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# DIALOGUING FOR DUE PROCESS: *KADI*, *NADA*, AND THE ACCESSION OF THE EU TO THE ECHR

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**ABSTRACT**

This paper examines the dialogue between the Court of Justice of the EU and the European Court of Human Rights regarding due process rules in the context of targeted anti-terror sanctions imposed by the UN Security Council. By analysing the references that the two courts make to each other's case law in the recent landmark decisions in *Nada* and *Kadi II*, the paper argues that the rivalling yet constructive relationship between CJEU and the ECtHR has played a key role in re-adjusting the balance between international security and fundamental rights in Europe. As the paper suggests, the looming accession of the EU to the ECHR influences the interaction between the two courts, and is already palpable in the case law of both.

**KEY WORDS**

Court of Justice of the EU – European Court of Human Rights – accession of the EU to the ECHR – *Kadi II* – *Nada* – UN Security Council – judicial dialogue – due process

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# DIALOGUING FOR DUE PROCESS: *KADI*, *NADA*, AND THE ACCESSION OF THE EU TO THE ECHR

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## 1. INTRODUCTION: FROM *KADI* TO *NADA* AND BACK AGAIN

The *Kadi* case law has thus far been approached predominantly from the point of view of the defence of due process rights through the assertion of autonomy of the EU legal order vis-à-vis international law, and in particular the UN Charter.[1] In this paper, we examine the *Kadi* case from the perspective of the relationship between the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR) and explain how the dialogue between 'two of Europe's most powerful and prestigious courts'[2] has contributed to striking a better balance between due process rights and national security in the global fight against terrorism.[3]

In its September 2012 decision in *Nada* v. *Switzerland*, the Grand Chamber of the ECtHR addressed the legality of measures implementing targeted sanctions stemming from the UN Security Council and, relying on the *Kadi* decision of the CJEU, found a violation of the rights enshrined in the European Convention on Human Rights (ECHR).[4] More recently, in the *Kadi II* judgment of July 2013, the CJEU in turn cited the ECtHR and reaffirmed its previous conclusion that Mr Kadi had been deprived of due process rights in being subject to the UN sanctions regime as

[1] See with regard to the 2005 decision of the Court of First Instance and the 2008 decision of the Court of Justice, Sara Poli and Maria Tzanou, 'The *Kadi* Rulings: A Survey of the Literature' (2009) 28 *Yearbook of European Law* 533, 535-544; see also the collection of references in Rudolf Streinz, 'Does the European Court of Justice keep the Balance between Individual and Community Interest in *Kadi*?' in Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011), pp. 1118-1131, 1121 (footnote 21); as well as Joris Larik, 'Two Ships in the Night or in the Same Boat Together: How the ECJ Squared the Circle and Foreshadowed Lisbon in its *Kadi* Judgment' (2010) 13 *Yearbook of Polish European Studies* 149.

[2] Erika de Wet, 'From *Kadi* to *Nada*: Judicial Techniques favouring Human Rights over United Nations Security Council Sanctions' (2013) 12 *Chinese Journal of International Law* (forthcoming, on file with the authors).

[3] On judicial dialogue in general, see Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191; and specifically on the dialogue between the CJEU and the ECtHR, Francis Jacobs, 'Judicial Dialogues and the Cross-Fertilization of the Legal Systems: The European Court of Justice' (2003) 38 *Texas International Law Journal* 547; Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 *Common Market Law Review* 629; and Filippo Fontanelli and Giuseppe Martinico, 'Alla ricerca della coerenza: le tecniche del "dialogo nascosto" fra i giudici nell'ordinamento costituzionale multi-livello' [2008] *Rivista Trimestrale di Diritto Pubblico* 37.

[4] *Nada* v. *Switzerland*, Application No. 10593/08, Eur. Ct. H. R. [GC], judgment of 12 September 2012 (hereinafter: *Nada* v. *Switzerland*).

implemented within the European Union (EU). Based on this recent case law, the argument we advance in this paper is that the CJEU and the ECtHR have been influencing each other, and that their interaction, under the looming accession of the EU to the ECHR, has been instrumental to ensure the effectiveness of the protection of due process standards in the European multilevel human rights architecture.

Recasting the Luxembourg—New York standoff as a Strasbourg—Luxembourg—New York triangle reveals an interactive process. Firstly, the *Kadi* case law of the CJEU has impacted on human rights protection within the framework of the ECHR with regard to the implementation of Security Council resolutions. Secondly, instead of seeing the CJEU as the sole pacemaker in this regard, the *Kadi II* judgment can be understood as having been influenced, on its part, by the ECtHR. To elaborate on these points, the paper is structured as follows. In Sections 2 and 3 we sketch out the changing international context shaping the *Kadi II* judgment and outline the prospects of the upcoming accession of the EU to the ECHR and its implications for the relationship between CJEU and the ECtHR. In Section 4 we briefly describe the *Nada* case of the ECtHR. In section 5 and 6, then, we consider how the CJEU influenced the ECtHR in *Nada* and subsequently we discuss the impact of *Nada* on the CJEU in *Kadi II*. In the conclusion we summarize our findings and highlight the implications of the dialogue between Luxembourg and Strasbourg for the protection of fundamental rights in the European multilevel human rights architecture.

## 2. THE CHANGING INTERNATIONAL CONTEXT: UN REFORMS IN LIGHT OF THE *KADI* SAGA

The decision of the CJEU in *Kadi II* took place in a changing context marked by two principal developments. The first occurred at the international level, *viz*. the evolution of the UN Security Council 'blacklisting' regime. The second, is taking place at the European level in the form of the accession of the EU to the ECHR. We will first turn to the international dimension by revisiting the consecutive reforms of the UN regime in light of the evolving case law in *Kadi*.

An essential feature of the *Kadi* saga was the question to which extent human rights, in particular procedural guarantees, can be observed in the implementation of sanctions imposed by the UN Security Council on persons suspected of being involved in the financing of terrorism. As it is well known, after 9/11 the UN Security Council began to draw a list of individuals and entities suspected of involvement in terrorist activities. Given that the Security Council adopts these measures under Chapter VII of the UN Charter, the UN members are obliged to comply with them,

even in the face of opposing international treaty obligations (Article 103 UN Charter). This led to the adoption of domestic laws and regulations to implement the sanctions on a global scale over the past decade.[5]

This form of targeted sanctions originated from resolution 1267/1999 in the context of measures taken against the Taliban regime in Afghanistan in the late 1990s.[6] These included the setting up of a designated committee of the Security Council to manage the 'blacklists' of targeted individuals and entities. Shortly after its inception, the scope of the regime was extended beyond targets linked to the Taliban or Afghanistan to cover 'funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organization.'[7]

The original sanctions regime received fierce criticism from scholars,[8] as well as judicial challenges on grounds of lack of due process from the point of view of the listed individuals.[9] Mr Kadi's complaints of the measures adopted against him by the EU are but one of these challenges. However, the *Kadi* litigation was followed particularly closely by the Monitoring Team of the '1267 Committee',[10] and arguably the most vocal judicial criticism of the regime was issued by Advocate General (AG) Poiares Maduro in his Opinion preceding the 2008 judgment.[11]

The Security Council, on its part, was not entirely unresponsive to these criticisms. In the course of the years, it endeavoured to make the regime friendlier to human rights

[5] See, for example, Letter dated 23 August 2004 from the Chairman of the Security Council Committee established pursuant to resolutions 1267 (1999), first report of the Monitoring Team, S/2004/679, 25 August 2004 (reporting on the implementation of Sanctions by states world-wide).

