

.....

Critical Review of Jurisprudence: An Occasional Series

The European Courts and the Security Council: Between Dédoublément Fonctionnel and Balancing of Values

Pasquale De Sena and Maria Chiara Vitucci*

Abstract

The recent case law of various international tribunals facing questions related to UN Security Council resolutions shows the clear tendency to grant primacy to the UN legal order. This trend, far from being well founded on formal arguments, appears to be a tribute to a legal order perceived as superior, and, at the same time, is revealing of the 'value oriented' approach followed by the courts. Such an approach can be categorized from a theoretical perspective in the light of Scelle's theory of relations between legal orders, whereby the courts implement in their respective legal orders values stemming from the UN legal order. Various critical remarks can be advanced in relation to this attitude. Basically, when different legal values are at stake, the need arises to strike a balance between them, as the ECJ has recently done in the appeal decision in the Yusuf and Kadi cases. Such a tendency, if consistently followed, could serve as a valuable instrument to find the correct equilibrium between the security interest and the need for respect of human rights.

1 Opening Remarks

In the decisions recently delivered by the European Court of Human Rights

(ECtHR) in the *Behrami* and *Saramati*¹ and *Berić and Others* cases,² there emerges a clear tendency to guarantee the primacy

* Professor of International Law, University of Naples 'Federico II' (padesena@tin.it); Associate Professor of International Law, University of Palermo (chiara.vitucci@unipa.it). While the authors equally share the responsibility for the entire work, just for evaluation purposes sections 1, 2, 4 and 5 A and C should be attributed to

Pasquale De Sena while the remaining sections should be attributed to Maria Chiara Vitucci.

¹ App. Nos 71412/01 and 78166/01 *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, ECtHR judgment of 5 May 2007, available at www.echr.coe.int.

² App. Nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04,

of decisions of the United Nations Security Council (SC) – under Chapter VII of the UN Charter – even at the expense of the legal order of the European Convention on Human Rights (ECHR).

Thus, as will be better illustrated later on, the Court found itself not competent to evaluate actions of international civil and security forces in Kosovo (respectively, UNMIK and KFOR) whose presence was decided and authorized through Security Council Resolution 1244 (1999), even though these actions allegedly infringed the human rights of the applicants. In the Court's reasoning, the actions of UNMIK and KFOR should be directly attributed to the UN and, since this organization was fulfilling its imperative collective security objective, its obligations should prevail over conflicting human rights obligations. In the *Berić and Others* case the Court refused, on the same basis, to review acts of the High Representative, the international administrator of Bosnia and Herzegovina, whose establishment had been authorized as an enforcement measure under Chapter VII of the Charter by Security Council Resolution 1031 (1995). The applicants complained of various violations of their human rights deriving from actions of the High Representative.

This tendency to curtail, on the basis of resolutions of the UN Security Council, internationally protected individual rights had already clearly manifested itself, albeit in a different way, in the decisions, in the

Yusuf and Kadi cases,³ by the Court of First Instance of the European Communities (CFI) in September 2005. It is well known that, by these decisions – recently reversed by the European Court of Justice (ECJ) – the CFI confirmed the lawfulness of some EC regulations imposing restrictive measures, both financial and personal, against both individuals and associated entities suspected of terrorism,⁴ on the basis that these regulations – allegedly conflicting with some fundamental rights protected by the EU legal order⁵ – can be regarded as measures merely implementing Security Council Resolutions 1267 (1999) and 1333 (2000).⁶ More precisely, the Court, in reaching its decisions, affirmed the

³ Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2005] ECR II-3533, and Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* [2005] ECR II-3649.

⁴ Council Reg. (EC) 467/2001 of 6 Mar. 2001 (prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Reg. (EC) 337/2000), OJ (2001) L67/1, Commission Reg. (EC) 2199/2001 of 12 Nov. 2001 (amending, for the fourth time, Reg. 467/2001), OJ (2001) L295/16, and Council Reg. (EC) 881/2002 of 27 May 2002 (imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, and repealing Reg. 467/2001), OJ (2002) 139/9.

⁵ *Infra* note 12.

⁶ SC Res. 1267 (1999) whereby the Sanction Committee (Al Qaeda/Taliban Committee) was established; SC Res. 1333 (2000) (whereby the SC instructed the Sanction Committee to maintain an updated list of the individuals and entities designated as associated with Osama bin Laden, including those in the Al-Qaeda organization), and SC Res. 1390 (2002), on the basis of which the applicants were listed and subjected to the abovementioned restrictive measures (both in the *Yusuf and Kadi*

45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05, and 25496/05, *Berić and Others v. Bosnia and Herzegovina*, ECtHR judgment of 16 Oct. 2007, available at www.echr.coe.int.

prevailing force of the measures imposed by the above resolutions even over human rights principles enshrined in EU law, and, furthermore, deemed them to be fully compatible with the few relevant *jus cogens* rules.

More or less in parallel with the decisions of the ECtHR in the *Behrami* and *Saramati* and *Berić and Others* cases, this tendency also manifested itself recently in the case law of the national courts; that is, in three extremely important decisions by, respectively, a Divisional Court, then the English Court of Appeal, and, very recently, the House of Lords in the *Al-Jedda* case, which concerned an individual suspected of being a member of a terrorist group, who was detained by British troops in Iraq without being formally charged with any offence.⁷ In all three decisions, the English courts applied the principle of the primacy of UN obligations over conflicting human rights obligations as the basis on which to dismiss the applicant's appeal.

The above tendency has already given rise to considerable debate, particularly with regard to the two decisions of the CFI, given that, of all those cited, these are the ones which date back furthest in time. As we will see later on, some strong criticisms were

advanced, both with regard to what these decisions led to, in terms of the restraining of the fundamental rights invoked, and with regard to the legal arguments used. It was also on account of these criticisms that the ECJ ultimately overturned – as mentioned a little earlier – the conclusions reached by the CFI, reversing the above decisions in a very important judgment which will be examined in the last section of this article.⁸

Equally critical were the opinions expressed (albeit on a partially different basis) in response to the judgment of the ECtHR in the *Behrami* and *Saramati* cases, and also in response to the decisions of the English courts in the *Al-Jedda* case.⁹ It should also be underlined that the trend exhibited through these decisions has not – so far at least – been analysed as an expression of a broader (or, even, a *unitary*) phenomenon. With the exception of one attempt to 'read' the CFI's decisions as examples of a more general inclination towards judicial review of SC resolutions – in the framework of an emerging international constitutionalism¹⁰ – the analyses conducted to date have in fact focused not just on *specific* aspects, but also on largely

cases); on this procedure see Rosand, 'The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions', 98 *AJIL* (2004) 745.

⁷ Div. Ct. [2005] EWHC 1809 (Admin), judgment of 12 Aug. 2005 on the application of *Hilal Abdul-Razzaq Ali Al-Jedda v. Secretary of State for Defence*; CA (Civil Division) [2006] EWCA Civ. 327, judgment of 29 Mar. 2006 on the application of *Hilal Abdul-Razzaq Ali Al-Jedda v. Secretary of State for Defence*; HL [2007] UKHL 58, judgment of 12 Dec. 2007 on the application of *Al-Jedda v. Secretary of State for Defence*. All three decisions are available at www.hmcourts-service.gov.uk.

⁸ Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation*, decided on 3 Sept. 2008, not yet reported, available at curia.europa.eu.

⁹ For the relevant references see *infra* sect. 3.

¹⁰ A discussion on this aspect is carried out, with specific regard to the *Yusuf* and *Kadi* judgments, by Bore Eveno, 'Le contrôle juridictionnel des résolutions du Conseil de Sécurité: vers un constitutionnalisme international?', 110 *RGDIP* (2006) 827, at 836–837; a general overview of the debate about an emerging international constitutionalism can be found in De Wet, 'The International Constitutional Order', 55 *Int'l Comp LJ* (2006) 51, at 57 ff.

formal aspects of the reasoning followed by the CFI.

The fact that the direction followed by the CFI now finds confirmation, both in the case law of the ECtHR and in that of a supreme court such as the House of Lords, suggests instead that it is mature enough to be examined *as a whole*, also in the light of the ECJ's recent judgment. At the same time, we feel that such examination should not seek only to bring out *formal* aspects of the lines of reasoning followed in the above decisions, but that it should, rather, try to clarify the *substantive* objectives which underlie them, as well as their legal significance. In other words, it is necessary, in our view, to look beyond the CFI's invocation of certain EU norms – in order to establish the primacy of the measures imposed by the above-mentioned SC resolutions – beyond the ECtHR's invocation, to the same ends, of the same Article 103, as well as beyond the formal attitude shown *prima facie* by the ECJ in the appeal judgment in the *Yusuf* and *Kadi* cases. It seems to us that only by dealing with the *substantive* values pursued by the Courts will it be possible to arrive at a reasonable assessment of the direction in question; one capable, that is, of setting it properly into its context, thereby avoiding the risk of becoming too 'stuck' in the Courts' reasoning, and also that of drawing excessive, if not unfounded, consequences from them.

This is precisely the purpose of the following analysis, in which this tendency will be evaluated with reference, almost exclusively, to the decisions of international courts, and thus to the decisions of the CFI, the ECtHR, and the ECJ. Even though a passing reference will be made to the *Al-Jedda* case, it is clear that the

case law of domestic courts would have to be the subject of a specific inquiry, not just for 'quantitative' reasons, but also on account of the specific problems it implies, given the enormous variety not only of the legal methods used in the different countries to implement SC resolutions, but also of the relations between those resolutions and national constitutional norms.

That said, we will examine the general direction which has been highlighted here, seeking first and foremost to bring out, briefly, the role played by the substantive values on the basis of the arguments used by the CFI in reaching its decisions in the *Kadi* and *Yusuf* cases (section 2). A similar perspective will then be adopted as we examine the decisions of the ECtHR in the *Behrami* and *Saramati* and *Berić and Others* cases, with the difference that a slightly more analytical approach will be required, given that, to date, these cases have been the subject of little comment (section 3).

Once we have established the importance which can be attributed to the above-mentioned *values* in both instances, we will go on to examine the consequences of the line of reasoning followed by the Courts, first of all from a theoretical point of view.

With regard to this aspect, we will suggest that the role played by the CFI as much as by the ECtHR in relation to the implementation of the measures imposed by the resolutions can be interpreted in the light of the *dédoulement fonctionnel* (role splitting) theory and, in more general terms, of Scelle's vision of relations between legal orders (section 4).

Subsequently, this line of reasoning will be criticized, starting from the assumption that it can be construed as a 'value oriented approach'. In our view, moving from this perspective, both the CFI and the ECtHR should have balanced the

substantive values pursued by the SC resolutions and the human rights at stake. More precisely, this assessment should not have been conducted in the light of the few relevant *jus cogens* rules – as the CFI did in its decisions of September 2005 – but, rather, in the light of the human rights standards enshrined in the UN legal order, as well as of the relevant principles of the European Convention and of the EU legal order.

As for the possible outcome of such a balancing assessment, it is not entirely clear under the UN legal order given the most recent practice of the Security Council relating to targeted sanctions against suspected terrorists (section 5.A).

Instead, it is, in our view, quite clear that the decision reached by the ECtHR did not respect the proportionality principle, i.e., the legal criterion according to which the Court should have struck a balance between the collective interest and the allegedly violated human rights (section 5.B).

As far as the EU legal order is concerned, we will focus on the ECJ judgment rather than on the decisions of the CFI, given that the latter were reversed by that judgment. It will be shown that the reversal of the CFI's decisions derived, to some extent at least, from a 'dualistic' perspective, quite different from the 'Scelian' approach adopted by the CFI and the ECtHR. Despite this, it will however emerge that the conclusions reached by the ECJ can still be considered the fruit of a 'value oriented approach', given the important role played by the balance pursued by the Court between the collective needs and the human rights at stake. Starting from this basis, the Court's reasoning leads to concrete results which can certainly be shared and which could also impact on future developments of ECtHR case law (section 5.C).

