

Title: The Application of Article 103 of the United Nations Charter in the European Courts: the Quest for Regime Compatibility on Fundamental Rights

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Abstract:

This contribution identifies and examines three approaches of the European courts to application of certain United Nations Security Council (SC) resolutions that trigger concerns for violations of fundamental rights in their respective legal orders. This analysis argues that a balance between the United Nations (UN) superior norm and preservation of fundamental rights should be aimed outside the monist and dualist constraints of interpretation, where the courts either obey art 103 of the UN Charter trumping fundamental rights (subordination approach), or detach from the UN system in order to safeguard fundamental rights of their autonomous regimes (detachment approach). This submission suggests that further exploration of norms and techniques of treaty interpretation found in the Al-Jedda and Nada cases of the European Court of Human Rights (ECtHR), coupled with constructive contribution of scholars provide tools allowing regime compatibility and harmonization that disturb neither coherence nor autonomy of the respective regimes (harmonization approach) in the world of legal plurality.

**THE APPLICATION OF ARTICLE 103 OF THE UNITED NATIONS CHARTER
IN THE EUROPEAN COURTS: THE QUEST FOR REGIME COMPATIBILITY ON
FUNDAMENTAL RIGHTS**

Kushtrim Istrefi*

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1. OPENING REMARKS: SETTING THE SCENE

Art 103 of the UN Charter (or the ‘Charter’),¹ in a rather unambiguous articulation, provides that, ‘[i]n 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’. The reference to *any other international agreement* reveals the external character of this clause, which presents an exception to the horizontal nature of international law.² Furthermore, the legal force of art 103 covers not only its member states, but also ‘international and regional organizations ... private contracts, licences and permits’.³

In view of the purposes of the UN Charter and its operation, the legitimacy of art 103 emanates from the wide acceptance of this principle by the UN member states,⁴ international courts and tribunals,⁵ other international treaties,⁶ the ILC Report on Fragmentation⁷ and opinions of academics.⁸ Following the wide acceptance of the UN superior norm, Benedetto Conforti asserts that ‘the principle contained in Article 103 is considered by the whole international community as a principle going beyond the law of treaties and it has come to be regarded as a customary rule’.⁹

Against this background, one would expect that when an issue arises on the basis of art 103 of the UN Charter, no legal system would intend to redefine its scope and effects, since, as

¹ Art 103 of the UN Charter is inherited from art 20 of the Covenant of the League of Nations (the ‘Covenant’). For more on art 20 of the Covenant, see especially Hersch Lauterpacht, ‘The Covenant as the Higher Law’ (1936) 17 *British YB Intl L* 54–65.

² Also *jus cogens* and *erga omnes* obligations belong to the vocabulary of ‘informal hierarchy in international law’, see in 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’ (13 April 2006) UN Doc A/CN.4/L.682 (ILC Report on Fragmentation) 327. Other authors argue that art 103 of the Charter should be considered as a mere conflict, rather than a hierarchy rule. See eg Antonios Tzanakopoulos, ‘Collective Security and Human Rights’ in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 66.

³ Arnold Pronto and Michael Wood, *The International Law Commission 1999–2009*, IV (OUP 2010) 756; See eg UNSC Res 748 (31 March 1992) UN Doc S/RES/748; UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267.

⁴ Rudolf Bernhard, ‘Article 103’ in Bruno Simma *et al* (eds), *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002) 1293.

⁵ See eg *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v United Kingdom) and (Libya v United States of America)*, [1993] ICJ Rep 39–41; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, [1985] ICJ Rep para 107; Case T-315/01, *Kadi v Council and Commission* [2005] ECR II-3649, paras 183–204; Case T-306/01, *Yusuf and Al Barakat v Council and Commission* [2005] ECR II-3533, paras 233–254; *Behrami and Behrami v France, Saramati v France, Germany and Norway*, ECHR, Applic. No. 71412/01 and applic no 78166/01, Decision on Admissibility of 2 May 2007, para 61, respectively at para 141; *Berić and Others v Bosnia and Herzegovina*, ECHR, applic no 36257/04, Decision on Admissibility of 16 October 2007, para 29.

⁶ See eg art 30(1) Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) UNTS 1155 (VCLT); art 131 Charter of the Organization of American States (30 April 1948); Seventh Principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (24 October 1970).

⁷ ILC Report on Fragmentation (n 2) 324–409.

⁸ See eg Bernhard (n 4) 1292–1302; Benedetto Conforti, ‘Consistency among Treaty Obligations’ in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 189–190; Michael Wood, ‘The Law of Treaties and the UN Security Council’ in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 253–254.

⁹ See Benedetto Conforti (n 8) 189.

Anthony Aust has put it, ‘no wise judge (international or national) wants to reinvent the wheel’.¹⁰

Nevertheless, in recent judicial and doctrinal dialogues the character of art 103 of the Charter has not been accepted without resistance when the claim of universality had to trump obligations of other legal orders related to individual fundamental rights.¹¹

Recalling that the SC in its Resolution 1530 (2004) could erroneously attribute the Madrid bombings of 2004 to the ETA organization,¹² a concern that individuals could be victims of similar ‘sorry tales of Security Council’¹³ resolutions without any procedural guarantee or the right for judicial review triggered scholars and courts to seek for proper responses to some ‘arbitrary’ SC resolutions.

