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Security Council Resolutions before European Courts: The Elusive Virtue of Non Direct Effect

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Abstract

UN Security Council resolutions lack direct effect, as they are not intended to oblige States in terms of means but just of results. This statement by the ECJ in the *Kadi* judgment has recently been used by the European Court of Human Rights in order to avoid the crucial decision over the *hierarchy* between obligations arising from the ECHR and the UN Charter. This article describes the “elusive virtue” of such a rationale as a formalistic but useful interpretive tool which avoids that national and regional courts commit themselves openly to a “*Solange* style” dialogue with UN institutions. In parallel, an analysis of UN Monitoring Team reports will show how UN institutions also prefer a certain degree of fluidity in the relationship between Security Council resolutions and national and regional legal orders. Giving the absence of a judicial interlocutor in the UN “smart sanctions” system and the difficulty to make the former compatible with European fundamental principles, the second-best solution of the supposedly flexible nature of UN resolutions is still to be preferred.

Key-words

European Court of Human Rights, Court of Justice of the European Union, UN Resolutions on terrorism, Fundamental Rights, *Solange* doctrine.



1. Introduction

After the decisions by EU Courts on the *Kadi* saga, a new piece to the picture of conflicts between UN Security Council “smart sanctions” resolutions and human rights was recently added by the European Court of Human Rights (ECtHR) in the *Nada* case.^I This decision relies upon a rationale already advanced by the ECJ in *Kadi*: the absence of direct effect of Security Council resolutions, whose nature is supposed to leave States enough discretion in the implementation process in order to make their requirements compatible with obligations deriving from human rights standards.^{II} While the *Kadi* judgment’s main focus seems to be on the self-contained, “constitutional” nature of the EU’s legal order, its definition of Security Council resolutions as lacking direct effect offered a – maybe involuntary – support to the ECtHR, suggesting to Strasbourg a useful way to gradually abandon the excessive deference to UN resolutions shown in its precedent *Bebrami and Saramati*.^{III} The ECHR being a different international treaty than EU treaties, the ECtHR had to follow an approach different from the ECJ when facing the same problem of the lawfulness of internal (national) measures implementing resolutions of the Security Council (hereafter: SC). The most evident difference – as questioned by the French government in *Nada* – is that the ECHR system is not as “constitutional” as the EU’s.^{IV} But it is not from this perspective that the issue will be tackled by the ECtHR. Indeed, Strasbourg will follow the pathway already traced by the ECJ: notwithstanding the clear hierarchy of international obligations established by Article 103 of the UN Charter, SC resolutions impose upon States merely an obligation of results, but not one of means.

This article will explore the beneficial effect of such an interpretive tool for the relationship between UN and European legal orders (the EU and the ECHR). The supposed flexibility of Security Council resolutions represents an “exit strategy” which helps courts avoiding the difficult task of settling once and for all a clear hierarchy between the UN Charter and other international instruments or “constitutional” principles (as the ECJ characterized human rights protection under EU treaties).

A similar approach is sometimes described as “elusive”, or formalistic, since it prevents a clearer doctrinal construction of the relationship between UN and other legal orders, on



the one hand, and ignores the importance of starting a constructive discourse with UN institutions about the role of human rights within the UN Charter, on the other hand. The article will try to give a persuasive explication why such a second-best solution is preferable to committing to a complex and long-term “constitutional discourse” with UN institutions. In particular, recalling the example of the WTO, the article will highlight the impossibility of openly addressing the Security Council in the way described by the *Solange* doctrine, which famously regulates the relationship between the German Constitutional Court (and other constitutional courts) and the ECJ. Lacking a real judicial interlocutor in the UN “smart sanctions” system, courts rightly keep away from opening up their legal orders to SC resolutions and from anticipating a future deference to UN bodies.

In the last part of the article, an analysis of the reports of the UN Analytical Support and Sanctions Monitoring Team will support the idea that a hidden and imperfect dialogue between UN institutions and national and regional courts is a better solution than an open and mutually confident dialogue. Giving the ambiguous nature of UN smart sanctions together with the clear intention of the SC not to create a real judicial body empowered to review listing decisions, European Courts’ choice to mark a clear distinction between their “systems of values” and that of the Security Council smart sanctions machinery deserves further support.

2. Conceptualizing the relationship between EU and other legal systems

Relationships between Security Council resolutions and other international treaties have undergone three different conceptualizations in EU and ECHR case law: the first belongs to what can approximately be defined as a monist conception, according to which SC resolutions are at the top of a hierarchy of norms, as provided by Article 103 of the UN Charter, so that their provisions prevail over every other treaty, irrespective of their human rights content.^V Arguing differently would allow a regional court – for example the European Court of Human Rights – «to interfere with the fulfillment of the UN’s key mission [to secure international peace and security]».^{VI} The practical effect of this conception is that the responsibility of a state implementing a SC resolution cannot arise from a human rights treaty such as the ECHR, signed by the state itself.



The second approach is similar to this, but it includes an important exception: measures implementing SC resolutions are not immune from judicial review when the resolution at hand is suspected to conflict with *jus cogens*, which admittedly constrains also UN institutions.^{VII} This approach seems audacious as it questions the validity of the UN resolution itself, thus eroding the authority of the SC. Yet, given the difficulty of ascertaining what norms in the international legal order have this pedigree and the impossibility to equate conventional human rights norms to *jus cogens*, the result of this second approach risks to be as deferential as the former regarding the power of the SC, as was the case also in the *Kadi* judgment of the Court of first instance.^{VIII}