2 Formal Reasoning and Substantive Legal Values in the Case Law of the Court of First Instance . . .

As we said a little earlier, the decisions of the CFI in the *Kadi* and *Yusuf* cases are widely known and, on account of their importance, have already attracted considerable comment. The solutions worked out by the CFI, already referred to, were also confirmed in subsequent case law, in particular in the *Ayadi* and *Hassan* cases.¹¹ For these two reasons, there is little point in analysing these decisions here. All that really needs to be underlined is the fact that, in the *Ayadi* and *Hassan* cases, the relevant EC regulations were the same ones – recalled at the start¹² – that were prominent in the *Kadi* and *Yusuf* disputes, and that also the rights claimed to have been violated were, basically, the same ones.¹³

Instead, it is worth looking briefly at the arguments on the basis of which the

¹¹ Case T-253/02, *Chafiq Ayadi v. Council of the European Union* [2006] ECR II-2139; Case T-49/04, *Faraj Hassan v. Council of the European Union and Commission of the European Commission* [2006] ECR II-52.

¹² *Supra* note 4.

¹³ The right to the use of property, the right to a fair trial – particularly the right to a fair hearing – the right to an effective judicial remedy: such rights have been invoked in the light of both the reference made by Art. 6(2) of the EU Treaty to the ECHR, and the case law of the ECJ, in the *Yusuf* (paras 190–191), *Kadi* (paras 138–148) and *Hassan* cases (paras 69–85); the applicant also pleaded a violation of the right to respect for private and family life; in the *Ayadi* case, a direct reference was made to the ECHR (paras 98–99); the applicant argued that the restrictive measures reduced him to stealing in order to survive, and that such a situation constituted degrading treatment prohibited by Art. 3 ECHR as well as a denial of respect for his dignity under Art. 8.

forementioned solutions were adopted in the *Kadi* and *Yusuf* cases and reproduced in subsequent case law.

In this regard it should first be recalled that the binding effect of SC resolutions for the EU – even though this cannot derive from the UN Charter (to which the EU is not a party) – can, according to the CFI, certainly be justified in the framework of the EU legal order; more precisely, on the strength of Articles 297 and 307 of the EC Treaty, from which it is possible to deduce not only the Member States' undertaking to safeguard the implementation of the obligations imposed by the UN Charter, but also that the EU itself is obliged to fulfil these obligations, precisely in order to allow their implementation by the Member States.¹⁴ Secondly, the impossibility of reviewing – even indirectly – the lawfulness of the above resolutions in the light of EU principles on human rights appears to be grounded in the EU legal order, and in particular in the principle according to which 'the Community judicature is to exercise its powers on the conditions and for the purposes provided for by the provisions of the EC Treaty and the Treaty on European Union'.¹⁵ Fur-

thermore, to submit these resolutions – even indirectly – to judicial review would go against the obligations laid down by the UN Charter,¹⁶ incumbent on the states which are parties to it, as well as against the need not to affect the 'validity of a SC measure or its effect', which is deducible – again according to the CFI – under both Article 307 EC and Article 103 of the Charter itself.¹⁷ Without prejudice to the fact that the measures provided for by Chapter VII 'fall in principle outside the ambit of the Court's judicial review', the CFI is, instead, still competent to check – albeit indirectly – the lawfulness of the resolutions of the Security Council *only* with regard to principles of *jus cogens*, given that even the Security Council is not allowed to depart from these principles in exercising its discretionary powers under Chapter VII.¹⁸ It was on precisely this basis that the CFI in the end rejected the applications submitted, concluding that the allegedly violated rights¹⁹ are not presently 'covered' by international *jus cogens* norms, other than in extremely specific hypotheses which, in any case, were *not* found in any of the cases under examination.²⁰

¹⁴ Para. 246 of the *Yusuf* judgment, *supra* note 3; Art. 297 EC establishes a duty of consultation 'to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take', *inter alia*, 'in order to carry out obligations it has accepted for the purpose of maintaining peace and international security'; according to Art. 307 EC, '[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more member states on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty'.

¹⁵ See the *Yusuf* judgment, *supra* note 3, at para. 274, where a reference is made to Art. 5 EC.

¹⁶ *Ibid.*, at para. 273: specific references are made to Arts 25, 48, and 103 UN Charter, as well as to Art. 27 Vienna Convention.

¹⁷ *Yusuf* judgment, *supra* note 3, at para. 275.

¹⁸ *Ibid.*, at paras 277–283.

¹⁹ *Supra* note 13.

²⁰ With regard to the right to the use of property, 'arbitrary deprivations' of property come to the fore (see paras 293–294 of the *Yusuf* decision, *supra* note 3, paras 242–243 of the *Kadi* judgment, *supra* note 3, as well as paras 117 and 92, respectively, of the *Ayadi* and *Hassan* judgments, *supra* note 11). For the right to a fair hearing and the right to an effective judicial remedy see, respectively, paras 307 and 341 of the *Yusuf* judgment and paras 268 and 286 of the *Kadi* judgment (as well as paras 117 and 92, respec-

If we look at the opinions expressed on these arguments, we find that they appear to arise from two basic orientations.

On the *one* hand, attention was drawn to the weakness of the Court's reasoning, both from the point of view of the EU legal order and, at the same time, from that of international law. The EU's obligation, affirmed by the CFI, to implement SC resolutions cannot easily be justified on the basis of the norms mentioned earlier or, even less, be considered the fruit of an improbable 'functional succession' of the EU for the UN obligations of the Member States.²¹ What is more, this logic, if pursued, would imply an undue subordination of the EU principles on human rights to the resolutions of the Security Council.²² Finally, to consider that the EU's obligations stem directly from the

EU Member States' obligations deriving from the UN Charter would be to consider the EU as a sort of common agent of those states, rather than as a subject of international law.²³

On the *other* hand, there was support for the principle stated by the CFI that, being a Court (albeit without the competence to review the SC resolutions under Chapter VII of the Charter) it is, nevertheless, still competent to check – even if only indirectly – the lawfulness of the resolutions of the Security Council with regard to *jus cogens*. Regardless of the concrete outcomes of the cases in question, this assertion was, in fact, taken either as confirmation of the vitality of *jus cogens* and of its suitability to be controlled from the bottom,²⁴ or as a sign of a possible emerging international constitutionalism.²⁵

We will, in part, come back to these opinions later. What needs to be underlined now, to go back to what we have already suggested, is that they tend to disregard the *substantive* objectives which presumably underlie the solutions chosen by the CFI. Instead, the need to dwell on this aspect is particularly pressing, in our view, given the CFI's strained arguments, to which commentators have drawn attention. It is the overall extent of these strained legal arguments that, in our view, makes it important – indeed necessary – to identify precisely the *real* objectives pursued in this way.

tively, of the *Ayadi* and *Hassan* judgments); for the right to respect for private and family life see para. 126 of the *Ayadi* judgment and para. 127 of the *Hassan* judgment; for the alleged violation of the prohibition of degrading treatments (Art. 3 ECHR) see para. 120 of the *Ayadi* judgment.

²¹ According to Nettesheim, 'U.N. Sanctions against Individuals – A Challenge to the Architecture of European Union Governance', 44 *CMLRev* (2007) 567, Art. 10 provides for a mere duty of the EC 'not to prevent Member States from fulfilling their duties or the make such fulfilment unduly difficult', whereas a duty of the EU 'to take on obligations of the member states' could not be supported by Art. 307, this norm being simply a 'division of power norm' between the EU and the Member States (at 584); for similar criticisms see also Vandepoorter, 'L'application communautaire des décisions du Conseil de Sécurité', 52 *Annuaire français de droit international* (2006) 102, at 122.

²² Conforti, 'Decisioni del Consiglio di sicurezza e diritti fondamentali in una bizzarra sentenza del Tribunale comunitario di primo grado', 11 *Diritto dell'Unione europea* (2006) 333, at 342.

²³ Cannizzaro, 'A Machiavellian Moment? The UN Security Council and the Rule of Law', 3 *Int'l Org L Rev* (2006) 189, at 202.

²⁴ See Tomuschat, 'Case Law – Court of Justice', 43 *CMLRev* (2006) 537, at 546.

²⁵ Bore Eveno, *supra* note 10.

It is clear, even from the way it frames the binding effect for the EU of SC resolutions, that the reasoning of the CFI cannot easily be set on formal lines. And, in fact, this is why it fails to connect to such an effect either the direct applicability of these resolutions in the EU legal order (in accordance with a ‘monistic’ point of view) or the specific obligation to ensure their implementation in the ambit of this legal order (in accordance with a ‘dualistic’ point of view). What we have just underlined seems to us to be clearly demonstrated by the fact that the Court, drawing the consequences of its reasoning on this point, on the one hand goes no further than simply to affirm:

that the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance and ... that in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures *necessary to enable its Member States to fulfil those obligations*;²⁶

and, on the other, limits itself to observing that, in this case, the EU Council found it ‘necessary’ that the European Community should adopt an action ‘within the confines of the powers conferred on it by the EC Treaty’; without concluding, in short, that it had a specific *obligation* to adopt such an action.²⁷

The rationale behind the *Yusuf* and *Kadi* judgments emerges quite clearly if one examines carefully the parts of such judgments where the impossibility of submitting SC decisions to judicial review – even indirect – is established. As we said

earlier, this impossibility, as well as being traced back to EC law itself, is explained both on the grounds that a different decision would create, *in general*, a conflict with the EU Member States’ obligations deriving from the UN Charter, and also on the grounds of what can be derived *specifically* from Article 103 of the Charter itself and from Article 307 of the EC Treaty.

The legal importance attributed by the CFI to the need to guarantee a full and uniform application of the Security Council measures within the territory of all the EU Member States clearly results – albeit implicitly – both from this reference to the states’ obligations (under Chapter VII of the UN Charter) to implement such measures and from the assertion that the Court’s competence to review them is incompatible with these obligations. The significance attached to this need is then made explicit in the passage in which the Court, reiterating the impossibility of the EU exercising any form of judicial review over the resolutions of the Security Council, refers to Article 103 of the Charter and to Article 307 of the EC Treaty, and observes that:

reference to infringements either of fundamental rights as protected by the Community legal order or of the principles of that legal order cannot affect the *validity of a Security Council measure or its effect in the territory of the Community* ...²⁸

In short, according to the CFI, the EU is obliged to guarantee full and uniform application of the Security Council resolutions against suspected terrorists throughout the ‘EU territory’, and by extension this implies

²⁶ *Yusuf* judgment, *supra* note 3, at para. 254 (emphasis added).

²⁷ *Ibid.*, at para. 255.

²⁸ *Ibid.*, at para. 275 (emphasis added).

the obligation not to submit SC resolutions to judicial review. On a *formal* level, these obligations are both linked to the provisions just cited.

Even were we to leave aside the doubts created – also in this respect – by the reference to Article 307 of the EC Treaty,²⁹ it is easy to see that a possible annulment of the EC regulations implementing the resolutions (on the ground that they infringe the EU principles on human rights) would not, *in itself*, have influenced in any way the EU Member States' ability to implement these resolutions within their legal orders, nor, therefore, the achievement of the aims embodied in Article 103 of the UN Charter.³⁰ Even were SC resolutions not incorporated in an EC regulation, they could still be fully implemented within the legal systems of the EU Member States, to the extent that those states must guarantee, precisely by virtue of Article 103 itself, that their obligations under the Charter – including the decisions adopted by the Security Council under Chapter VII³¹ – prevail over *any* other treaty obligation. It thus follows that reference to this last provision, in order to derive from it the dual need to guarantee full and uniform application of

SC decisions against suspected terrorists and, to that end, to refrain from recourse to judicial review can be seen, on a *formal* level, to lack credibility.

That said, we feel that the importance attached to this need emerges as a fundamental element for clarifying the *overall* logic of the decisions in question.

Even though the exclusion of any form of judicial review of the above resolutions finds no justification in Article 103 of the Charter, it cannot be denied that their incorporation in a EC regulation would *help to strengthen*, in two regards at least, their legal force within the legal systems of the EU Member States. One need only consider the fact that EC regulations enjoy direct applicability in such legal systems, without the need of any formal implementing act; and also, at the same time, the fact that they are bound to prevail over any other conflicting provision, in accordance with a principle firmly established in the case law of the ECJ.³² In the case law under consideration these characteristics were not expressly recalled, but it seems fair to assume that the CFI was fully aware of them and that, indeed, in affirming the need to guarantee the legal force of the SC resolutions in the 'territory of the Community', the Court aimed at guaranteeing these resolutions the same direct applicability and legal primacy of the EC regulations into which they had been incorporated.