[6] United Nations Security Council Res. 1267 (Oct. 15, 1999).

[7] United Nations Security Council Res. 1333 (Dec. 19, 2000), para. 8(c); also subsequently United Nations Security Council Res. 1390 (Jan. 16, 2002). See further Larissa van den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual' (2007) 20 *Leiden Journal of International Law* 797, 800.

[8] See e.g. Iain Cameron, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, Report commissioned by the Council of Europe, 6 February 2006.

[9] See for a list of judicial challenges in 26 cases, Letter dated 15 November 2007 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), seventh report of the Monitoring Team, S/2007/677, 20 November 2007, 40-42.

[10] See, for instance, Letter dated 13 May 2008 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), eighth report of the Monitoring Team, S/2008/324, 14 May 2008, 16-17. In its report of December 2012, the Monitoring Team still referred to the *Kadi* case as one of the 'outside factors [which] might upset' the 'stable, if temporary, equilibrium with respect to due process issues' which the sanction regime was said to have reached after its latest reforms, Letter dated 31 December 2012 from the Chairman of the Security Council Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), thirteenth report of the Monitoring Team, UN Security Council, S/2012/968, 31 December 2012, 9 (para. 17).

[11] Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, Opinion of Advocate General Poiares Maduro [2008] ECR I-06351.

concerns. This includes above all more detailed rules governing the information about the target person to be provided by the country requesting its listing,[12] and the establishment of a focal point responsible for managing individual de-listing requests,[13] which would eventually be replaced by a so-called Office of the Ombudsperson.[14]

At the same time, the saga continued before the EU Courts, with several appeals from the various parties and Mr Kadi challenging the superseding implementing measures adopted in the wake of the 2008 judgment. From the point of view of the EU Courts, the sanctions regime represented thus a moving target. At the time of the first *Kadi* judgment of the Court of First Instance (CFI) back in 2005, no procedure existed for individual de-listing as blacklisted persons had to rely on the diplomatic protection of their countries of nationality or residence to this effect, based on a set of guidelines adopted by the '1267 committee'. Nonetheless, the CFI ruled that 'the Security Council intended to take account, so far as possible, of the fundamental rights of the persons entered in the Sanctions Committee's list, and in particular their right to be heard.'[15]

This ruling, framed by the controversial *jus cogens* standard, was resoundingly overturned on appeal three years later. The CJEU rejected the adaptations made to the UN blacklisting regime (at that point in time the 'focal point') as insufficient, admonishing that 'the fact remains that the procedure before [the '1267 Committee'] is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto.'[16] The CJEU hence famously held that it needed to 'ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law', which explicitly included 'review of Community measures which, like the contested regulation, are designed to

[12] United Nations Security Council Res. 1735 (Dec. 22, 2006); and subsequently United Nations Security Council Res. 1822 (Jun. 30, 2008).

[13] United Nations Security Council Res. 1730 (Dec. 19, 2006).

[14] United Nations Security Council Res. 1904 (Dec. 17, 2009). See also the summary of these development provided Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom* v. *Kadi*, judgment of 18 July 2013, *nyr*, paras. 9-12 (hereinafter: *Kadi II*); and Lisa Ginsborg and Martin Scheinin, 'You Can't Always Get What You Want: The *Kadi II* Conundrum and the Security Council 1267 Terrorist Sanctions Regime' (2011) 8 *Essex Human Rights Review* 7, 10-13.

[15] Case T-315/01 *Kadi* v. *Council and Commission* [2005] ECR II-03649, para. 265.

[16] Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* [2008] ECR I-06351, para. 323.

give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.'[17]

The General Court (as the CFI was renamed by virtue of the Lisbon Treaty), acquiesced to this standard in its 2010 judgment.[18] At the same time, it acknowledged the changes that had been effected at the UN level in the meantime, including the establishment of the Office of the Ombudsperson.[19] However, it noted that judicial review at EU level must be exercised 'at the very least, so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection'.[20]

In his March 2013 Opinion in *Kadi II*, instead Advocate General Bot put a stronger emphasis on the need to pursue international security, suggesting a more forgiving approach towards the Security Council, aimed more towards compliance with international law.[21] The AG avowed himself more sympathetic to the sanctions regime and the work of the Ombudsperson, noting that in 'view of the important role played by the Ombudsperson in the decisions taken by the Sanctions Committee, [he considered] that the procedure before it can no longer be regarded as purely diplomatic and intergovernmental' and that the 'improvements to the procedure before the Sanctions Committee thus help to guarantee that listings are based on sufficiently serious evidence and are evaluated on an on-going basis.'[22] Consequently, instead of a rigorous review, he advised that 'the EU courts should not adopt a standard of review which would require the EU institutions to examine systematically and intensively the merits of the decisions taken by the Sanctions Committee, on the basis of evidence or information available to that body, before giving effect to them.'[23]

In its July 2013 appeals judgment in *Kadi II*, at last, the CJEU upheld the requirement of a full review,[24] but also added more detailed language on the duty incumbent on the Union institutions to acquire information to justify their measures and on the treatment of such confidential and sensitive information by courts.[25] In the words of the CJEU, judicial review conducted along these lines 'is indispensable to ensure a fair balance

[17] Id., para. 326.

[18] Case T-85/09 *Kadi* v. *Commission* [2010] ECR II-05177, para. 126.

[19] Id., paras. 15-29.

[20] Id., para. 127.

[21] *Kadi II*, Opinion of Advocate General Bot of 19 March, *nyr*.

[22] Id., para. 82.

[23] Id., para. 86.

[24] *Kadi II*, para. 97.

[25] Id., paras. 107 et seq.

between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned'.[26]

Hence, the relationship between the Security Council and the Court of Justice can been cast as a dialogue about the balance of human rights and the public interest for (inter)national security. More precisely, it is about weighing the need to effectively combat global terrorism, including the use of confidential information to that end, against the requirements of due process at various levels of governance. Over time, this balance was tipped in favour of human rights by the EU Courts.

## 3. THE CHANGING EUROPEAN CONTEXT: THE ACCESSION OF THE EU TO THE ECHR

While the dialogue between the CJEU and the UN throughout the *Kadi* case law is certainly significant, the CJEU can be seen equally dialoguing with the ECtHR on matters of due process and the right balance between security and fundamental rights. In order to fully grasp this dialogue, we argue that the Luxembourg—Strasbourg relationship is structurally conditioned by the looming accession of the EU to the ECHR. This helped tip the balance in favour of due process in both courts.