With regard to the Security Council resolutions blacklisting suspects of (supporting) terrorism, Justice Zinn sitting in the Canadian Federal Court, in the *Abdelrazik* case stated that ‘there is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness’.¹⁴ Indeed, as already emphasized ‘it is the procedural system per se that does not respect such rights’.¹⁵

While judicial bodies worldwide have been struggling to balance human rights and subordination to the UN supremacy, this has been particularly sensitive for European courts where protection of fundamental rights is of a paramount importance in the hierarchy of norms.

When placed between the UN obligations vested in art 103 and domestic fundamental rights, from the methodological point of view, European courts appear to have adopted three approaches, namely the ‘subordination’, ‘detachment’ and ‘harmonization’. Oscillation on this varied trinity of approaches, affects not only rights of the individuals concerned but also the legal (un)predictability and coherence of international law.

Majority of European case law follows the ‘subordination’ approach where constitutional and conventional fundamental rights are trumped when in conflict with the SC resolutions, by considering unattainable to accommodate simultaneously two obligations of different legal orders.¹⁶ The second approach, the ‘detachment’ from the UN system is a reverse

¹⁰ Anthony Aust, ‘Peaceful Settlement of Disputes: A Proliferation Problem?’ in Tafsir Maliek Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes, Liber Amicorum Judge Thomas A. Mensah* (MNP 2007) 137.

¹¹ Even the (then) ICJ Judge Bruno Simma, a universalist proponent, stated that ‘[i]f ... universal institutions like the UN cannot maintain a system of adequate protection of human rights, considerations of human rights deserve trump arguments of universality’ in Bruno Simma, ‘Universality of International Law from the Perspective of a Practitioner’, (2009) 20 *EJIL* 294.

¹² The arrest of several radicals associated with Al-Qaeda organization by Spanish authorities for the Madrid bombings of 2004 is an indication of erroneous attribution to the ETA organization.

¹³ Therese O’Donnell, ‘Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)’, (2007) 17 *EJIL* 946 ff.

¹⁴ Case T-727/08 *Abdelrazik v Minister of Foreign Affairs and Attorney General of Canada* [2009] FC 580, 51.

¹⁵ Salvatore Zappalà, ‘Reviewing Security Council Measures in the Light of International Human Rights Principles’ in Bardo Fassbender (ed), *Securing Human Rights? Achievements and Challenges of the UN Security Council* (OUP 2011) 182.

¹⁶ See eg *Kadi* (n 5); *Behrami and Saramati* (n 5); *Berić and Others* case (n 5); *R (on the applicant of Al-Jedda) (FC) v Secretary of State for Defence* [2007] UKHL 58 (2008); *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative Appeal Judgment of 14 November 2007, BGE 133 II 450, 1A 45/2007.

approach of the ‘subordination’, generated also by a narrow understanding of art 103.¹⁷ This is peculiar particularly for the EU legal order, which in the widely debated *Kadi* case considered the EU law as a ‘supreme law of the land’, and developed a dualist or strong pluralist approach¹⁸ that led to detachment from the UN supremacy. ‘Harmonization’ is the third approach, developed by the ECtHR in *Al-Jedda* and *Nada* cases.¹⁹ This methodology provides that by utilizing techniques and norms of treaty interpretation, courts can balance concerns of the UN supremacy with human rights.

In the same structural order, this contribution examines the aforementioned responses by adding a section with theoretical considerations that provide pertinent tools for reaching harmonious accommodation of different treaty obligations in domestic cases. The conclusion highlights the key features of these approaches and considers their relevance in the ongoing discussion on regime interaction in international law.

2. SUBORDINATION APPROACH: WHEN COHERENCE BECOMES THE ANTONYM OF FUNDAMENTAL RIGHTS

The wide and cross-regime acceptance of the UN superior norm was reflected in most of the European case law, even when conformity with art 103 resulted in jeopardizing domestic fundamental rights. The General Court of the European Union (GCEU)²⁰ in *Yusuf and Kadi* chose the subordination approach. It considered that decisions of the SC overruled the European Union (EU) law even in light of fundamental rights and the GCEU had no mandate to review obligations originating from the SC.²¹ While the GCEU regarded that a review could be done exceptionally based on *jus cogens* violations,²² nevertheless it did not find any *jus cogens* violation, and firmly applied art 103 of the Charter as a conflict and superior rule.

The ECtHR in *Behrami and Saramati* and *Berić and Others* did not engage in the alleged violations of the fundamental rights, including right to life,²³ liberty and security,²⁴ and an effective remedy,²⁵ as such an examination was precluded due to court’s finding on the attribution of the conduct in question. The court observed that in authorizing the military mission in Kosovo the UN SC retained the ‘ultimate authority and control’ over it. Therefore, the ECtHR was not faced with complexities of art 103 and its possible relationship and effects on the regional convention. At the same time, the ECtHR’s reasoning in *Behrami and Saramati* attracted a significant debate. When observing criticism in writings of jurists on the ‘ultimate control’ test employed by the ECtHR and the manner

¹⁷ See Joined Cases C-402/05 P and C-415/05 P *Kadi and Yusuf v Council and Commission* [2008] ECR I-6351; T-85/09 *Kadi v Commission* [2010] ECR II-05177.