If this is true, it can thus be concluded that in the overall logic of these decisions

²⁹ In this respect see the views expressed by Nettesheim and Vandepoorter, *supra* note 21.

³⁰ In a similar vein see Eeckhout, 'Community Terrorism Listing, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit', 3 *European Constitutional L Rev* (2007) 183, at 191–192; see also the Opinion of Poiares Maduro AG (16 Jan. 2008) in Case C-402/05 P, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, not yet reported, at para. 39.

³¹ The applicability of Art. 103 to the UN SC resolutions is widely admitted: see *infra* sect. 3.

³² See, e.g., Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629, and, more recently, Joined Cases C-10/97 to C-22/97, *Ministero delle Finanze v. IN.CO.GE. '90 and others Srl* [1998] ECR I-6307.

both the binding character of SC decisions for the EU and the impossibility of reviewing – even indirectly – their lawfulness may be seen as an expression of the CFI’s will to cooperate with the UN Security Council, in order to ensure that targeted sanctions against suspected terrorists enjoy the same level of legal force (in the legal orders of EU Member States) as EC regulations. And we might also add that this will, far from being imposed by well-founded *formal* reasons – relating to the *normatively* superior character of SC decisions – appear, rather, to be the fruit of the need to put into effect their *substantive* contents and the *values* which underlie those contents (the fight against terrorism) even at the expense of conflicting values, like those relating to the safeguarding of human rights.

3 ... and in the Case Law of the European Court of Human Rights

As we have already anticipated, to reach its inadmissibility decision in the *Behrami* and *Saramati* cases³³ the ECtHR recently followed a line of reasoning similar to that of the CFI. In a short space of time, the content of this decision has been followed by the same Court in the *Berić and Others* case and by the House of Lords in the *Al-Jedda* case.³⁴

The first two cases refer to the situation in Kosovo under international administration. In *Behrami* and *Behrami v. France* the applicants alleged that their deaths and injuries were caused by the failure

of French KFOR troops to mark and/or defuse the undetonated cluster bombs which they had known to be present on a site under their control. In the *Saramati* case the applicant maintained that by his prolonged detention by KFOR troops, France, Germany, and Norway had failed to guarantee his rights under the Convention, namely the rights to liberty and security, to an effective remedy, and to a fair trial.

The Court found that it was not competent to review the French, Norwegian, and German contributions to the international forces (UNMIK and KFOR) created by SC Resolution 1244.

To reach such a decision, the Court did not consider whether the states concerned exercised extra-territorial jurisdiction in Kosovo – in the light of the case law inaugurated in *Banković* and thereafter reproduced, they could easily have been found not to have done³⁵ – but whether it was competent to examine under the European Convention those states’ contribution to the relevant civil and security presence exercising control of Kosovo. That implies a shift of the *thema decidendum* from (extraterritorial) state jurisdiction to attribution of the alleged facts to states or the organization which had established the civil and

³⁵ For a general overview on the question of the extraterritorial jurisdiction see P. De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo* (2002); more recently see also Cerone, 'Out of Bounds? Considering the Reach of International Human Rights Law', Center For Human Rights and Global Justice Working Paper No. 5 (2006); De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights', 6 *Baltic Yrbk Int'l L* (2006) 143; F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004).

³³ *Supra* note 1.

³⁴ See *infra* in this sect.

security presence, i.e. the United Nations. But there is more than that.

The Court's line of reasoning is in fact twofold. On the one hand, it states that the alleged violations of the Convention cannot be attributed to the defendant states, but should be attributed to the UN. Even though this statement is questionable and has indeed attracted severe criticism,³⁶ it is not particularly relevant to the present discourse, in that it is ultimately functional to a further shift of the *thema decidendum*.³⁷ On the other hand, the Court affirms its incompetence to review not only the alleged acts and omissions found to be attributable to the UN, but everything covered by SC Resolution 1244, on account of the primacy of the UN legal order, which *qualifies*³⁸ the human rights obligations under the Convention.

The first part of the reasoning is open to criticism for one main reason. The Court,

while recalling them, does not properly use the criteria developed by the International Law Commission (ILC) in the draft Articles on the Responsibility of International Organizations adopted on first reading in 2004.³⁹ Article 5 of the draft Articles deals with the situation of the organ of a state placed at the disposal of an international organization but not fully seconded to that organization, which is the typical case of military contingents placed at the disposal of the UN. According to that Article, the organ's conduct will be attributable to the receiving organization only if the latter exercises effective control over the specific conduct.

However, in its reasoning on the attribution of the impugned acts and omissions to the contributing states or to the receiving organization, the Court fails to analyse who effectively exercised control over the relevant activities. The Court, rather, refers to the Security Council's competence, under Chapter VII of the Charter, to adopt the measure relating to the institution of UNMIK and to the authorization of states and relevant international organizations to establish the international security presence in Kosovo (KFOR). While UNMIK's failure to de-mine could, nevertheless, probably be attributed to the UN were the ILC's criteria applied correctly,⁴⁰ the same is not

³⁶ Palchetti, 'Azioni di forze istituite o autorizzate dalle Nazioni Unite davanti alla Corte europea dei diritti dell'uomo: i casi Behrami e Saramati', 90 *Rivista di diritto internazionale* (2007) 693; Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', 19 *EJIL* (2008) 509; Lagrange, 'Responsabilité des Etats pour actes accomplis en application du chapitre VII de la Charte des Nations Unies', 112 *RGDIP* (2008) 85; Sarl, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases', 8 *Human Rights L Rev* (2008) 151.

³⁷ As will be made evident below (*infra* sect. 5), the Court draws a further consequence from the attribution of the alleged acts and omission to the UN instead of to member states: it does not consider it necessary to assess the equivalence of the human rights protection in UNMIK and KFOR.

³⁸ More than a qualification, it seems to be a total displacement of the rights at stake. In this decision there is no room for the balancing of interests ruling, normally operated by the Court. See *infra* sect. 5.B.

³⁹ UN Doc. A/59/10, at 109.

⁴⁰ Various elements allow one to state the attribution of UNMIK's activities to the UN: UNMIK is a subsidiary organ of the SC, and the Secretary-General could waive the immunity of UNMIK personnel (while for KFOR personnel requests were to be referred to the relevant national commander: see *Behrami* and *Saramati*, *supra* note 1, at para. 46). But see *contra* the UN submissions referred to in the Court's decision, at para. 120.

true of KFOR's prolonged detention of Saramati.⁴¹

NATO did indeed have operational control of KFOR's activities, while the Security Council was informed of these activities only through periodical reports and could end the mission only by not renewing the authorization. The Court is aware of this and, instead of demonstrating the effective control operated by the Security Council, limits itself to stating that the Council had delegated only the operational command but retained ultimate authority and control over KFOR. According to the Court, this is borne out by several facts: Chapter VII allowed the Security Council to delegate; the relevant power was a delegable one; it was a prior delegation explicitly stated in Resolution 1244; the extent of the delegation was defined; and the leadership of the security presence was required to report to the Security Council.⁴² In the Court's view, NATO's operational control does not prevent the UN from retaining ultimate authority and control, but this continues to be at odds with the ILC's Article 5, where reference is made to effective control over conduct. Moreover, the control is not demonstrated but only evoked through reference to the fact that

'KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN'.⁴³ It is therefore difficult to share the Court's conclusion regarding the attribution of KFOR activities to the UN.⁴⁴ The Court's strained *interpretation* of the effective control attribution criterion is the premise for the second part of the reasoning.

In order to answer the question whether it is competent to review acts of states carried out on behalf of the UN, the Court analyses the relationship between the Convention and the UN acting under Chapter VII, affirming the primacy of the latter over the former. The conclusion it reaches is apparently derived from Article 103 of the Charter. Literally, this Article refers only to the *obligations* under the Charter which prevail, in the event of a

⁴¹ Stein, 'The Attribution of Possible Internationally Wrongful Acts: Responsibility of NATO or of its Member States?', in C. Tomuschat (ed.), *Kosovo and the International Community, A Legal Assessment* (2002), at 181, 191; Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo', 12 *EJIL* (2001) 469, at 485–487. See also Brownlie, 'The Responsibility of States for the Acts of International Organizations', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), at 355, 361.

⁴² *Behrami and Saramati*, *supra* note 1, at para. 134.

⁴³ *Ibid.*, at para. 141. While the Court uses the term 'delegation', as had already made clear (*ibid.*, at para. 43), that term and the term 'authorization' are used interchangeably. For a clear and convincing demonstration that not every kind of authorization can be considered legitimate according to the UN Charter see Picone, 'Le autorizzazioni all'uso delle forze tra sistema delle Nazioni Unite e diritto internazionale generale', 88 *Rivista di diritto internazionale* (2005) 5. The author identifies several conditions which must be met in order for the authorization to be legitimate (at 13–15); in particular, for what concerns KFOR, see at 50–51 and at 60, note 160, *in fine*.

⁴⁴ Still, two different chambers of the ECtHR have confirmed in two recent cases that the actions and inactions of KFOR are in principle attributable to the UN, quoting the *Behrami* precedent: App. No. 6974/05 *Kasumaj v. Greece*, judgment of 5 July 2007, at para. 3 and App. No. 31446/01 *Gajic v. Germany*, judgment of 28 Aug. 2007, at para. 1, available at: www.echr.coe.int.

conflict, over the *obligations* under any other international agreement, in the case in question the European Convention on Human Rights. While it is widely admitted that the obligations enshrined in SC resolutions are part and parcel of the obligations under the Charter,⁴⁵ the applicability of Article 103 to authorizations raises trickier issues.⁴⁶ Nevertheless, disregarding the literal content of Article 103, the Court extends the primacy to any act and omission of contracting states *covered by* SC Resolution 1244, irrespective of whether they are *imposed* (being the specific object of an obligation contained in the resolution), whether they are only *authorized*, or even whether they are voluntary. The Court is probably aware of the limits inherent in recourse to Article 103 because, immediately after mentioning it, it states that '[o]f *even greater significance* is the imperative nature of the principal aim of the UN and, consequently of the powers accorded to the UNSC under Chapter VII to fulfil this aim'.⁴⁷

This statement is a clue to what really lies behind the reasoning followed by the Court to reach its inadmissibility finding. That there was something unsound in its formal construction was already evident. In addition to the attribution criterion, various other legal categories had indeed been forced. First, even assuming the applicability of Article 103 to the situation in question, as we have already demonstrated, the primacy of UN obligations does not necessarily lead to the Court's lack of jurisdiction when its findings could only potentially create a situation of inconsistency with SC resolutions.⁴⁸ Secondly, the assumption itself is untenable. Even if the Court had been definitively convinced of the interpretation advanced by that part of legal doctrine which, against the literal interpretation, extends the scope of Article 103 to Security Council authorizations,⁴⁹ here it goes a step further, applying the same reasoning also to voluntary acts. As a matter of fact, in the Court's construction there is something which cannot be explained through the formal primacy argument. Hence, recourse to the imperative nature of the principal aim of the UN. Actually, it is not difficult to substantiate what is behind the Court's reasoning if only one

⁴⁵ Bernhardt, 'Art. 103' in B. Simma *et al.* (eds), *The Charter of the United Nations. A Commentary* (2002), at 1292, 1295–1296; Thouvenin, 'Article 103' in J.P. Cot, A. Pellet, and M. Forteau (eds), *La Charte des Nations Unies. Commentaire Article par Article* (2005), at 2132, 2135. See also the Order of 14 Apr. 1992 of the ICJ in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Provisional Measures, Order of 14 April 1992* [1992] ICJ Rep. 3, at 15, para. 39.

⁴⁶ See also for further reference Kolb, 'Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?', 64 *ZaöRV* (2004) 21.

⁴⁷ *Behrami and Saramati*, *supra* note 1, at para. 148 (emphasis added).

⁴⁸ Cannizzaro, *supra* note 23, at 200–201, n. 24.