The third is the so called “pluralistic approach”, according to which the EU legal order has an autonomous nature, distinct from the international legal order, so that EU measures implementing SC resolutions must be subjected to the judicial review of the Court of Justice in order to ascertain their compatibility with EU ‘constitutional principles’.^{IX} This judicial review is not intended to ascertain the lawfulness of the SC resolution itself, but only that of the measure implementing the resolution, so that the primacy of SC resolutions in international law is left untouched.^X Even with this deferential recognition of the «primacy of [SC] resolution in international law»^{XI}, the result of this third approach seems more audacious in terms of human rights protection and, more generally, in terms of the protection of the “constitutional status” and autonomy of the EU legal order: its legitimacy depends on its own values, not on the international legal order. This contrasts strongly with the deferential approach adopted by the ECtHR in the aforementioned *Bebrami* and *Saramati* case, where the ECHR’s legitimacy was perceived to be depending on the UN legal order and/or the international legal order in general.^{XII} The refusal of the ECJ to scrutinize the lawfulness of SC resolutions under *jus cogens* was commonly criticized as a symbolic deference to the UN legal order. As a matter of fact the outcome of the judgment in question amounted to a full review of the EC regulation implementing the SC resolution at hand, as if it were an ordinary act of secondary legislation, thus giving no weight to its UN linkage.^{XIII} Yet the ECJ practiced authentic deference when it maintained, for a maximum period of three months, the effects of the annulled regulation, arguing that an immediate annulment «would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by the regulation and which the Community is required to implement». What is more, for the ECJ it could not «(...) be



excluded that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified». ^{XIV} All that implies a strong presumption in favor of the listing decision by the Committee, whose merit cannot automatically be overpowered by the unfairness of its procedure. Pending the judgment by the ECJ on the annulment of the second decision by the General Court on the further listing of Mr Kadi, ^{XV} the SC removed Mr Kadi from the UN list on October 2012 and, a few days later, the EU also struck Mr Kadi from its list. “This means that as a matter of fact, the EU has always been in full compliance with the resolutions of the UN Security Council (...) as far as Mr Kadi was concerned”. ^{XVI}

3. Refusing SC resolutions direct effect in order to avoid conflicts

Beyond these three theoretical approaches to the relationship between SC resolutions and national or regional legal systems, there is another interpretive tool which has gained success among European Courts: the *absence of direct effect* of SC resolutions. According to the ECJ in *Kadi*,

the Charter of the United Nations *does not impose the choice of a particular model* for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

(...) It is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of [the contested regulation] in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations. ^{XVII}



If the three approaches of the European Courts analyzed above are normative conflict-solving tools, this one represents a tool to avoid conflicts by preventing them. In fact, if SC resolutions are not directly applicable to national or EU legal orders, since they merely oblige Member States in terms of results but not of means, it derives that their lawfulness is not at stake.

For some commentators, this passage in the ECJ judgement constitutes a ‘sympathetic interpretation of the Security Council resolution in question’ which amounts to ‘somewhat closer to a charitable consideration of international law’.^{xviii} For others, the passage is worthy of consideration and the Court should have better developed it in order to adopt ‘an internationally-engaged approach which drew directly on principles of international law instead of emphasizing the particularism of Europe’s fundamental rights’; ‘the ECJ could have concluded that the Resolutions could not be implemented as they stood, without the interposition by the EU, within its freedom of transposition, of a layer of due process such as to protect the interests of affected individuals’.^{xix} This way to understand the interpretive tool of the absence of direct effect is not elusive: the “incompleteness” of SC resolutions implies that Member States (or the EU) have to implement them with regard to the whole framework of norms and values enshrined in the UN Charter, thus respecting the human rights commitments made in the Charter itself.^{xx} The consequence would be for a national or regional court to commit to a constructive dialogue with UN institutions about international customary human rights law and the proper way to develop a “human rights”-oriented interpretation of SC powers. That seems to be the approach followed by the ECtHR in *Al Jedda*, where Strasbourg recalled Articles 1 and 24(2) of the UN Charter in order to affirm that ‘in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations’.^{xxi}

But there is also another way to understand and use the “no direct effect” tool – a minimalist way that basically aims at avoiding normative conflicts under the veil of the formalistic recognition that a source of law needs further implementation while leaving enough discretion to the implementing authority. Nothing more and nothing less. As we



have already sketched in the Introduction, that was approximately how the ECtHR in the *Nada* case understood the idea that the UN Charter does not prescribe the “direct applicability” of SC resolutions. Following the pathway already traced by the ECJ in *Kadi*, Strasbourg will eschew the hierarchy issue posed by Article 103 of the UN Charter by upholding that SC resolutions impose upon States simply an obligation of results, not of means.

In a first case, it was relatively easy for the ECtHR to ascertain that the SC resolution in question did not illustrate *how* the multinational force should have contributed to maintaining security and stability in Iraq; in particular, the internment of suspected criminals or terrorists without charge and without judicial guarantees was not explicitly referred to in the resolution.^{xxii}

In a second case before Strasbourg things were quite different, as the SC resolution at stake clearly mandated Member States to prevent listed people from entering and transiting their territories.^{xxiii} Seemingly, the ban had to be applied irrespective of obligations deriving from human rights treaties to which Member States are parties. Resolution 1390 quite clearly admitted only a derogation permitting that listed people could enter or transit for the fulfillment of a judicial process, leaving the SC itself with the power to determine on a case-by-case basis other justified derogations.^{xxiv} Notwithstanding those clear indications, the ECtHR preferred to stretch its interpretation of the resolution, ignoring the “*voluntas auctoris*” and considering its wording as sufficiently flexible to leave Member States with enough room for maneuvering in order to harmonize the obligations arising from the ECHR with those arising from the UN Charter.^{xxv} In doing so, the ECtHR explicitly referred to the aforementioned assertion of the ECJ in *Kadi* on the absence of a direct effect of SC resolutions.^{xxvi} As a result, the responsibility for the infringement of the applicant’s rights shifted from the SC to the respondent State.^{xxvii}