In the course of the *Kadi* case law, we can observe a changing appreciation of the rights enshrined in the ECHR, moving from dismissal to increased referencing to the ECHR and the case law emanating from Strasbourg. As is well-known, the judicial dialogue between the two courts has a long historical pedigree. Ever since *Nold*, the ECHR serves as a significant source of inspiration for the fundamental rights present in the EU legal order.[27] However, a key development recently enhanced the relationship between the CJEU and the ECtHR. Already the Constitutional Treaty and the Lisbon Treaty afterwards made the accession of the EU to the ECHR an obligation for the EU.[28] As a result of this development, it was foreseeable that the ECHR, instead of merely being a source of 'inspiration' for EU human rights law, would become binding upon the EU as a matter of law.

Unsurprisingly, Mr Kadi has relied from the outset on the ECHR, stressing the long standing case law of the CJEU that the Convention represents a special source of

[26] Id., para. 131.

[27] Case 4/73 *Nold* v. *Commission* [1974] ECR 491, para. 13.

[28] See the failed Treaty Establishing a Constitution for Europe of 2004, Art. I-(9)(2); Art. 6(2) TEU. The 14th Additional Protocol to the ECHR, which amended the latter to the extent that the EU could become a party, was open for signature since May 2004.

inspiration for the rights forming part of the Union legal order.[29] But the CFI in 2005, as forgiving as it was to the UN, it dismissed the role of the ECHR, noting that as a matter of international law 'the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty.'[30]

By contrast, in its 2008 judgment, in preparing the ground for its 'full review' stance, the CJEU acknowledged the 'special significance'[31] of the ECHR in inspiring the rights which act as a condition for the lawfulness of secondary Union acts. Moreover, it explicitly referred to the ECtHR decisions in *Bosphorus*, as well as *Behrami* and *Saramati* in arriving at the conclusion that the contested measures did not benefit from immunity from jurisdiction due to attribution to the UN.[32] In finding the violations of fundamental rights, the CJEU again referred to the ECHR as a source of support.[33]

In the 2010 judgment, having aligned with the CJEU, the General Court looked more favourably upon the ECHR. For instance, it explicitly referred to the ECHR and the Strasbourg case law when it ruled that the need for confidentiality in the quest for (inter)national security does not exempt judicial review altogether,[34] and subsequently that the information provided to justify the contested measures was deemed insufficiently specific.[35]

This alignment can be best explained by the prospect of the accession of the EU to the ECHR. The first attempts to link the (then) Communities to the Council of Europe and its human rights regime were made as early as the 1950s, but were

[29] Case T-315/01 *Kadi* v. *Council and Commission* [2005] ECR II-03649, para. 138, referring to Case 4/73 *Nold* v. *Commission* [1974] ECR 491, para. 13.

[30] Case T-315/01 *Kadi* v. *Council and Commission* [2005] ECR II-03649, para. 181.

[31] Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* [2008] ECR I-06351, para. 283.

[32] Id., paras. 311-313; referring to *Bosphorus* v. *Ireland*, Application No. 45036/98, Eur. Ct. H. R. [GC], judgment of 30 June 2005; *Behrami & Behrami* v. *France*, Application No. 71412/01, Eur. Ct. H. R. [GC], judgment of 2 May 2007; and *Saramati* v. *France, Germany and Norway*, Application No. 78166/01 Eur. Ct. H. R. [GC], judgment of 2 May 2007.

[33] Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* [2008] ECR I-06351, para. 335 (effective judicial protection, Arts. 6 and 13 ECHR) and para. 356 (right to respect for property, Art. 1 of the First Additional Protocol to the ECHR).

[34] Case T-85/09 *Kadi* v. *Commission* [2010] ECR II-05177, para. 146, referring to *Chahal* v. *United Kingdom*, Application no. 22414/93, Eur. Ct. H. R. [GC], judgment of 15 November 1996, para. 131.

[35] Case T-85/09 *Kadi* v. *Commission* [2010] ECR II-05177, para. 176, on procedural fairness (Article 5(4) ECHR, referring to *A.* v. *United* Kingdom, Application no. 3455/05, Eur. Ct. H. R. [GC], judgment of 19 February 2009 (note that this finding was partially overruled in *Kadi II*, para. 148).

unsuccessful.[36] In the early 1990s, a re-launched endeavour of the EU to accede was thwarted by the CJEU, which ruled that the Union lacked competence to submit itself to the judicial architecture of the ECHR.[37]

Nonetheless, following decades of parallel existence, a judicial dialogue between the ECtHR and the CJEU emerged. This relationship has been thoroughly analysed elsewhere.[38] What is essential for present purposes is that following the upheavals of the fall of the Iron Curtain in Europe set in motion profound transformations of both organisations. Their reinforced roles prompted the question as to whether the Strasbourg Court could review measures of the Union or at least measures of the Union Member States implementing EU law. This question had been negated firmly in the previous decades, but since the *Matthews* case the ECtHR opened the theoretical possibility of such review. In the latter case, the ECtHR proclaimed itself competent to rule on the compatibility of EU primary law with the ECHR given that it was excluded from the jurisdiction of the CJEU.[39] However, through a presumption of equivalent protection standard at EU level, the ECtHR desisted from testing this on a case-by-case basis.[40] Nonetheless, this can be seen to have resulted in intensified competition between the two courts as to which institution would be the trailblazing and ultimate arbiter in human rights questions on the continent.[41]

In a renewed political effort to formalize the relationship between the two courts, with the entry into force of the Lisbon Treaty in 2009 and the necessary amendments of the ECHR, the road is now open for the accession of the EU to the ECHR. Pursuant to the new Article 6(2) TEU as well as the new Article 59(2) ECHR, as modified by the 14th Additional Protocol to the ECHR, the negotiating process for the accession of the EU to the ECHR has reached an advanced stage and may soon be concluded with a formal accession document.[42]

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[36] Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 *American Journal of International Law* 649.

[37] Opinion 2/94, *Re the Accession of the EU to the ECHR* [1996] ECR I-1759.

[38] Bruno de Witte, 'The Past and the Future Role of the European Court of Justice in the Protection of Human Rights' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999), pp. 859-97, 873.

[39] *Matthews* v. *UK*, Application No. 24833/94, Eur. Ct. H. R. [GC], judgment of 18 February 1999.

[40] *M & Co.* v. *Germany*, Application No. 13258/87, Eur. Comm. H. R, decision of 9 February 1990; and later *Bosphorus* v. *Ireland*, Application No. 45036/98, Eur. Ct. H. R. [GC], judgment of 30 June 2005.

[41] Iris Canor, '*Primus Inter Pares*: Who is the Ultimate Guardian of Fundamental Rights in Europe?' (2000) 25 *European Law Review* 3.