⁴⁹ Actually, an analysis of the legal writings extending the scope of Art. 103 to authorizations shows that the reason behind such extension is always teleological, not to obstruct the implementation of UN sanctioned collective measures (D. Sarooshi, *The United Nations and the Development of Collective Security* (1999), at 151) and not to hamper the effectiveness of the system of collective security (Frowein and Kirsch, 'Art. 39' and 'Art. 42' in Cot *et al.* (eds), *supra* note 45, at 729 and 759).

reads the following passage, which is at the same time a candid and revealing indication of the Court's real aim:

Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are *fundamental to the mission of the UN* to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with *the fulfilment of the UN's key mission* in this field including, as argued by certain parties, with *the effective conduct of its operations*. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UNSC in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained *crucial to the effective fulfilment* by the UNSC of its Chapter VII mandate and, consequently, by the UN of its *imperative peace and security aim*.⁵⁰

This reference to the imperative peace and security aim and to the effectiveness of Security Council action in this field shows that the Court's real interest is focused on the values enshrined in collective security action, more specifi-

cally on ensuring public safety and the smooth international administration of Kosovo. More than the formal primacy of UN Security Council *obligations*, it is the primacy of some UN substantive values that is at stake. That the Court is granting prevalence to *substantive values* is also made evident by the submission of several parties: if the states contributing to the international forces feared that they were at risk of breaching the Convention, then they might refrain from participating in future missions of this kind, which would in turn undermine the maintenance of international peace and security.⁵¹ The Court, to avoid any possible interference with the effective fulfilment of the principal aim of the UN, grants the values of public order enshrined in SC Resolution 1244 through the setting up of the international administration.⁵²

Soon after the adoption of the *Behrami* and *Saramati* decision by the Grand Chamber, the same reasoning was adopted by a section of the Court in the *Berić and Others* case.⁵³ The applicants

⁵¹ *Ibid.*, at paras 94, 101, 108, 111, 115, and 117.

⁵² As a consequence, the Court totally disregards the human rights protection which is also enshrined in the UN Charter: see *infra* sect. 5.

⁵³ *Supra* note 2. Moreover, this decision has been followed up in later cases. On the one hand, there are the cases, already quoted *supra* at note 44, regarding the attribution to the UN of KFOR's acts and omissions; on the other hand, there is a case attributing to the UN removals from office ordered by the High Representative for Bosnia and Herzegovina: App. Nos 45541/04 and 16587/07, *Dragan Kalinić and Miograd Bilbija v. Bosnia and Herzegovina*, judgment of 13 May 2008, available at: www.echr.coe.int. On the latter case see *infra* notes 87 and 88 and corresponding text.

⁵⁰ *Behrami and Saramati*, *supra* note 1, at para. 149 (emphasis added).

had been removed from office by the High Representative, an international administrator for Bosnia and Herzegovina, whose establishment by a group of states had been authorized as an enforcement measure under Chapter VII of the Charter by SC Resolution 1031 (1995) and whose almost unlimited powers had been specified over time by the states belonging to the Peace Implementation Council (PIC) and endorsed by subsequent SC resolutions.⁵⁴

Even after the lifting of the ban and despite a decision in their favour by the Constitutional Court, the applicants were not granted any effective remedy because the High Representative – in order not to undermine the implementation of the Peace Agreement – had decided that his acts could not be reviewed by the Constitutional Court.⁵⁵ Therefore, the applicants complained not only under Article 6 of the Convention, because of criminal charges in the absence of any determination by an independent and impartial tribunal, and Article 11, concerning freedom of association, but also under

Article 13, which relates to an effective remedy before a national authority.

The Court's line of reasoning reflects perfectly that followed in *Behrami* and *Saramati*. The acts of the High Representative are attributed to the UN since the delegation of powers in question is considered compatible with the Security Council's exercising of 'effective overall control'.⁵⁶ In this case the circumstances render even more evident the straining of the first part of the Court's reasoning: indeed, the open-ended mandate conferred on the High Representative and the continuing additions to his powers by the PIC show very little control by the UN over the specific acts. The second part of the reasoning is even more striking: the relevant paragraphs of the *Behrami* and *Saramati* decision are taken *tel quel* and applied to Bosnia's acceptance of an international civil administration on its territory, therefore to an act which – at least from a formal point of view – should be considered voluntary.⁵⁷ As a consequence, not only is the Bosnian Constitutional Court unable to review the High Representative's acts on the ground that they are internationally imposed and, therefore, international in nature, but the European Court – because of the primacy argument – too is purportedly incompetent to review them. If one remains on a purely formal level, it is very difficult to

⁵⁴ See the conclusions of the Bonn Peace Implementation Conference, by which the Peace Implementation Council (PIC) approved the High Representative's authority to remove from office public officials considered to be violating legal commitments of the Peace Agreement: UN Doc. S/1997/979. See also SC Res. 1144 (1997) and 1722 (2006).

⁵⁵ The Constitutional Court, by its AP 953/05 decision of 8 July 2006, had ordered domestic authorities to secure an effective remedy in respect of removal from office by the High Representative. The High Representative deprived the Constitutional Court judgment of any practical effect by declaring, in his decision of 23 Mar. 2007, that his acts could not be challenged before any court, so as not to undermine the implementation of the civilian aspect of the Dayton Peace Agreement.

⁵⁶ This wording replaces the 'ultimate authority and control' of the *Behrami* and *Saramati* decision, *supra* note 1.

⁵⁷ Even if the Court refers to Bosnia's acceptance of the international administration (*Berić and Others*, *supra* note 2, at para. 30), one can cast doubt on the degree of consent freely expressed by Bosnia at the signature of Dayton Agreement.

see in Bosnia's acceptance any obligation under Article 103 which could be said to prevail over its obligations under the Convention. Nevertheless, as we have seen, this is the Court's conclusion. It is therefore clear that the Court, far from reasoning at a formal level, is in fact imposing substantive values contained in SC resolutions.

Through simple reference to its *Behrami* and *Saramati* findings, the Court upholds once again the substantive value of an effective transitional international administration, mandated by the Security Council. In order to guarantee a smooth administration, the Court is ready to disregard the conclusions of the Venice Commission, worried by the fact that 'decisions directly affecting the rights of individuals taken by a political body are not subject to a fair hearing or at least the minimum of due process and scrutiny by an independent court'.⁵⁸

As we have already said in the opening remarks, the House of Lords has recently decided a case similar to the *Saramati* one, recalling the findings of the European Court and applying them to the different situation of Iraq. The applicant, Al-Jedda, suspected of being a member of a terrorist group actively involved in terrorist activities, complained that his detention by British troops was contrary to Article 5(1) of the European Convention because he had not been charged with any offence. Previously, a Divisional Court and the Court of Appeal had already dismissed his case, arguing that his rights under Article 5 were qualified by a reso-

lution of the UN.⁵⁹ The House of Lords⁶⁰ decided the case through recourse to the relationship between Article 5(1), on the one hand, and the United Nations Charter and certain resolutions of the Security Council, on the other. Reference is made in particular to SC Resolution 1546 (2004) which, reaffirming for the period following the end of the occupation in Iraq the authorization under SC Resolution 1511 (2003), assigned to the multinational force a broad range of tasks contributing to the maintenance of security; among them internment, if necessary for imperative reasons of security.

In this case, the logical chain of reasoning used in *Behrami* and *Saramati* is broken, in that the first part of the judgment reaches a different conclusion with regard to the attribution issue. The majority of the Law Lords affirmed that Al-Jedda's internment and custody by British troops were indeed to be referred to them and not to the UN because '[i]t cannot realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant'.⁶¹

Despite this finding, the rest of the European Court's decision, i.e., the primacy of UN obligations in the event of conflicting human rights obligations, is applied to dismiss the applicant's appeal. It is outside the scope of this

⁵⁸ Quoted in *Berić and Others*, *supra* note 2, at para. 17.

⁵⁹ See *supra* note 7. For a critical comment see Arcari, 'Autorizzazioni del Consiglio di sicurezza, tutela dei diritti dell'uomo e occupazione militare in Iraq: il caso *Al-Jedda* di fronte ai giudici britannici', 89 *Rivista di diritto Internazionale* (2006) 1083; Palchetti, *supra* note 36, at 708 ff.

⁶⁰ See *supra* note 7.

⁶¹ *Al-Jedda*, *supra* note 7, at para. 23.

article to analyse and rebut the various arguments developed by the Law Lords to derive obligations from a mere authorization, so as to justify the use of Article 103. Suffice it to say that the extension of the scope of Article 103 to authorizations really required a more careful demonstration, given that the prevalence of UN obligations over other obligations represents an exception to the general rule of treaty law according to which treaty provisions can generally be departed from. Had the Court reasoned on a truly formal basis, it should have given only a narrow meaning to this exceptional provision. That the Court insists on this extension is telling of the fact that its line of reasoning is only apparently formal. On the contrary, the Court is giving importance to the substantive values which the SC is imposing. This is perfectly shown by the following passage. Lord Bingham of Cornhill affirms that in the present situation:

‘obligations’ in article 103 should not in any event be given a narrow, contract-based meaning. The importance of maintaining peace and security in the world cannot scarcely be exaggerated, and that (as evident from the articles of the Charter quoted above) is the mission of the UN. ... It is of course true that the UK did not become specifically bound to detain the appellant in particular. But it was, I think, *bound* to exercise its power of detention where this was necessary for imperative reasons of security.⁶²

The obligation needed to use Article 103 in order to impose the primacy of

UN values is, by necessity, created artificially.⁶³ Behind the Court’s construction this time there lies the value of security, in particular in the fight against terrorism.

4 The ‘Value Oriented Approach’ of the European Courts and Scelle’s Conception of the Relations among Legal Orders

It is clear from the previous sections that the *formal* lines of reasoning followed in order to justify the primacy of the SC resolutions – in particular, recourse to Article 103 of the UN Charter – are not legally sound. Through what are clearly strained arguments, the Courts aims in fact at guaranteeing – as much as possible – the implementation within the national legal systems of the *substantive* content of several UN Security Council resolutions, in accordance with the *values* which they themselves pursue. In this respect, the various resolutions at stake have something in common: either they contain *specific* measures of *domestic public order*, applicable within the national legal orders (such as anti-terrorism measures or the removal from office of potentially harmful civil servants), or they attribute *general* responsibility for *public safety and order*, necessary for the setting up of an

⁶³ We can already anticipate that various Law Lords have nevertheless felt the need to find a balance between the duty to follow the content of the SC Resolution imposing detention and the detainee’s fundamental rights under the Convention. See *infra* sect. 5.B.

⁶² *Ibid.*, at para. 34 (emphasis added).

international administration. The CFI, like the ECtHR and even the House of Lords, thus appears to be ready to cooperate with the Security Council in order to put into practice methods of fighting terrorism and of administering territories decided by that organ (Kosovo, Bosnia, Iraq).

Precisely because of this, it is tempting to conclude that the Courts' behaviour, in the absence of any institutional-type link between UN, EU, and ECHR, constitutes a sort of *dédoublement fonctionnel*, at least as understood in Scelle's broadest and most recent account of that phenomenon. It can be remarked that, in fostering the legal force of these resolutions, the CFI and the ECtHR used:

*leur capacité 'fonctionnelle' telle qu'elle est organisée dans l'ordre juridique qui les a institués, mais pour assurer l'efficacité des normes d'un autre ordre juridique privé des organes nécessaires à cette réalisation, ou n'en possédant que d'insuffisants.*⁶⁴

In other words, it seems quite likely that both of these Courts have allowed themselves to act on behalf of the UN legal order, aiming *specifically* at facilitating the realization of *values* stemming

from that order, both in the case of targeted sanctions against suspected terrorists, and with regard to the resolutions concerning the transitional administration of Kosovo and the administration of Bosnia.

This conclusion, however, may give rise to some puzzlement.

