THE EUROPEAN COURT OF HUMAN RIGHTS FACING THE SECURITY COUNCIL: TOWARDS SYSTEMIC HARMONIZATION

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Abstract The ECtHR is in the process of refining its conceptual tools for determining the responsibility of the States Parties to the ECHR acting in execution of a Security Council resolution. Where the implementation of resolutions involving the use of force is concerned, the Court's recent case law has shown a shift towards systematic acceptance of the extraterritorial scope of the ECHR. As to whether the conduct in issue should be attributed to the States Parties or to the UN, the Court now makes a clear distinction between operations authorized by the Security Council and UN peacekeeping operations. The implementation of UN economic sanctions will be addressed differently according to whether or not the respondent State is a member of the EU. The criterion of 'equivalent protection' is only applicable in the former scenario. And in any event, it needs to be applied cautiously on a case-by-case basis. As regards the enforcement of economic sanctions by non-EU Member States, the Court tends to interpret Security Council resolutions in a manner consistent with the obligations deriving from the ECHR. More generally, the Court's approach is oriented towards systemic harmonization rather than towards normative conflict.

Keywords: Article 103 of the UN Charter, economic sanctions, equivalent protection doctrine, European Court of Human Rights, extraterritorial application of human rights, Security Council, State responsibility, systemic harmonization, use of force.

I. INTRODUCTION

The European Court of Human Rights (ECtHR) has been repeatedly confronted with issues arising from the execution of a Security Council resolution, from the 2005 *Bosphorus* judgment[1] to the 2016 *Al-Dulimi* case.[2] There have been a

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[1] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, App No 45036/98, Grand Chamber Judgment (ECtHR, 30 June 2005).

[2] *Al-Dulimi and Montana Management Inc. v Switzerland*, App No 5809/08, Grand Chamber Judgment (ECtHR, 21 June 2016).

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number of significant steps along the way, in particular: the *Behrami and Saramati* decision,[3] concerning the activities of UNMIK and KFOR in Kosovo, the *Al-Skeini*[4] and *Al-Jedda v the United Kingdom* judgments,[5] concerning the activities of the United Kingdom forces in Iraq, the *Nada v Switzerland* judgment,[6] concerning Security Council blacklists, and two important cases against the Netherlands, namely the *Stichting Mothers of Srebrenica* decision,[7] concerning the conflict in Bosnia, and the *Jaloud* judgment.[8]

Beyond the technical problems they raise, these cases pose a fundamental question, namely the relationship between the United Nations (UN) system and that of the European Convention on Human Rights (ECHR),[9] and consequently the ECtHR's role in this vast geopolitical framework, and at the same time its function in guaranteeing the fundamental values of European public order.

A retrospective examination of the cases cited above may sometimes give the impression that the ECtHR oscillates between a somewhat reserved, or even self-effacing, attitude, and a significantly more assertive approach, at times showing reverence towards the Security Council and at other times a form of defiance towards it. It is therefore important to take a step back from this often sensitive dispute and to attempt to conceptualize this issue as a whole.

To do so, we need to make a distinction between Security Council resolutions that involve or could potentially involve the use of armed force and those which impose economic or targeted sanctions. First of all, the two types of resolutions have a different legal basis: economic sanctions are imposed on the basis of Article 41 of the UN Charter, whereas military operations are based mainly on Article 42[10] or, better still—at least in the case of authorized

[3] *Behrami and Behrami v France and Saramati v France, Germany and Norway*, App No 71412/01 and 78155/01, Grand Chamber Decision (ECtHR, 2 May 2007).

[4] *Al-Skeini and Others v the United Kingdom*, App No 55721/07, Grand Chamber Judgment (ECtHR, 7 July 2011).

[5] *Al-Jedda v the United Kingdom*, App No 27021/08, Grand Chamber Judgment (ECtHR, 7 July 2011).

[6] *Nada v Switzerland*, App No 10593/08, Grand Chamber Judgment (ECtHR, 12 September 2012).

[7] *Stichting Mothers of Srebrenica and Others v the Netherlands*, App No 65542/12, Decision (ECtHR, 1 June 2013).

[8] *Jaloud v the Netherlands*, App No 47708/08, Grand Chamber Judgment (ECtHR, 20 November 2014).

[9] For an overall analysis of the judicial control of Security Council resolutions by international, regional and national courts see Institute of International Law, 'Judicial Control of Security Council Decisions (UNO)', Rapporteur: R Wolfrum, Tallinn Session (2015) 74. See also A Tzanakopoulos, *Disobeying the Security Council*: *Countermeasures against Wrongful Sanctions* (Oxford University Press 2011); A Tzanakopoulos, 'Sharing Responsibility for UN Targeted Sanctions' (2015) 12 IOLR 427; D Leary, 'Balancing Liberty and the Security Council: Judicial Responses to the Conflict between Chapter VII Resolutions and Human Rights Law under the Council's Targeted Sanctions Regime' in JA Green and CPM Waters (eds), *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi* (Brill/Martinus Nijhoff 2015) 69.

[10] See O Corten, *Le droit contre la guerre* (2nd edn, Pedone 2014) 531.

operations—on Chapter VII of the Charter as a whole.[11] The two series of resolutions also, and above all, differ as regards the means and procedure for their implementation: the former involve the deployment of military troops abroad, while the latter require the establishment of a legal and regulatory framework to enforce the economic sanctions within the territory of the forum State—corresponding to the respondent State before the ECtHR.

II. EXECUTION OF RESOLUTIONS INVOLVING USE OF FORCE

A. Extraterritorial Application of the ECHR

The execution of resolutions involving the use of armed force will almost inevitably raise the question of the extraterritorial application of the ECHR. While the UN member States wishing to contribute to the implementation of Security Council resolutions of this kind may offer logistical support or decide to cover part of the expenses of the operation concerned, such forms of contribution do not, in principle, raise any issues in terms of human rights protection. Problems of this nature normally arise, however, when the participating State contributes military troops—either as part of a multinational force, or as part of a UN peacekeeping operation—to be deployed within the territory of the State in which the crisis calling for resolution by the Security Council is taking place.

Much has been written about the extraterritorial application of the ECHR,[12] and it is not the purpose of this contribution to dwell on this subject in detail. It may simply be observed in this connection that the decision in the *Bankovic* case[13] was somewhat case-specific and that since then, the ECtHR has clearly nuanced it and refined important aspects of it. The *Al-Skeini*,[14] *Al-Jedda*[15] and *Jaloud*[16] judgments, among others, testify to this development.