[42] The negotiation process on the accession of the EU to the ECHR has been currently finalized in a Draft Accession Agreement. We refer here to the Draft Accession Agreement as annexed to the Final Report to the CDDH (*Comité directeur pour les droits de l'Homme*), Strasbourg, 5 April 2013, 47+1(2013)008, pp. 4-12. See also Council of the European Union, 6-7 June 2013, Doc. 10461/13, 15 (indicating that once the CJEU has had the opportunity to give an opinion on the agreement, the Commission will come forward with a Council decision authorizing the signature of the agreement). See further Tobias Lock,

The Draft Agreement on the accession of the EU to the ECHR modifies the latter in such a way as to accommodate 'the specific situation of the EU as a non-State entity with an autonomous legal system that is becoming a Party to the Convention alongside its own member States.'[43] This includes, most notably for the relationship between the two courts, the so-called 'co-respondent mechanism' and, as a part thereof, the prior involvement of the CJEU.[44] The former means that where either Member States are implementing EU law or where primary EU law is at stake with regard to alleged violations of Convention rights, the Union and the Member States can respond to the complaint jointly.[45] The latter provides the CJEU with the power to review the compatibility of Union legislation with the ECHR preceding a decision by the ECtHR.[46] This applies whenever Member State courts fail to request a preliminary reference from the CJEU, meaning that the case arrives at the ECtHR without the EU Courts having had the opportunity to review it. This grants the CJEU a privilege that no other court of a ECHR contracting party enjoys. This mechanism, as we argued elsewhere, represents the most powerful link between the two courts and harbours the greatest potential in intensifying their relationship.[47] Before the ECtHR can rule, the CJEU will always have the opportunity to set the tone. But if the former does not want to fall behind, it will have to align itself, and go beyond, the standards set by the CJEU.[48]

In light of this, the fact that the EU Courts, after the rejection of the CFI judgment, started heavily referencing the ECHR and the case law of the ECtHR, to the point of claiming to employ 'criteria identical to those used by the European Court of Human Rights'[49] in determining rights violations, suggests that the EU Courts recognise that they will be held accountable after accession for breaches of the ECHR which they failed to remedy. *Nada* made this hypothesis even more likely.

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'End of an Epic? The Draft Agreement on the EU's Accession to the ECHR' (2012) 31 *Yearbook of European Law* 162.

[43] Final Report to the CDDH, 22 (point 38).

[44] See on all aspects of the Union's accession Jean-Paul Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 *Common Market Law Review* 995, 995; and Robert Uerpmann-Wittzack, 'Rechtsfragen und Rechtsfolgendes Beitritts der Europäischen Union zur EMRK' [2012] *Europarecht (Beiheft 2)* 167.

[45] Art. 3 Draft Accession Agreement.

[46] Art. 3(6) Draft Accession Agreement.

[47] Federico Fabbrini and Joris Larik, 'The Accession of the EU to the ECHR and its Effects: *Nada* v. *Switzerland*, the Clash of Legal Orders and the Constitutionalization of the ECtHR' (forthcoming).

[48] Id.

[49] Case T-85/09 *Kadi* v. *Commission* [2010] ECR II-05177, para. 177.

## 4. THE DECISION OF THE ECTHR IN *NADA*

The *Nada* case originated from an application against Switzerland lodged with the ECtHR by an Italian/Egyptian national, Mr. Youssef Moustafa Nada. The latter had been living since the 1970s in Campione d'Italia, a small Italian exclave surrounded by Swiss territory. On 9 November 2001, at the request of the United States, his name was added to the UN black-list run by the 1267 Sanctions Committee. Within days the Swiss government added Mr. Nada to the domestic blacklist implementing the above mentioned UN resolutions resulting in the freezing of all his funds. Moreover, pursuant to a 2003 request of the Monitoring Group of the UN Sanctions Committee, Switzerland subjected Mr. Nada to a travel ban. Given the peculiar geographical situation of Campione d'Italia, the impossibility to enter into, and transfer through, Switzerland effectively confined him to this small strip of land. Mr. Nada brought proceedings in Swiss courts against the measures. On 14 November 2007, the Swiss Federal Court heard the case but, following the same stand adopted by the CFI in *Kadi*, rejected Mr. Nada's complaint ruling that it lacked a general power to review a national measure implementing a UN Security Council resolution listing suspected terrorist and freezing his assets except for conformity with *jus cogens*.[50]

Having exhausted the domestic avenues of recourse, in February 2008, Mr. Nada brought proceedings before the ECtHR claiming that the addition of his name to the blacklist had breached his right to liberty (Article 5 ECHR), his right to respect for private and family life (Article 8 ECHR), and his right to an effective remedy (Article 13 ECHR). He complained that the travel ban was tantamount to ill-treatment within the meaning of Article 3 ECHR and in breach of his freedom to manifest his religion or beliefs (Article 9 ECHR). On 23 September 2009, while the case was pending, the UN Security Council decided to delete Mr. Nada's name from the sanctions list, thus terminating the travel ban against him. Nevertheless, the ECtHR found that this decision did not modify the status of the applicant as a 'victim' within the meaning of Article 34 ECHR. According to the ECtHR, 'the lifting of sanctions […] has not deprived the applicant of his status as victim of the restrictions from which he suffered from the time his name was added, in November 2001, to the Sanctions Committee's list. […] Moreover, it was not followed by any redress within the meaning of that case-

[50] Swiss Federal Court, ATF 1A.45/2007/daa, *Nada* v. *SECO*, judgment of 14 November 2007.

law.'[51] In doing so, the ECtHR discarded the argument by the Swiss government that Mr. Nada did not have standing.[52]

In addition, the ECtHR resolved the other preliminary objection raised by the respondent government regarding the lack of jurisdiction in the present case in favour of Mr. Nada. Whereas Switzerland had argued that the case was incompatible *ratione personae* with the ECHR, because the action taken against Mr. Nada was ultimately to be attributed to the UN, the ECtHR found that the alleged violations of the ECHR were committed by Switzerland and that it was therefore competent to adjudicate the case. The ECtHR distinguished the present case from *Behrami and Behrami*.[53] The ECtHR noted that in *Behrami and Behrami*

> 'the impugned acts and omissions of KFOR, whose powers had been validly delegated to it by the Security Council under Chapter VII of the Charter, and those of UNMIK, a subsidiary organ of the UN set up under the same Chapter, were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective […]. In the present case, by contrast, the relevant Security Council resolutions, […] required States to act in their own names and to implement them at national level.'[54]

In this way, the ECtHR squarely established its jurisdiction to review the case, and moved to assess Mr. Nada's claim on the merits.