At first sight at least, it seems, in fact, to conflict with a basic feature of the *dédoublement fonctionnel* theory in international law, given that the latter referred essentially to state agents, leaving aside international courts. The difficulty of extending his reasoning, *tel quel*, to international courts probably did not escape the French author, given the impossibility – on account of the courts' independence from the states – of comparing them with state agents.⁶⁵

This circumstance – which finds its confirmation in other aspects of the theory of *dédoublement fonctionnel*⁶⁶ – is still not enough to exclude the applicability of this theory to the case law of the CFI and the ECtHR in the cases considered. Although the CFI and the ECtHR cannot be depicted, respectively, as agents of the EU Member States or of the states parties to the Convention, but, rather, as agents of the EU legal order and of the European Convention, there is nothing, in our view, that prevents them from acting with the specific aim of ensuring '*l'efficacité des*

⁶⁴ Scelle, 'Le phénomène juridique du *dédoublement fonctionnel*', in W. Schätzel and H.J. Schlochauer (eds), *Rechtsfragen der internationalen Organisation, Festschrift für Wehberg* (1956), at 324, 331; Scelle's model has been recently recalled by P.-M. Dupuy as a more general source of inspiration for framing the relations between international law and national legal systems: 'Unité d'application du droit international à l'échelle globale et responsabilité des juges', 1 *European J Legal Studies* (2007), available at: www.ejls.eu, at 4; for some critical remarks in this regard see Y. Shany, *Regulating Jurisdictional Relations Between National and International Courts* (2007), at 97.

⁶⁵ Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law', 1 *EJIL* (1990) 210.

⁶⁶ Suffice it to think that Scelle, far from describing the Permanent Court of International Justice as a states' agent, considered it 'a collective body fulfilling a judicial function' on behalf of a sort of 'suprastate society', such as the League of Nations: *ibid.*, at 218–219.

normes d'un autre ordre juridique', in a context of *dédoulement fonctionnel*. On the contrary, the very fact that no convincing legal argument was advanced by the Courts to support the *formal* primacy of the SC resolutions constitutes, in our view, a very significant demonstration of the applicability of this theory to the cases examined.

That said, a more general argument could be cited against the applicability of the *dédoulement fonctionnel* model to this case law. One could point out that, both for the repression of terrorism and for the administration of territories, recent years have seen a significant transfer of powers in a direction *opposite* to the one thus far evoked, as far as typical state powers – such as the power to administer a given territory or to adopt police measures in response to terrorism – have been increasingly transferred to the Security Council.⁶⁷ This could make it possible to hypothesize that, in granting primacy to the measures adopted by the Security Council, the ECtHR and the CFI have, *in*

fact, restricted themselves to cooperating with the exercising, by the Security Council, of powers which the states themselves have transferred to the Council, simply so that the latter can exercise them in their stead.

But even this argument does not seem able to exclude the hypothesis outlined a little earlier. It is in fact clear that, even though the contents of the resolutions in question concern typically *state* powers, this certainly does not rule out the fact that these contents can be considered expressions of values legally relevant to the UN legal order, or to the international legal order *tout court*. One need only think that these resolutions are adopted on the basis of Chapter VII of the Charter, which means that their provisions are considered functional to the maintenance of international peace and security as, moreover, was expressly affirmed by the ECtHR in the *Behrami* and *Berić* decisions.⁶⁸ For precisely this reason, in describing the Courts' behaviour, it can be affirmed that the CFI and the ECtHR, by granting primacy to them, acted in such a way as to safeguard internationally relevant legal values, at least within the UN legal system.

A more far-reaching reservation about the applicability of the *dédoulement fonctionnel* model to the case law in question could arise instead, in our view, from other circumstances. As regards the decisions of the CFI, in particular, it can reasonably be observed that this organ, on a *formal* level, is actually implementing EC regulations, and *not* UN legal norms. To

⁶⁷ With respect to SC decisions targeting individuals in the context of the fight against terrorism see, e.g., Cannizzaro, *supra* note 23, at 200, as well as Alvarez, 'Hegemonic International Law Revisited', 97 *AJIL* (2003) 871, at 876–877; for what concerns the international administrations see Stahn, 'The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis', 5 *Max Planck Yrbk UN L* (2001) 105, at 119, where one reads: 'the United Nations has, in both cases, assumed the classical powers of a state within the respective territories'; Bothe and Marauhn, 'UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration', in Tomuschat (ed.), *supra* note 41 at 217; and, more generally, D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (2005).

⁶⁸ *Behrami* and *Saramati*, *supra* note 1, at paras 147–149; *Berić and Others*, *supra* note 2, at paras 26–30.

be more precise, it limits itself to construing such regulations in the light of the values pursued by the Security Council decisions in question, as emerges in fact from its own balancing between the need to fight terrorism and the allegedly violated human rights provided for by *jus cogens* rules.⁶⁹

A similar argument can be advanced in relation to the ECtHR decisions in the *Behrami* and *Berić* cases. Here again – it can be observed – what we are faced with, from a strictly *formal* point of view, is not a proper implementation of norms drawn from other legal orders, but, rather, an interpretation of the Convention in the light of the aims pursued by the pertinent SC resolutions;⁷⁰ what emerges is thus a total squashing of the rights enshrined in the Convention, sacrificed on the altar of the imperative nature of the principal aim of the UN, which, in the case in question, led to the institution of a provisional administration.

If this is true, there is nevertheless another aspect of Scelle's overall vision of relations among legal orders which, given what we have said so far, can be related to the case law under consideration.

Leaving aside the questionable references to Article 103 of the Charter and to other specific norms (in particular, the norms of the EU legal order recalled by the CFI), we have seen that both the CFI and the ECtHR were aimed at giving precedence – more or less consciously – to *values* pursued in the legal order of

the UN, that is, to values belonging to a legal order perceived as *superior*, as a *whole*, both to the EC legal order and to the ECHR. This seems, what is more, to be borne out by a further circumstance: that is, by the fact that the Courts did not concern themselves at all with the need to state, still less verify, that the substantive contents of the above resolutions corresponded to – and thus put into practice – *specific norms of jus cogens*.

It is precisely from this perspective that the direction we have just highlighted can be found once again to echo Scelle's model. Indeed, within that model there is no doubt that international law is destined to prevail over national legal systems – or over other international special legal orders – according to a 'monistic' view of the relations among legal orders.⁷¹ What needs to be underlined is simply that from this perspective – as has rightly been observed – 'it cannot be said ... that international rules take precedence over state rules, but that the international legal order, *as such*, is *superior* to national legal systems',⁷² More precisely, the primacy of

⁷¹ Scelle's monism is not a normative monism, in so far as it stems from the basic assumption that the legal orders (including international law) are social phenomena aimed at regulating different aspects of the individual life (*Précis de droit des gens* (1932) I, at 28; *Règles Générales du droit de la paix*, 46 *RC* (1933) IV 331, at 341–344); it has been considered as an 'extreme form of monism' by Thierry, 'The Thought of George Scelle', 1 *EJIL* (1990) 193, at 200. The connections between this approach and Kelsen's theory have been highlighted by Jouannet, 'L'idée de communauté humaine à la croisée de la communauté des Etats et de la communauté mondiale', 47 *Archives de philosophie du droit* (2003) 191, at 208–212.

⁷² Cassese, *supra* note 65, at 212 (emphasis added).

⁶⁹ In this regard see *supra* notes 18–20 and the corresponding text.

⁷⁰ *Behrami* and *Saramati*, *supra* note 1, at para. 122.

international law over national legal systems appears to be no more than a consequence of the general principle whereby a '*droit intersocial*' – which is precisely what international law is – is destined *naturally* to prevail over the legal orders of the societies under it – the national legal systems – on account of its being the expression of a broader society (the international society) the legal values of which thus have broader scope.⁷³ Even though it is the relations between the UN Charter – on one side – and EU legal order and ECHR – on the other – that we have highlighted in this case law, and *not* those between the international order *tout court* and the national legal systems, it is thus difficult to get away from the idea that such case law was guided precisely by the logic we have indicated, *albeit* implicitly, that is, in the absence of any reference to Scelle's model.

5 The Courts' 'Value Oriented Approach' and the Need for a Proper Balancing Between Collective Needs and Individual Rights

A Evaluating the Courts' Approach from the Point of View of Human Rights Standards

Once the case law here examined is framed into a theoretical context, a series of critical remarks can be advanced in relation to the 'value oriented approach' followed by the Courts.

First of all, such an approach can be evaluated from the point of view of the UN legal order.

⁷³ *Règles Générales du droit de la paix*, *supra* note 71, at 351.

Basically, can the described prevalence over human rights of the measures imposed by UN resolutions really be deemed to be in conformity with the UN legal order?

In attempting to answer this question, one might, initially, be tempted to argue that the duty to respect human rights itself can be traced back to Article 103 of the UN Charter. More precisely one could argue that – notwithstanding the facts that the Charter's few provisions in this regard are certainly soft-law provisions⁷⁴ – many important treaties on human rights have been concluded in the framework of the UN (in particular, the 1966 Covenants) and that the obligations established by these treaties must be considered out-and-out specifications of the abovementioned provisions. Just like these provisions, these obligations could therefore also be *formally* traced back to the Charter, and indeed to Article 103, just like the Security Council decisions in question. Hence, the Court's failure to take them into account while curtailing the rights at stake could not be considered justified in the ambit of the UN legal order.⁷⁵

Quite apart from other doubts which this argument raises,⁷⁶ we feel that this line, given its clearly *formal* character,

⁷⁴ The reference here is to Art. 1(3), Art. 55, and Art. 56, by virtue of which the member states of the UN pledge themselves simply to *promote* universal respect for human rights and to *cooperate* with the UN itself with this aim.

⁷⁵ With specific regard to the case law of the CFI see Sciso, 'Fundamental Rights and Article 103 of the UN Charter before the Court of First Instance of the European Communities', 15 *Italian Yrbk Int'l L* (2006) 137, at 148 ff.

⁷⁶ It does seem excessive to conclude that such obligations can be *formally* traced back to the Charter – and, thus, to Art. 103 – simply because they are aimed at implementing the principles (of which they are considered specifications) enshrined in the Charter itself.

does not sit well with the logic followed in the case law examined, to the extent that the latter referred to the UN legal order not so much for *formal* reasons as for reasons relating to the *substantive* contents and values which can be drawn from that order, including, precisely, those pursued by the resolutions in question.

In connection with this kind of logic, what is more interesting – we think – is the view that the human rights standards of the UN treaties on human rights could serve to complement and clarify the UN Charter, not as regards the *obligations* stemming from it, but as regards, precisely, its inherent *principles* or substantive *values*.⁷⁷ Starting from this assumption, one could thus conclude that the legal force the Courts attached to the values underpinning the UN resolutions is disproportionate, precisely in the framework of the ‘value oriented approach’ the Courts themselves adopted. This can be observed very easily with regard to the decisions of the ECtHR, where – as we have seen – no attempt was made to balance the above-mentioned values with the human rights standards of the UN treaties on human rights. The same can be said of the case law of the CFI, in which the balancing between the need to fight terrorism and the allegedly violated human rights was not even attempted in the light of these *standards*, but carried out only taking into account the handful of rights provided for by *jus cogens* norms.

However, it must be remarked that the tendency the Courts have shown to ensure the prevalence of the collective interests pursued by the SC resolutions over the safeguarding of human rights

does, in fact, find some confirmation in recent UN practice, both that relating to the fight against terrorism and, albeit in a more ambiguous way, in that concerning issues of territorial administration.

As regards the fight against terrorism in particular, while it is true that many SC resolutions urge the states to adopt the necessary means in accordance with ‘international human rights, refugee and humanitarian law’,⁷⁸ it is also true that, with the notable exception of the recent adoption of SC Resolution 1822 (2008) introducing further amendments to the listing and de-listing procedure, nothing of this kind could be found in the SC resolutions *specifically* relating to targeted sanctions.⁷⁹ Moreover, the need to combat terrorism by all means in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee, and humanitarian law, appears only in the preambular paragraph of the resolutions. Furthermore, to date, even the most recent amendments to procedures for the ‘listing’ and ‘de-listing’ of suspected terrorists have not made provision for any right to a fair hearing or for the right to an effective remedy to be secured to the targeted individuals.⁸⁰ Finally, it must be added that respect for these rights

⁷⁸ See the preambles to SC Res. 1456 (2003), 1535 (2004), 1617 (2005), and 1787 (2007).

⁷⁹ See, for instance, SC Res. 1390 (2002), 1455 (2003), 1526 (2004), 1566 (2004), and 1617 (2005).

⁸⁰ For the amendments to the listing and de-listing procedures provided for by SC Res. 1730 (2006) and 1735 (2006) see Arcari, ‘Sviluppi in tema di tutela dei diritti di individui iscritti nelle liste dei comitati delle sanzioni del Consiglio di sicurezza’, 90 *Rivista di diritto internazionale* (2007) 657. The same conclusions could equally be applied even after the adoption of SC Res. 1822 (2008).