¹⁸ ‘Strong pluralist approaches deny the possibility of a shared, universally-oriented system of values and question the meaningfulness of the idea of an international community’ in Gráinne de Búrca, ‘The European Court of Justice and the International Legal Order After *Kadi*’ 51 *HILJ* (2010) 4 (the description contained in fn 10).

¹⁹ *Al-Jedda v The United Kingdom*, ECHR, applic no 27021/08, Judgment of 7 July 2011; *Nada v Switzerland*, ECHR, applic no 10593/08, Judgment of 12 September 2012.

²⁰ Before the entry into force of the Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TFEU), the GCEU was known as the Court of First Instance (CFI).

²¹ *Kadi* [2005] (n 5) 221-231. *Yusuf* [2005] (n 5) 277-282.

²² *ibid* 176.

²³ See eg *Behrami* (n 5) 61.

²⁴ See eg *Saramati* (n 5) 141.

²⁵ See eg *Berić* (n 5) 29-30.

of ‘attribution of conduct’ to states and international organizations,²⁶ the underlying significance of art 103 of the UN Charter is apparent.

The House of Lords of the United Kingdom in the *Al-Jedda* case²⁷ and the Swiss Federal Supreme Court in the *Nada* case²⁸ enriched the case law providing for the gentle subordination approach, whereby both European domestic higher courts unanimously held that art 103 gave primacy to resolutions of the SC, even in relation to human rights agreements.

For the purposes of this contribution, the common denominator of the aforementioned cases in the European jurisdictions is that in implementation of certain SC obligations, courts chose to obey rules of the SC and set aside their respective fundamental conventional or constitutional rights. This approach where courts are unable to reach synergy between, what appear to be, conflicting norms provides for a narrow interpretation of norm conflict ‘where giving effect to one international obligation unavoidably leads to the breach of another obligation or right’.²⁹ It may be said that a court rather looks at the terms of conflicting obligations in clinical isolation and omits the quest for ‘regime compatibility’³⁰ or harmonization between the SC obligation to maintain peace and security on the one hand, and protection of fundamental rights in the European or domestic legal order on the other.

Following a broader interpretation of art 103, the European courts could rely on the UN Charter provisions on human rights that allow diminishing arbitrariness associated with the SC resolutions. Art 24 (2) of the Charter provides that the SC in discharging its duties, *inter alia*, under Chapter VII ‘shall act in accordance with the Purposes and Principles of the United Nations’. Indeed, one of the purposes of the United Nations (UN) as provided by art 1(3) is to ‘achieve international co-operation in ... promoting and encouraging respect for human rights and for fundamental freedoms’. Indeed, as the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) asserted in *Tadić* case, ‘neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutes* (unbound by law)’.³¹ In discussing the confrontation between the SC resolutions and fundamental rights, the ECtHR Judge Giorgio Malinverni in the recent *Nada* case emphasized that ‘one does not need to be a genius to conclude that the Security Council itself must also respect human rights, even when acting in its peace-keeping role’.³²

As a result, one might expect that ‘the Security Council would be stopped from behavior that violates the core elements of the human rights norms underpinning Article 1(3) of the

²⁶ See eg Giorgio Gaja, Seventh Report on Responsibility of International Organizations, UN Doc A/CN.4/610, (27 March 2009), at 10-12; Andrew Clapham, ‘The Subject of Subjects and the Attribution of Attribution’ in Laurence Boisson de Chazournes and Marcelo Kohen (eds), *International Law and the Quest for its Implementation Le droit International et la quête de samise en oeuvre: liber amicorum Vera Gowlland-Debbas* (MNP 2010) 53-56; Marko Milanovic, ‘Al-Skeini and Al-Jedda in Strasbourg’, (2012) 23 *EJIL* 1, 134-135; Kjetil Mujezinović Larsen, ‘Attribution of Conduct in Peace Operations: The “Ultimate Authority and Control” Test’, (2008) 19 *EJIL* 509.

²⁷ *Al-Jedda* (n 16).

²⁸ *Nada* (n 16).

²⁹ Erika de Wet and Jure Vidmar (n 2) 1. See also C Wilfred Jenks, ‘Conflict of Law-Making Treaties’ (1953) 30 *British YB Intl L* 401.

³⁰ Dirk Pulkowski, ‘Universal International Law’s Grammar’ in Ulrich Fastenrath *et al* (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) 154.

³¹ IT-94-AR72, *Prosecutor v Dusko Tadić a/k/a/ “Dule”*, ICTY Appeals Chamber, Interlocutory Judgment on Jurisdiction of 2 October 1995, 28.

³² ECtHR *Nada* (n 19) Concurring Opinion of Judge Malinverni, 15.

Charter' or at least would consider engaging in a synergy with the systems on the protection of human rights.³³ The validity of this anticipation goes in line with the assertion of the International Court of Justice (ICJ) that 'where a State or an international organization has created the legitimate expectation that it would act in a certain manner, it is under a legal obligation to fulfill that expectation'.³⁴ This extends to the UN as well.

