivalent protection to the one laid down in the European Convention on human rights.
The point is that the members of the European Convention on human rights shall not be allowed to escape their human rights obligations by transferring sovereign power to an international organization, a line of reasoning fully applicable in principle also to the transferral of power by members to the UN.

Another point of a different nature is that the ECtHR in the *Bosphorus* case managed not to defer and rule but rather to rule and defer - to the EU. This solution to the dilemma of competing jurisdictions probably satisfied both parties.

Despite negative consequences for human rights of the *Behrami and Saramati* case, the deferential attitude of the ECtHR to the UN remained in subsequent cases for some years. Then it dramatically changed which we will see below.

In *Beric and Others* which came after *Behrami and Saramati* the Court simply cited the judgment in *Behrami and Saramati* extensively in order to make its point that the UN legal order as expressed through resolutions by the Security Council under Chapter VII of the Charter is superior to the legal order of the European Convention.50

The reasoning of the ECtHR in *Behrami and Saramati* concerning the UN mission in Kosovo (UNMIK) and the military component thereof (KFOR) was equally applicable to the international civil administration in Bosnia and Herzegovina in *Beric and Others*, the Court stated.51

The gist of the matter was again that the aim of the UN of maintaining international peace and security and the enforcement powers accorded to the UN Security Council under Chapter VII to fulfil that aim makes the UN legal order superior in rank to the legal order of the European Convention merely concerned with ensuring respect for human rights.

In *Gajic* a brief but significant reference is made to *Behrami and Saramati* in order to strengthen the argument in favour of the dismissal of the case which under all circumstances should be dismissed because of failure to exhaust domestic remedies.52 Through

50 Applications 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 and 25496/05, *Berić and Others v. Bosnia and Herzegovina*, decision of 16 October 2007, para. 29.

51 Ibid., at para. 30.

52 Application no. 31446/02, *Gajic v Germany*, decision of 28 August 2007, para. 1.
its reference to its earlier reasoning in *Bebrami and Saramati*, the ECtHR indirectly reiterates its opinion that the UN Charter is superior to the European Convention.

The situation was similar in *Kasumaj* where the case was dismissed for reasons ratione personae and reference was made to *Bebrami and Saramati*.53

In *Nederlandse Kokkelvisserij* the Court confirmed its finding in *Bosphorus* vis-à-vis the EU and again came to the conclusion that the presumption that the level of human rights protection in the EU is satisfactory had not been rebutted.54

In *Blagojevic* the Court in addition to *Beric and Others* refers to the landmark case of *Bebrami and Saramati*.55 In *Blagojevic* it was undisputed that the matters complained of resulted from acts or omissions of the ICTY, and not of a state or another organization.56 Since the ICTY is a subsidiary organ of the UN it was easy for the Court to attribute the acts of the ICTY to the UN.57

The result was that *Blagojevic* was declared inadmissible ratione personae just like *Bebrami and Saramati*. The superiority of the UN Charter over the European Convention with respect to subsidiary organs of the UN is uncontroversial.

The Court in *Blagojevic* nevertheless tried whether the Netherlands could be held responsible for the actions of the ICTY by accepting to host the tribunal in its territory.58 The Court referred to *Beric and Others* in which Bosnia had accepted an international civil administration and found that the same reasoning as in *Beric* (and before than in *Bebrami and Saramati*) could be applied to the acceptance by a respondent state in its territory of an international criminal tribunal pursuant to a resolution of the Security Council under Chapter VII of the UN Charter.59

The point was that to scrutinize the acts of the member states of the UN following Security Council resolutions under Chapter VII, even if the acts are voluntary and not compulsory under the resolution like the contribution of troops to a security mission or the ac-

54 Application no. 13645/05 *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v Netherlands*, decision of 20 January 2009.
55 Application no. 49032/07 *Blagojevic v Netherlands*, decision of 9 June 2009.
56 Ibid., at para. 30.
57 Ibid., at para. 35.
58 Ibid., at para. 37 et seq.
59 Ibid., at para. 39.
ceptance in one’s territory of an international civil administration or of an international criminal tribunal, would amount to interfering with the UN’s key mission to secure international peace and security including with the effective conduct of its operations.  

The Court pointed out in this context that the Security Council resolution establishing the ICTY linked the establishment of an international tribunal to the restoration and maintenance of peace and that, accordingly, the creation of the ICTY is to be seen as an operation fundamental to the mission of the UN. These additional arguments were also used by the ECtHR to declare the complaint inadmissible ratione personae.

It can be added that it was necessary for the Security Council to link the establishment of the ICTY to the maintenance or restoration of peace in order for the Council to be able to adopt the resolution under Chapter VII of the UN Charter with all the compulsory consequences for the member states that follow from this, including the duty to cooperate with the ICTY and the possibility to adopt sanctions against states who would not cooperate.

It can be inferred that the ECtHR in Blagojevic as in Behrami and Saramati and Beric and Others continues to hold that the aims of the UN Charter to secure international peace and security are superior to the aim of the European Convention to ensure respect for human rights. As a consequence, the UN Charter becomes superior to the European Convention in the international hierarchy of norms, independently of the formal superiority of the UN Charter laid down in Article 103 of the Charter.

Galic also concerned complaints relating to proceedings before the ICTY and the legal issues ended up being more or less the same as in Blagojevic, including the attitude manifested by the ECtHR toward the relationship between the European Convention and the UN Charter.

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60 Ibid., at para. 44; referring back to Behrami and Saramati, supra note 1, para. 149.
61 Application no. 49032/07 Blagojevic v Netherlands, supra note 55, para. 39.
62 Application no. 22617/07, Galic v Netherlands, decision of 9 June 2009.
4 A new turn in the practice of the European Court of Human Rights?

There are signs that the ECtHR is becoming more aware of the importance of the enforcement of human rights protection. Even in the context of actions ultimately having their origin in UN SC resolutions and even if the actions take place in the context of the maintenance or restoration of international peace and security under Chapter VII of the UN Charter as in *Behrami and Saramati* for instance.

The position of the ECtHR on the relationship between the European Convention and the UN Charter also seems to be changing accordingly, i.e. the absolute submission to the UN law given evidence of by the ECtHR in the case of *Behrami and Saramati* and the cases following in their wake seems to be giving way to a better informed and more nuanced position on these matters.