The principle established in the ECtHR's case law in this sphere is that, while being essentially territorial in its application, the ECHR may be applicable outside the territory of the State concerned in a range of specific situations, including—and especially—when that State's armed forces are operating

[11] On this point see L-A Sicilianos, 'Entre multilatéralisme et unilatéralisme: l'autorisation par le Conseil de sécurité de recourir à la force' (2008) 339(9) Collected Courses of The Hague Academy of International Law 166.

[12] See, among many other sources, M Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization' (2005) NILR 349; M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011); VP Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' (2014) 36 MichJIntlL 129; N Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and Its Challenges* (Oxford University Press 2016); L Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should Be Read as Game Changers' (2016) EHRLR 161.

[13] *Bankovic and Others v Belgium and 16 other States*, App No 52207/99, Grand Chamber Decision (ECtHR, 12 December 2001).

[14] *Al-Skeini* (n 4) paras 130ff.

[15] *Al-Jedda* (n 5) paras 74ff.

[16] *Jaloud* (n 8) paras 140ff.

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abroad.[17] This position is corroborated by the case law of the International Court of Justice and the practice of the Human Rights Committee and other international human rights treaty bodies.[18] It is noteworthy that the approach pursued by these international bodies is now unequivocal on this point, reflecting the principle of general international law that '[e]very internationally wrongful act of a State entails the international responsibility of that State',[19] irrespective of where the act was perpetrated or the source of the obligation breached.

It must also be acknowledged that the extraterritorial scope of the ECHR is taking on greater importance nowadays, given that the States Parties to the ECHR are increasingly active in the context of military operations abroad, usually on the basis of Security Council resolutions. To insist on the 'regional' nature of the ECHR would sit ill with this significant development for maintaining and restoring international peace and security, while also leaving a 'black hole' in human rights protection and double standards in its application.

B. Multinational and UN Operations

Another question that needs to be clarified regarding the responsibility of States acting in execution of Security Council resolutions involving the use of force concerns the distinction between multinational military operations—authorized by the Security Council—and the UN's peacekeeping, peace-making or peace-enforcement operations.

The latter are UN operations in that their name refers to that organization; they use the UN flag and emblems; they are generally funded from the UN budget; their personnel are treated as UN personnel; and above all, they are placed under UN command. On the basis of these factors, UN peacekeeping operations constitute subsidiary bodies of the Security Council.

The situation is entirely different for multinational forces. Their designation does not refer to the UN, they do not use UN emblems, their budget is funded by the participating States, their personnel are not treated as UN personnel and, above all, they are placed under the command of either a State or a regional

[17] See in particular the judgments cited above, nn 14–16.

[18] See in particular ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, [2004] ICJ Rep 136, para 111; *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, para 216; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)*, Provisional Measures [2008] ICJ Rep 353, paras 108ff; Human Rights Committee, General Comment No 31, 'Nature of the General Legal Obligation on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13; and Committee on the Elimination of Racial Discrimination, Concluding Observations on Israel, UN Doc A/62/18, paras 225ff.

[19] Art 1, International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission* (2001) vol II (Pt Two) 32 and related commentary.

organization, but not the UN. Unlike UN peacekeeping operations, multinational forces are not subsidiary bodies of the UN.[20]

That being so, these two types of operations should not be placed on the same footing. To maintain that UN operations (such as UNMIK) and multinational operations (such as KFOR) are both placed under the 'ultimate authority and control' of the Security Council—to use the phrase employed by the ECtHR in its *Behrami and Saramati* decision—and that their acts are attributable to the UN[21] would appear to be an over-simplistic approach.[22] It is significant that in the commentary on its Draft Articles on the Responsibility of International Organizations the ILC made a clear distinction between the two situations by noting that, unlike in the case of UN peacekeeping operations, 'conduct of military forces of States or international organizations is not attributable to the United Nations when the Security Council authorizes States or international organizations to take necessary measures outside a chain of command linking those forces to the United Nations'.[23] In such circumstances, the conduct at issue is attributable to the entity that exerts effective control over it, that is, a State participating in the multinational force or the international organization that assumes command over the operation, or both (in the case of shared responsibility).

In line with this approach, the *Al-Jedda v the United Kingdom* judgment, adopted by the Grand Chamber, set matters straight by finding that the Security Council had 'neither effective control nor ultimate authority and control' over the acts and omissions of troops within the multinational force operating in Iraq under Security Council Resolution 1546 (2004) and that the

[20] For a more detailed analysis of the differences between authorized operations and UN peacekeeping operations, see Sicilianos (n 11) 141–62.

[21] *Behrami* (n 3), in particular paras 133ff.

[22] For a criticism of this approach, see in particular P Klein, 'Responsabilité pour les faits commis dans le cadre d'opérations de paix et étendue du pouvoir de contrôle de la Cour européenne des droits de l'homme: quelques considérations critiques sur l'arrêt *Behrami* et *Saramati*' (2007) 53 Annuaire français de droit international 55; P Lagrange, 'Responsabilité des États pour actes accomplis en application du Chapitre VII de la Charte des Nations Unies' (2008) 112 Revue générale de droit international public 94–5; C Laly-Chevalier, 'Les opérations militaires et civiles des Nations Unies et la Convention européenne des droits de l'homme' (2007) 40 Revue belge de droit international 642–4; K Mujezinović Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test' (2008) 19 EJIL 521, 522; P Palchetti, 'Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi *Behrami* e *Saramati*' (2007) 90 Rivista di Diritto Internazionale 689–90; A Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases' (2008) 8 HRLRev 164; L-A Sicilianos, 'L'(ir)responsabilité des forces multilatérales?' in L Boisson de Chazournes and M Kohen (eds), *International Law and the Quest for Its Implementation*, Liber Amicorum *Vera Gowland-Debbas* (Brill 2010) 98; ILC, Draft Articles on the Responsibility of International Organizations, with commentaries, *Report of the International Law Commission*, UN Doc A/66/10 (2011), commentary on Article 7, paras 10ff.

[23] ILC, Draft Articles, Ch II (Attribution of conduct to an international organization), Introduction, para 5. See also Institute of International Law, 'L'autorisation du recours à la force par les Nations Unies', Rapporteur: RE Vinuesa, *Yearbook of the IIL* (2011) 365, 384–5.

applicant's detention was therefore not attributable to the UN[24] but to the respondent State. Admittedly, the ECtHR was careful to distinguish the situation in Kosovo in the context of the *Behrami and Saramati* cases from the situation prevailing in Iraq at the time of the facts relating to the *Al-Jedda* case. The geopolitical background to these cases was indeed very different. From a strictly legal viewpoint, however, it must be acknowledged that the Security Council did not have any more control over KFOR, which was set up under Resolution 1244 (1999), than it had over the multinational force authorized to operate in Iraq by Resolution 1546 (2004). Both cases involved multinational forces acting outside the chain of command linking them to the UN. In other words, the Grand Chamber was right to shift its approach as regards the attribution of the acts of multinational forces to the participating States and not the UN.