All this seems to be a strategic solution which spared Strasbourg the crucial decision over the *hierarchy* between obligations arising from the ECHR, on the one hand, and obligations arising from the UN Charter, on the other, as the Court rested its case on the insufficient effort by the State to harmonize, as far as possible, the obligations that the respondent Government regarded as divergent.^{xxviii} If compared with the previous cases of *Bebrami and Saramati* and *Al Jedda*, we must notice a significant shift in the Court’s reasoning in *Nada*. First of all, in contrast to *Bebrami and Saramati*, the ECtHR seemed to



lose its previous certainty about the hierarchy between obligations arising from Chapter VII of the UN Charter and those arising from other international treaties, since Strasbourg described the issue as a *question to be determined*, and not determined once for all.^{xxxix} Secondly, Strasbourg did not affirm anymore that the SC resolution at stake had to be interpreted consistently with the UN Charter itself and its commitment to human rights, as it made in the aforementioned passage in *Al Jeddah*. Aware of the clear intention of the authors of the resolution at stake,^{xxx} the Court confined itself to requiring that the respondent State make an interpretation of the SC resolution consistent with the ECHR only. Resembling the affirmation of the ECJ on the constitutional and autonomous character of the EU legal order, the ECtHR hinted at ‘the Convention’s special character as a treaty for the collective enforcement of human rights and fundamental freedoms’ in order to rebut the respondent State’s argument about the binding nature of SC resolutions and to place upon it the burden of a consistent interpretation of SC resolutions.^{xxxi}

4. Constitutional implications of the elusive virtue of non-direct effect

Within a wider scope, we can say that the strategic tool of the non-direct effect of SC resolutions spared Strasbourg the “tragic” choice between collective security and individual freedom, between the effectiveness of the fight against terrorism and the judicial protection of fundamental rights. Instead of balancing substantial values, the Court preferred a formalistic approach based on the supposedly flexible nature of international obligation. As sustained by eminent scholars, the direct effect (and similar conceptual tools such as the “self-executive” nature of international treaties) is an “elusive virtue”:^{xxxii} its attractive aspect consists in its ability to avoid normative conflicts between legal systems (which are also systems of values).^{xxxiii}

The usual criticism of the elusive virtue of direct effect points to the formalistic risk of covering a substantive choice endorsed by courts in favor of one interest (an asset of rights or of public policy) against another. Economic freedoms, just to make reference to a topical example, are equipped with the direct-applicability apparatus afforded by EU law, and that leads to the dismantling of many welfare and social legislations of Member States.^{xxxiv} But sometimes things are more complicated than this, as our case about SC resolutions against terrorism shows.



Sometimes the formalistic tool of (non) direct applicability or of (non) direct effect is part of a complex argumentative strategy put forth by one normative level towards another (superior or external) level in a way which not simply intends to jeopardize the effectiveness of this second normative level. Looking at the decisions of the European Courts over SC resolutions on terrorism and the formalistic approach they adopted in order to neutralize the legal force of such resolutions, we can pose the following question. By refusing judicial immunity to SC resolutions' implementing measures, are European Courts only protecting their own regional systems (EU law or the ECHR) from the oppressive supremacy of SC decisions, or are they (also) protecting the coherence and legitimacy of the UN legal order itself? 'Judicial review by domestic courts, far from imperiling the efficiency and authority of the UN, might bestow an enhanced transparency and legitimacy on the UN system'.^{xxxv} As we will see further down, such a doctrinal interpretation of the *Kadi* judgment by the ECJ has not been refused by SC institutions themselves. In its Ninth Report, the UN Analytical Support and Sanctions Monitoring Team asserted that 'the involvement of national and regional courts can help the Committee to strengthen the regime as an effective response to the threat from Al-Qaida and the Taliban, without undermining the authority of the Council'.^{xxxvi}

In the *Kadi* case, the ECJ faced a puzzling situation: endorsing the "monistic" approach of the Court of First Instance (CFI, now the "General Court") would have implied a clear commitment by the EU to international law, marking a strong difference between the EU and the United States.^{xxxvii} As stated in its case law, international obligations entered into by (the former) European Community are directly binding for community institutions, and their force is superior to secondary law.^{xxxviii} But the paradox is that, in the case of SC anti-terrorism resolutions, such a choice would also have implied the endorsement of the United States policy on international security and counter-terrorism: a policy charged with political ideology and clearly aimed at making executive powers prevail over the two other branches, the legislative and the judiciary, and considering the legal protection of fundamental rights as an obstacle to the effective fight against international terrorism.

Something similar happened in the well-known saga on the relation between WTO obligations and the EU legal order. Given that some of the most important WTO litigation cases of the EU involve exports to the United States in crucial fields such agriculture or food, granting WTO obligations direct effect would have implied a twofold, puzzling



consequence. The ECJ would have showed a commitment to international and transnational law and their institutions (in contrast to the approach of the United States)^{XXXIX}, but at the same time the ECJ would have endorsed economic and industrial choices sponsored by the United States (for example Genetically Modified Organisms) with great impact upon the crucial fields of agriculture, food and health.^{XI} Thus, the refusal of the ECJ to grant direct effect to WTO norms and even to quasi judicial decisions of the WTO Dispute Settlement Body represents a strategy aimed at lowering the level of internal *effectiveness* of WTO norms in order to avoid a test on the internal *legitimacy* of those external norms.^{XLI} That is to say that the ECJ, in doing so, avoided the difficult task of reviewing the legitimacy of WTO norms according to the ‘constitutional’ principles and values of the EU.^{XLII}

5. A *Solange* doctrine also for the UN?

Another puzzling aspect: the ECJ refused to apply to the UN Charter the same philosophy it had applied to EC and EU treaties. UN obligations would result to be highly ineffective if each Member State judiciary applied – even indirectly – its own scrutiny.^{XLIII} But granting jurisdictional immunity to measures implementing SC resolutions would also have meant neglecting any judicial protection of fundamental rights at EU level, thus triggering a possible reaction by national constitutional courts, as was the case with the well-known *Solange I* decision by the German Federal Constitutional Court.^{XLIV} The relative “closure” of the EU to the international legal order, or at least, to the UN legal system, is then one of the conditions posed by Member States for the acceptance of EU law primacy (implicitly or explicitly).^{XLV}

Yet the ECJ was reproached exactly the fact that it did not try to start a dialogue with the UN institutions following the *Solange* doctrine of the Bundesverfassungsgericht.^{XLVI} “As long as” (*solange*, in German) the UN does not endow fundamental rights with a protection comparable to that of the EU, the ECJ will review the lawfulness of the decisions of UN bodies. That amounts not only to a warning by the ECJ but also makes sure that a future reform of the SC sanctions system could lead the Court to exercise self-restraint. Why not anticipate such a ‘comity’ scenario?