The cases of *al-Skeini* and *al-Jedda* respectively bear witness to a partly new attitude of the ECtHR.\(^{63}\)

Both cases were launched against the United Kingdom and both cases were caused by the US and UK military intervention in Iraq in 2003.

Both cases concern the issue of the extraterritorial jurisdiction of the ECtHR more than they concern the issue of the relationship between the provisions of the European Convention and the UN Charter, but the cases still give an indication of the attitude of the ECtHR to the latter relationship.

The case of *al-Skeini* concerned six Iraqi civilians who had been killed in an area controlled by the British military forces.

The ECtHR thus found that the UK was in control of the geographical area where the deaths had occurred and that the UK consequently could be tried before the ECtHR.

The ECtHR, more precisely, found that the UK had (together with the US) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. The Court went on to find that the UK through its soldiers engaged in security operations in Basrah during the period in question exercised authority and control over individuals killed in the course of such security operations, so as to establish the necessary jurisdic-

\(^{63}\) *Al-Skeini and Others v. The United Kingdom, Al-Jedda v. The United Kingdom*, supra note 6.
tional link between the deceased and the UK for the purposes of the application of the European Convention to the case.64

This is in sharp contrast to the Behrami and Saramati case where the jurisdictional link ended up in the UN and not with individual troop contributing states to KFOR.

The UN Security Council was involved in the situation in Iraq during the time period in question in al-Skeini. First, the UN SC had recognized, albeit temporarily, the security role of the US and the UK in Iraq. Then, the SC had authorized a multinational force in Iraq, i.e. the SC gave the forces already in place a UN mandate.65

The ECtHR, however, did not even consider employing the formula used in the Behrami and Saramati case of “overall authority and control” on the part of the UN in order to attribute the acts of the UK soldiers to the UN. The Court solely used the criterion of effective control in order to decide what legal entity had jurisdiction over the actions of the UK soldiers in the area in question.66

Even though there is no explicit discussion of the relationship between the European Convention and the UN Charter in al-Skeini, at least the ECtHR does not radiate the same kind of deference to the UN and its peace and security aim that the Court did in Behrami and Saramati.

The ECtHR reverts to a more conventional way of assessing international responsibility which does not comprise any preconceived notion as to whether the UN or the state, in this case, shall be regarded as responsible for the actions of soldiers on international military missions.

The position taken in al-Skeini that the Convention rights can indeed be “divided and tailored”, which is opposite to the position taken in Bankovic, makes the application much easier of (some) human rights in the context of maintaining or restoring international peace and security under the UN Charter.67 Kjetil Larsen had

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64 Al-Skeini and Others v. The United Kingdom, supra note 6, para. 149.
66 If the EU would be considered to have effective control over some military operation decided under the CFSP once the EU has accessed to the European Convention, the EU could thus hypothetically be found guilty of having violated the European Convention for acts committed during the operation.
67 Al-Skeini and Others v. The United Kingdom, supra note 6, at para. 137; cf. Application no. 52207/99 Bankovic and Others v Belgium and 16 Other Contracting States, decision of 12 December 2001.
earlier explicitly made the point that it should be possible to divide and tailor the Convention rights depending on the situation.\textsuperscript{68} The \textit{al-Jedda} case concerned a British citizen of Iraqi descent who was detained by British forces in Iraq for more than three years for reasons of security. Before being released he was deprived of his British citizenship. No criminal charges were brought against Mr \textit{al-Jedda}.\textsuperscript{69}

Before the ECtHR Court the British government tried the argument that because the British soldiers during the time Mr \textit{al-Jedda} was detained were operating as part of a multinational force authorized by the UN Security Council the acts of the British were attributable to the UN just as in the \textit{Behrami and Saramati} case.\textsuperscript{70}

The ECtHR, however, takes the same approach as in \textit{al-Skeini} and looked more to the actual situation on the ground than to the terms of the UN Security Council resolution. Indeed, the Court more or less explicitely argues against its own judgment in \textit{Behrami and Saramati}.

For instance, contrary to the \textit{Behrami and Saramati} case, the Court stated that it did not consider that, as a result of the authorization contained in the Security Council resolution, the acts of the soldiers within the multinational force became attributable to the UN or ceased to be attributable to the troop contributing nations.\textsuperscript{71}

Perhaps in order to smooth over the fact that in \textit{al-Jedda} it takes the opposite position in relation to \textit{Behrami and Saramati}, the ECtHR tried to distance itself from the judgment in \textit{Behrami and Saramati} by pointing to a number of circumstances that allegedly distinguished the situation in Kosovo in 1999 from the situation in Iraq after the invasion in 2003.\textsuperscript{72}

This is reminiscent of the efforts of the ECJ in \textit{Kadi} and \textit{Al Barakaat} to distinguish \textit{Kadi and Al Barakaat} from \textit{Behrami and Saramati}.\textsuperscript{73}

Nevertheless, it is obvious that the Court evaluates the issue of the attributability of the acts of the soldiers belonging to the multi-

\begin{itemize}
\item \textsuperscript{69} \textit{Al-Jedda v. The United Kingdom}, supra note 6, paras. 9-11, 14.
\item \textsuperscript{70} \textit{Ibid}, at para. 64.
\item \textsuperscript{71} \textit{Ibid}, at para. 80.
\item \textsuperscript{72} \textit{Ibid}, at paras. 83-85.
\item \textsuperscript{73} Cf. supra note 27.
\end{itemize}
national force in a diametrically different manner in *al-Jedda* in comparison with in *Behrami and Saramati*.

The approach of the ECtHR in *al-Jedda* bears witness to a considerably less deferential attitude towards the UN and its peace and security mission than did the Court’s approach in *Behrami and Saramati*.

The ECtHR also manifests considerably better knowledge of international law in *al-Jedda*, as in *al-Skeini* for that matter.

After having arguably refuted its own argument in *Behrami and Saramati*, the ECtHR in *al-Jedda* directly approached the issue of the relationship between the European Convention and the UN Security Council. The question was whether the obligation of the UK under the European Convention not to intern Mr Al-Jedda arbitrarily was displaced by the obligations of the UK under the SC resolution in question (1546).74

The mechanism behind the displacement would be Article 103 of the UN Charter saying that the obligations under the Charter precede obligations under any other international agreement of the member states. A rather powerful mechanism in the world of relations between international regimes.