The more recent judgment in *Jaloud v the Netherlands* confirms this approach. The Grand Chamber recalled Security Council's Resolution 1511 (2003), which had authorized 'a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq' and had urged UN Member States 'to contribute assistance under this United Nations mandate, including military forces, to [this] multinational force'.[25] The ECtHR noted, however, that the practical elaboration of the multinational force was shaped by a network of Memoranda of Understanding defining the interrelations between the various armed contingents present in Iraq. Referring to the terms of the relevant Memorandum of Understanding, the Court emphasized that the Netherlands had 'retained full command over its contingent',[26] which was decisive for establishing the Netherlands' 'jurisdiction' within the meaning of Article 1 of the ECHR.[27]

C. *Non-Applicability of Article 103 of the UN Charter*

The *Al-Jedda* judgment also set matters straight on another important point, namely Article 103 of the UN Charter and its applicability to operations authorized by the Security Council. It will be recalled that Article 103 provides: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' Contrary to the *Behrami and Saramati* decision, in which

[24] *Al-Jedda* (n 5) para 84.

[25] S/RES 1511 (2003), 16 October 2003, paras 13, 14, quoted in *Jaloud* (n 8), para 94 and recalled in para 145.

[26] *Jaloud* (n 8) para 149.

[27] It is significant that the ECtHR left open the question whether the United Kingdom—which was not a party to the proceedings—had 'exercised concurrent jurisdiction' as one of the 'lead nations' of the operation in question (ibid, para 153).

Article 103 was invoked,[28] the *Al-Jedda* judgment avoided relying on that provision—for good reason, since Article 103 does not apply to operations that have simply been authorized by the Security Council.[29] Authorizations of this kind amount to an invitation or an encouragement for member States to take part in a particular military operation. They do not create any legal obligation to do so.

Furthermore, the wording of a Security Council authorization is generally fairly flexible—referring to maintaining order and security, for example—and as a result, it always leaves considerable discretion to the States participating in the operation concerned. As the ECtHR noted in the *Al-Jedda* judgment, 'the terminology of … Resolution [1546] appears to leave the choice of the means to achieve this end to the member States within the Multinational Force'.[30] In these circumstances, the presumption must be that the Security Council intended States within the Multinational Force to contribute towards maintaining security in Iraq while complying with their obligations under international human rights law.[31] This is a strong presumption—or indeed a premise, given that the Security Council is supposed to act in accordance with the purposes of the UN as set forth in Article 1 of the Charter, including 'respect for human rights and for fundamental freedoms' (Article 1, para 3).

As the ECtHR observed on the basis of a detailed analysis of the terms used by the Security Council, nothing in Resolution 1546 (2004) or any other subsequent resolutions could be construed as imposing any obligation on the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq 'in indefinite detention without charge'. On the contrary, both the UN Secretary-General and the United Nations Assistance Mission for Iraq (UNAMI), likewise set up by the Security Council, had criticized this practice of internment. In these circumstances, 'in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 § 1 of the Convention'.[32]

Similar considerations apply *mutatis mutandis* to all operations authorized by the Security Council. Since 1990 the Security Council has authorized more than 30 operations, in each case according to the same logic: the Council notes the existence of a threat to peace, gives the go-ahead for the setting up of a multinational force, lays down the general mandate for the operation and the objectives to be achieved and then carries out an extremely limited, or indeed

[28] *Behrami* (n 3), in particular para 147.

[29] See Sicilianos (n 11) 180, and contrast R Kolb, 'Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorizations Adopted by the Security Council?' (2004) ZaöRV 26. [30] *Al-Jedda* (n 5) para 105. [31] ibid. [32] ibid, para 109.

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nominal,[33] supervision of the conduct of the operations, leaving considerable discretion to the participating States. In these circumstances, the problem of a direct conflict between the obligations flowing from the Charter, and more specifically from the resolution authorizing the multinational operation concerned, and the respondent State's human rights obligations does not even arise in practice. To maintain the contrary would be to disregard the hybrid legal nature, the particularities and the profile of authorized operations.

D. UN Peacekeeping Operations

Beyond the question of authorized operations, it is important to consider the further issue of the responsibility of States Parties to the ECHR that supply troops to a UN peacekeeping operation. In the *Behrami and Saramati* decision the ECtHR held that the acts or omissions of UNMIK were attributable to the UN.[34] More recently, in the *Stichting Mothers of Srebrenica* decision the ECtHR found that the Netherlands courts had rightly refused to consider the application on the merits by referring to the UN's immunity from jurisdiction in relation to the activities of the United Nations Protection Force (UNPROFOR) in Bosnia.[35]

Both solutions are correct in principle. Contrary to authorized operations, peacekeeping operations are—as noted above—subsidiary bodies to the UN, and on that account their actions generally engage the responsibility of that organization (which in principle enjoys immunity from jurisdiction before the domestic courts). This principle has long been accepted by the UN. As the UN Legal Counsel has observed, '[a]s a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation'.[36]

However, as the ILC has rightly observed, this position is based on the assumption that the UN has 'exclusive control' of the deployment of national contingents in a peacekeeping force.[37] It should nevertheless be borne in mind that contributing States retain a certain degree of control over members of their contingents, particularly in disciplinary and criminal matters. Depending on the facts of the case, this aspect may have a bearing on the attribution of the conduct in question to the State concerned.[38]

[33] See T Christakis and K Bannelier, 'Acteur vigilant ou spectateur impuissant? Le contrôle exercé par le Conseil de sécurité sur les États autorisés à recourir à la force' (2004) 2 RBDI 498; Sicilianos (n 11) 155ff.

[34] *Behrami* (n 3) paras 142ff.

[35] *Stichting Mothers* (n 7), in particular paras 146ff.

[36] Letter of 3 February 2004 from the United Nations Legal Counsel to the Director of the Codification Division (A/CN.4/545, sect. II.G).

[37] ILC, Draft Articles on the Responsibility of International Organizations, UN Doc A/66/10, commentary on Article 7, para 6.

[38] See the example mentioned by the ILC, ibid, para 7.