The formalistic tool of the non-direct effect prevents European Courts to analyze more deeply the intrinsic legitimacy of the SC targeted sanctions system according to basic values common not only to national and regional systems but also to the UN Charter and international law. That elusive strategy also avoids formulating clear and long-term conditions for UN institutions in order to accord SC resolutions a high(er) level of effectiveness in national and regional legal orders.^{XLVII} That was precisely what the Bundesverfassungsgericht did with its *Solange* doctrine. But it cannot be omitted that the *Solange* doctrine was conceived as an instrument to connect two different *judicial* systems at national and Community level, respectively.^{XLVIII} But in the case of the UN smart sanctions system, judicial interlocutors of national and regional courts are still lacking.^{XLIX}

The issue is not new in the transnational institutions landscape: looking once again at the WTO, it is worth noting that the Appellate body of this Organization tried to sketch a ‘fundamental rights’ doctrine in order to stress the fact that fundamental rights protection is one of the values internal to the system, which is not blindly and uniquely devoted to international markets and world-wide competition. Resembling the initial evolution of the ECJ on fundamental rights, the WTO Panel first affirmed the irrelevance of international law norms on environmental protection evoked by the respondent State as justification for its protectionist measures conflicting with WTO rules. Such a line of reasoning was later reversed on appeal by the WTO Appellate Body, which corrected the one-dimensional vision of the Panel by recognizing that even in the WTO legal order international norms on environmental protection must be taken into account.^L The result was that the relevant WTO norms must be interpreted consistently with international law principles on environmental protection. All that did not lead to reverse the practical result of the litigation (the condemnation of United States protectionism) – on the contrary, it only strengthened the justification of such a condemnation as well as the legitimization of the WTO as a whole.^{LI}

Notwithstanding those similarities between the WTO and the EU, advocating a *Solange* doctrine for WTO norms in order to support their direct effect in the EU legal order seems quite difficult.^{LII} It must be mentioned that already at the beginning of the dialogue between the German Constitutional Court (or the Italian one)^{LIII} and the ECJ the Community order was endowed with crucial prerequisites for the ‘constitutional absorption’^{LIV} of fundamental rights in the EC. First of all, the Community judicial system



recognized individual and group standings to challenge Community measures directly before the ECJ. Secondly, individuals could always obtain, through preliminary ruling, a review of Community legislation by the ECJ. Considering the WTO, even if its litigation procedure has evolved from diplomacy to rule of law, Panel and Appellate Body are quasi-judicial bodies but not real courts yet.^{LIV} What is more, private parties have no standing before the WTO's dispute settlement body.^{LVI}

Can the UN system avoid the same kind of skepticism?

As well known, the SC smart sanctions system does not endow listed persons and entities with any judicial remedy against listing decisions. Even if, at the time of the *Kadi* judgment of the ECJ, the system had already evolved in order to increase the fairness and transparency of listing and delisting procedures, the ECJ considered them as lacking any right to effective judicial protection. In particular, the UN focal point charged with the task of receiving individual claims of delisting did not grant a guarantee comparable to the right to judicial protection.^{LVII} After the *Kadi* judgment and surely also as a consequence of it, the SC enacted a reform creating the Ombudsperson charged with the task of receiving individual requests for delisting and of cooperating with the Sanctions Committee in the delisting procedure. Notwithstanding the formal recognition of the independence and impartiality of the Ombudsperson, even this reform did not change the criticism raised by EU Courts: following the *Kadi* litigation, the General Court held that the new office of the Ombudsperson 'cannot be equated with the provision of an effective judicial procedure'.^{LVIII} The judgment of the General Court has been appealed before the ECJ and the process is still pending. In the meantime, the SC enacted another resolution in order to improve the fairness of the delisting procedure, without however transforming it in a truly judicial remedy.^{LIX}

It is not easy to predict the outcome of the process pending before the ECJ but the *Kadi* saga, together with the Strasbourg case law, can be read as follows. The recourse to the 'elusive virtue' of the non-direct effect of SC resolutions (in terms of their incompleteness which leaves states room for maneuvering) often corresponds to a sort of *fictio juris*, given that direct effect and its equivalents are not objective and measurable features of some sources of law or some provisions, but the product of judicial interpretation. Sometimes the legal fiction borders on hypocrisy, as was probably the case for the ECJ in *Kadi* and, almost surely, for the ECtHR in *Nada*. But that does not



necessarily imply a criticism of the interpretive tool at hand. Appealing to the programmatic nature of some legal provisions or of an entire category of sources of law (such as WTO agreements or SC resolutions) can be seen as an exit strategy when other interpretive tools enabling the judicial de-construction of normative conflicts are lacking. In the SC resolutions on smart sanctions those tools are missing because the language used by European Courts (and courts in general) is not a language common to UN institutions, given that the UN legal order – at least in our case – is interpreted by institutions acting through means of *executive* and not *discursive* methods, as would be the case if a UN judicial organ could issue complaints about the lawfulness of listing procedures.^{LX} Given the persistent lack of a UN judicial interlocutor for national and regional courts, the *Solange* doctrine cannot be transplanted to the SC targeted sanctions system. But this does not mean that some form of hidden dialogue among European (and national) Courts and UN institutions is not taking place, as the following analysis of the reports of the UN Analytical Support and Sanctions Monitoring Team will show.