In order to find out what effect Article 103 would have in the *al-Jedda* case, the ECtHR started by investigating whether there existed a conflict between the UK’s obligations under the Security Council resolution and the European Convention respectively.75

More precisely, the ECtHR stated, the key question is whether the Security Council resolution placed the UK under an obligation to hold the applicant in internment.76 Here, the ECtHR went on to a discussion not of the relationship between the European Convention and the UN Charter but of the relationship between the different purposes of the UN.77

Interestingly, this time the ECtHR finds that not only international peace and security are mentioned in the UN Charter, but also human rights.78

Therefore, the ECtHR concludes that there must be a presumption that the UN Security Council does not intend to impose any

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74 Security Council resolution 1546 of 8 June 2004.
75 *Al-Jedda v. The United Kingdom*, supra note 6, para. 101.
76 Ibid., at para. 101.
77 Ibid., at para 102.
78 Ibid.
Defer and rule: The relationship between...

obligation on the member states to breach human rights, and that in case of ambiguity in the terms of a Security Council resolution the Court must choose the interpretation which is most in harmony with the European Convention. This is somehow reminiscent of the reasoning of the ECtHR in the earlier Bosphorus case.

In this way the ECtHR, elegantly, manages to shift the balance not only between international peace and security on the one hand and human rights protection on the other – now in favour of human rights - but as a result between the UN Charter and the European Convention in favour of the European Convention.

In the light of the UN’s important role in promoting and encouraging respect for human rights, the ECtHR continues, it is to be expected that clear and explicit language would be used were the Security Council to intend states to take particular measures which would conflict with their obligations under international human rights law.

This might not be a correct expectation on the part of the ECtHR – the Security Council might very well wish states to take measures which violate human rights even though this is not clearly expressed, how could it be? – but the important matter is not whether the expectation of the ECtHR is correct but that this is how the ECtHR chooses to regard the matter in al-Jedda.

In fact, contrary to the conclusion by the ECtHR the contents of the UN Security Council resolution in question points to the intention of the Security Council actually being that the multinational force act in contravention of human rights in case of need.

It is rather unlikely that the Security Council will ever clearly state that it wishes the member states to take action in direct contravention of their human rights obligations. Through its new doctrine relating to the interpretation of UN Security Council resolutions the ECtHR will always manage to let human rights win the fight with international peace and security, should the two come into conflict.

79 Ibid., at para. 102.
80 Supra note 46; cf. also Cedric Ryngaert, op. cit. note 47
81 Al-Jedda v. The United Kingdom, supra note 6, para. 102.
In *al-Jedda* the ECtHR found that, despite the fact that internment for imperative reasons of security is explicitly mentioned not in the resolution itself but in an annexed letter, the language used in the resolution does not indicate unambiguously that the UN Security Council intended to place the member states within the multinational force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the European Convention.83

Between the lines this statement by the ECtHR also expresses a rather strong critique of the acts of the British troops.

All in all the ECtHR finds that in the absence of a binding obligation to use internment, there was no conflict between the UK’s obligations under the UN Charter and the European Convention; the UK could comply with both simultaneously.84 Thus Article 103 of the Charter did not come into play.

The ECtHR seems to retain the view that in principle the UN Charter does precede other international agreements through Article 103, but in practice in *al-Jedda* the Court bypasses Article 103 by means of interpretation.

The way the ECtHR interprets the Security Council resolution in *al-Jedda* can be used in many other instances of potential conflict between the UN Charter and the European Convention. In practice the ECtHR has found a way of reconciling the superiority of the UN Charter with the actual application of the European Convention. The ECtHR defers and rules.

On the level of principle the way the ECtHR views the relationship between the UN Charter and the European Convention remains quite distinct from the way the ECJ views the relationship between the UN Charter and the EU Treaty. In practice, after *al-Jedda*, the ECtHR might enforce the respect for European human rights vis-à-vis the respect for global international peace and secu-

83 *Al-Jedda v. The United Kingdom*, supra note 6, para. 105.
84 *Ibid.*, at para. 109; this approach is to some extent reminiscent of the approach of the Human Rights Committee in *Nabil Sayadi and Patricia Vinck v. Belgium*, supra note 13, para 10.3 where the apparent conflict between the International Covenant on Civil and Political Rights and the UN Charter through resolution 1267 and following of the Security Council was interpreted away, although in an even more radical manner than that pursued by the European Court in *al-Jedda* since the Human Rights Committee could see no conflict at all to evaluate.
Defer and rule: The relationship between ... 

Defer and rule: The relationship between ... 

... just as strongly as the ECJ, which is not more than should be expected from a regional human rights court.

It is quite possible that the ECtHR although it stays deferential to the UN Charter in principle, will enforce the respect for human rights even more emphatically than the ECJ who is not deferential at all to the UN Charter on the level of principle, but might not be as dedicated as the ECtHR to human rights in practice.

The ECtHR does not embrace the reasoning of the ECJ concerning the freedom of manner of transposition of UN Security Council resolutions into domestic regional law, i.e. any reasoning concerning the European Convention and/or the Council of Europe as a kind of independent legal order corresponding to the EU legal order which would decide for itself what requirements the transposition of Security Council resolutions into its legal order should fulfil in order to be acceptable from the point of view of human rights.

Neither and perhaps as a consequence of what has just been said does the ECtHR emphasize its own role as the prime and exclusive interpreter of the legal order set by the European Convention, in a manner similar to the ECJ in relation to the EUT in *Kadi and Al Barakaat*.

Nevertheless, through the more recent case law of the ECtHR the respective positions of the ECtHR and the ECJ towards the UN Charter and the UN Security Council come closer to one another. Although they reach their conclusions by different ways of argumentation they arrive at a similar point in substance giving precedence to human rights concerns before the concerns for international peace and security and the closely related automatic primacy of Security Council resolutions.

The position of the ECtHR in later cases is similar to the position taken by the ECJ in *Kadi and Al Barakaat*.

The position of the ECtHR on the issue of jurisdiction in its turn has come closer to the position in public international law on how to judge issues of jurisdiction and responsibility, manifested inter alia in the Draft Articles on the Responsibility of International Organizations of the ILC.\(^5\)

In the cases under treatment by the ECtHR so far the more conventional international legal position taken by the ECtHR in

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\(^5\) *Cf.* Cedric Ryngaert, *op. cit.* note 47.
later cases, as opposed to the *Behrami and Saramati* case or the *Bankovic* case, has contributed to a stronger protection of human rights. This effect is more incidental and not a direct and intentional effect of the international law on the responsibility of states and international organizations as such. All in all it seems as if the ECtHR’s case law concerning the relationship between the European Convention and the UN Charter is stabilizing and becoming better informed and better thought-out.