There have also been cases where national contingents have continued to seek and receive orders from their national authorities. As was found by the Commission of Inquiry established to investigate armed attacks on the personnel of the United Nations Operation in Somalia (UNOSOM II), the force commander was not in 'effective control' of several national contingents which had persisted in seeking orders from their home authorities. There were even operations undertaken under the UN flag and in the context of UNOSOM's mandate that 'were totally outside the command and control of the United Nations'.[39] Clearly, in such circumstances it is virtually impossible to attribute the actions of the national contingents concerned to the UN.

There have also been certain cases where a multinational (or regional) force and a UN mission have carried out a joint operation.[40] In such cases, international responsibility for the conduct of the troops lies with the entity in which operational command and control is vested according to the terms of the cooperation arrangements between the State or States providing the troops and the UN. In the absence of such arrangements, responsibility will be determined in each case according to the degree of 'effective control' exercised by either party in the conduct of the operation.[41]

This reasoning applies *mutatis mutandis* to all UN peacekeeping operations, 'insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the contributing State'.[42] In other words, where and to the extent that the State in question retains effective control over the conduct at issue, its responsibility may also be engaged. The criterion of 'effective control' on the ground is a factual element[43] which is decisive for the purposes of attributing the conduct to the UN or the contributing State, or both simultaneously.[44]

That being so, instead of simply adopting an abstract or indeed dogmatic approach, it is important for the ECtHR to look at each case in rather greater depth, by examining whether the respondent State had effective control over the conduct at issue. The ECtHR will have to determine each individual case on the basis of the particular facts.

[39] S/1994/653, 37, paras 243ff.

[40] The example of KFOR and UNMIK in Kosovo, established pursuant to Resolution S/RES/1244 (1999), adopted on 10 June 1999, is certainly the best known. However, there are a number of others, such as the 'hybrid operation' between the UN and the African Union in Darfur, the deployment of which was authorized by Resolution S/RES/1769 (2007), adopted on 31 July 2007. For further examples, see Sicilianos (n 11) 290ff.

[41] According to the UN Secretary-General, UN Doc A/51/389, 7, paras 17ff.

[42] According to the ILC (n 37) para 9.

[43] See Tzanakopoulos (n 9) 40.

[44] As regards the question of attributing conduct to two subjects of international law simultaneously, see F Messineo, 'Attribution of Conduct' in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (Cambridge University Press 2014) 60.

The issue of the responsibility of the States Parties to the ECHR in enforcing the economic sanctions adopted by the Security Council has certain similarities, but also a number of differences, in relation to the issue discussed above.

III. EXECUTION OF RESOLUTIONS IMPOSING ECONOMIC SANCTIONS

A. From Global to Targeted Sanctions

In considering the case law of the European Court of Human Rights against the general background of economic sanctions in international law,[45] it is important to remember that during the 'sanctions decade' (the 1990s), the Security Council generally adopted global economic sanctions. These were measures taken against a State, and hence an entire people, such as the economic sanctions against Iraq (following its invasion of Kuwait), the former Yugoslavia or Haiti. The famous *Bosphorus* case related to the implementation by Ireland of this generation of sanctions.

In 2000 the then UN Under-Secretary-General for Political Affairs did not hesitate to describe these sanctions as 'blunt' instruments[46] which had a devastating impact on the economy of the State affected, including—above all—on the economic and social rights of its population, without necessarily achieving the aim pursued. Neighbouring States (such as Greece in the case of the sanctions against the former Yugoslavia) suffered significant 'side-effects'.[47] The Interlaken and Bonn/Berlin processes led to a reform of this system and the introduction of 'smart' or 'targeted' sanctions,[48] aimed directly at the decision-makers and their immediate or less immediate circles and seeking to spare as far as possible the population of the State concerned. The issue of Security Council (and European Union) 'blacklists' relates mainly to this second generation of sanctions.

It should not be forgotten that this reform process led to a significant improvement, or even a certain humanization, in the Security Council's power to impose sanctions. However, although the overall effects of this new generation of measures were relatively limited since they affected a more or less specific number of people, targeted sanctions managed to raise a range of other problems, relating in particular to civil rights. It was not long before the measures attracted the ire of the Council of Europe's Parliamentary Assembly,

[45] With regard to this question, see in particular V Gowlland-Debbas (ed), *United Nations Sanctions and International Law* (Kluwer 2001); L Picchio Forlati and L-A Sicilianos (eds), *Les sanctions économiques en droit international/Economic Sanctions in International Law* (Martinus Nijhoff 2004).

[46] S/PV. 4128, 2.

[47] See DL Tehindrazanarivelo, *Les sanctions des Nations Unies et leurs effets secondaires* (PUF 2005).

[48] For further information about this reform process, see L-A Sicilianos, 'Sanctions institutionnelles et contre-mesures: Tendances récentes' in Picchio Forlati and Sicilianos (n 45) 61ff. On targeted sanctions see also Wolfrum (n 9) 28 ff.

which expressed the view that the procedural and substantive standards applied by the Security Council and the Council of the European Union 'violate the fundamental principles of human rights and the rule of law'.[49] The *Kadi I* case[50] and subsequent cases concerning blacklists—including, for example, *Nada v Switzerland* and *Al-Dulimi v Switzerland* as far as the ECHR is concerned—are to be seen against this overall background.

Following this brief summary of the historical context, it is important to note that cases concerning economic sanctions do not raise any issues in terms of 'jurisdiction' within the meaning of Article 1 of the ECHR. The measures in question are applied in the territory of the respondent State by means of acts at national level, attributable to the organs of that State.[51] Contrary to the execution of Security Council resolutions involving the use of force, the implementation of resolutions imposing economic sanctions does not raise the issue of the extraterritorial application of the ECHR.

It should also be underlined that on the face of it, Article 103 of the UN Charter *is* indeed applicable in this context, because economic sanctions are, in principle, imposed by binding Security Council resolutions based on Article 41 of the Charter (and not simply 'authorized'). It should be borne in mind, however, that Article 103 does not concern a conflict of norms *in abstracto*. It is aimed at resolving *in concreto* a potential conflict of obligations.[52] However, the questions arising in connection with economic sanctions differ according to whether or not the State party to the ECHR enforcing the sanctions is at the same time a member of the European Union (EU).

B. Enforcement of Sanctions by EU Member States

In the first scenario the EU regulation enforcing the economic sanctions imposed by Security Council acts as a kind of screen. The existence of such a regulation was what caused the European Court of Justice (ECJ), in the *Kadi I* case,[53] to find that there had been a violation of a series of fundamental rights, without calling into question—at least in formal terms—the legality of the Security Council's actions. The dispute focused on the procedure for the implementation of the Council's resolution within the EU and at national level, and not the act of imposing sanctions as such.