On the substance, the ECtHR decided to address Mr. Nada's complaint primarily under Article 8 ECHR. As the ECtHR clarified, '"private life" is a broad term not susceptible to exhaustive definition', which encompasses the right to personal development and to establish and develop relationships with other human beings and the outside world in general.[55] The ECtHR found that the applicant's complaint fell within the scope of application of Article 8 ECHR and therefore moved to examine, following its conventional approach to proportionality analysis: first, whether there had been an interference with Mr. Nada's right; and second, whether the interference was justified.

On the first question, the ECtHR took the view that 'the measure preventing the applicant from leaving the very confined area of Campione d'Italia for at least six

[51] *Nada* v. *Switzerland*, para. 129.

[52] Id., para. 130.

[53] See *Behrami & Behrami* v. *France*, Application No. 71412/01, Eur. Ct. H. R. [GC], judgment of 2 May 2007.

[54] *Nada* v. *Switzerland*, para. 120.

[55] Id., para. 150.

years was likely to make it more difficult for him to exercise his right to maintain contact with others – in particular his friends and family'.[56] This thus amounted to an interference with Article 8(1) ECHR by the Swiss government.[57]

To address the second question, i.e. whether the interference of Mr. Nada's right was justified, the ECtHR outlined at the outset the general principles which would guide its reasoning. On the one hand, the ECtHR restated its consolidated case law, epitomized by *Bosphorus*, according to which 'a Contracting Party is responsible under Article 1 ECHR for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations.'[58] On the other hand, the ECtHR expressed its concern for the phenomenon of the fragmentation of international law, and stated that '[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.'[59] In this light, the ECtHR re-called its decision in *Al-Jedda*,[60] introducing a presumption of compatibility between the resolutions of the UN and the ECHR. However, 'having regard to the clear and explicit language [of UN resolution 1390 (2002)], imposing an obligation to take measures capable of breaching human rights', [61] the ECtHR rebutted the presumption of compatibility between the ECHR and UN law.

Yet, the ECtHR refrained from following the previous statement to its logical conclusions.[62] Rather, after stating that the interference with Mr. Nada's right found a legal basis in a Swiss law[63] and pursued the legitimate aim of protecting national security,[64] it began inquiring whether the relevant UN resolutions 'left States any freedom in their implementation and, in particular, whether they allowed the authorities to take into account the very specific nature of the applicant's situation and therefore to meet the requirements of Article 8 ECHR.'[65] In this regard, the ECtHR

[56] Id., para. 165.

[57] Id., para. 166.

[58] Id., para. 168.

[59] Id., para. 170.

[60] See *Al-Jedda* v. *United Kingdom*, Application No. 27021/08, Eur. Ct. H. R. [GC], judgment of 7 July 2011.

[61] *Nada* v. *Switzerland*, para. 172.

[62] See further on this Fabbrini and Larik, 'The Accession of the EU to the ECHR and its Effects'.

[63] *Nada* v. *Switzerland*, para. 173.

[64] Id., para. 174.

[65] Id., para. 175.

argued that the UN Charter 'd[id] not impose on States a particular model for the implementation of the resolutions adopted by the Security Council under Chapter VII.'[66] Moreover, the ECtHR sought to interpret the text of Resolution 1390 (2002) as 'affording the national authorities a certain flexibility in the mode of implementation.'[67] In view of the foregoing, the ECtHR found that 'Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UN Security Council.'[68]

By arguing that Switzerland was endowed of some autonomy in the implementation of the UN resolution – a statement criticized in two separate opinions[69] – the ECtHR was able to avoid the thorny question 'of the hierarchy between the obligations of the States Parties to the ECHR under that instrument, on the one hand, and those arising from the UN Charter, on the other.'[70] The ECtHR examined whether Switzerland had 'the possibility of recourse to an alternative measure that would cause less damage to the fundamental right [of Mr. Nada] whilst fulfilling the same aim [of protecting national security].'[71] The ECtHR showed its awareness that 'the threat of terrorism was particularly serious at the time of the adoption, between 1999 and 2002, of the resolutions prescribing those sanctions.'[72] Nevertheless, on the basis of a plurality of factors, the ECtHR concluded that Switzerland had violated Article 8 ECHR. To begin with, the ECtHR noted with surprise that Switzerland, for more than four years, had failed to inform the UN Sanctions Committee that the domestic investigations against Mr. Nada had been discontinued for lack of evidence of his involvement in terrorism-related activities.[73] Secondly, the ECtHR underlined how, despite the peculiar facts of the case Mr. Nada had been *tout court* prohibited from leaving an Italian enclave in the Swiss territory.[74] Finally, the ECtHR criticized Switzerland for failing to comply with its positive obligations to act before the competent UN organs to seek his delisting.[75] Recalling its long standing principle that the ECHR protects rights that are not

[66] Id., para. 176.

[67] Id., para. 178.

[68] Id., para. 180.

[69] See id., Joint Concurring Opinion of Judges Bratza, Nicolau and Yudkivska and Concurring Opinion of Judge Malinverni. For a comment see Fabbrini and Larik, 'The Accession of the EU to the ECHR and its Effects'.

[70] *Nada* v. *Switzerland*, para. 197.

[71] Id., para. 183.

[72] Id., para. 186.

[73] Id., para. 188.

[74] Id., paras. 190-191.

[75] Id., para. 194.

theoretical or illusory but practical and effective,[76] the ECtHR therefore concluded that Switzerland 'could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the ECtHR that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation.'[77] Hence, the ECtHR condemned Switzerland for imposing a restriction 'on the applicant's freedom of movement for a considerable period of time [which] did not strike a fair balance between his right to the protection of his private and family life, on the one hand, and the legitimate aims of the prevention of crime and the protection of […] national security and public safety, on the other.'[78]

Having found a breach of Article 8 ECHR for a violation of Mr. Nada's right to private and family life, the ECtHR briefly considered Mr. Nada's complaint under Article 13 ECHR. Here, the ECtHR drew extensively from the ruling of the CJEU in *Kadi*, according to which the requirement for judicial review is not removed by the fact that contested measures are implementing UN Security Council resolutions.[79] Applying *mutatis mutandis* the same reasoning to the present case, the ECtHR held that 'there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions,'[80] and ruled that Switzerland had violated Article 13 ECHR.[81]

## 5. SPEAKING TO STRASBOURG: HOW *KADI I* INFLUENCED *NADA*

The references made by the ECtHR in *Nada* to the 2008 *Kadi* judgment of the CJEU reveal the latter's influence on the Strasbourg Court. As we have argued elsewhere,[82] the ECtHR in *Nada* broke with its previous jurisprudence of deference vis-à-vis the UN and upheld a vanguard protection of rights due to the influence of the case law of the CJEU and the prospect of accession of the EU. Given the two main developments described above, the *Nada* case and its discussion on due process rights in targeted sanctions cases is particularly interesting as it represents a site where three constitutional claims from non-state entities met: Firstly, this evoked the role of the

[76] *Artico* v. *Italy*, Application No. 6694/74, Eur. Ct. H. R., judgment of 13 May 1980, para. 33.