The ECtHR is taking a firmer stand for the benefit of human rights which contributes to strengthen the position of the European Convention relative to the UN Charter.

Perhaps this firmer stand on the basis of substantive considerations is even more reliable than the already firm stand taken by the ECJ based primarily on the formal consideration of the EU legal order as an independent legal order and not on the substantive consideration of the protection of human rights taking precedence over – or tempering – considerations relating to the protection of international peace and security.86

5 The new turn settles

In *Nada* the ECtHR continues to defer and rule, or rather to deflect and rule vis-à-vis Security Council resolutions adopted under Chapter VII of the UN Charter.87 At the origin of the case lie the Security Council resolutions 1267 and 1333 whereby the Security Council instituted sanctions against, first, the Taliban and later

86 Although the position of the ECtHR seems to have taken a different direction in the most recent cases one could claim that the European Court in *al-Skeini and al-Jedda* connects back to a way of thinking hinted but not developed in the earlier case of Application no. 6422/02, *SEGI and Others v. 15 States of the European Union*, decision of 23 May 2002. The ECtHR in *SEGI* makes remarks on the equivalence in principle of international legal orders (i.e. not prioritizing the UN legal order as such) and on the possibility of judicial review seemingly indicating a position more grounded in human rights protection than in respect for international peace and security under the UN Charter, that the ECtHR arguably reconnects to in the *al-Jedda* and *al-Skeini* cases. This idea was originally suggested by a student Ms Hanna Eklund whose master’s thesis I supervised. At issue in the *SEGI* case were two common positions adopted by the EU within the framework of the CFSP as a response to UN Security Council resolution 1373 of 28 September 2001.

87 Application no. 10593/08, *Nada v Switzerland*, judgment of 12 September 2012.
against Osama bin Laden and Al-Qaeda and persons and entities maintaining relations with them.\textsuperscript{88}

More precisely the case of \textit{Nada} related to Security Council resolution 1390 which required states to prevent the individuals on the UN list of terrorists or sympathizers from entering into or transiting through their territory.\textsuperscript{89} Mr Nada who found himself on that list – incorrectly as it would turn out – was as a result confined for six years to the Italian enclave of Campione d’Italia surrounded by Swiss territory.

In the \textit{Nada} case, the ECtHR would have to directly confront the relationship between the binding UN Security Council resolutions and the European Convention on Human Rights, or would it?

First, the ECtHR found that the \textit{Nada} case was compatible with the ECHR ratione personae despite the fact that the case originated from a resolution of the UN Security Council, which, in line with the judgment in \textit{Behrami and Saramati} could have led to the measures complained of being considered attributable to the UN and not to Switzerland in this case.\textsuperscript{90}

The ECtHR unconvincingly, but laudably, distinguished the \textit{Nada} case from \textit{Behrami and Saramati} by pointing to the fact that the Security Council resolutions at issue in the \textit{Nada} case required states to act in their own names and to implement the resolutions at national level.\textsuperscript{91} Therefore, the acts in question relate to the national implementation of UN Security Council resolutions and the alleged violations of the Convention were thus attributable to Switzerland.\textsuperscript{92} The unconvincing part of the ECtHR’s argument is not to find the measures at issue in \textit{Nada} attributable to Switzerland, but to maintain that the acts (and omissions) in \textit{Behrami and Saramati} had been correctly attributed to the UN.

When, subsequently, considering the complaint on the merits, relating to Article 8 on the right to private and family life, the

\textsuperscript{88} UN Security Council resolution 1267 of 15 October 1999; and 1333 of 19 December 2000.
\textsuperscript{89} UN Security Council resolution 1390 of 16 January 2002.
\textsuperscript{90} \textit{Nada v Switzerland}, supra note 87, para 120; \textit{Behrami and Saramati}, supra note 1.
\textsuperscript{91} \textit{Ibid.}, supra note 87, para 120.
\textsuperscript{92} \textit{Ibid.}, para. 121; the ECtHR refers to \textit{Bosphorus}, supra note 46, para. 137, and distinguishes itself from \textit{Behrami and Saramati}, supra note 1, para. 151.
ECtHR cited widely its own judgment in *al-Jedda* as well as the judgment of the ECJ in *Kadi and Al Barakaat*.\(^93\)

In contrast to *al-Jedda* the ECtHR in *Nada* found that the UN Security Council in resolution 1390 in clear and explicit language had indeed imposed obligations on states to take measures capable of breaching human rights.\(^94\) Therefore the presumption that the UN Security Council would not intend states to violate human rights stipulated in *al-Jedda* had been rebutted in *Nada*.\(^95\)

However, the ECtHR found, citing the ECJ in *Kadi and Al Barakaat* that the UN Charter does not impose on states a particular model for the implementation of the resolutions adopted by the Security Council under Chapter VII.\(^96\) The ECtHR specifies in *Nada*: “Without prejudice to the binding nature of such resolutions, the Charter in principle leaves to UN member States a free choice among the various possible models for transposition of those resolutions into their domestic legal order.”\(^97\)

A bit unexpectedly the ECtHR drew the further conclusion that Switzerland enjoyed some latitude in implementing the relevant binding resolutions, primarily Security UN Council resolution 1390 in *Nada’s* case.\(^98\)

This is in direct contrast to how the CFI (General Court) viewed the matter in *Kadi and Al Barakaat* - with its sharp distinction between the absolute regime under resolution 1267 (in which line resolution 1390 followed) and the discretionary regime under resolution 1373 - and slightly different from the approach taken by the ECJ.\(^99\)

In the light of the ECHR’s special character as a treaty for the collective enforcement of human rights and fundamental freedoms, the ECtHR found that Switzerland could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court that it had taken – or at-

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\(^93\) *Al-Jedda v United Kingdom*, supra note 6; *Kadi and Al Barakaat*, supra note 1.

\(^94\) *Nada v Switzerland*, supra note 87, para. 172.

\(^95\) *Al-Jedda v United Kingdom*, supra note 6, para. 102; *Nada v Switzerland*, supra note 87, para. 172.