⁷⁷ Cannizzaro, *supra* note 23, at 201.

in the ambit of these procedures is *not* expressly mentioned in part IV of the 'Plan of Action' annexed to the resolution adopted by the UN General Assembly on the 'Global Counter-Terrorism Strategy', which focuses specifically on the relationship between the protection of human rights and the fight against terrorism.⁸¹ That resolution, as well as more recent GA resolutions on the same topic, only affirms that states must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law,⁸² and calls on the various UN entities involved in supporting counter-terrorism efforts to continue to facilitate the promotion and protection of human rights and fundamental freedoms while countering terrorism.⁸³

As far as international administrations are concerned the question differs in part. According to the letter of SC Resolution 1244, the promotion and protection of human rights is one of UNMIK's responsibilities. But there are no effective ways of enforcing human rights against international administrations.⁸⁴ The implementation of all established procedures ultimately depends on the decision of a political organ, the Special Representative of the Secretary-General. Moreover, according to UNMIK's general legal position, reflected in a paper

entitled 'Security and the Rule of Law in Kosovo', security interests can override the rights of individuals.⁸⁵ In the case of Bosnia and Herzegovina, the High Representative was appointed to facilitate the implementation of the parties' undertakings contained in Annex 10 to the Dayton Agreement. Even though these undertakings included the promotion of and respect for human rights,⁸⁶ the High Representative has recently stated that it is not possible for any domestic mechanism to review his decisions, even when they could impinge on human rights.⁸⁷ This factual situation has been restated, also at the international level, by a very recent inadmissibility decision of the ECtHR, where the Court confirmed that the acts of the High Representative are in principle attributable to the UN, so that it is not competent *ratione personae* to deal with them.⁸⁸ It is thus left to the High Representative, i.e., a political body, to strike its final and unjustifiable balance

Human Rights Protection in Kosovo', in P.-M. Dupuy *et al.* (eds.), *Völkerrecht als Weltordnung – Common Values in International Law, Festschrift für/Essays in Honour of Christian Tomuschat* (2006), at 15, 26, and 40; Ingravallo, 'La tutela dei diritti umani nel Kosovo sotto amministrazione diretta dell'ONU' in A. Cannone *et al.* (eds.), *I Studi in onore di Starace* (2008) 447.

⁸¹ GA Res. 60/288 of 8 Sept. 2006.

⁸² GA Res. 61/171 of 1 Mar. 2007 and GA Res 62/159 of 11 Mar. 2008.

⁸³ GA Res. 62/272 of 15 Sept. 2008.

⁸⁴ See Zimmermann and Stahn, 'Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo', 70 *Nordic J Int'l L* (2001) 423, at 447; Aznar-Gómez, 'Some Paradoxes on

⁸⁵ The document in question, a paper issued by the Special Representative of the Secretary-General on 12 Jan. 2000, is quoted by Stahn, *supra* note 67, at 163.

⁸⁶ In addition to Annex 10, the respect for human rights is the very topic of Annex VI to the Agreement.

⁸⁷ See the High Representative's Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija *et al.*, AP-953/05 of 23 Mar. 2007, available at: www.ohr.int.

⁸⁸ See *supra* note 53.

between the public good and individual rights.⁸⁹

In view of what we have just outlined, it is difficult to find *unequivocal* elements on the basis of which to assess, from the perspective of the UN legal order, the soundness of the approach followed by the CFI and the ECtHR. On the other hand, the primacy attributed to the values pursued through the SC resolutions is in line with the ‘Scellian’ perspective which we looked at earlier. In this perspective the Courts tend in fact to consider these values as prevalent because they can be linked to an order which, as a whole, is perceived as *superior*.⁹⁰

However, such an approach is open to criticism when examined from a *second* point of view; that is, if one poses the question whether the primacy attributed to the UN resolutions under examination can in fact be justified from the point of view of the legal systems whereby the above resolutions must be implemented.

In other words, this primacy seems to us to be entirely incompatible with these legal systems, starting precisely from the assumption that in the case law examined both the ECtHR and the CFI aimed more at pursuing *values* enshrined in the UN legal order than at implementing *norms* stemming from that legal order.⁹¹

From the perspective of the ECHR, it thus emerges clearly that a proper balance should have been established between the collective security needs

pursued through the SC resolutions – even though these needs have a basis in the UN legal order – and the conflicting rights at stake. Such a balance is what is imposed by the fundamental ‘principle of proportionality’ which regulates, precisely, the conflict between collective interests and the individual rights protected by the ECHR, in the event both of restrictions of such rights and of derogations provided for by Article 15 of the Convention.⁹² The applicability of this principle to the cases examined could actually have been excluded *only* had the Courts taken the trouble to demonstrate that the substantial contents of the above resolutions corresponded to *specific* norms of *jus cogens*.

As far as the EU legal order is concerned, the absence of a proper balancing between the individual rights at stake and the collective interests pursued by SC resolutions had already been pointed out by Advocate General Poiares Maduro in the Opinion delivered in the *Kadi* case, where he stated that the conclusion reached by the CFI – which maintains that EC regulations implementing an SC resolution cannot be submitted to judicial review – is basically the same as attributing to these resolutions ‘supra-constitutional status’ in the ambit of the EU legal order.⁹³ In the view of the

⁸⁹ There is a standard preambular para. in the decisions affecting individual rights, where the High Representative declares himself to be ever conscious of the need to balance in due proportion the public good with the rights of individuals.

⁹⁰ *Supra* sect. 4.

⁹¹ *Supra* sect. 2.

⁹² For a general and very in-depth analysis of the principle of proportionality in the case law of the ECtHR see S. Van Drooghenbroeck, *La proportionnalité dans le droit de la Convention européenne des droits de l’homme* (2001); more recently, see also Arai-Takahashi, ‘The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR’, 74 *British Yrbk Int’l L* (2004) 435.

⁹³ Opinion of Poiares Maduro AG, *supra* note 30, at para. 25.

Advocate General, *no* basis for this conclusion can be found either in the EU legal order or in the case law of the ECJ. There is, in fact, nothing in Article 307 of the EC Treaty on the basis of which the prevailing force of SC resolutions over any other EU law principle on human rights can be affirmed, making an exception to Article 6(1) of the EU Treaty.⁹⁴ Furthermore, the ‘supra-constitutional status’ of these resolutions *cannot* be inferred from the well-known decision in the *Bosphorus* case, in which the ECJ, albeit deeming the interest of ‘putting an end to the state of war in the region and to the massive violations of human rights and humanitarian law in the Republic of Bosnia-Herzegovina’ to prevail over the individual rights at stake, ‘made no suggestion whatsoever that it might not have powers of review’ over SC resolutions.⁹⁵

That said, we thus need to look at how, and with what consequences, the ECtHR *might* have taken into account the need for a proper balance between collective needs and individual rights, as well as how and with what consequences such a need was *actually* taken into account by the ECJ in the appeal judgment in the *Kadi* and *Yusuf* cases.

⁹⁴ *Ibid.*, at paras 29–33.

⁹⁵ *Ibid.*, at para. 26 and Case C–84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications and others* [1996] ECR I–3953 (decided on 30 July 1996); the individual interests at stake were both the right to property and the freedom to pursue a trade or business, allegedly infringed by EC Reg. 990/93 (implementing SC Res. 820 (1993)), according to which ‘all vessels, freight vehicles, rolling stock and aircraft in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States’.

B The Need for a Proper Balancing between Collective Needs and Individual Rights in the Case Law of the ECtHR ...

As regards the European Court, we have already indicated that, contrary to its previous case law, this time it failed to use the usual instruments at its disposal for dealing with conflicting values and interests, i.e., the proportionality test. We will now look in detail at how the Court attains this result and at what its findings might have been had it decided to apply its balancing-of-interests test.

In the *Behrami* and *Berić* cases the Court drew a further consequence from the attribution of the alleged acts and omission to the UN rather than to Member States: it did not deem it necessary to assess the equivalence of the human rights protection in the UNMIK and KFOR systems, using the test first introduced in the *M. and Co.* case⁹⁶ and recently specified in *Bosphorus*.⁹⁷ In the latter case the impugned act had been carried out by the respondent state on its own territory and following a non-discretionary decision by one of its ministers,⁹⁸ while in the present cases, in the Court’s opinion, the impugned

⁹⁶ App. No. 13258/87, *M. and Co. v. FRG*, DR 64 138.

⁹⁷ App. No. 43036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005, available at: www.echr.coe.int, at para. 155; for critical analyses of this judgment see, recently, Haratsch, ‘Die Solange-Rechtsprechung des Europäischen Gerichtshof für Menschenrechte’, 66 *ZaöRV* (2006) 927, at 936 ff. and Lavranos, ‘Das So-Lange-Prinzip im Verhältnis von EGMR und EuGH’, 41 *Europarecht* (2006) 79.

⁹⁸ *Ibid.*, at para. 148.

acts and omissions could not be attributed to the respondent states and did not take place on the territory of those states or by virtue of a decision of their authorities.⁹⁹ We have already demonstrated that the first allegation by the Court is open to question and that, through forced interpretations of legal categories such as the attribution criteria and the scope of Article 103 of the Charter, the Court is indeed *imposing* substantive legal values endorsed by SC resolutions. But even assuming that the impugned acts were attributable to the UN, the Court should nonetheless have checked whether, in the international organization in question, i.e., the United Nations, there is a level of protection of human rights at least equivalent to that provided for by the European Convention.

Since the *M and Co.* case and throughout the *Bosphorus* case, the Strasbourg organs have made it clear that the transfer of powers to an international organization is not incompatible with the Convention, provided that fundamental rights receive an equivalent level of protection within that organization.¹⁰⁰ Against the application of the same principle to the *Behrami* and *Berić* cases one cannot raise the argument that –

unlike in the present situations – in the *Bosphorus* judgment the Court had to assess acts formally attributable to the defendant state. To invoke this difference does not seem logically sound for two reasons. First, even in the *Behrami* and *Berić* cases, it is possible to identify acts formally attributable to the states and related to the ECHR's violations allegedly attributable to the UN, such as the vote in the Security Council, the contribution of troops to the security force in Kosovo, or Bosnia's acceptance of the international presence on its territory.¹⁰¹ Moreover, the acts impugned in the *Bosphorus* case were adopted by the respondent state *merely* to implement a SC resolution; when states have no discretion while executing the obligations contained in SC resolutions, the situation is substantially analogous to the case where the alleged acts are (or are deemed) attributable to the UN.¹⁰²

Until recently, the mere presence of substantive and procedural guarantees in the system under scrutiny was considered sufficient to satisfy the equivalent protection test. In the *Bosphorus* case the Court first affirmed the existence of the equivalent protection condition, thereby creating the presumption that a state has not departed from the Convention's

⁹⁹ *Behrami and Saramati*, *supra* note 1, at para. 151, *Berić*, *supra* note 2, at para. 29.

¹⁰⁰ For a critical view on the equivalent protection test see Conforti 'Le principe d'équivalence et le contrôle sur les actes communautaires dans la jurisprudence de la Cour européenne des droits de l'homme', in M. Breitenmoser *et al.* (eds), *Human Rights, Democracy and the Rule of Law. Menschenrechte, Demokratie und Rechtsstaat. Droits de l'homme, démocratie et état de droit. Liber amicorum Luzius Wildhaber* (2007), at 173, 179–180.

¹⁰¹ Still, the Court decided not to review these acts, considering them functional to the effective fulfilment of the UN imperative peace and security aim. See *supra* note 50 and the corresponding text. For a possible different outcome, at least in relation to the ECHR's violations which can be traced back to SC resolutions against terrorism, see *infra* sect. 5.C., nn 138, 139, and the corresponding text.

¹⁰² See *supra* notes 40 to 44 and the corresponding text.

requirements if all it has done is implement legal obligations flowing from its membership of the organization. Then, in order to check whether this presumption should be rebutted,¹⁰³ the Court carefully verified the existence of a balance between the two competing interests: the general interest of international cooperation with the organization and the protection of the individual's fundamental rights.