[49] Parliamentary Assembly of the Council of Europe, Resolution 1597 (2008) 'United Nations Security Council and European Union Blacklists' para 6.

[50] ECJ, Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* (3 September 2008). For a critical analysis of this judgment, see among others LM Hinojosa Martínez, 'Bad Law for Good Reasons: The Contradictions of the *Kadi* Judgment' (2008) 5 IOLR 339.

[51] *Bosphorus* (n 1) para 121.

[52] See R Kolb, 'L'article 103 de la Charte des Nations Unies' (2013) 367 Collected Courses of The Hague Academy of International Law 145ff.

[53] *Kadi I* (n 50).

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The same is true, *mutatis mutandis*, in the case law of the Strasbourg Court. The *Bosphorus* judgment puts forward the well-known 'equivalent protection' criterion, according to which if the international organization concerned provides equivalent protection—that is, comparable to that afforded by the ECHR—the presumption will be that a State satisfies the requirements of the ECHR when it does no more than implement legal obligations flowing from its membership of the organization. However, the presumption in question is rebuttable.[54] It can be rebutted if it is considered that the protection of ECHR rights was 'manifestly deficient'. In such cases, the ECtHR considers that the ECHR, as a 'constitutional instrument of European public order', should prevail over the interests of international cooperation.[55]

The facts of the *Bosphorus* case, as summarized in the Strasbourg Court's judgment, made it clear that the procedure for executing Security Council Resolution 820 (1993)—the relevant resolution in the case—was dictated by the UN Sanctions Committee in New York. However, the Community regulation implementing the UN sanctions formed the legal basis for the impoundment of the aircraft at issue by the Irish authorities and acted as a shield leaving the Security Council safe from any reproach. The Strasbourg Court's attention was focused on the guarantees of human rights protection in Community law, which were held to be 'equivalent' to those provided by the ECHR. The ECtHR also considered that there was generally a presumption of equivalence—albeit a rebuttable one—between human rights protection within the Community system and the protection afforded under the ECHR.[56]

Once the ECtHR has found that EU law does afford equivalent protection, the respondent State party to the ECHR, where it has correctly applied that law, is likewise safe from criticism and its responsibility cannot be engaged. In other words, if the ECtHR considers that the presumption is applicable in the case before it and has not been rebutted, the conclusion is inevitable: there must be a finding of no violation. Accordingly, caution is required before the 'equivalent protection label' can be awarded.

Indeed, it is worth recalling the remarks made in the joint concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki appended to the *Bosphorus* judgment, pointing out the limits of human rights

[54] For a more in-depth analysis of the concept of equivalent protection see, among others, P De Hert and F Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights' (2012) 13 German Law Journal 874; F Benoît-Rohmer, 'Bienvenue aux enfants de Bosphorus: la Cour européenne des droits de l'homme et les organisations internationales' (2010) Revue trimestrielle des droits de l'homme 19; C Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 HRLRev 87; C Ryngaert, 'The European Court of Human Rights' Approach to the Responsibility of Member States in Connection with Acts of International Organization' (2011) 60 ICLQ 997.

[55] *Bosphorus* (n 1) para 156. See also V Gowland-Debbas, 'The Security Council and Issues of Responsibility under International Law' Collected Courses of The Hague Academy of International Law 353 (2011) 185.

[56] *Bosphorus* (n 1) paras 159–165.

protection within the EU and calling on the Strasbourg Court to apply the equivalent-protection criterion cautiously, on a case-by-case basis. While stating that they were convinced of the growing role of fundamental rights and their integration into the Community legal order—a finding borne out in the light of the Lisbon Treaty, which made the Charter of Fundamental Rights a binding instrument—the aforementioned judges regretted the 'general abstract review of the Community system'.[57]

In that context, they highlighted in particular the importance of the right of individual application as the keystone of the protection system set forth in the ECHR. This right is one of the basic obligations assumed by States on ratifying the ECHR. It is therefore difficult to accept that the effectiveness of this remedy could be reduced as a result of the transfer of powers to the EU. Notwithstanding the existence of a plurality of appeals, individual access to the EU courts remains limited. Despite its value, a reference for a preliminary ruling as an internal means of prior review cannot replace the external, *ex post facto* supervision carried out by the ECtHR on the basis of an individual application. This is all the more true as a reference to the Luxembourg Court for a preliminary ruling does not constitute an appeal but a request for interpretation. Furthermore, the competent national court retains a certain discretion in applying the ECJ's ruling in the dispute before it. In other words, leaving it to the EU judicial system to ensure 'equivalent protection', without retaining a means of verifying on a case-by-case basis that the protection afforded is indeed comparable, would be tantamount to consenting tacitly to substitution, in the field of EU law, of the ECHR standards with the EU's own standards.[58]

The concurring opinion also emphasizes the 'relatively undefined' nature of the criterion of 'manifestly deficient' used, as noted above, to rebut the presumption of 'equivalent protection'.[59] It is true that the criterion in question establishes a relatively low threshold, contrasting with the nature and scope of the supervision carried out under the ECHR. It should also be borne in mind that in accordance with Article 53, the ECHR guarantees a minimum level of protection. Admittedly, the EU Charter of Fundamental Rights provides: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention …' (Article 52, paragraph 3). However, abstract application of the equivalent-protection criterion cannot have the effect of lowering the minimum level of protection afforded by the ECHR. As the authors of the aforementioned concurring opinion noted at the time, 'the Union has not yet acceded to the European Convention on Human Rights and … full protection does not yet exist at European level'.[60]

[57] Joint concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, appended to *Bosphorus* (n 1) para 3. [58] ibid, para 3. [59] ibid, para 4. [60] ibid, para 3.

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This reserved attitude is even more appropriate today, it would seem, following opinion 2/13, adopted by the ECJ in December 2014.[61] Without wishing to recapitulate the criticisms expressed on this subject by various authors,[62] it has to be acknowledged that the opinion in question renders the prospect of EU accession to the ECHR more remote. Everyone loses out in this situation, but most of all the citizens of the EU. The European Court of Human Rights, for its part, should apply the equivalent-protection doctrine *vis-à-vis* the EU in the spirit mentioned above. An attentive examination on a case-by-case basis will be needed if the Strasbourg Court is to discharge its duty properly. Such an approach has been recently confirmed by the judgment in *Avotiņš v Latvia*.[63] As the Grand Chamber put it:

> The Court carries out this assessment … in order to determine whether it can apply the presumption of equivalent protection to the decision complained of, a presumption which the Court applies in accordance with conditions which it has itself laid down. The Court thus considers that the question whether the full potential of the supervisory mechanisms provided for by European Union law was deployed … should be assessed *in the light of the specific circumstances of each case*.[64]

Having highlighted this development, we still need to address the questions relating to the implementation of Security Council sanctions by the States Parties to the ECHR that are not EU Member States.