\(^96\) *Nada v Switzerland*, supra note 87, para. 176; *Kadi and Al Barakaat*, supra note 1, para 298.

\(^97\) *Nada v Switzerland*, supra note 87, para. 176.


tempted to take – all possible measures to adapt the sanctions regime to the applicant’s individual situation.\textsuperscript{100}

It remains very doubtful whether there was any room for actually adapting the sanctions regime under resolution 1390 to Mr Nada’s individual situation, but the ECtHR had its reasons for arguing in this way.

That finding namely, in the Court’s own words, dispenses the Court from determining the question of the hierarchy between the obligations of the states under the ECHR, on the one hand, and those arising from the UN Charter, on the other.\textsuperscript{101} The ECtHR deflects and rules.\textsuperscript{102}

The ECtHR adds a bit mystically that Switzerland failed to show that it attempted, as far as possible, to harmonise the obligations – under the ECHR and the UN Security Council resolutions respectively – that it regarded as divergent.\textsuperscript{103} Harmonise in this case would amount to violating the obligations under the Security Council resolutions. By obliging the states to harmonise their seemingly divergent obligations perhaps the ECtHR in veiled terms exhorts the states to actually disobey Security Council resolutions that evidently conflict with the protection of human rights, and sometimes even according to the very terms of the resolutions themselves. Harmonise sounds better than disobeying (if that is what the ECtHR really intends).

The ECtHR cannot, however, bring itself to confronting the issue of the potential hierarchy between the UN Charter and the European Convention directly.

On the subject of any violation of Article 13 of the ECHR on effective remedies, the ECtHR observed that Mr Nada was able to apply to the national authorities to have his name deleted from the list annexed to the “Taliban Ordinance” (adopted in order to implement the relevant UN Security Council resolutions on sanc-

\textsuperscript{100} \textit{Nada v Switzerland}, supra note 87, para. 196.

\textsuperscript{101} \textit{Ibid.}, at para. 197.

\textsuperscript{102} Thus, here the ECtHR does not apply the \textit{Solange} argument as hypothesized by Antonios Tzanakopoulos, “Judicial Dialogue in Multi-level Governance: The Impact of the \textit{Solange} Argument”, in \textit{The Practice of International and National Courts and the (De)Fragmentation of International Law}, Ole Kristian Fauchald and André Nollkaemper (eds.), Oxford and Portland, Oregon: 2012, pp 185-215, at pp 201.

\textsuperscript{103} \textit{Nada v Switzerland}, supra note 87, para. 197.
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tions) and that this could have provided redress for his complaints under the ECtHR.\(^{104}\)

However, the Swiss authorities did not examine on the merits Mr Nada’s complaints concerning the alleged violations of the Convention.\(^{105}\) In particular, the ECtHR notes, the Swiss Federal Court took the view that whilst it could verify whether Switzerland was bound by the Security Council resolutions, it could not lift the sanctions imposed on Mr Nada on the ground that they did not respect human rights.\(^{106}\) The Swiss Federal Court, moreover, the ECtHR says, expressly acknowledged that the delisting procedure at the UN level, even after its improvement could not be regarded as an effective remedy within the meaning of Article 13 of the ECHR.\(^{107}\)

Then the ECtHR goes on to cite extensively the judgment of the ECJ in \textit{Kadi and Al Barakaat} where the ECJ lays down the inexorable dualism prevailing in the relations between the UN and the EU legal orders: “[I]t 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.”\(^{108}\) The ECtHR thus adapted to the manner of reasoning of the ECJ. This adapting and relating to each others’ legal orders on the part of the ECtHR and the ECJ has taken place irrespective of any formal accession by the ECJ to the ECtHR.

The ECtHR is of the opinion that the same reasoning as in \textit{Kadi and Al Barakaat} must be applied to the review by the Swiss authorities of the conformity of the “Taliban Ordinance” with the ECHR.\(^{109}\)

The ECtHR 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.\(^{110}\) By this statement the ECtHR some-

\(^{104}\) \textit{Ibid.}, at para. 207.
\(^{105}\) \textit{Ibid.}
\(^{107}\) \textit{Ibid.}, at para. 211.
\(^{108}\) \textit{Ibid.}, at para. 212; \textit{Kadi and Al Barakaat}, supra note 1, para. 299.
\(^{109}\) \textit{Nada v Switzerland}, supra note 87, para. 212.
\(^{110}\) \textit{Ibid.}
Defer and rule: The relationship between ... how seems to qualify the absolute dualism laid down by the ECJ in Kadi and Al Barakaat. The question could be asked how the ECtHR would have viewed the matter had the UN Security Council explicitly included in the resolutions a prohibition against the introduction of any national mechanism of verification of measures taken pursuant to its resolutions. Perhaps this is what the Security Council will do after the finding of the ECtHR that such a prohibition could matter; something which would go against the entire new trend of increased respect for human rights if necessary at the potential expense of international peace and security under the UN Charter.

The ECtHR found as a consequence that Mr Nada did not have any effective means of obtaining the removal of his name from the list annexed to the “Taliban Ordinance” and therefore no remedy in respect of the violations of the ECHR that he alleged.111

Since Article 13 on effective remedies is only possible to invoke together with an alleged violation of any of the substantive rules of the ECHR the ECtHR first had to find that Switzerland had violated Article 8 before it could consider the alleged violation of Article 13. As we have seen, the ECtHR a bit paradoxically found that Switzerland had violated Article 8 by not making use of the very doubtful possibilities that the ECtHR maintained existed to adopt the implementation of the UN Security Council sanctions regime to the particular circumstances of Mr Nada’s case.