In the *Behrami* and *Berić* cases the general interest at stake was the effectiveness of the international administration as a means of guaranteeing the collective security objective. Instead of balancing this interest with the individual interest not to suffer disproportionate interferences with the enjoyment of individual rights, the Court simply referred to the determination adopted at international level by the Security Council, according to which the interest of domestic public order should prevail *tout court* over the protection of individual rights. This reasoning is at variance with the *Bosphorus* precedent for no other reason than that of the alleged different nature of the international cooperation with the United Nations, an organization of universal jurisdiction fulfilling its imperative collective security objective.¹⁰⁴ Even if the interest of collective security, as

determined by the SC, deriving from a legal order regarded as superior is in turn perceived as superior, in the ECtHR's system it should have been balanced with the interest to guarantee the individual rights which could have been impinged on.

The means of dealing with interferences with the applicant's rights have been developed by the Court in its case law concerning the limitation of specific rights and the derogation clauses. As regards limitations of specific rights, the Court has always evaluated the national margin of appreciation, balancing the competing interests through a proportionality judgment, conducted on a case-by-case basis. Also the derogation clauses have been considered legitimate only if – according to the outcome of the proportionality test – it was found that at least the very essence of the right in question had been guaranteed through alternative forms of protection.¹⁰⁵ The Court should thus have used the balancing procedure it normally uses in cases of limited or derogated rights. In particular, it should have considered the state of emergency as somehow implicit in the determination made by the SC according to Article 39 of the Charter.¹⁰⁶

In the light of these remarks, it is striking that the Court in the *Behrami* and *Berić* cases did not even consider the need

¹⁰³ We are not concerned here with the high threshold established by the Court for rebutting the presumption: see 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', 110 *RGDIP* (2006) 85, at 98.

¹⁰⁴ *Behrami* and *Saramati*, *supra* note 1, at para. 151.

¹⁰⁵ App. Nos 14553/89 and 14554/89, *Brannigan and McBride v. United Kingdom*, judgment of 23 Mar. 1993, at paras 63–66; App. No. 21987/93, *Aksoy v. Turkey*, judgment of 26 Nov. 1996, at paras 71–84.

¹⁰⁶ See UNMIK Statement on the Ombudsperson Special Report No. 3, referred to *infra* at note 111; but see *contra* Stahn, *supra* note 67, at 166–167.

for the equivalent protection test. By contrast, the need to balance the interests at stake has been expressed both by the European Commission for Democracy through Law (the Venice Commission) in relation to the facts alleged by the applicants in the *Berić* case and by several Law Lords in their opinions on the *Al-Jedda* case.¹⁰⁷

Had it reasoned according to this test, the Court's analysis might have been as follows: first, it could have affirmed that the promotion and protection of human rights had been among UNMIK's responsibilities since its inception¹⁰⁸ and that there are procedural mechanisms to guarantee these rights, thereby establishing the presumption of equivalent protection. Then, in order to check whether this presumption should be rebutted, it could have scrutinized in greater depth the procedural mechanisms designed to safeguard against abuse. However, on closer analysis, it is apparent that there is no effective guarantee of the rights at stake. Indeed, neither the Ombudsperson's mandate nor the recently instituted Human Rights Advisory Panel provides

for effective procedural guarantees in cases of violations of rights.¹⁰⁹

The Ombudsperson's original mandate is to promote and protect the rights and freedoms of individuals and legal entities and ensure that all persons in Kosovo are able to exercise effectively their human rights and fundamental freedoms. Nonetheless, first it should be noted that in principle the Ombudsperson is not authorized to receive complaints of abuses committed by KFOR; it can only proceed *subject to a special agreement*.¹¹⁰ This is a matter of the utmost importance if one considers that at least some of the alleged violations resulted from actions committed by KFOR rather than by UNMIK. Moreover, as a result of its investigation, the Ombudsperson may only make recommendations to the competent authorities and – should they fail to take appropriate measures – may alert the Special Representative of the Secretary-General to the matter. In addition to that, the Ombudsperson shall provide an annual report to the Special Representative of the Secretary-General and make its findings public.

That this does not provide the individual with any effective guarantee

¹⁰⁷ See the Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, adopted by the Venice Commission at its 62nd plenary session, 11–12 Mar. 2005, available at: www.venice.coe.int, in particular at paras 97 and 99. In the *Al-Jedda* case, *supra* note 7, various Law Lords felt the need to find a balance between the duty to follow the content of the SC Res. imposing detention and the detainee's fundamental rights under the Convention: see the *Al-Jedda* House of Lords decision, at paras 39, 126, 130, and 136.

¹⁰⁸ SC Res. 1244 (1999), at para. 11 letter j and also UNMIK Reg. 1999/24 of 12 Dec. 1999, available, as are all UNMIK documents, at: www.unmikonline.org.

¹⁰⁹ See UNMIK Regs 2000/38 of 30 June 2000, 2006/6 of 16 Feb. 2006, and 2006/12 of 23 Mar. 2006. We will not deal here with the changes in the Ombudsperson's mandate, as they result from the second Reg., because it is not applicable to the facts at stake. Even if the jurisdiction of the Human Rights Advisory Panel does not cover the facts under examination, we will nevertheless mention it to show that nothing has really changed, at least not for the better, even after the most recent regs. For a commentary on the Human Rights Advisory Panel see Knoll and Uhl, 'Too Little, Too Late: The Human Rights Advisory Panel in Kosovo', 10 *European Human Rights L Rev* (2007) 534, at 543.

¹¹⁰ UNMIK Reg. 2000/38, sect. 3, at para. 4.

is clear from the ultimate outcome of the Ombudsperson's Special Report No. 3, which found that preventive detentions carried out by UNMIK and the absence of sufficient judicial control over deprivations of liberty were not in conformity with the Convention's provisions.¹¹¹ The report was presented to the Special Representative of the Secretary-General who rejected the hypothesized violation of internationally recognized standards, arguing that SC Resolution 1244 authorizes derogations in certain emergency situations.¹¹² While this may be true in principle, the conditions for legitimate derogations should nonetheless be respected.

The Human Rights Advisory Panel may deal with a matter only once all other possible remedies for the alleged violation have been pursued. According to section 17 of its instituting document, the Advisory Panel shall issue findings as to whether there has been a breach of human rights and, where necessary, shall make recommendations. These findings – which are of an advisory nature – and recommendations shall be published and shall be submitted to the Special Representative of the Secretary-General, who has exclusive authority and discretion to decide whether to act on them.

In view of the fact that the Special Representative of the Secretary-General

is a political organ, it seems that neither the Ombudsperson nor the Advisory Panel can effectively guarantee the very essence of the rights.

As far as the situation in Bosnia and Herzegovina is concerned, it is sufficient to recall, despite the applicability of the European Convention,¹¹³ that there is no provision for judicial review against the almost unlimited powers of the High Representative, powers which could limit in principle and indeed have impinged on individual human rights, as the *Berić* case demonstrates.¹¹⁴

In conclusion, even if we are able to identify the situation in Kosovo and Bosnia as a public emergency, the interference with the individual rights of the appellants provoked by acts of the international administration, short of any effective alternative guarantee, cannot be considered a legitimate derogating measure.

While we accept that the Court may, from the application of its balancing test, have arrived at a different conclusion from the one set out above, it certainly should not have avoided using it altogether.

C ... and in the Appeal Judgment of the ECJ in the *Kadi and Yusuf* Cases

As mentioned in the opening remarks, the ECJ rejected the findings of the CFI, reversing both the *Kadi* and the *Yusuf* decisions. The ECJ reached its judgment by reviewing the lawfulness of the EC regulations at stake in the light of the general

¹¹¹ Ombudsperson Institution, *Special Report No. 3 on the Conforming of Deprivations of Liberty under 'Executive Orders' with Recognized International Standards* of 29 June 2001, available at: www.ombudspersonkosovo.org.

¹¹² See the transcript of the Press Briefing of 2 July 2001, UNMIK Statement on the Ombudsperson Special Report No. 3, available at: www.unmikonline.org/pio.htm.

¹¹³ The applicability of the European Convention is provided for in Art. 2(2) of the Constitution, contained in Annex IV of the Dayton Agreement.

¹¹⁴ See *supra* sect. 3.

principles of the EC law on fundamental rights,¹¹⁵ even though the above regulations had been adopted to give effect to a resolution of the UN Security Council under Chapter VII of the UN Charter. In spite of this, it was in fact stated that ‘the review of lawfulness ... to be ensured by the Community judicature applies to the *Community act* intended to give effect to the international agreement at issue, and not to the *latter as such*’.¹¹⁶ In short, the fact that these regulations can be categorized as acts *formally* pertaining to the EU legal order becomes an important factor in favour both of the Court’s power to review their lawfulness and of the primacy of the EU principles on fundamental rights over them, in line with the Opinion delivered by Advocate General Poiares Maduro.

The judgment of the ECJ thus seems, *prima facie* at least, to stem from a line of reasoning quite different from the ‘Scelian approach’ adopted by the CFI in its decisions on the *Kadi* and *Yusuf* cases and by the ECtHR in its decision on the *Behrami* and *Saramati* case. In the *Kadi* judgment there emerges a tendency to frame the relationship between the EU legal order and the UN legal order through recourse – to all appearances – to a ‘dualistic’ scheme as well as to formal arguments which look more credible than those of the CFI. Suffice it to say,

on the one hand, that the highly debatable (and strongly criticized) recourse by the CFI to Articles 307 and 297 of the EC Treaty in order to justify *formally* the prevailing force of the SC resolutions at stake over any other EU law principle on human rights (and to exclude, as a consequence, the Court’s power to review the EC regulations implementing such resolutions) was completely rejected by the ECJ;¹¹⁷ and, on the other, that the ECJ itself did not make any reference to Article 103 of the UN Charter in order to frame the relationship between Community law and SC resolutions.¹¹⁸

But can it really be said that in the reasoning followed by the ECJ no provision was made for *direct* balancing between the *substantive* values pursued by the SC resolutions at stake and the human rights principles enshrined in the EU legal order? In other words, can it really be said that the balancing between collective needs and human rights was carried out by the Court only in the framework of EC law; that is, simply on the grounds of the prevalence of the EC principle on fundamental rights over the EC regulations at stake?

This question cannot be answered affirmatively.

In actual fact, the ‘dualistic’ approach chosen by the Court is *not* based on convincing arguments, at least in so far as

¹¹⁵ See Joined Cases C-402/05 P and C-415/05 P, *Kadi* and *Al Barakaat International Foundation*, *supra* note 8, at para. 283; for a first commentary on this judgment see Tridimas and Gutiérrez-Fons, ‘EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?’, available at: www.coleurop.be.

¹¹⁶ *Ibid.*, at para. 286; emphasis added.

¹¹⁷ The reference here is to the unequivocal statements made by the Court at paras 301–305 of the judgment, *supra* note 8 (see also *infra*).

¹¹⁸ For some critical remarks on the opposite attitude adopted by the CFI with regard to Arts 297 and 307 EC Treaty and to Art. 103 UN Charter see *supra* sect. 2.

the Court seems to take it for granted that the SC resolutions at stake create obligations *vis-à-vis* the EC itself as well as *vis-à-vis* the Member States, even though the Community is not a party to the Charter. This is what can clearly be deduced from the passage in which, in reference to the UN Charter, the Court states that 'the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty', even though it does not take the trouble to specify on what basis the EC regulations at stake could be construed as the implementing acts of a genuine obligation, *vis-à-vis* the Community, deriving from the UN Charter.¹¹⁹

In the same way, the Court fails to provide any clarification regarding the capacity of the 'undertakings given in the context of the United Nations ... in the sphere of the maintenance of international peace and security' to bind the EC, in the passage stating the need to construe the regulation at stake in the light of such undertakings, as well as in the light of the SC's primary responsibility 'for the maintenance of peace and security at the global level' including 'the power ... to take the measures necessary to maintain or restore international peace and security'.¹²⁰

These remarks show clearly that the ECJ's *prima facie* 'dualistic' and formal attitude is much less credible than it appears. But the persistent need for a *direct* balance between the substantive values pursued by SC Resolutions 1267 and 1333 and the EC principles

on human rights emerges, rather, in the Court's reasoning concerning the thesis advanced (during this dispute) by the European Commission, according to which the immunity of the contested regulations from the Court's power of judicial review should have been deemed *justified* in view of recent improvements made with regard to the protection of the fundamental rights of individuals or entities affected by the system of sanctions set up by the UN Security Council.¹²¹

To reject this thesis, all the ECJ need have done was to pick up again the arguments just mentioned. In other words, it could have remarked that the evolution of the system of sanctions concerns the UN legal order, and that it is precisely for this reason that it cannot be considered, from the perspective of EC law, a legitimate basis for dismissing the Court's own power to review the lawfulness of Community acts in the light of the EC principles on fundamental rights. Indeed, this argument would have been not only fully coherent with the 'dualistic' approach (*prima facie*) adopted in this judgment, but also in line with the interpretation given to Articles 297 and 307 of the EC Treaty, according to which these Articles cannot be understood to permit any immunity from the power of the Court to review the lawfulness of Community acts.¹²²

Far from proceeding in this way, the Court rejected the European Commission's thesis, remarking that such an immunity

¹¹⁹ *Kadi* appeal judgment, *supra* note 8, at para. 285.