In sum, while 'subordination' seems to be less harmful for the coherence of international law, two deficiencies of this methodology can be identified with the optics of international law. First, the judicial interpretation of conflict norms resulting in gentle subordination, without attempts to accommodate different treaty rule systems, is not in harmony with the international law's strong presumption against normative conflict.³⁵ Second, leaving aside the essential role of the fundamental rights further legitimizes the claim that the SC in discharging its duties in the field of peace and security is not cognizant of international human rights. This approach, portraying art 103 as the antonym of fundamental rights further provokes scholarship argument that the effects of the UN superior norm deserve a challenge on arguments of morality and values of other legal orders, this justified on the grounds of protection of fundamental rights.

3. DETACHMENT FROM THE UN SYSTEM: THE EU'S STRONG PLURALISM REFLECTED IN THE KADI CASE

Upon appeals against the *Kadi* judgment of 2005, the Court of Justice of the European Union (CJEU)³⁶ considered itself competent to 'provide "in principle the full review" of the lawfulness of the EU contested regulation [adopted to implement the UN SC Resolution] in the light of the fundamental rights'.³⁷ The CJEU's approach *vis-à-vis* the UN system was largely based on its understanding that 'the constitutional framework created by the EC Treaty as a wholly autonomous legal order, [is] not subject to the higher rules of international law – in this case the law deriving from the Charter of the United Nations'.³⁸ Consequently, the CJEU considered its primary EU law as a 'supreme law of the land'.³⁹ In the EU internal hierarchy of norms, the UN law was equalized with any other international agreement and subordinated to the primacy of the EU law.⁴⁰

By analogy with Hans Kelsen's perception on solipsistic and imperialistic features of dualism, Martti Koskenniemi described the EU's approach to international law as '[s]olipsistic in the sense of capable of seeing nothing else than one's own legal system ...

³³ Erika de Wet and André Nollkaemper, 'Review of the Security Council Decisions by National Courts', (2003) 45 *German YB Intl L* 8.

³⁴ *Nuclear Tests (Australia v. France)*, (1974), ICJ Reports (1974) para 267.

³⁵ ILC Report on Fragmentation (n 2) para 37.

³⁶ Before the entry into force of the TFEU, the CJEU was known as the European Court of Justice (ECJ).

³⁷ *Kadi* [2008] (n 17) para 326. See also *Kadi* [2010] (n 17) para 126 [emphasis added].

³⁸ *Kadi* [2010], the GCEU summarizing the reasoning of the CJEU in *Kadi* [2008] (n 17) para 119 [emphasis added].

³⁹ The GCEU in *Kadi* [2010] heavily criticized the approach taken by the CJEU in *Kadi* [2008], however, its conclusion did not differ from that of the CJEU. See particularly Armin Cuyvers, 'The Kadi II Judgment of the General Court: The ECJ's Predicament and the Consequences for Member States' (2011) 7 *ECLR* 3, 481-510.

⁴⁰ See Nikos Lavranos, 'Revisiting Article 307 EC: The Untouchable Core of Fundamental European Constitutional Values and Principles' in Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza (eds), *Shaping the Rule of Law Through Dialogue* (Europa Law Publishing 2009) 122.

[and] imperialistic because everything taking place in the world is judged from its perspective. Or, I should like to say, everything as long as this is convenient.’⁴¹

Nevertheless, while scrutinizing the EU legal order with the optics of international law, one must recognize the peculiarities of the EU regime for its intertwined relationship with the legal orders of member states.⁴² Through the principles of supremacy and direct effect developed by the CJEU, EU law not only affects its member states, but also natural and legal persons.⁴³

Hence, to preserve the relationship with its member states, the EU legal order has the specific task of filtering norms and obligations derived from other regimes in scrutinizing if they correspond to the standard as granted by the EU law. Otherwise, the failure of the EU legal order to apply its primary law when juxtaposed with the SC resolutions, could theoretically lead to a new type of *Solange* confrontation,⁴⁴ with the argument that terms of the SC resolutions contradict the fundamental rights of domestic orders of its member states. In this hypothesis, the two principles holding the EU system, namely, the supremacy and the direct effect would be challenged.

Yet, it remains a legitimate question whether the detachment from the UN system is the only viable solution to preserve the peculiarities of the EU legal order and whether the EU jurisprudence is reflecting the EU’s political agenda in international relations.

First, in avoiding the hypothetical challenge on supremacy and direct effect, as Gráinne de Búrca emphasized, ‘instead of adopting a strongly pluralist approach to international law, the [CJEU] could and should have followed the soft-constitutionalist approach which it and other European courts have used on different occasions to mediate the relationship between the norms of the different legal orders’.⁴⁵ Hence, the CJEU should have tried to alleviate treaty conflicts by means of treaty interpretation, and not by using ‘chauvinist and parochial tones’ with respect to international law.⁴⁶

Second, ‘[t]he traditional self-presentation of the EU as a virtuous international actor ... as well as with the broader political ambition of the EU to carve out a distinctive international role for itself as a “normative power” committed to effective multilateralism under international law’⁴⁷ should be reflected upon when facing application of international law. Following the position of the EU foreign policy, one may observe that the EU is cognizant of the importance of pluralism and international law.⁴⁸

⁴¹ Martti Koskenniemi, ‘International Law: Constitutionalism, Managerialism and the Ethos of Legal Education’ (2007) 1 *EJLS* 2 [emphasis added]. Indeed, one could view that the EU legal order is not detached from the UN system. Instead, the UN system is integrated and subordinated to EU law.