C. Implementation of Sanctions by Non-EU Member States

1. The non-applicability of the equivalent-protection test

While the practical difference between this scenario and the one discussed above may appear purely formal, in legal terms the distinction between the two situations is considerable. A non-member State of the EU that adopts measures for the implementation of a Security Council resolution imposing economic sanctions is a direct agent in the enforcement of the resolution. In such circumstances there is no EU regulation, and hence no screen or shield, between the national legal system and the system of the UN Charter. This means that if we are to apply the equivalent-protection criterion here, we will

[61] ECJ, Opinion 2/13 – Opinion pursuant to Article 218, para 11, TFEU (18 December 2014).

[62] See, among many others, J-P Jacqué, 'L'avis 2/13 de la CJUE. Non à l'adhésion à la Convention européenne des droits de l'homme?' <http://www.droit-union-europeenne.be/412337458>; D Simon, 'Deuxième (ou second et dernier?) coup d'arrêt à l'adhésion de l'Union à la CEDH: étrange avis 2/13' (2015) 2 Europe 4; J Polakiewicz, 'Accession to the European Convention on Human Rights (ECHR) – An Insider's View Addressing One by One the CJEU's Objections in Opinion 2/13' (2016) 36(1–6) HRLJ 10.

[63] *Avotiņš v Latvia* App No 17502/07, Grand Chamber Judgment (ECtHR, 23 May 2016).

[64] ibid, paras 110–111 (emphasis added).

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need to compare the guarantees provided by the ECHR with those afforded by the procedure before the Security Council and its sanctions committees.[65]

It is true that following the virulent criticisms of the blacklisting process[66]—having far-reaching implications for the persons concerned, including, for instance, freezing their funds and other financial assets—the Security Council set up the Office of the Ombudsperson,[67] to help the Al-Qaeda Sanctions Committee[68] to examine delisting requests. More recently, this procedure has been extended and reinforced.[69] It must be acknowledged, however, that despite these developments, the proceedings before the Ombudsperson are essentially diplomatic in nature and lead at most to a recommendation to the sanctions committee, which accordingly has the final say as to whether the person concerned should be delisted. This being so, the procedure in question clearly does not offer comparable guarantees to those afforded by the judicial system established by the ECHR.

One might therefore wonder whether the equivalent-protection criterion is relevant in this context. Admittedly, the criterion was formulated in general terms in the *Bosphorus* case. In theory, it can be applied in respect of any international organization to which the States Parties to the ECHR decide to transfer powers potentially touching upon human rights protection. It is true that in the case of *Gasparini v Italy and Belgium*, for example, the ECtHR applied the equivalent-protection test outside the EU context, the subject matter there being the rights of NATO officials.[70] However, NATO's constitutive treaty—the North Atlantic Treaty of 4 April 1949[71]—contains no clause that is comparable to Article 103 of the UN Charter. In fact no other constitutive instrument of an international organization contains such a clause. The UN Charter and its Article 103 are unique in that regard. The provision in question constitutes the cornerstone of the international legal order, because it contains a key element of that order's hierarchical structure. The United Nations and other international organizations cannot therefore be placed on the same plane. This means that the equivalent-protection test does not simply apply to all international organizations alike. To the extent that Article 103 is applicable to economic sanctions adopted by the Security

[65] See the Chamber judgment in the case of *Al-Dulimi and Montana Management Inc. v Switzerland* App No 5809/08 (ECtHR, 26 November 2013) paras 115ff.

[66] See for instance the Resolution 1597 (2008) of the Parliamentary Assembly of the Council of Europe (n 49).

[67] S/RES/1904 (2009), 17 December 2009.

[68] This committee was set up by Resolution S/RES/1267 (1999), 15 October 1999.

[69] See S/RES/1989 (2011), 17 June 2011 and S/RES/2083 (2012), 17 December 2012. On the importance of the changes introduced in the sanctions against Al-Qaeda, see LM Hinojosa Martínez and C Pérez-Bernárdez, 'El Derecho a La Tutela Judicial Efectiva En El Derecho Europeo Y Las Sanciones Contra Al Qaeda' in J Cardona Llorens *et al*. (eds), *Estudios de Derecho Internacional y Derecho Europeo en homenaje al Profesor Manuel Pérez González* (Tirant lo Blanch 2012) 1576ff. It has to be noted, however, that the mandate of the Office of the Ombudsperson is limited to the Al-Qaida Sanctions List (see S/RES/2083 (2012) paras 19ff).

[70] See *Gasparini v Italy and Belgium*, Decision, App No 10750/03 (ECtHR, 12 May 2009).

[71] *UNTS*, vol. 34.

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Council, UN law itself contains a rule which governs any conflict between obligations arising from the Charter and from any other international agreement.

More specifically, when it comes to the implementation of the Security Council's (binding) economic sanctions by non-members of the EU, there are two sides to the equation: either there is no real conflict of obligations for the respondent State, in which case the equivalent-protection test does not even come into play; or there is a conflict of obligations, but then it will be governed by Article 103 of the UN Charter. In both cases—and *tertium non datur*—the equivalent-protection test is inapplicable to a situation such as the present. It is, moreover, significant that in the *Nada v Switzerland* judgment[72]—concerning the applicant's inclusion on a Security Council blacklist by the Swiss authorities—and more recently in *Al-Dulimi*[73] the Grand Chamber carefully avoided relying on that test.

2. *The concern for systemic harmonization*

Among the above mentioned judgments (and decisions) of the ECtHR which concern the responsibility of States parties to the Convention when implementing a Security Council resolution, the *Al-Dulimi* judgment is the first to refer expressly to 'systemic harmonisation'.[74] However, far from heralding a departure from precedent, this judgment is in keeping with that case law and particularly with the judgments in *Al-Jedda*[75] and *Nada*.[76] When looked at closely, and going beyond the specificities of each case, the three Grand Chamber judgments—*Al-Jedda*, *Nada* and *Al-Dulimi*—follow a common pattern of reasoning, the main points of which may be summed up as follows.

a) Non-existence of a normative conflict in the abstract

The ECtHR is first guided by the report of the International Law Commission (ILC) on the 'Fragmentation of international law', which, under the heading 'Harmonization – Systemic integration', states in general terms that '[i]n international law, there is a strong presumption against normative conflict'.[77]

[72] *Nada* (n 6).