6. Inverting the rationale of *Solange*: the thesis of the UN Monitoring Team

In its Ninth Report, adopted after the ECJ's *Kadi* judgment, the UN Monitoring Team took note of the fact that European and American courts had started reviewing national implementation procedures and stated that this would offer an independent review of listing decisions by the Committee, thus pre-empting 'any initiative that the Security Council might have taken... to create its own independent review mechanism'.^{LXI} The UN Monitoring Team explicitly linked this (paradoxical) statement to the quest for an independent body charged with the power to review the listings advanced by critics. The paradox lies in the fact that the UN Monitoring Team inverted the rationale of the *Solange* doctrine, interpreting the judicial intervention of national and regional courts *not* as an invitation to achieve equivalent or comparable judicial protection at the supranational (UN) level, but as a reason *not to start* any reform aimed at introducing such a judicial remedy. In its Tenth Report, the UN Monitoring Team explicitly reaffirmed the same position,^{LXII} adding the following points: introducing a 'quasi-judicial review panel' would not be a



solution, as it would not stop EU Courts from making their autonomous review of listing decisions. This arises from the fact that the rationale of *Kadi* ‘suggests that the [EU] Court is obligated to conduct its review as a matter of European law, not by the absence of another appropriate and adequate forum’.^{LXIII} This may be a typical example of when a dialogue falls short, since this interpretation of *Kadi* is questionable, but what counts here is the fact that the UN Monitoring Team exploits the EU jurisprudence in order to demonstrate the uselessness of introducing a body of judicial nature at UN level charged with the reviewing task.

The strategy of the UN Monitoring Team (started in the Ninth Report) remains the same: a discussion on such a reform was pre-empted by national and regional courts. Giving the difficulties of such a reform,^{LXIV} we can say that the *Kadi* jurisprudence helped the UN institutions to avoid an awkward discussion on the subject. From a different perspective, the UN Monitoring Team objected that creating an independent review body would risk hampering the work of the Sanction Committee without solving the problem of national and regional courts’ denial of SC resolutions immunity from jurisdiction. Indeed, there is no certainty that *all* regional and national courts would consider the panel as sufficiently effective.^{LXV} Although questionable, this assumption about the irreducible judicial pluralism marks the difference with the *Solange* doctrine: when the ECJ started its jurisprudence about fundamental rights as a ‘general principle of community law’, its national counterparts were the constitutional or supreme courts of the (then) six Member States sharing similar law traditions and cultures.^{LXVI}

One could imagine that the last remark of the UN Monitoring Team pre-empted any kind of dialogue with national and regional courts, especially with EU courts, but such is not the case. The rationale advanced by the UN Monitoring Team in its later reports is apparently not very coherent, as they all start with the admission that the creation of an Ombudsperson to review delisting requests ‘is unlikely to satisfy calls for an effective and independent judicial review’,^{LXVII} ending with the assertion that the (realized) introduction of the Ombudsperson’s review satisfies the fairness standards requested by the ECJ in *Kadi*.^{LXVIII} The argumentative strategy of the UN Monitoring Team, in fact, is not that obscure: instead of convincing national and regional courts of the fairness of listing and delisting procedures, reforms of the smart sanctions system must aim at convincing listed persons and distracting them from national and regional judicial challenges of the sanctions



in favor of the more effective remedy of the UN Ombudsperson. In its Eleventh report the UN Monitoring Team suggested the Sanctions Committee ‘to encourage Member States to require a listed party to exhaust the process available at the United Nations before seeking relief in their national and regional system’.^{LXIX} And the suggestion was rapidly put in force by Resolution 1989 (2011), where Member States and relevant international organizations and bodies are requested to ‘encourage individuals and entities that are considering challenging or are already in the process of challenging their listing through national and regional courts to seek removal from the Al-Qaida Sanctions List by submitting delisting petitions to the Office of the Ombudsperson’.^{LXX} In its Twelfth report the UN Monitoring Team went further still, stressing the attractive force of the Ombudsperson process, which has demonstrated to be more effective than national and regional judicial remedies.^{LXXI}

Even if in a relatively ambiguous way, the UN Monitoring Team thus committed itself to a dialogue with EU Courts. It is worth noting that, before the creation of the Ombudsperson, the Monitoring Team downplayed the potential threat to the sanctions system arising from the activism of national and regional courts. On the contrary, it seemed to welcome the potentially beneficial role of such an activism for the fairness of the UN system as an external corrective contribution.^{LXXII} Once the office of Ombudsperson had been created and started its reviewing task, the UN Monitoring Team changed its approach. On the one hand, it stressed the threat that national and regional judicial review represented for the UN sanctions system, addressing the *Kadi* judgments – the ECJ decision of 2008 and the General Court decision of 2010 – as a challenge for ‘the legal authority of the Security Council in all matters, not just in the imposition of sanctions’,^{LXXIII} and recognizing that pending cases before the courts (such as *Kadi*) ‘still have the potential to damage the regime or to distract it from looking forward’.^{LXXIV} On the other hand, the UN Monitoring Team entered into a dialogue with various courts, especially with EU Courts, in order to convince them that the Ombudsperson process had reached the level of fairness required in order to accord SC resolutions and the Sanctions Committee’s decisions judicial immunity.^{LXXV} In doing so, the Monitoring Team was aware that the Ombudsperson process had to resemble a judicial process as much as possible, especially with regards to the transparency requirement.^{LXXVI}



Interestingly, the UN Monitoring Team spent few words to contest the legal approach sustained by the ECJ in *Kadi* (that the constitutional nature of the EU legal order is distinctive from any other international treaty and therefore not submitted to the hierarchy rule enshrined in Chapter VII of the UN Charter).^{LXXVII} Nor did it object to the supposed margin of appreciation left by the Charter to Member States in implementing SC resolutions, as asserted by the ECJ in *Kadi*. In doing so, the UN Monitoring Team seemed to share the same attitude of ‘conflict avoidance’ followed by the ECJ and the ECtHR when relying on the formalistic argument of the lack of direct effect of UN resolutions. This strategy of the Monitoring Team seemed to confirm the idea that legal pluralism is not the cause of the political problems encountered by the SC in implementing its smart sanctions system; as a matter of fact, it is just a symptom or an effect.^{LXXVIII} At the same time, the hierarchical tools available in a monistic – *constitutional* – structure (for example the prevailing force of SC resolutions as affirmed by Chapter VII of the UN Charter) are not resolute in themselves. As a matter of fact, the SC has avoided a confrontational approach towards States or the EU until now, notwithstanding the lack of deference shown by their Courts with regards to the UN sanctions system.^{LXXIX}