More straightforward would have been by the ECtHR to state that by implementing the UN Security Council resolution – which in fact did not allow the states any discretion at all, Switzerland had violated the ECHR. At no cost did the ECtHR want to make such a bold statement, however, although the cited passage in the Kadi and Al Barakaat judgment would have seemed to cover also such reasoning on the subject of any violation of Article 8 of the ECtHR. Thanks to the principle of dualism invoked first by the ECJ and now also by the ECtHR the states are never obliged to implement Security Council sanctions that they find would violate the rights and freedoms under the ECHR, or inversely, the states always have the discretionary power to adopt the sanctions regimes

111 Ibid., at para. 213.
to the reigning human rights regime; harmonisation is the code word. If this is what the ECtHR is saying it is quite revolutionary.\footnote{On the subject of Article 8 in particular, the ECtHR did not separately examine the complaint by Mr Nada that the addition of his name to the list annexed to the “Taliban Ordinance” also impugned his honour and reputation (\textit{Nada v Switzerland}, supra note 87, para. 199), something which could credibly be alleged by Mr Nada. In \textit{SEGI and Others v. 15 States of the European Union} (supra note 86, in fine) the ECtHR found, a bit surprisingly, that as to the potential damage caused to the applicant associations by their appearing as “groups or entities involved in terrorist acts” in the list annexed to the EU common position as it were, this could be dismissed by the Court as merely “embarrassing” and the Court found in consequence that the link was much too tenuous to justify application of the ECHR. One wonders whether the ECtHR would find the inclusion of Mr Nada in the list annexed to the Swiss “Taliban Ordinance” as merely “embarrassing” not damaging in any serious sense his honour and reputation.}

In \textit{Al Dulimi v Switzerland} which is still pending before the ECtHR, the circumstances are similar to the ones in \textit{Nada}, and \textit{Kadi and Al Barakaat}, except that the freezing of Mr Al-Dulimi’s assets was based on a UN Security Council resolution adopted against Iraq in 2003, and not on the sanctions regime against the Taliban and al-Qaeda.\footnote{Application no. 5809/08, \textit{Al Dulimi v Switzerland}.} In \textit{Al-Dulimi} the applicant invokes Article 6 on the right to a fair trial in addition to Articles 7 (nulla poena sine lege), 8 and 13. In that respect the circumstances in \textit{Al-Dulimi} are even closer to the \textit{Kadi and Al Barakaat} case than the \textit{Nada} case since the \textit{Kadi and Al Barakaat} case to a great extent turned on the right to a fair trial.

Following its judgment in \textit{Nada} it seems inevitable that the ECtHR follows its new line in favour of human rights even faced with binding UN Security Council resolutions and finds that Switzerland has violated the ECHR by neither allowing a fair trial nor effective remedies in the case of \textit{Al-Dulimi}.

Dualism would rule, for the benefit of human rights. But the ECtHR will not deny the superiority in principle of the UN Charter, it will defer – or deflect – and rule.
6 On whose side is the EU General Court?

If a case has been appealed and decided by the ECJ, the reasoning of the General Court can still be of interest if the General Court as in the Kadi and Yusuf and Al Barakaat cases took a radically different stand in comparison with the ECJ.\footnote{Kadi and Yusuf and Al Barakaat, supra note 3.}

If the General Court sticks to its opposite view in relation to the ECJ, the opinion of the former becomes even more interesting. In Kadi (II) it somehow seems as if the General Court cannot bring itself to give up entirely the views it held in Kadi and Yusuf and Al Barakaat on the relationship between the UN Charter and the EU legal order.\footnote{Kadi II, supra note 8.}

In Kadi and Yusuf and Al Barakaat the General Court took a diametrically different position from the one the ECJ would take on the issue of the relationship between the UN Charter and the EU legal order.\footnote{Supra note 3. For a critical analysis of the judgment of the CFI in the Kadi and Yusuf and Al Barakaat cases respectively, see Nikolaos Lavranos, “UN Sanctions and Judicial Review”, in Jan Wouters, André Nollkaemper and Erika de Wet (eds.), The Europeanisation of International Law: The Status of International Law in the EU and its Member States, The Hague; T.M.C. Asser Press, 2008, pp 185-204.}

When there is no room for discretion on the part of the EU there is no room for judicial review on the part of the ECJ of EU legal acts ultimately deriving their origin from UN Security Council resolutions.\footnote{Yassin Abdullah Kadi v Council and Commission, supra note 3, para. 225; Yusuf and Al Barakaat International Foundation v Council and Commission, supra note 3, para. 276.} In such cases the UN legal order precedes the EU legal order.

The EU is bound by the UN Security Council resolutions and, furthermore, threats to international peace and security under the UN Charter are nothing that the EU authorities and courts or for that matter national authorities and courts should really deal with.\footnote{Yassin Abdullah Kadi v Council and Commission, supra note 3, para. 219; Yusuf and Al Barakaat International Foundation v Council and Commission, supra note 3, para. 270.}

The only limit to the power of the UN Security Council is the body of jus cogens.\footnote{Yassin Abdullah Kadi v Council and Commission, supra note 3, para. 226 et seq.; Yusuf and Al Barakaat International Foundation v Council and Commission, supra note 3, para. 277 et seq.}
The way the General Court proceeded with its review of the EU legal acts in the light of jus cogens would seem to illustrate that the General Court is lacking familiarity with the concept of jus cogens as generally understood in international public law as well as with the protection of human rights, at least its devotion to the cause of human rights seemed weak.

The seemingly uncertain devotion of the General Court to human rights in its turn is interesting in the perspective of whether the ECJ, i.e. the highest instance, later on opted for another solution to the Kadi and Al Barakaat cases for reasons of human rights or for reasons of guarding the EU legal order.

Although the General Court fought for none of these in the Kadi and Al Barakaat cases, its judgments would seem to indicate a rather weak support for human rights under all circumstances. The Lisbon Treaty has introduced a stronger element of human rights protection in the EU after the judgments in Kadi and Al Barakaat.120

On the subject of the relationship between the UN legal order and the European regional legal orders, there are strong parallels between the reasoning of the General Court in Kadi and Al Barakaat and the reasoning of the European Court of Human Rights in Behrami and Saramati.

Once the ECtHR changes its attitude to the relationship between the UN legal order and the EU legal order – and/or to the relationship between the issues of international peace and security and human rights, something which seems to be happening – it will be interesting to see whether the new attitude of the ECtHR will affect the stand taken by the General Court or whether the General Court will continue its struggle for the hierarchical relationship between the global and regional legal orders alone.

In Organisation des Mojahedin es du people d’Iran (OMPI) partly the same complaints as in Kadi and Al Barakaat were raised against the lack of fair procedure in the adoption of sanctions against an organization listed as suspected of terrorist activities.121 The CFI referred to the Kadi and Al Barakaat cases and pointed out the cir-

120 See for instance Articles 2 and 6 TEU; and The Charter of Fundamental Rights of the European Union, O. J. 30 March 2010, C 83/389.