⁴² See eg Daniel Bethlehem, ‘International Law, European Community Law, National Law: Three Systems in Search of a Framework’ in Martti Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer Law International 1998) 169; Samantha Besson, ‘European Legal Pluralism after Kadi’ (2009) 5 *ECLR* 237–264.

⁴³ See Case 26/62, *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 3.

⁴⁴ 2 BvL 52/71, BVerfGE 37, 271 (*Solange I*); 2 BvR 197/83, BVerfGE 73, 339 (*Solange II*).

⁴⁵ Gráinne De Búrca (n 18) 4 [emphasis added].

⁴⁶ *ibid*.

⁴⁷ *ibid* 3.

⁴⁸ The President of the European Commission José Manuel Durão Barroso has outlined a vision of the EU’s foreign policy in the following terms: ‘We certainly welcome pluralism in international relations ... In international relations, partnerships and a multilateral approach can achieve so much more ... we need a renewed politics of global engagement, particularly with international institutions ... because that is the only way we can consolidate and strengthen a stable, multilateral world, governed by internationally-agreed rules’.

Accordingly, it seems unsurprising that the approach of the EU courts in *Kadi* caused dissent within its legal order. In December 2010, the Commission, the Council and majority of the EU member states filed another appeal and intervened in *Kadi*,⁴⁹ arguing:

[t]he United Nations Charter requires compliance with its obligations by its Member States. Such obligations prevail over the obligations which may arise under any other international agreement. Such obligations include those imposed under Security Council resolutions intended to combat international terrorism. Having regard, in particular, to Articles 3(5) and 21 TEU and Article 351 TFEU, the obligation upon EU Member States to comply with the decisions of the Security Council prevails over any obligations which may arise under the EU Treaties. The EU must consider itself bound by the terms of the UN Charter and the UN Security Council decisions made under it.⁵⁰

If the two EU legislating institutions and the majority of its member states claim different understanding of the relationship between the EU law and the UN law, the EU courts should pay due regard to the claimed impression that the EU law is solely within discretion of its judges. In fact, even in cases when judges make law, Ronald Dworkin suggests that ‘they should act as deputy to the appropriate legislature, enacting the law that they suppose the legislature would enact if seized of the problem’.⁵¹ Immanuel Kant also argues that the ‘law establishes the omnilateral or ‘general united will’ of a community’.⁵² ‘This will is understood as an “all-sided will” or, ... “all the Wills of a Community together”’.⁵³ This does not suggest that the EU courts should be influenced by political pressures of EU institutions and member states, but rather to quest for a more balanced interpretation when dealing with the UN obligations that might affect responsibility of the EU member states.

If the CJEU decides not to revisit its memorable *Kadi* reasoning, the case might enhance political and legal tensions. From a political perspective, the EU member states being obliged to respect the SC resolutions and the supremacy of the EU law will be left to respond with the principle of political decision. This principle developed by Manfred Zuleeg provides that ‘the state concerned simply has to make a political decision which commitment to prefer’.⁵⁴

From the international law’s perspective, the challenge of art 103 based on the EU strong pluralism, where legal orders escape the UN obligations by rules of domestic law, ‘may obliterate boundaries of legality’.⁵⁵ As a consequence, the detachment approach ‘might reinforce perceptions of international law as non-law (or quasi-law) – i.e., a loose system of non-enforceable principles, containing little, if any real constraints on state power’.⁵⁶ Indeed, if the backbone UN principle - art 103 of the Charter is challenged by strong

See José Manuel Durão Barroso, ‘A Letter from Brussels to the Next President of the United States of America’ (2008), Lecture at Harvard University.

⁴⁹ Joined Cases C-584/10 P, C-593/10 P, C-595/10 P.

⁵⁰ *ibid* C-595/10 P. Appeal brought by the United Kingdom of Great Britain and Northern Ireland against *Kadi* judgment [2010] (n 16).

⁵¹ Ronald Dworkin, ‘Hard Cases’ (1975) 88 *HLR* 6, 1058.

⁵² Patrick Capps and Julian Rivers, ‘Kant’s Concept Of International Law’ (2010) 16 *Legal Theory* 233.

⁵³ *ibid*. See also Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as a Science of Right*, (William Hastie trs, T&T Clark 1887) 84.

⁵⁴ Manfred Zuleeg, ‘Vertragskonkurrenz im Völkerrecht. Teil I: Verträge zwischen souveränen Staaten’ (1977) 20 *German YB Intl L* 246-76, cited in Jan Klabbers, *Treaty Conflict and the European Union* (CUP 2009) 88.

⁵⁵ Adré Nollkaemper, ‘Rethinking the Supremacy of International Law’, (2010) 65 *ZaöR*, 74.