[77] *Nada* v. *Switzerland*, para. 196.

[78] Id., para. 198.

[79] Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* [2008] ECR I-06351, para. 299.

[80] *Nada* v. *Switzerland*, para. 212.

[81] Id., para. 214. The ECtHR, on the contrary, did not find a violation of Article 5 ECHR (id., para. 230), and summarily rejected Mr Nada's complaint on Arts. 3 and 9 ECHR (id., para. 236).

[82] Fabbrini and Larik, 'The Accession of the EU to the ECHR and its Effects'.

ECHR 'as a "constitutional instrument of European public order" in the field of human rights'.[83] In order to make their case and bolster their constitutional credentials, both the ECtHR and the CJEU can be seen to assert the autonomy of their respective legal instruments from international law, including the UN.[84] Secondly, the case equally evoked the particular role of the UN Charter and its supremacy, according to its Article 103, over any other international agreement, which for some authors make it a sort of a global constitution.[85] Thirdly, the explicit reference to *Kadi* also recalled the constitutional principles of the EU legal order, which the CJEU in *Kadi* ruled cannot be upset by any requirements under international law, even if stemming from the UN Charter.

This put the ECtHR in a very difficult position, forcing it to choose between accepting the supremacy of the UN, and thus falling far behind the CJEU as a human rights stronghold post-*Kadi I*, or competing with the CJEU in the quest for becoming the 'ultimate bulwark'[86] for the protection of human rights in Europe. In the former case the Strasbourg Court would subjugate itself to the UN, thereby putting into question its own constitutional credentials. In the latter case, it would have to face the Luxembourg Court as the other powerful transnational judicial body in the 'European legal space'.[87]

In our view, the fact that the ECtHR upheld Convention rights even in the face of Security Council resolutions can only be properly understood in view of the *Kadi* case law combined with the accession of the EU to the ECHR. In order not be side-lined by the CJEU and instead to assert itself also in the future as the trailblazer for human rights in Europe, the ECtHR is all the more incentivised to maintain protection standards at least as high as those existing at the EU level. Given the accession of the EU to the ECHR and the mechanisms put in place, it is clear that for the future there will be no choice but to communicate with the CJEU and to ensure that its decisions conform to all obligations flowing from the ECHR. This difficult position is

[83] *Bosphorus* v. *Ireland*, Application No. 45036/98, Eur. Ct. H. R. [GC], judgment of 30 June 2005, para. 156, quoting from *Loizidou* v. *Turkey*, Application No. 1538/89, Eur. Ct. H. R., preliminary objection, judgment of 23 March 1995, para. 75.

[84] Fabbrini and Larik, 'The Accession of the EU to the ECHR and its Effects'.

[85] See e.g. Bardo Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance*, pp. 133-148 (CUP 2009).

[86] *Nada* v. *Switzerland*, Concurring Opinion of Judge Malinverni, para. 15, citing Josiane Auvret-Finck, 'Le contrôle des décisions du Conseil de sécurité par la Cour européenne des droits de l'homme' in Constance Grewe et al. (eds), *Sanctions ciblées et protections juridictionnelles des droits fondamentaux dans l'Union européenne. Equilibres et déséquilibres de la balance* (Bruylant 2010), pp. 213-243, 214.

[87] See on the concept Christopher Harding, 'The Identity of European Law: Mapping Out the European Legal Space' (2002) 6 *European Law Journal* 128.

well captured in the *Nada* judgment, where the ECtHR, while avoiding an overt clash with the UN Security Council, makes sure not to fall behind the CJEU and its human rights standards.

In the past, the ECtHR accorded a certain margin of discretion to ECHR Contracting Parties when acting under a mandate of the Security Council.[88] In *Nada*, however, the ECtHR rebutted the *Al-Jedda* presumption in view of the 'clear and explicit language, imposing an obligation to take measures capable of breaching human rights' [89] contained in the Security Council resolution at issue.[90] Nonetheless, instead of delving into the implication that the Security Council was potentially obliging states to act in violation of the ECHR, the ECtHR focussed exclusively on the manner in which Switzerland had implemented the UN resolutions. In employing this same argumentative device as the CJEU had in *Kadi*, the ECtHR managed to circumvent the discussion of Article 103 UN Charter, a controversial feature of its judgment.[91] Referring to *Kadi I*, the ECtHR held that 'the Charter in principle leaves to UN member States a free choice among the various possible models for transposition of those resolutions into their domestic legal order.' [92] In view of this 'latitude, which was admittedly limited but nevertheless real', [93] the ECtHR managed to conclude that Switzerland had breached Mr Nada's right to private and family life, combined with a failure of providing an effective remedy.

The factual differences between *Kadi* and *Nada* notwithstanding, a central issue in both cases concerned the lack of legal protection, at home and at the UN level, against the targeted sanctions. If such a satisfactory mechanism existed in New York, arguably either European Court could have deferred to the international level. As to what consequences such a lack of protection entailed, the ECtHR employed a lengthy quote from the CJEU's *Kadi* judgment of 2008 concerning Article 13 ECHR on the right to an effective remedy:

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[88] Recalling *Bosphorus* v. *Ireland*, Application No. 45036/98, Eur. Ct. H. R. [GC], judgment of 30 June 2005; or *Behrami & Behrami* v. *France*, Application No. 71412/01, Eur. Ct. H. R. [GC], judgment of 2 May 2007; note also the French reliance on these cases in order to argue as a third party in *Nada* that Switzerland had no jurisdiction over these measures, *Nada* v. *Switzerland*, paras. 107-109. The ECtHR rejected this argument, however, in the case at hand, id., paras. 116-125.

[89] *Nada* v. *Switzerland*, para. 172.

[90] See also Inger Osterdahl, *Defer and Rule: The Relationship Between the EU, the European Convention on Human Rights and the UN*, Uppsala Faculty of Law Working Paper No. 5 (2012).

[91] See in particular *Nada* v. *Switzerland*, Concurring Opinion of Judge Malinverni.

[92] *Nada* v. *Switzerland*, referring to Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat* [2008] ECR I-06351, paras. 298.

[93] *Nada* v. *Switzerland*, para. 180.

> ‘The Court would further refer to the finding of the CJEC that “it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations” (see the *Kadi* judgment of the CJEC, § 299 […]). The Court is of the opinion that the same reasoning must be applied, mutatis mutandis, to the present case, more specifically to the review by the Swiss authorities of the conformity of the Taliban Ordinance with the Convention. It further finds that there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions.’[94]

In doing so, the ECtHR subscribed to the view of the CJEU in terms of the requirement of effective judicial review of the restrictive measures adopted by the UN Security Council. Given that the Swiss had failed to provide such protection, the ECtHR had to step in and uphold this right, thus re-asserting the position of the Convention as the ‘constitutional instrument of European public order’.[95]

At the same time, the *Nada* judgment can even be seen to push protection standards further than the CJEU in its 2008 *Kadi* judgment, as the Strasbourg Court tries to reclaim the vanguard from the CJEU. The ECtHR put a particular emphasis on the positive obligations it deemed incumbent upon Switzerland under the ECHR. The ECtHR admonished Switzerland for having failed to convince the Court ‘that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant’s individual situation.’[96] Such measures included, according to the ECtHR, informing more promptly the UN Sanctions Committee of the results of the investigations against Mr. Nada in Switzerland, which did not yield any proof that he was associated with terrorist groups.[97] Furthermore, the Swiss government should have made use of the exemptions granted under the sanctions regime more fully, and ought to have encouraged Mr Nada to this effect as well.[98] The ECtHR thus requires the Signatories of the ECHR to be actively involved in preventing

[94] Id., para. 212.