7. The “comity proposal” advanced by the Monitoring Team to European Courts: good reasons to refuse?

The conditions posed by the UN Monitoring Team to national and regional courts (especially to EU Courts) are quite clear: on the one hand, courts are not expected to defer completely to the SC’s authority and thus to accord resolutions and listing decisions full judicial immunity; on the other hand, a court’s decision regarding the national implementation of a listing will have persuasive value for the Sanction Committee when reviewing the corresponding listing as long as it carefully evaluates the ‘reasons for listing as stated by the Committee’ and accords ‘appropriate deference to its fact-finding and decision-making prerogatives’.^{LXXX} A further request to courts, made by the UN Monitoring Team after the Ombudsperson had become effective, is to recognize ‘that an acceptable and equivalent level of review can be achieved through a system unique to the Security Council that does not precisely emulate a national judicial system’.^{LXXXI}



We do not know if these conditions posed by the UN Monitoring Team to national and regional courts will be accepted by the ECJ in the eagerly awaited appeal judgment on the General Court decision of 2010. Incidentally, it seems difficult to consider the Ombudsperson as equivalent to a judicial authority from the point of view of its independence, given its short-term appointment.^{LXXXII} What is sure is that, although avoiding a clear proposal for a long-term dialogue between UN bodies and European Courts along the *Solange* pathway, national and European judicial – but also political – criticism^{LXXXIII} of SC resolutions has contributed to inducing reforms of the smart sanctions system.^{LXXXIV} The major one of those reforms is surely contained within the 1989 resolution. First of all, that resolution calls upon the Sanctions Committee, when rejecting requests for delisting, ‘to share its reasons with relevant Member States and national and regional courts and bodies, where appropriate’.^{LXXXV} Secondly, it upgrades the normative force of the Ombudsperson’s proposals for delisting, resembling a judicial decision: unless the Sanctions Committee decides by consensus within 60 days that individual sanctions shall remain in place, Member States are obliged to terminate sanctions.^{LXXXVI}

The most powerful objection to the “comity” proposal advanced by the UN Monitoring Team remains the fact that anti-terrorism sanctions may be “smart”, but they are hardly “temporary”,^{LXXXVII} as both EU Courts and the ECtHR have remarked.^{LXXXVIII} The UN Monitoring Team itself describes the current situation as one ‘whereby listings can remain through inertia’, reaffirming its previous suggestion that listings should have a time limit.^{LXXXIX} Even the most advanced 1989 Resolution does not tackle this issue. As a result, in the UN smart sanctions system we now find a “quasi-judicial body”, on the one hand, and “quasi-criminal individuals and entities”, on the other, since freezing measures and entry bans resemble criminal sanctions and not mere preventative and temporary measures.^{XC} The result is that the burden of proof has shifted from criminal prosecutors to suspected persons.^{XCI} Integrating such a principle into national and European legal orders (including the ECHR) would be too risky. Instead, it seems preferable to continue with this kind of mutual misunderstanding between Courts and UN institutions, hoping that further judicial challenges will trigger further institutional reforms by the SC in order to improve its accountability to individuals.^{XCII}



8. Conclusions

There are three patterns followed by the European Courts in order to organize the relationship between their own legal order (EU law) or system (the ECHR) and the Resolutions of the UN Security Council. The most deferential pattern underlines that SC Resolutions enjoy a hierarchical status superior to every other normative system (the ECtHR in *Behrami*); the intermediate pattern recognizes the possibility of limited judicial review in case of conflict between those Resolutions and *jus cogens* (the CFI in *Kadi*); and the least deferential seems to give unconditional precedence to the internal “constitutional” values in order to review the internal measures implementing SC Resolutions as if they were ordinary measures of secondary EU law (the ECJ and the General Court in *Kadi in 2008 and 2010*, respectively). The recent *Nada* case of the ECtHR puts forward a fourth option already advanced in the *Kadi* case by the ECJ: States are (always?) free to choose the implementing measures that best fit the Human Rights obligations by which they are (internationally or constitutionally) bound. This approach is based on the formal assumption that SC Resolutions lack direct effect and, as such, seems to jeopardize the effectiveness of the UN’s most powerful measures in the legal order of UN Member States. A plausible alternative would be create a comity approach in the EU (and UN Member States) for SC Resolutions which, following the well-known *Solange* method, would subscribe to the primacy of Resolutions under the condition of a review at UN level equivalent to the one usually performed internally. All that would imply that the UN puts in force a *judicial* review of SC Resolution. Analyzing the relevant documents of the UN (the reports of the Analytical Support and Sanctions Monitoring Team), it is quite clear that such a reform is far from being possible at the moment. This is also the most striking difference between our case and the situation where the *Solange* method originated: the comity proposition offered by the German Constitutional Court to the ECJ was made when the EC legal order was fully equipped with a truly judicial system. Notwithstanding those crucial differences between the original *Solange* scenario and the one characterizing the relationship between national and EU orders, on the one hand, and the UN counter-terrorism system, on the other, a hidden form of dialogue has been going on between European Courts and the SC: the threat of fully reviewing SC Resolutions has triggered



important reforms of the delisting mechanism. Surrendering now to the hierarchical position advanced by the UN Monitoring Team in its last reports would risk stopping further improvements of the guarantees that individual persons or entities enjoy in the UN counter-terrorism system: strengthening the independence of the Ombudsperson (making it a more powerful and stable institution) and introducing a temporary nature of listing measures (no more “inertia effects” that burden the suspected persons to prove their own innocence). A reasonable option (if not the “best” one) to obtain those improvements, while still according the due symbolic deference to the UN legal order by the national and European Courts, is the formalistic recognition that SC Resolutions are – generally speaking – conceived by the UN Charter to leave enough room for maneuver to UN Members to harmonize their contents in respect of human rights. Even if formalistic in nature, that move is not to be read as a self-interested claim of the superior “constitutional” nature of the internal order that jeopardizes the effectiveness of the UN’s collective security system, but as a move capable to improve the legitimacy of the UN as a whole. Without such a dialectic development, the SC risks to be a place where some national executive powers evade the judicial (and parliamentary) control they ordinarily have to face within their own constitutional order.