⁵⁶ Yuval Shany, ‘Toward a General Margin of Appreciation Doctrine in International Law?’ (2005) 16 *EJIL* 912.

pluralist views of legal orders, not applying the higher UN law, the claim of the CJEU Judge Allan Rosas that ‘[i]nternational [l]aw is dead’ would not be an exaggeration.⁵⁷

4. HARMONIZATION APPROACH: THE *AL-JEDDA* AND *NADA* MODEL

The foregoing observations indicate that by means of treaty interpretation the courts of the same legal order in the *Kadi* case could reach diametrically different outcomes. While both approaches present examples of a narrow interpretation of norm conflict, the reasoning of the ECtHR in *Al-Jedda* provides an addendum as to how pertinent tools of treaty interpretation allow reaching a more harmonious and constructive outcome than the one of the House of Lords, which decided to set aside the application of the European Convention on Human Rights (ECHR) for the sake of the UN supremacy.⁵⁸

Al-Jedda triggered a question of continual internment in light of art 5(1) of the ECHR and the SC Resolution 1546 (2004). The ECtHR’s response began with a survey of commonalities on the issue of human rights as reflected in the principles and purposes of the UN Charter. By means of harmonious interpretation, the ECtHR considered that ‘in interpreting ... [the SC] 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’.⁵⁹ Indeed, the SC itself appealed in its resolutions that while ‘promoting the maintenance of security and stability ... to act in accordance with international law’.⁶⁰ This implies also acting in accordance with human rights treaties, because ‘[h]uman rights are part of international law’.⁶¹

After setting the scene on ‘regime compatibility’, the ECtHR argued that the Resolution 1546 did not provide for ‘clear and explicit language... [requiring] States to take particular measures which would conflict with their obligations under international human rights’.⁶² Consequently, the ECtHR asserted that ‘it must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations’.⁶³ In this manner, the ECtHR came to its eloquent findings by considering that Resolution 1546 was ambiguous with regard to the issue of ‘obligation to intern’.⁶⁴ While there could be grounds to argue in support of internment in the context of the Resolution 1546,⁶⁵ the ECtHR by relying on the relevant UN reports⁶⁶ considered that internment was not *intended* as an obligation that set aside human rights obligations.⁶⁷

In sum, the ECtHR, after scrutinizing every angle of the UN superior norm and clarifying that art 103 did not create obligations to intern in the present case, gave effect to its conventional rights without eroding the vertical norm of international law.

⁵⁷ Allan Rosas, ‘The Death of International Law?’ (2011) 20 *Finch YB Intl L* 227.

⁵⁸ *Al-Jedda* (n 16).

⁵⁹ ECtHR, *Al-Jedda* (n 19) para 102 [emphasis added].

⁶⁰ UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546, Preamble.

⁶¹ See eg UNAMI, Human Rights Report 1 April – 30 June 2007, para 77.

⁶² ECtHR, *Al-Jedda*, (n 19) para 76 [emphasis added].

⁶³ *ibid.*

⁶⁴ *ibid* 105.

⁶⁵ *ibid* 34 and 108. The annexed letter to the SC Resolution 1546 (2004) provides that, ‘will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security ...’. Para 10 of the UNSC Res 1546 (8 June 2004) considered the annexed letters as integral part of the Resolution.

⁶⁶ *ibid* 40-41, the ECtHR made reference to the UN Assistance Mission for Iraq (UNAMI), Human Rights Reports.

⁶⁷ See also Marko Milanovic (n 26) 137.

In view of the recent jurisprudence of the ECtHR, it appears that the *Al-Jedda* model of harmonization does not reveal an accidental response to situations when the ECHR is juxtaposed with SC obligations. On 12 September 2012, the Strasbourg Court in its landmark *Nada* judgment asserted:

[w]here a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law.⁶⁸

While the ECtHR in the *Nada* case reiterated its readiness to pursue simultaneous accommodation of fundamental rights and SC obligations, the facts surrounding Mr. Nada's case should be distinguished from the facts in *Al-Jedda*. In particular, the situation in *Nada* emanated from more explicit terms of the SC Resolution 1390 (2002), requiring, *inter alia*, freeze assets, and apply the entry and transit ban against Mr. Nada.⁶⁹ The listing of Mr Nada in the 'Taliban Ordinance', associating him with serious terrorist activities, created a situation that differed from that in *Al-Jedda*, and reflected similarities to *Kadi*. In this regard, the ECtHR recognized:

contrary to the situation in *Al-Jedda*, ... Resolution 1390 (2002) expressly required States to prevent the individuals on the United Nations list from entering or transiting through their territory. As a result, the ... [*Al-Jedda*] presumption is rebutted in the present case, having regard to the clear and explicit language, imposing an obligation to take measures capable of breaching human rights, that was used in that resolution (... in paragraph 7 of Resolution 1267 (1999) ... the Security Council was even more explicit in setting aside any other international obligations that might be incompatible with the resolution).⁷⁰

Although the ECtHR acknowledged that the clear and explicit terms of the Resolution 1390 obliged Switzerland to take measures that may breach human rights, it also found that 'the Charter in principle leaves to UN member States a free choice among the various possible models of transposition of those resolutions into their domestic legal order'.⁷¹

After giving attention to the CJEU's reasoning in *Kadi*, particularly on domestic courts' latitude in choosing the means for implementation of the SC resolutions, the ECtHR again shifted to its 'linguistic ambiguity exercise', by identifying spaces in the terms of the SC Resolution 1390 in which to accommodate fundamental rights.⁷² In this manner, the ECtHR held that the wording employed in the Resolution 1390 '*where appropriate*' and '*necessary*' comprised on the part of the national authorities 'certain flexibility in the mode of implementation of the resolution'.⁷³ In support of this argument, the ECtHR took into account the Swiss Parliament's statement to the UN SC 'that it would no longer unconditionally be applying the sanctions prescribed against individuals under the counter-terrorism resolutions'.⁷⁴

⁶⁸ ECtHR, *Nada* (n 19) 170.