121 Organisation des Mojahedin es du people d’Iran (OMPI) v Council and Commission, Case T-228/02, judgment of 12 December 2006, para. 61.
cumstances that in the view of the Court distinguished the OMPI case from the Kadi and Al Barakaat cases.122

The EU legal acts in the form of common positions, regulations and decisions in the OMPI case were adopted following another UN Security Council resolution than in the cases of Kadi and Al Barakaat.123

In the Security Council resolution relating to the OMPI case the Security Council did not specify what persons and entities should be included on the list of suspected terrorists.124 It was for the EU itself, as well as the EC at that time, to draw up the lists of suspected terrorists on the basis of information provided to the Council by the EU member states.125

Nor did the Security Council establish specific legal rules concerning the procedure for freezing funds, or the safeguards or judicial remedies ensuring that the persons or entities affected by such a procedure would have a genuine opportunity to challenge the measures adopted by the states in respect of them.126

This statement also indirectly illustrates the view of the CFI of the relationship between the UN and EU legal orders.

If the Security Council explicitly gives the members the freedom to make decisions on certain issues themselves, and only then, will the CFI feel free to perform a judicial review with respect to the resulting EU legal acts, i.e. the EU obeys the UN if the UN itself does not give the EU any leeway.

The crux of the matter was that the identification of the persons and entities contemplated by the UN Security Council in the resolution in question in OMPI, and the adoption of the ensuing measure of freezing funds, involved the exercise of the Community’s

122 Ibid., at para. 99.
123 UN Security Council resolution 1373 of 28 September 2001 in the case of OMPI; resolution 1267 of 15 October 1999 in the cases of Kadi and Yusuf and Al Barakaat, supra note 3.
124 Organisation des Mosjedéines du peuple d'Iran (OMPI) v Council and Commission, supra note 121, para. 101.
125 One list was drawn up under the common position by the Council acting under the EUT within the framework of the CFSP and another list was drawn up under the regulation, through a decision by the Council acting under the ECT within the framework of the economic policy.; Organisation des Mosjedéines du peuple d'Iran (OMPI) v Council and Commission, supra note 121, para. 7 et seq.
126 Organisation des Mosjedéines du peuple d'Iran (OMPI) v Council and Commission, supra note 121, para. 101.
own powers entailing a discretionary appreciation by the Community.\textsuperscript{127}

Again, it can be noted that the ECJ for its part took the stand that the EU institutions always have the right to choose the means of implementation of UN Security Council resolutions.

In OMPI, the CFI accepted the claim by the Council that the content of the restrictive measures benefitted from the principle of primacy of UN law as contemplated in Articles 25 and 103 of the UN Charter.\textsuperscript{128} The CFI, however, considered that contrary to the acts at issue in the \textit{Kadi and Al Barakaat} cases, the acts in OMPI which specifically applied those restrictive measures to a given person or entity did not come within the exercise of circumscribed powers and accordingly did not benefit from the primacy effect in question.\textsuperscript{129}

In the context of the SC resolution in question in the OMPI case, it was for the members of the UN through the EU in this case to identify specifically the persons, groups and entities whose funds are to be frozen, in accordance with the rules in their own legal order.\textsuperscript{130}

The ECJ for its part in \textit{Kadi and Al Barakaat} did not contest the fact that the UN Security Council sanctions committee designated what individuals and entities were to the be the subject of sanctions, but the ECJ contested that the EU was obliged to carry the sanctions into effect within the EU legal order without being able to choose the methods of implementation itself.

The CFI in \textit{OMPI} separates the EU legal order from the UN legal order and from the national legal orders of the member states.\textsuperscript{131} All the legal orders are considered as closed or self-sufficient systems by the General Court so that it cannot review decisions either within the UN legal order or within the domestic legal orders of the member states.

It is within the exclusive power of the competent national courts or, writes the General Court, the European Court of Human Rights to assess whether the domestic proceedings were conducted

\textsuperscript{127} Ibid., at para. 107.
\textsuperscript{128} Ibid., at para. 103.
\textsuperscript{129} Ibid.
\textsuperscript{130} Ibid., at para. 102.
\textsuperscript{131} Cf. the cases of \textit{Van Gend & Loos} and \textit{Costa v. ENEL}, supra note 19.
correctly or whether the fundamental rights of the party concerned were respected by the national authorities.\textsuperscript{132}

After the inclusion of the EU Charter on Fundamental Rights in the EU Treaty, however, the EU Court can no longer avoid dealing with decisions taken by national authorities on the basis of EU legal acts, as was the case in OMPI.

After the accession of the EU to the European Convention of Human Rights, furthermore, legal acts of whatever kind taken by the Council under the CFSP will no longer be outside the reach of the judiciary due to the mere fact that they were adopted under the CFSP.\textsuperscript{133} The ECtHR will have general jurisdiction covering the entire field of human rights and not limited to any particular policy areas.

After Kadi and Yusuf and Al Barakaat in 2005 and OMPI in 2006 the General Court continued its two different lines of reasoning with respect to the relationship between the EU legal order and the UN legal order depending on whether the EU legal acts were ultimately based on UN Security Council resolution 1267 or 1373.\textsuperscript{134} That is until the ECJ delivered its radical judgment in Kadi and Al Barakaat and applied the same reasoning irrespective of whether

\begin{itemize}
\item \textsuperscript{132} Organisation des Modjahedines du peuple d’Iran (OMPI) v Council and Commission, supra note 121, para. 121; cf. also Fahas v Council, Case T-49/07, 7 December 2010, para. 72
\item \textsuperscript{133} Cf. supra note 10.
\end{itemize}
the ultimate source of the EU legal acts was resolution 1267 or 1373.

In 2009 the sanctions issue against Mr Kadi reached the General Court/CFI again, now on the basis of a revised regulation in the light of the *Kadi and Al Barakaat* judgment of the ECJ.\(^{135}\)

Interestingly, in the *Kadi II* judgment, between the lines the General Court seems to maintain its reasoning from the *Kadi* and *Yusuf and Al Barakaat* cases although this reasoning had been no less than crushed by the ECJ. The General Court once more enters into a detailed analysis of the relationship between the UN legal order and the EU legal order although this relationship presumably had been exhaustively analyzed first by the General Court and then by the ECJ in *Kadi and Al Barakaat*.\(^ {136}\) The General Court heavily criticizes the ECJ one could say, but follows the ECJ’s line in the end. The General Court defers, but does not defer-and-rule but rather defers-and-protests.