[95] *Loizidou* v. *Turkey*, Application No. 1538/89, Eur. Ct. H. R., preliminary objection, judgment of 23 March 1995, para. 75.

[96] *Nada* v. *Switzerland*, para. 196.

[97] Id., para. 188.

[98] Id., para. 193.

possible human rights violations flowing from the international level, also by minimizing the adverse consequences of the people affected.

## 6. LUXEMBOURG IS LISTENING: HOW *NADA* INFLUENCED *KADI II*

In the previous Section, we argued that the judgment of the ECJ in *Kadi* influenced the decision of the ECtHR in *Nada*. Did *Nada*, in turn, hold sway over *Kadi II*? In its judgment of 18 July 2013, the Grand Chamber of the CJEU rejected the appeals against the decision of the General Court of 30 September 2010,[99] and confirmed the annulment of the Commission regulation re-listing Mr. Kadi[100] for violation of due process standards. In its ruling, the CJEU cited the decision of the ECtHR in *Nada* only once – to confirm its argument that, despite the improvements in the UN machinery for listing and delisting suspected terrorists, the UN Security Council still did not provide to black-listed persons 'the guarantee of effective judicial protection.'[101]

Nevertheless, the reference to *Nada* is the only reference the CJEU actually made to a judgment by a court outside the EU. This suggests full awareness by the Luxembourg Court of the fact that an advanced standard of protection of human rights in counter-terrorism had been recently recognized and protected in the framework of the ECHR. In our view, therefore, it is plausible to maintain that *Nada* influenced the CJEU, encouraging it to keep a vanguard degree of human rights protection for suspected terrorists, the need to fight global terrorism notwithstanding.

The explanation for the influence that *Nada* may have exerted on the CJEU is to be found in the prospect of the accession of the EU to the ECHR. As we have seen in section 3, in the absence of a formal link between the EU and the ECHR, the relationship between two institutions was regulated by the case law of the ECtHR, which had excluded the possibility to review acts by the EU institutions,[102] save for EU Treaties, which could not be subject to the scrutiny of the CJEU.[103] In *Bosphorus*,[104] in particular, the ECtHR affirmed that it would review EU measures through the national implementing acts only as an *ultima ratio*, if the overall EU system of human rights

[99] Case T-85/09 *Kadi* v. *Commission* [2010] ECR II-05177.

[100] Commission Regulation (EC) No 1190/2008 of 28 November 2008 [2008] OJ L 322/25.

[101] *Kadi II*, para. 133.

[102] See *Confédération Française Démocratique du Travail* v. *EEC (CFDT)*, Application No. 8030/77, Eur. Comm. H. R, decision of 10 July 1978.

[103] *Matthews* v. *UK*, Application No. 24833/94, Eur. Ct. H. R. [GC], judgment of 18 February 1999.

[104] *Bosphorus* v. *Ireland*, Application No. 45036/98, Eur. Ct. H. R. [GC], judgment of 30 June 2005.

protection suddenly falls below the ECHR standard[105] and if 'in the circumstances of a particular case, it is considered that the protection of ECHR rights was manifestly deficient [at the EU level].'[106] Under this test, Annalisa Ciampi had plausibly argued that a decision such as the one of the CFI in *Kadi* would not obtain a remedy before the ECtHR.[107]

After the accession of the EU to the ECHR, however, a major institutional change will take place in the relationship between the EU and the ECHR and their respective courts.[108] Since the EU will be a Contracting Party to the ECHR, there would be no reason for the ECtHR to preserve a deferential approach in reviewing action by the EU institutions, including the CJEU.[109] Rather, it seems likely that the ECtHR will adopt *vis-à-vis* the EU the same full standard of review it employs *vis-à-vis* the other Contracting Parties to the ECHR. As a result, any lowering of the standard of protection in the EU legal order would come under the scrutiny of the ECtHR.

Given that strong pressures continue to be exerted from the EU political branches, and a handful of EU member states, to maintain wide discretionary powers in the struggle against terrorism,[110] the risks of a possible watering-down of the EU standards of due process protections for suspected terrorists is quite real. In fact, this was made plain by the Opinion of AG Bot of 19 March 2013.[111] AG Bot, assessing the reforms of the UN sanction regime in a very positive light – for which he credited the CJEU[112] – advised the CJEU to annul the decision of the General Court by advancing

[105] See Steve Peers, 'Limited Responsibility of European Union Member States for Action within the Scope of Community Law. Case Note to *Bosphorus Airways* v. *Ireland*' (2006) 2 *European Constitutional Law Review* 443, 452 (arguing that 'the concept of conditional review as developed by the [ECtHR] is fraught with ambiguities and uncertainties and runs the risk that human rights will not be sufficiently guaranteed in certain cases.')

[106] *Bosphorus* v. *Ireland*, Application No. 45036/98, Eur. Ct. H. R. [GC], judgment of 30 June 2005, para. 156.

[107] Annalisa Ciampi, 'L'Union Européenne et le respect des droits de l'homme dans la mise en œuvre des sanctions devant la Cour Européenne des droits de l'homme' [2006] *Revue générale de droit international public* 85

[108] See Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship Between the Two European Courts' (2009) 8 *The Law and Practice of International Courts and Tribunals* 375.

[109] But see the cautionary remarks of Olivier De Schutter, *The Two Lives of* Bosphorus*: Redefining the Relationship Between the European Court of Human Rights and the Parties to the Convention*, paper presented at the Conference 'The EU Accession to the ECHR', Brussels 16-17 Nov. 2012 (on file with the authors).

[110] See Deirdre Curtin and Christina Eckes, 'The *Kadi* Case: Mapping the Boundaries Between the Executive and the Judiciary in Europe' (2009) 5 *International Organization Law Review* 365.

[111] *Kadi II*, Opinion of Advocate General Bot of 19 March 2013, *nyr*.