⁶⁹ UNSC Res 1390 (28 January 2002) UN Doc S/RES/1390, part 2 (a) and 2 (b).

⁷⁰ ECtHR, *Nada*, (n 19) para 172 [emphasis added].

⁷¹ *ibid* 176.

⁷² Marko Milanovic, 'European Court Decides *Nada v Switzerland*' (*EJIL Talk*, 14 September 2012) <<http://www.ejiltalk.org/european-court-decides-nada-v-switzerland/>> accessed 30 September 2012.

⁷³ ECtHR, *Nada* (n 19) 178.

⁷⁴ *ibid* 179.

In this light, the ECtHR in *Nada* concluded that ‘Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UN Security Council’.⁷⁵ In this way, the ECtHR neither challenged the supremacy of art 103 of the UN Charter, nor sacrificed fundamental rights. In this ‘hard case’ of a rather straightforward language of the SC Resolution 1390, the ECtHR maneuvered to preserve both, the coherence of international law and fundamental rights, by recourse to a linguistic test which, as one may observe, centers on spaces in SC resolutions.

The substantial ECtHR’s findings flowing from the less clear SC resolutions in *Al-Jedda*, and, more recently, in *Nada*, constitute an alarm for the SC that more precision may be expected in the language of its resolutions, particularly, when triggering human rights issues.

Overall, the ECtHR holdings in *Al-Jedda* and *Nada* are a result of a broader interpretation of norm conflict and provide invaluable examples of how coherence of international law could be preserved outside the ‘either, or’ constraints when dealing with two prima facie conflicting obligations. By relying on a systemic integration, the ECtHR read different treaty rule systems in a ‘mutually supportive light’.⁷⁶ The customary nature of the principle of systemic integration,⁷⁷ enshrined in art 31(3)(c) VCLT urges that in cases of treaty interpretation, together with the context there should be taken into account ‘any relevant rules of international law applicable in the relations between the parties’.

In search of what Cicero called *topoi* or common places, the ECtHR applied topical jurisprudence⁷⁸ and referred not only to SC resolutions as the applicable law in the present cases, but also utilized other inspirational sources from the national case law, the ILC Reports, and other non-binding documents.⁷⁹ Even though the outcome in *Al-Jedda* and *Nada* was solely based on the applicable law, the reference to other non-binding sources and the expanded interpretation of art 103 provide that the ECtHR reasoning in *Al-Jedda* and *Nada* is not only convincing to the litigants and the community of the court’s regime, but also persuasive in the context of international community interest.

5. FURTHER REFLECTIONS ON TECHNIQUES OF TREATY INTERPRETATION IN ‘HARD CASES’

While one may regard that the SC resolutions discussed in *Al-Jedda* and *Nada* contained rather unambiguous terms, the ECtHR still attained to find a room for its invaluable harmonization approach. The court embarked on a rule, which entails that it is only when

⁷⁵ *ibid* 180.

⁷⁶ ILC Report on Fragmentation (n 2) 417. See also para 271.

⁷⁷ PCA in *Iron Rhine* case stipulated that: ‘Articles 31 ... of the Convention reflect pre-existing customary international law’. See *Arbitration regarding the Iron Rhine (Ijzeren Rijn) Railway (Belgium v the Netherlands)* (2005) PCA Reports (2005) para 45.

⁷⁸ For the relevance of *topoi* and topical jurisprudence for international law, see Kushtrim Istrefi and Zane Ratniece, ‘Think Globally, Act Locally: Al-Jedda’s Oscillation Between the Coherence of International Law and Autonomy of the European Legal Order’ (2012) 24 Hague YB Intl L 249-253. See also Vassilis P Tzevelekos, ‘The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?’ (2010) 31 *MJIL* 620-690; Anita Soboleva, ‘Topical Jurisprudence: Reconciliation of Law and Rhetoric’ in Anne Wagner, Wouter Werner and Deborah Cao (eds), *Interpretation, Law and the Construction of Meaning: Collected Papers on Legal Interpretation in Theory, Adjudication and Political Practice* (Springer 2006) 49.

⁷⁹ ECtHR, *Al-Jedda* (n 19) paras 42-58. ECtHR, *Nada* (n19) paras 65-101.

the relevant SC resolution employs clearly defined terms the court will consider whether the SC resolution trumps the fundamental rights in question. Until such time, the ECtHR's linguistic exercise in identifying spaces in the language of SC resolutions, appears to achieve the preservation of the conventional rights when, at first sight, juxtaposed with arbitrary SC resolutions.