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^I *Nada v. Switzerland*, [GC], App. No. 10593/08, 12 September 2012.

^{II} Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351, para. 298-299.

^{III} *Behrami v. France and Saramati v. France, Germany and Norway*, [GC], App. nos. 71412/01 and 78166/01, admissibility decisions, 2 May 2007, 45 EHRR SE 85.

^{IV} *Nada v Switzerland* (n I) para 110.

^V *Behrami v. France and Saramati v. France, Germany and Norway* (n III).

^{VI} *Ibid* para 149, where the Court added that reviewing state measures implementing SC resolutions «would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself». See De Búrca 2009a: 18-21.

^{VII} T-315/01, *Kadi v Council and Commission* [2005] ECR II-03649.

^{VIII} Tridimas 2009: 113; Cannizzaro 2006: 203; Halberstam and Stein 2009: 62.

^{IX} Tridimas defined this as a ‘sovereignist approach’: *Ibid* 111.

^X *Kadi and Al Barakaat International Foundation v Council and Commission* (n II) para 288.

^{XI} *Ibid*.

^{XII} De Búrca 2009a: 38-39.

^{XIII} Tridimas 2009: 116.

^{XIV} *Kadi and Al Barakaat* (n II) paras 373-374.

^{XV} Case T-85/09, *Kadi v Commission* [2010] ECR II-05177: see *infra*.

^{XVI} Larik 2012.

^{XVII} *Kadi and Al Barakaat* (n II) paras. 298-299.

^{XVIII} Halberstam and Stein 2009: 49. For further critics see Gattini 2009: 229-230.

^{XIX} De Búrca 2009a: 57-58. See also Kumm 2009: 288.

^{XX} See Article 1, paras 1 and 3, of the UN Charter.



XXI *Al Jeddah v The UK*, [GC], ECHR 2011, 53 EHRR 23, para 102, which so continues: ‘In the light of the United Nations’ important role in promoting and encouraging respect for human rights, 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’.

XXII *Al Jeddah v The UK* (n XXI) para 105: ‘In the Court’s view, the terminology of the Resolution appears to leave the choice of the means to achieve this end to the Member States within the Multi-National Force. Moreover, in the Preamble, the commitment of all forces to act in accordance with international law is noted. It is clear that the Convention forms part of international law [...]. In the absence of clear provision to the contrary, the presumption must be that the Security Council intended States within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law’.

XXIII *Nada v. Switzerland* (n I).

XXIV Resolution 1390 (2002), para 2 (b).

XXV ‘The Security Council was well aware of the conflict that would inevitably arise between its own resolutions and the obligations that certain States had assumed in ratifying international human rights treaties. For each of the resolutions that it adopted, it thus expressly stipulated that States were obliged to comply with them “notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement ... prior to the date of coming into force of the measures imposed” (Resolution 1267 (1999) paragraph 7; Resolution 1333 (2000), paragraph 17)’: Concurring opinion of Judge Malinverni in *Nada*, para 13.

XXVI *Nada v. Switzerland* (n I), paras 176 and 212.

XXVII According to the majority of the Court the margin of appreciation left by the resolution to states could have allowed the alleviation of the sanction regime towards the applicant, taking into account the very specific situation of the latter (the fact that he resided in Campione d’Italia, an Italian enclave in the Swiss territory, transformed the transit ban in a sort of internment, with heavy interferences with the applicant’s right to respect for his private and family life). The Court therefore reproached the defendant State not to have taken – or attempted to take – all possible measures to adapt the sanctions regime to the applicant’s individual situation (*ibid*, paras 195-197). Quite different is the point of view of the concurring opinion of Judge Malinverni.

XXVIII *Ibid*, para 197.

XXIX *Ibid*.

XXX *Ibid*, para 172.

XXXI *Ibid*, para 196.

XXXII The expression is borrowed from Heyd 1996.

XXXIII Bogdandy 2008: 403. See also De Búrca 2009b: 853, n 2.

XXXIV Scharpf 2002: 647.

XXXV Cannizzaro 2006: 191; see also Isiksel 2010: 564.

XXXVI 9th report of the Analytical Support and Sanctions Implementation Monitoring Team of 9 Feb. 2009, point 18 (S/2009/245) available at: www.un.org/sc/committees/1267/monitoringteam.shtml.

XXXVII De Búrca 2009b: 853-854 and 862, where the EU ‘distinctive commitment to international law’ counters the US ‘instrumentalist engagement with international law’; Halberstam and Stein 2009: 67.

XXXVIII Cases C-286/90, *Anklagemyndigheden v Poulsen and Diva Navigation* [1992] ECR I-6019 and C-162/96, *Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR I-3655.

XXXIX United States consider from the beginning WTO agreements as deprived of direct effect: Leebron 1997: 210-211.

XI. See Bogdandy 2008: 404.

XI.I See case C-377/02, *Van Parys* [2005] ECR I-01465, together with the precedents reported there; on the effects of the decisions of the WTO Dispute Settlement Body, see the ECJ judgment in joined cases 120/06 P (*FLAMM*), and 121/06 P (*Fedon*) [2008] ECR I-06513: Dani 2009.

XI.II For example the conflict between WTO obligations to open the European Market to the import of hormones added meat, on the one hand, and health protection in the light of the precautionary principle as intended by EU institutions and legislation, on the other hand: Eeckhout 2002: 100.

XI.III Eeckhout 2007: 205; Cannizzaro 2006: 221.

XI.IV *BverfGe* 37, 271 (1974). A similar warning was made also by the Italian Constitutional Court (decisions Nos. 183/1973, 232/1989, 168/1991). See, among many, Kumm 2005: 294-295; Martinico and Fontanelli 2008.