[112] Id., para. 83: 'As the Ombudsperson has acknowledged, the judgment of the Court of Justice in *Kadi* led to the establishment of the Office of the Ombudsperson, which has made it possible to raise the quality of the list considerably. It would be paradoxical if the Court failed to take account of the improvements to which it has directly contributed, even though the Office of the Ombudsperson is not a judicial body.' (italics in the original, footnotes omitted)

a ‘security-sensitive’ reading of the standard of review to be adopted in the case. According to the AG, reasons relating ‘to the preventative nature of the measures in question, the international context of the contested act, the need to balance the requirements of combating terrorism and the requirements of protection of fundamental rights, the political nature of the assessments made by the [UN] Sanctions Committee in deciding to list a person or an entity, and the improvements in the procedure before that body in recent years’ [113] justified ‘moderation in the performance of judicial review.’ [114] Yet, by articulating this view, the AG largely sacrificed the promise of the CJEU’s decision in *Kadi* to secure meaningful protection to due process rights to the applicant, concluding that ‘[t]he EU judicature should not […] perform an intensive review of the justification for listing on the basis of the evidence and information on which the assessments made by the Sanctions Committee are based’[115] except in cases of ‘a flagrant error’.[116]

In its decision, however, the CJEU disavowed the advice of the AG and confirmed the substance of its earlier ruling, that the constitutional guarantees of the EU legal order required ‘judicial review of the lawfulness of all [EU] measures, including those which, as in the present case, implement an international law measure, in the light of the fundamental rights guaranteed by the [EU].’[117] The CJEU clarified that the right to defence and to effective judicial protection required that the ‘the competent [EU] authority disclose to the individual concerned the evidence against that person available to that authority and relied on as the basis of its decision, that is to say, at the very least, the summary of reasons provided by the [UN] Sanctions Committee.’[118] Moreover, the CJEU underlined how the task of EU Courts is to verify that sanctions decisions are ‘taken on a sufficiently solid factual basis’[119] and that, ‘[t]o that end, it is for the Courts of the [EU], in order to carry out that examination, to request the competent EU authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination.’[120] At the same time, the CJEU held that ‘the secrecy or confidentiality of that information or evidence is no valid

[113] Id., para. 67.

[114] Id., para. 80.

[115] Id., para. 87.

[116] Id., para. 110.

[117] *Kadi II*, para. 66.

[118] Id., para. 111.

[119] Id., para. 119.

[120] Id., para. 120.

objection'[121] and that if the EU institutions were unwilling or unable to disclose the evidence justifying the decisions, 'it is then the duty of those Courts to base their decision solely on the material which has been disclosed to them'.[122] Consequently, the CJEU ruled, '[i]f that material is insufficient to allow a finding that a reason is well founded, the Courts of the [EU] shall disregard that reason as a possible basis for the contested decision to list or maintain a listing.'[123] According to the CJEU, the EU judiciary has to maintain an in depth supervision on counter-terrorism sanctions, as '[s]uch a judicial review is indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned […] those being shared values of the UN and the European Union.'[124] Hence, the CJEU embraced the rule 'either disclose or delist',[125] and hereby reaffirmed (albeit without quoting it) the *ratio decidendi* of the ECtHR in *A.* v. *United Kingdom*,[126] i.e. that secrecy and confidentiality of the material cannot serve as a general excuse for the Member States or institutions to withhold it.[127]

The fact that the CJEU disregarded the influential advice of the AG[128] and re-affirmed its commitment to a strong protection of human rights in the EU legal order becomes meaningful when seen in light of *Nada* and the prospect of the accession of the EU to the ECHR. The stand of the ECtHR contributed to 'lock-in' the CJEU, preventing it from lowering in *Kadi II* the standard of protection it had set up in the *Kadi I* judgment of 2008. Given the looming accession of the EU to the ECHR, it became harder for the CJEU to reconsider its previous position, as *de facto* advised by AG Bot.[129] Whereas, before accession, no external scrutiny of EU standards of protection was in place, once the accession will be accomplished, EU institutions, including EU Courts,

[121] Id., para. 125.

[122] Id., para. 123.

[123] Id.

[124] Id., para. 131.

[125] See for a more in depth explanation of the operation of this rule, Federico Fabbrini, 'Global Sanctions, State Secrets and Supranational Review: Seeking Due Process in an Interconnected World', in David Cole et al. (eds.), *Secrecy, National Security and the Vindication of Constitutional Law* (Elgar 2013), pp. 284-301, 299-300.

[126] *A.* v. *United Kingdom*, Application No. 3455/05, Eur. Ct. H. R. [GC], judgment of 19 February 2009.

[127] On the problem of the disclosure of secret evidence (or the gist thereof) see also Daphne Barak-Erez and Matthew Waxman, 'Secret Evidence and the Due Process of Terrorist Detention' (2009) 48 *Columbia Journal of Transnational Law* 3 and the research paper prepared for the UK Joint Committee on Human Rights: *The Use of Secret Evidence in Judicial Proceedings: A Comparative Survey* (OUP 2011).

[128] See Anthony Arnull, *The European Union and its Court of Justice* (2nd ed, OUP 2006), 15, who notes that 'most students of the Court would probably say that it is fairly unusual – although by no means unheard-of – for the Court to depart from the Opinion of its Advocate General […]'.

[129] See also *Kadi II*, paras. 60 et seq.

will be required to comply with the guarantees of ECtHR. A future gap of protection generated in the EU by a low-level standard of due process protection would most likely not be tolerated by the ECtHR. In our view, therefore, the existence of a prospective control by the ECtHR on the action of the EU institutions persuaded the CJEU to maintain the high due process standard it framed in *Kadi*, preventing any re-emergence of challenges of ineffectiveness in the EU constitutional system.

## 7. CONCLUSION: PULLING TOGETHER FOR HUMAN RIGHTS

In conclusion, the dialogue between the CJEU and the ECtHR, against the backdrop of the opening of the ECHR to the EU proved to be of great value in securing adequate protection of human rights in the European multilevel constitutional architecture.[130] The UN Security Council raised serious challenges to an effective protection of due process rights both in Luxembourg and Strasbourg. The joint efforts by the two-transnational judicial bodies were instrumental in limiting excesses by the most powerful global executive organ – the UN Security Council.

In the combined story of *Kadi* and *Nada*, it was revealed how, in the context of UN targeted anti-terror sanctions, a rivalling yet constructive relationship between the two courts worked in a beneficial manner for fundamental rights. As we sought to demonstrate, fuelled by the continuing shortcomings of the UN sanctions regime as well as by the prospect of the EU's accession to the ECHR, the ECtHR found in *Kadi I* a powerful argument to make the case for the persisting need to exercise judicial review even in the face of the UN Security Council. Subsequently, the *Nada* judgment helped the CJEU to stand its ground in the face of voices demanding to paddle back to a more deferential approach. Hence, both Strasbourg and Luxembourg, in their competition to be a 'bulwark' of human rights pulled together for the benefit of judicial protection in Europe. From *Kadi I* to *Nada* to *Kadi II*, European Courts consistently struck the balance between global security and due process rights in a way that the latter is never eclipsed by the former.

[130] See also Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (OUP, forthcoming 2014), Chapter 2.

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