[73] *Al-Dulimi* (n 2) para 149.

[74] ibid, para 140. For a brief commentary on this judgment see A Peters, 'The New Arbitrariness and Competing Constitutionalisms: Remarks on ECtHR Grand Chamber Al-Dulimi' EJIL: *Talk!* (30 June 2016); M Milanovic, 'Grand Chamber Judgment in Al-Dulimi v. Switzerland' EJIL: *Talk!* (23 June 2016). VP Tzevelekos, 'The *Al-Dulimi* Case before the Grand Chamber of the European Court of Human Rights: Business as Usual? Test of Equivalent Protection, (Constitutional) Hierarchy and Systemic Integration', 6 QIL 38 (2017), 5–34. See also the critical approach by Judges Ziemele and Nußberger in their partly dissenting and dissenting opinions respectively, appended to *Al-Dulimi* (n 2), as well as the concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov, and the concurring opinions of Judges Keller and Kūris.

[75] *Al-Jedda* (n 5).

[76] *Nada* (n 6).

[77] ILC, 'Fragmentation of International Law: difficulties arising from the diversification and expansion of international law', Report of the Study Group of the International Law Commission, finalized by M Koskenniemi, UN Doc A/CN.4/L. 682 (13 April 2006) para 37.

On that premise, the ECtHR emphasizes that the United Nations is based on the values of human rights, pointing out that the purposes of the universal organization, as stated in Article 1 of its Charter, include 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' (Article 1, paragraph 3). In the same vein, Article 55(c) of the Charter, which is part of the chapter on '[i]nternational economic and social cooperation', provides that 'the United Nations shall promote … universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.

Those two provisions of the UN's constitutive treaty form the legal basis for the whole comprehensive normative framework of the United Nations in the field of human rights, starting with the Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948. It is well known that this historic document was the source of inspiration *par excellence* for the European Convention on Human Rights,[78] as shown by the fact that the Convention's preamble refers to it three times: in the first and second of its consideranda and again in the last, where the governments signatory thereto express their resolve to 'take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'. To be sure, the Convention system has been much enriched since then (just like the UN's own normative framework). Nevertheless, the fact that the Convention is soundly anchored in the values proclaimed by the Universal Declaration is unquestionable and unquestioned. In those circumstances, it is impossible to refer in the abstract to any normative conflict between the UN system and the Convention system.

b) Interpretation of Security Council resolutions in terms of human rights

The second stage of the ECtHR's reasoning stems from the first and concerns the interpretation of Security Council resolutions. It should be noted here that the organs of international organizations are generally bound by the rules applicable to their functioning. In other words, the Security Council is in principle bound by the provisions of the UN Charter, including Article 1 section 3 and Article 55 concerning respect for human rights. That is what the ECtHR stated in substance when it found that 'Article 24 § 2 of the Charter require[d] the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United

Report quoted in *Al-Dulimi* (n 2) para 56. See also ibid, para 138 together with *Nada* (n 6) paras 81 and 170.

[78] WA Schabas, *The European Convention on Human Rights* (Oxford University Press 2015) 55ff.

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Nations''.' The ECtHR has thus drawn the legal conclusion that when resolutions are interpreted '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' and that '[i]n the event of any ambiguity in the terms of a United Nations 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'[79].

To put it another way, having regard to the normative framework governing the Security Council's activities, there is a presumption whereby its resolutions do not create any obligations that are incompatible with those undertaken by the member States in the domain of human rights. The presumption in question is, admittedly, rebuttable. Nevertheless, any doubt must be dispelled in favour of an interpretation of the relevant Security Council resolutions which avoids a conflict of obligations. This idea of presumption was used in *Nada*[80] and has been developed in the *Al-Dulimi* judgment.[81]

The ECtHR first reiterates the findings of its case law according to which, in view of the UN's 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'.[82] The ECtHR thus assumes the logical consequence of that idea: in the absence of any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, 'the Court must always presume that those measures are compatible with the Convention'.[83]

The words 'must always presume' do not mean that the presumption in question suddenly becomes irrebuttable. It is certainly not in dispute that, except in respect of norms of *jus cogens*, the Security Council has the possibility of provisionally departing from specific human rights provisions. This is what transpires, moreover, from the judgments given in the context of the *Al-Dulimi* case by the Swiss Federal Court, and the ECtHR shares its conclusions on that point.[84] However, the presumption of human-rights compliance by Security Council resolutions is a strong presumption, in the sense that only 'clear and explicit' language is capable of rebutting it. Any vague, ambiguous or implicit terms would not have that effect.

In sum, the ECtHR has made every effort to limit, to the extent possible, the situations where a real conflict of obligations would arise for the Contracting States when they implement Security Council resolutions in general and

[79] *Al-Jedda* (n 5) para 102. See also *Nada* (n 6) para 171; *Al-Dulimi* (n 2) para 140.
[80] *Nada* (n 6) paras 171ff.
[81] *Al-Dulimi* (n 2) paras 139–140.
[82] *Al-Jedda* (n 5) para 102; *Nada* (n 6) para 171.
[83] *Al-Dulimi* (n 2) para 140.
[84] ibid, para 136.

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more specifically those which impose economic sanctions under Article 41 of the UN Charter. As has been already stressed, to the extent that they are binding, resolutions based on the latter provision are covered by the effect of Article 103 of the Charter. However, the method of interpretation used by the ECtHR has tended to minimize the significance of the primacy rule in Article 103. The rule in question has only to be applied in *ultima ratio*, once all the possibilities of a human-rights-compliant interpretation have, so to speak, been exhausted.

On the basis of that methodology, the question arises whether the Resolutions underlying the dispute in *Al-Dulimi*—especially Security Council Resolution 1483 (2003)[85]—may be interpreted in such a way as to avoid a conflict of obligations.

c) Interpretation of the Resolutions underlying the dispute in *Al-Dulimi*

As a general rule, Security Council resolutions, even where they are binding, which is in principle the case for those which impose economic sanctions, leave a certain latitude to States in their implementation. This is true in particular as regards the means to be used, or the possibilities of derogations or exceptions on humanitarian and other grounds.[86] Such latitude—'admittedly limited but nevertheless real'[87]—may enable States to find the appropriate solutions in order to harmonize their various obligations.