While recognizing the value of *Al-Jedda* and *Nada* in developing the treaty interpretation techniques, one may put forward that the ECtHR's harmonization approach is not a one-size-fits-all methodology capable to resolve all cases involving SC resolutions, particularly those with clear and firm terms. Although this approach may be applicable to cases involving international and regional courts, the ECtHR itself held in the *Nada* case that domestic courts 'are to choose the means by which they give effect to the [SC] resolutions'.⁸⁰ In this regard, observations of Joost Pauwelyn may be recalled that 'if the reconciliation between the two norms is not feasible, that is where the presumption [against normative conflict] ends'.⁸¹ This entails limitations in possibilities to avoid conflicting obligations of different rule systems, particularly for domestic courts. However, even in hard cases, techniques of treaty interpretation remain useful to alleviate the degree of contradiction and confrontation between legal orders. This may still be useful when discussing the coherence of international law.

With regard to hard cases that emanate from clear terms of the SC resolutions and opposing fundamental rights of other legal orders, André Nollkaemper suggests that a balance with human rights could be achieved by 'identifying a criterion for qualifying the principle of supremacy that may lead to synergies between the international and domestic legal orders'.⁸² This criterion is 'the conformity of a rule of fundamental rights under domestic law with international rights'.⁸³ Considering that most domestic fundamental rights originate or are similar to those of international law, domestic courts by means of treaty parallelism and harmonization could reach a similar conclusion for the protection of domestic fundamental rights as it would, if a dualistic approach were taken. However, this argument echoes the necessity to apply an international law approach⁸⁴ and thus leaves no flexibility for domestic legal orders to consider balancing obligations of the UN Charter by means of 'domestic choices'. A domestic fundamental right may not necessarily always have universal relevance (eg Sharia law)⁸⁵ and the dualist approach of legal orders does not correspond to the external and vertical character of art 103 of the Charter.

6. CONCLUSION

In the 2008 ESIL Biennial Conference, Judge Bruno Simma argued that 'heterogeneity does not exclude universality of international law'.⁸⁶ Four years later, this argument has become even more pertinent considering the increased vivid regime interaction in judicial fora. In the world of plurality and co-existence of legal orders, when dealing with treaty conflicts,

⁸⁰ *ibid* *Nada*, (n 19) at para 176 [emphasis added].

⁸¹ Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003) 242 [emphasis added].

⁸² André Nollkaemper (n 55) 76.

⁸³ *ibid*.

⁸⁴ Eg Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) etc.

⁸⁵ See also André Nollkaemper (n 55) 67.

⁸⁶ Bruno Simma (n 11) 264.

the ‘either, or’ approach as observed in ‘subordination’ or ‘detachment’ approaches, seems not to follow the trend of international law development. While art 103 of the Charter must be obeyed as a rule of ‘last resort’ (save when in conflict with *jus cogens*), in many instances the best application of art 103 may be no application at all.⁸⁷ Legal orders juxtaposed with the UN superior norm should by means of treaty interpretation search for common places and harmonization instead of confrontation.

This contribution thus argues that norms and techniques of interpretation, led by systemic integration are not dogmatic tools for theoretical entertainment. Instead, they present concrete and useful techniques in mitigating treaty conflicts in the new reality of international law.

Koskenniemi suggests that any legal concept must have its normativity and concreteness.⁸⁸ ‘The normativity ... has to do with its “oughtness”, the way it does not merely describe some aspects of reality but poses requirements for it ... [and the concreteness] must reflect what actually takes place in the political and economic world’.⁸⁹ In the author’s view, the request for broader and systemic interpretation has the element of normativity as it presents the customary norm and the treaty obligation.⁹⁰ Considering that heterogeneity and fragmentation have become an integral part and the parcel of current international law, its concreteness could have never been more apparent. Moreover, ‘the demand to relate interpretations to the system of law is part of positive law and of the prevailing legal ethos’.⁹¹

Consequently, when confronted with issues of fragmentation, judges should seek for judicial comity in applying the virtues of the legal techniques of interpretation discussed above. This would also meet the double and simultaneous function of the judges to contribute to the coherence of international law and safeguard the fundamental rights of their respective legal orders. In addition, domestic and regional courts should revisit harsh legislating powers on the issues of global concern and rather resolve disputes on a case-by-case basis, thus making it unnecessary to engage in on the morality and values of other legal orders.⁹²

The evidence that European courts have employed three diverse approaches when applying art 103 of the Charter reflects that there is no single understanding of how ‘arbitrariness’ associated with the SC obligations should be diminished. Nevertheless, the ECtHR recent case law, led by *Al-Jedda* and *Nada*, and the constructive engagement of scholars indicate that European courts are developing solutions that allow harmonization and regime compatibility that disturb neither coherence of international law nor autonomy of the respective regimes.

⁸⁷ Andreas Paulus and Johann Leiß, ‘Article 103’ in Bruno Simma *et al* (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) 2114.

⁸⁸ Martti Koskenniemi, ‘International law in the world of ideas’ in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 60.

⁸⁹ *ibid* [emphasis added].

⁹⁰ For customary norm see PCA, *Iron Rhine* case (n 77). For treaty obligation see art 31(3)(c) VCLT (n 6).

⁹¹ Armin von Bogdandy and Ingo Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification’ (2012) 23 *EJIL* 1, 37.

⁹² Jan Klabbers suggests that ‘treaty conflicts are unsolvable as a matter of law as soon as they emanate from clashes of values’ [emphasis added]. Klabbers (n 54) 35.