- XLV Halberstam and Stein 2009: 63: ‘the lacuna of rights protection (and rights review) proposed by the CFI would be tantamount to rejecting the mutual arrangement with the Member States under the Solange compromise’. See also Tridimas 2009: 125-126.
- XLVI Halberstam and Stein 2009: 68; De Búrca 2009a: 58-61. For an alternative reading of the *Kadi* judgment, see Isiksel 2010: 563-569.
- XLVII Gattini 2009: 234-235.
- XLVIII For a generalization of the *Solange* doctrine as a method of regulating overlapping jurisdictions, see Lavranos 2008.
- XLIX Isiksel 2010: 564-565; Gattini 2009: 234-235.
- L United States – *Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998, paras 130-131. (available at www.wto.org). See Scott 2000: 125.
- LI See Simma and Pulkowski 2006: 510.
- LII On the conceptual difference between direct effect in EU law and in International agreements, see Joined Cases C-120/06 P and C-121/06 P, *FLAMM* [2008], Opinion of A.G. Maduro, delivered on 20 February 2008, para 27-31, where the Advocate General proposed to substitute the expression “direct effect” with “the possibility of relying on international agreements” in order to avoid confusion with those two different concepts.
- LIII Italian Constitutional Court, decisions Nos 183/1973, 232/89, 168/91 (available at www.cortecostituzionale.it).
- LIV Halberstam and Stein 2009: 26.
- LV Weiler 2000.
- LVI Picone and Ligustro 2002: 567.
- LVII *Kadi* (n II) para 322-326.
- LVIII Case T-85/09, *Kadi v Commission*, *supra* at 15, para 128.
- LIX Resolution n. 1989 (2011), which will be analyzed further.
- LX That is also what make the position of the ECJ in *Kadi* different from that of the US Supreme Court in *Medellin v. Texas*, 552 US, 128 S. Ct. 1346 (2008), where the interlocutor of the Supreme Court was the International Court of Justice (the US SC considered the ICJ’s judgment *Avena and Other Mexican Nationals*, 2004 I.C.J. 12, as not self-executing): see, for the opposite approach, Halberstam and Stein 2009: 67.
- LXI 9th report (n XXXVI) point 27.
- LXII 10th report of the Analytical Support and Sanctions Implementation Monitoring Team of 31 July 2009, point 40 (S/2009/502), available at: www.un.org/sc/committees/1267/monitoringteam.shtml.
- LXIII *Ibid*, point 43. The reference is to para 300 of *Kadi* (n II), where the ECJ affirmed that ‘What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty’.
- LXIV 10th report (n LXII) points 44-45.
- LXV *Ibid*, point 44.
- LXVI Cannizzaro 2006: 219-220.
- LXVII 10th report (n LXII) point 46.
- LXVIII 12th report of the Analytical Support and Sanctions Implementation Monitoring Team of 1 October 2012, points 32 and 35 (S/2012/729), available at: www.un.org/sc/committees/1267/monitoringteam.shtml.
- LXIX 11th report of the Analytical Support and Sanctions Implementation Monitoring Team of 22 February 2011, point 43 (S/2011/245), *Ibid*.
- LXX Resolution 1989 (2011), para 26.
- LXXI 12th report (n LXVIII) point 40.
- LXXII 9th report (n XXXVI) point 18. The assertion of the Un Monitoring Team echoes the words of Cannizzaro 2006: 191.
- LXXIII 11th report (n LXIX) point 30: see Armin Cuyvers 2011: 496-497.
- LXXIV 12th report (n LXVIII) point 33.
- LXXV *Ibid*, point 32.
- LXXVI 11th report (n LXIX) point 38; 12th report (n LXVIII) point 35.
- LXXVII See the aforementioned point 30 of the 11th report (n LXIX).
- LXXVIII Krisch 2010: 181-188.
- LXXIX *Ibid* at 183.



LXXX 9th report (n XXXVI) point 29.

LXXXI 11th report (n LXIX) at point 36. See Cuyvers 2011: 504.

LXXXII Resolution 1904 (2009) fixed an 18 months mandate to the Office of the Ombudsperson; Resolution 1989 (2011) extended the mandate for other 18 months.

LXXXIII See, eg, Resolution 1597 of the Parliamentary Assembly of the Council of Europe, *United Nations Security Council and European Union blacklists*, of 23 January 2008; see also the letters sent by Denmark, Germany, Liechtenstein, the Netherlands, Sweden and Switzerland to the President of the Security Council on 2008 (UN Docs A/62/891 and S/2008/428).

LXXXIV True-Frost 2009: 1241.

LXXXV Resolution 1989 (2011), para 33.

LXXXVI *Ibid*, para 23 (and point 12 of Annex II). Indeed, the same provision contemplates also the possibility to submit the question, upon request of a Committee Member, to the Security Council for a decision within a period of 60 days.

LXXXVII Freezing measures prescribed by Resolutions 1267, 1333 and 1390 have been explained as ‘preventative in nature and [...] not reliant upon criminal standards set out under national law’: see recitals to Resolutions 1735 (2006), 1822 (2008) and 1904 (2009).

LXXXVIII Case T-85/09, *Kadi v Commission*, (n XV) para 151: ‘the principle of a full and rigorous judicial review of such measures is all the more justified given that such measures have a marked and long-lasting effect on the fundamental rights of the persons concerned’; ECtHR decision in *Nada*, (n I) para 198: ‘the restrictions imposed on the applicant’s freedom of movement *for a considerable period of time* did not strike a fair balance between his right to the protection of his private and family life, on the one hand, and the legitimate aims of the prevention of crime and the protection of Switzerland’s national security and public safety, on the other’ (italics added). The ECJ in *Kadi* also made reference to the long-lasting effect of smart sanctions: *Kadi and Al Barakaat International Foundation v Council and Commission* (n II) para 358. See Cuyvers 2011: 494.

LXXXIX 11th report (n LXIX) point 41.

^{XC} In *Nada*, the applicant claimed under Article 8 of the ECHR that his listing had impugned his honour and reputation, but the Courts preferred to issue only the violation of Article 8 as for the restriction of the right to leave the enclave of Campione d’Italia, considering that part of the complaint as absorbed: *Nada v. Switzerland* (n I) para 199. See the critics of the concurring opinion of Judges Rozakis joined by Spielmann, Berro-Lefevre, and those of Judge Malinverni, point 29.

^{XCI} Godinho, 2010; Halberstam and Stein 2009: 30.

^{XCII} True-Frost 2009: 1242-1244.

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