Resolution 1483 (2003) is no exception to that rule. Indeed, the crucial paragraph—paragraph 23—while using prescriptive language, requiring that the member States 'shall freeze without delay' the relevant funds or other financial assets or economic resources and 'immediately … cause their transfer' to the Development Fund for Iraq, nevertheless allows for a significant exception by excluding funds or other financial assets or economic resources which are 'the subject of a prior judicial, administrative, or arbitral lien or judgment'. In other words, it suffices for there to be a dispute or for the assets or economic resources to have been the subject of an administrative measure or decision, and they will be excluded from the scope of the transfer obligation. It would thus appear that the wording of the paragraph at issue cannot be regarded as unconditional in nature. It is, moreover, noteworthy that the Swiss authorities have taken certain practical decisions,[88] which show that it was indeed possible to apply Resolution 1483 (2003) with some flexibility.

Going beyond those textual considerations, what is most important, having regard to the ECtHR's methodology, is to ascertain whether Resolution 1483 (2003) or Resolution 1518 (2003),[89] which created the relevant Sanctions

[85] S/RES/1483 (2003), 22 May 2003.
[86] See Sicilianos (n 48) 82ff (also for further references).
[87] *Nada* (n 6) para 180.
[88] As described in paras 31, 32 and 34 of *Al-Dulimi* (n 2).
[89] S/RES/1518 (2003), 24 November 2003.

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Committee, expressly prohibited access to a court and, accordingly, whether it was possible for the national courts to verify, in terms of human rights, the measures taken at national level pursuant to the first of those Resolutions. Applying *mutatis mutandis* the general rule of interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties, the ECtHR finds that the above-mentioned Resolutions, when 'understood according to the ordinary meaning of the language used therein', did not contain any such prohibition. Nor does the ECtHR detect any other legal factor that could legitimize such a restrictive interpretation.[90] However, given the nature and purpose of the measures provided for by Resolution 1483 (2003), the ECtHR circumscribes the extent of the judicial scrutiny under Article 6 of the ECHR.

d) The arbitrariness test

It is certainly to be borne in mind that, according to the ECtHR's settled case-law, the right of access to a court, as secured by Article 6 paragraph 1 of the Convention, is not absolute: it may be subject to limitations, since by its very nature it calls for regulation by the State. The Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the ECtHR, which must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, such a limitation of the right of access to a court will not be compatible with Article 6 paragraph 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[91]

In the same vein, the ECtHR considers in the *Al-Dulimi* judgment that 'the fact that it has remained totally impossible for [the applicants] to challenge the confiscation measure for many years is hardly conceivable in a democratic society'.[92] The ECtHR thus seems to be suggesting that such a drastic restriction on the right of access to a court would impair the essence of that right. On the other hand, the ECtHR takes account of the nature and legitimate aim of the impugned measures, namely the protection of international peace and security. In order to strike a 'fair balance' between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security, the ECtHR takes the view that the courts of the respondent State should have exercised 'sufficient scrutiny so that any arbitrariness [could] be avoided'.[93] The ECtHR reiterates in this connection that '[o]ne of the fundamental components of European public

[90] *Al-Dulimi* (n 2) para 143.
[91] See, among many other authorities, *Cudak v Lithuania*, App No 15869/02, Grand Chamber Judgment (ECtHR, 23 March 2010) para 55 and the references cited therein.
[92] *Al-Dulimi* (n 2) para 152.
[93] ibid, para 146.

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order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle'.[94] Moreover, in the context of such scrutiny—admittedly minimal, but nevertheless important—the applicants should have been afforded 'at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, in order to show that their inclusion on the impugned lists had been arbitrary'.[95] This means that, at least at the outset, the burden of proof is on the applicants, who should have sufficient evidence at their disposal to enable them, if appropriate, to prove that the measures taken against them are arbitrary in nature.

As thus defined, the scrutiny intended by the ECtHR does not seem to place an excessive burden on the national judicial authorities, while taking into account, in a balanced manner, the imperatives of the protection of international peace and security—and, accordingly, the responsibilities of the Security Council under the Charter, on the one hand, and the rights at the heart of the Convention system, on the other. In my opinion, this is a wise approach. It has the merit of avoiding a systemic conflict, or even the fragmentation of the international legal order. Instead, it seeks to promote a coherent view of international law. The ECtHR scrupulously avoids calling into question the Security Council's decisions as such or encouraging States to engage in a form of 'disobedience'[96] towards the body with primary responsibility for maintaining international peace and security. At the same time, the ECtHR assumes its role in guaranteeing the values enshrined in the ECHR and the Protocols thereto.

IV. CONCLUSIONS

In conclusion, it will be noted that the ECtHR is in the process of refining its conceptual tools for determining the responsibility of the States Parties to the ECHR acting in execution of a Security Council resolution. Where the implementation of resolutions involving the use of force is concerned, the ECtHR's recent case law has shown a shift towards systematic acceptance of the extraterritorial scope of the ECHR. This position is corroborated by the case law of the International Court of Justice and the practice of the Human Rights Committee and other international human rights treaty bodies. The extraterritorial scope of the ECHR is taking on greater importance nowadays, given that the States Parties to the Convention are increasingly active in the context of military operations abroad, usually on the basis of Security Council resolutions.

As to whether the conduct in issue should be attributed to the States Parties or to the UN, the ECtHR now makes a clear distinction between operations authorized by the Security Council and UN peacekeeping operations. The

[94] ibid, para 145.
[95] ibid. para 151.
[96] To use the expression employed by Tzanakopoulos (n 9).

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former are placed under national command and control authorities, and consequently the question of the UN's responsibility does not even arise. In the case of UN operations, however, it is important to undertake a more detailed examination of the question of shared responsibility between the UN and States contributing troops.

The question of the responsibility of the States Parties to the ECHR in the implementation of resolutions imposing economic sanctions will be addressed differently according to whether or not the respondent State is a member of the EU. The criterion of 'equivalent protection' is only applicable in the former scenario. And in any event, it needs to be applied cautiously on a case-by-case basis, bearing in mind that the prospect of EU accession to the ECHR has receded following the ECJ's opinion 2/13, and that as a result, the protection of human rights is still not complete in Europe.

As regards the enforcement of economic sanctions by non-EU Member States, the ECtHR tends to interpret Security Council resolutions in a manner consistent with the obligations deriving from the ECHR. Without ruling out the applicability of Article 103 of the Charter in the circumstances of each individual case, such an approach seeks to avoid a conflict of obligations, and thus tension between the UN and ECHR systems. The ECtHR favours an integrated and harmonized interpretation and application of (potentially conflicting) obligations of States under the two systems. In other words, the ECtHR's approach is oriented towards systemic harmonization rather than towards normative conflict. At the same time, the Security Council should continue to improve the sanctions process through greater observance of the principles of the rule of law. The ECtHR, for its part, can only affirm and consolidate its role in guaranteeing the fundamental values of European public order.