The appellate principle itself, the General Court states, and the hierarchical judicial structure which is its corollary generally advise against the General Court revisiting points of law which have been decided by the ECJ.\(^ {137}\) If not, the General Court would have been very willing it seems to reopen the points of law decided by the ECJ in *Kadi and Al Barakaat*. The General Court refers to the standpoints taken by different national courts on similar matters and concludes that some national courts have followed the General Court’s approach whereas others have followed the ECJ’s.\(^ {138}\)

The General Court refers among other cases to the *al-Jedda* case, in which as we saw above the ECtHR subsequently found that the UK had violated the European Convention and thus for all practical purposes reversed the judgment of the House of Lords.\(^ {139}\)

With a rather obvious nod of approval of the arguments put forward by the institutions and intervening states in the *Kadi II* case, the General Court says that in principle it falls not to it but to the ECJ to reverse precedent in such a way as to return to the same position as that of the General Court in *Kadi* and *Yusuf and Al Ba-

135 *Kadi II*, supra note 8.
Defer and rule: The relationship between...

*Defer and rule: The relationship between...*

*rakaat*, given the serious difficulties referred to by the institutions and intervening governments,140

Referring to the relationship between the UN and the EU legal orders and taking into account the “full review” that it must undertake of all EU legal acts even if they are designed to give effect to UN Security Council resolutions, the General Court also finds that the review carried out by the EU court can be regarded as effective only if it concerns, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying them.141 This has a bearing on the relationship between the UN and the EU legal orders to the extent that the UN legal order then no longer lies beyond review by the EU Court, although indirectly, and thus would no longer be superior to the EU legal order.

As to the intensity of the actual judicial review, the General Court reaches the conclusion that the standards it elaborated in *OMPI* in this respect are to be applied in the *Kadi II* case so that indeed the two different tracks of reasoning that the General Court had formerly upheld depending on whether the EU legal acts originate from resolution 1373 (or similar resolutions) or from resolution 1267 (or similar resolutions) come together in one and the same track in *Kadi II*, based on the criteria elaborated in the *OMPI* case.142

7 Regional challenge to the UN Security Council?

Much speaks in favour of a regional effort, conscious or subconscious, to influence the way the UN Security Council and its Sanctions Committee handle the targeted sanctions against suspected terrorists. This motivation might lie behind the heat with which the ECJ and increasingly the ECtHR pursues its line that concerns for international peace and security must not result, and need not result, in the negation of the respect for human rights. The intent to ultimately influence the UN Security Council may also lie behind the seemingly reluctant but still scrupulous judicial review of the...

140 *Kadi II*, *supra* note 8, para. 123.
141 Ibid., at para. 129.
142 Ibid. at paras. 186-187 which describe the two different regimes.
EU legal acts implementing UN Security Council targeted sanctions elaborated by the General Court in *Kadi II*.

It is rather obvious that the concerned EU legal acts will never pass the test laid out by the General Court in *Kadi II* so either the UN Security Council introduces satisfactory legal guarantees within the framework of its own procedure for instituting and reviewing sanctions or the EU will never be able to put the sanctions into effect within its legal order. That could be the message of the General Court to the UN Security Council.

In order to strengthen its argument on the high intensity of the judicial review necessary in order for the review to constitute a “full review” in the words of the ECJ, the General Court refers to case law by the ECtHR laying down that national authorities (read in our case the UN Security Council) are not free from any review by the national courts (read the EU Court in our case) simply because they state that the case concerns national security and terrorism.143 The General Court further refers to the judgment in *A and Others v the UK* by the ECtHR on the subject of the demands of procedural fairness, which are considerable.144

Clearly, the General Court manages to defer to the ECJ, the ECtHR and the UN Security Council while at the same time, arguably, making clear that the human rights requirements are considerable and not negotiable and will rule, to the detriment of the international sanctions regime in its current form and ultimately to the superior position of the UN Security Council. After *Nada*, the same message seems to be sent from the initially more respectful ECtHR to the Security Council.

8 Conclusion

Quite some exciting developments have taken place in European regional judicial practice as a response to the edicts of the UN Security Council in the field of international peace and security. The positions of the ECJ and the ECtHR respectively towards the reso-


144 *Kadi II*, supra note 8, para. 176; Application no. 3455/05, *A and Others v UK*, judgment of 19 February 2009, para. 203 et seq.
Defer and rule: The relationship between...

Lolutions of the UN Security Council under Chapter VII of the Charter have gradually come closer to one another. The harmonization of the positions of the ECJ and the ECtHR has taken place independently of the accession of the EU to the ECHR provided for in the EUT, which is still pending. Perhaps it is against the prospect of the inescapable accession that the regional courts have harmonized their positions; it would seem inevitable that the positions would have to be harmonized after the accession anyway.

Perhaps the harmonization takes place entirely voluntarily. Against the looming accession as a driving force behind the harmonization of positions speaks the fact that it is the ECtHR which seems to have adapted to the position of the ECJ rather than the other way round, on the issue of human rights versus international peace and security. The accession by the ECJ to the ECHR would otherwise seem to point in the direction of the ECJ adapting to the position of the ECtHR. Now both courts take a firm stand in favour of human rights which is encouraging.

They both defer, however, to the UN Charter and general international law in principle, but still they rule.

Through practice, moreover, the two regional European courts are reversing the relationship between the UN Charter and the human rights provisions in the EUT and the ECHR respectively. They are placing human rights in a position superior to international peace and security under the UN Charter. As hinted in the preamble of the ECHR one might guess that the respect for human rights is indeed a prerequisite of peace. The superiority of human rights over peace might thus be entirely logical and, contrary to what the UN Security Council itself seems to think, advantageous to peace.

The EU General Court, which seems to have been fighting a battle of its own in favour of the superiority of UN Security Council resolutions over any human rights considerations emanating from the regional legal orders unless the Security Council itself allows the regional orders a little freedom, now has to give up any such efforts faced with the joint resistance of the ECJ and the ECtHR to human rights violating UN Security Council resolutions. The General Court will have to defer and it will not be able to find support either with the ECtHR which now has chosen to side with the ECJ or with national courts which can hardly continue to rule
in favour of the Security Council in the light of the clear position to the contrary taken by the ECtHR.

The UN Security Council as a result may see its superiority eroding. This is an unhappy development but entirely self-inflicted. In the end the Security Council might neither defer, nor rule.