¹²⁰ *Ibid.*, at para. 293.

¹²¹ *Ibid.*, at paras 318 and 319.

¹²² More precisely, it is stated that the above provisions 'cannot be understood to authorise any derogation from the [EC] principles of liberty, democracy and respect for human rights and fundamental freedoms': *supra* note 8, at para. 303.

would be *unjustified*, given that not even the already quoted amendments provided for by Resolutions 1730 (2006) and 1735 (2006)¹²³ to the listing and de-listing procedures give rise to guarantees of judicial protection.¹²⁴ In spite of the establishment of a ‘focal point’ to deal specifically with de-listing requests,¹²⁵ the listing and de-listing procedures are, in fact, defined by the Court as ‘still in essence diplomatic and intergovernmental’; the Court also remarks that the persons or entities concerned enjoy neither the ‘opportunity to assert’ their rights, nor the right to be informed of the ‘reasons and evidence’ on the basis of which they have been listed.¹²⁶

This conclusion is entirely acceptable, given that the de-listing procedure cannot, of course, be deemed a judicial procedure. But what must be stressed here is that it would quite probably have been different had SC Resolutions 1730 and 1735 genuinely made provision for judicial guarantees for the individuals or entities concerned. It is, in fact, quite reasonable to think that, were this the case, the ECJ would have accepted as *justified* the immunity of the contested regulations from its power of judicial review, thereby

adopting a logic similar to that of the ECtHR’s equivalent protection test.¹²⁷

The very fact that the Court acted in the way it did means that the findings reached in its judgment can, ultimately, be regarded as the outcome of a *direct* balancing of the EC principles on fundamental rights with the value of cooperation of the EU states with the UN in the fight against terrorism. More precisely, the Court was prompted to reaffirm its power to review the lawfulness of Community acts not so much by its ‘dualistic’ attitude, but, *rather*, by the need to guarantee the right to an effective judicial remedy – as this right is framed in EC law – to the individuals and entities concerned, in the light of the absence of such a remedy in the UN legal order. In other words, this outcome can be deemed the consequence of the ECJ’s will not to overestimate the value of cooperation with the UN in the fight against terrorism, in comparison with the need to safeguard human rights in EC law.

Contrary to appearances, then, the ECJ judgment too contains significant traces of a ‘value oriented approach’, the aim of which is to coordinate different legal orders; and this is true even though this judgment differs from the ‘*dédoulement fonctionnel*’, or role-splitting, tendency shown, as we have seen, both by the CFI and by the ECtHR.

That said, all that remains is to examine briefly the results of the review carried out by the Court in order to compare

¹²³ On this point, see *supra* sect. 5.A., at note 80.

¹²⁴ *Kadi* appeal judgment, *supra* note 8, at para. 322.

¹²⁵ That is, in order to receive a de-listing request, verify its novelty, forward the request – for their information and possible comments – to the designating government(s) and to the government(s) of citizenship and residence, inform the petitioner of the determinations of the Sanction Committee relating to his/her request (see points 1–4 and 8 of the ‘de-listing procedure’ provided for by Res 1730); *supra* note 80.

¹²⁶ *Kadi* appeal judgment, *supra* note 8, at paras 323, 324, and 325.

¹²⁷ For the appropriate references, as well as for a discussion on the role that this principle might have played in the framework of the *Behrami* and *Saramati* decision, see *supra* sect. 5.B.

them with the relevant orientations of ECtHR case law, as well as to assess the overall impact they could have on future case law.

Having affirmed its own power to check the lawfulness of the contested EC regulations, the Court then annulled Regulation (EC) 881/2002, deeming it to infringe the EC principle of effective judicial protection, the rights of defence, of the applicants, and also the applicants' right to respect for property.

With regard to the principle of effective judicial protection and to the rights of defence (in particular, the right of individuals or entities to be informed of the evidence and the grounds of the measures against them, as well as their right to be heard in this respect), it is made quite clear that, even though this principle and these rights can be lawfully restricted for national security reasons,¹²⁸ 'the contested regulations cannot escape all review by the Community judicature' and that, therefore, the Court must be furnished with all the elements it will need in order to check the lawfulness of these restrictions.¹²⁹ If no information on the evidence against the appellants is provided, either to the appellants themselves or to the Court, such restrictions inevitably become violations of the rights of defence and the principle of effective judicial protection.¹³⁰

Furthermore, even though the restrictive measures relating to the right of property imposed by Regulation 881/2002 are considered *in principle* justifiable, having being adopted to counter 'threats to international peace and security posed by acts of terrorism',¹³¹ they too immediately find themselves judged incompatible with the above right, as this regulation does not provide for any procedural guarantee for challenging them.¹³²

With regard to all the mentioned rights, the solutions adopted by the ECJ appear to be in line with, if not even more advanced than, the case law of the ECtHR.

The aspect which can perhaps be considered more advanced is the role assigned both to the principle of effective judicial protection and to the rights of defence. Although both the right to a fair hearing and the right to an effective judicial remedy are provided for by Article 6 of the ECHR, it has to be pointed out that this provision is hardly applicable to proceedings in which interim or provisional measures are at stake, like those under examination. Irrespective of the question whether the freezing measures are to be classed as concerning the applicants' 'civil rights' and/or as a 'criminal charge' against them, the ECtHR has very recently reiterated – in *Dassa Foundation v. Liechtenstein* – that Article 6 is *not* applicable to proceedings of this kind, due to the

¹²⁸ See particularly paras 339–342 of the judgment, *supra* note 8.

¹²⁹ This is what can be substantially drawn from paras 343 and 344.

¹³⁰ See para. 249 (for the position of the appellants), paras 250–251 (for the position of the Court), and para. 253 (for the final statement of the Court).

¹³¹ At para. 263, whereby both the *Bosphorus* judgment of the ECJ (*supra* note 95) and the *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* decision of the ECtHR, *supra* note 97, are recalled.

¹³² At para. 268.

lack of a ‘determination’ of such rights or charge.¹³³

As far as the right to respect for property is concerned, the ECJ judgment seems instead to be entirely in line with the case law of the ECtHR concerning Article 1 of the First Additional Protocol to the ECtHR, providing for the right of every natural or legal person to the peaceful enjoyment of his possessions. The fact that individuals or entities affected by freezing measures are not accorded, by the relevant SC resolutions, procedural guarantees for the purpose of challenging these measures also goes against well-established principles of ECtHR case law concerning the proportionality of the ‘interferences’ with the right protected by the Protocol. In many judgments the ECtHR has stated that, although the Protocol does

not make provision for explicit procedural guarantees, the individual has to be guaranteed reasonable opportunity to put ‘his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision’.¹³⁴

In spite of this, and in spite of its potential effects on the relevant practice of the UN Security Council, the ECJ judgment cannot be considered definitely capable of affecting the case law of the ECtHR examined in this article. Explaining its decision to review the contested regulations, the ECJ readily pointed out a ‘fundamental difference’ between the measures imposed by these regulations and the measures concerned by the above case law, given that the former cannot be considered directly attributable to the UN, but rather to the EC, whereas the latter are ‘not ascribable’ to the respondent states, but to the UN.¹³⁵

It therefore becomes almost inconceivable that the ECtHR, at least in the event of its being called upon to assess the compatibility with the ECHR of acts seemingly attributable to the UN, might be prompted to use the *Kadi* judgment as the basis on which to adopt an attitude more favourable to the rights of the individuals or entities concerned. On the contrary, it is precisely the *Kadi* judgment which, through the passage just alluded to, seems – albeit implicitly – to confirm the logic intro-

¹³³ App. No. 696/05, *Dassa Foundation and Others v. Liechtenstein*, judgment of 10 July 2007, available at: www.echr.coe.int: at section B of the judgment, ‘Compliance under Article 6 of the Convention’; it has to be recalled that Art. 6 of the ECHR, in so far as it is relevant, reads: ‘[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by [a] ... tribunal established by law ... Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’. In a similar vein, with specific regard to the targeted sanctions, see also Fassbender, ‘Targeted Sanctions and Due Process’, 3 *Int’l Org L Rev* (2006) 437; *contra*, Cameron, ‘The ECHR, Due Process and UN Security Council Counter-Terrorism Sanctions’, *Report prepared for the Council of Europe* (2006), at 2. More generally see Cameron, ‘UN Targeted Sanctions, Legal Safeguards and the ECHR’, 72 *Nordic J Int’l L* (2003) 159, and Schilling, ‘Der Schutz der Menschenrechte gegen Beschlüsse des Sicherheitsrats. Möglichkeiten und Grenzen’, 64 *ZaöRV* (2004) 343.

¹³⁴ See, among the others, App. No. 41673/98, *Brunconra v. Finland*, judgment of 16 Nov. 2004, at para. 69, as well as App. No. 13616/88, *Hentrich v. France*, judgment of 22 Sept. 1994, at para. 49.

¹³⁵ In this regard see the critical remarks made *supra*, in sect. 3.

duced by the *Behrami* and *Saramati* cases, according to which the above assessment is outside the Court's jurisdiction.

If this is true, then this situation clearly risks giving rise to quite peculiar outcomes, at least as far as the 'targeted' measures against terrorism adopted by the UN Security Council are concerned. Checking the compatibility of these measures with the fundamental rights of the individuals or entities concerned would certainly be possible if they had been incorporated into EC regulations: should this be found to be the case – as it was in the *Kadi* decision – the CFI and the ECJ could in fact lawfully exercise their power of judicial review over these regulations, even if they amounted to nothing more than reproductions of SC resolutions. In this situation, the ECtHR could *not*, instead, check the lawfulness of the above measures under the terms of the ECHR, given that the EC is not a party to the Convention. Furthermore, as a consequence of the *Behrami* and *Saramati* judgment,¹³⁶ the Court, in the absence of domestic acts of implementation by the states party to the Convention, could not even review the relevant SC resolutions.¹³⁷

¹³⁶ On this point see *supra* sect. 5.B.

¹³⁷ SC resolutions imposing targeted sanctions against suspected terrorists tend to be implemented in the domestic legal orders through domestic acts (see V. Gowland Debbas (ed.), *National Implementation of United Nations Sanctions* (2004), at 103, 195, 233, 523). But it has to be stressed that in an increasing many instances these resolutions have been incorporated into EC regulations which do not need – in principle – any domestic act of implementation as a consequence of their 'direct effect': furthermore, violations of the ECHR could be asserted (e.g., in the field of the protection of reputation, which is encompassed in art. 8 of the Convention) as a direct consequence of such resolutions, irrespective of their domestic implementation.

Therefore it is worth reiterating what has already been remarked upon in this section, namely the fact that the conclusions reached by the ECJ were ultimately based *more* on a balance between the collective need to cooperate with the UN in the fight against terrorism and the need to protect human rights from the perspective of EC law *than* on the *formal* status of the contested regulations as part of EC law. As a result, the need to assess the *substantive* values at stake can be deemed the *prevalent* need emerging from the *Kadi* judgment.

Actually, a similar trend could also emerge in the case law of the ECtHR, at least with regard to judgments on violations of the ECHR which can be traced back to SC resolutions against terrorism. One need only consider that the purpose of the equivalent protection test – developed by the Court with respect to the transfer of powers to an international organization – is, too, to achieve a case-by-case balance between the general interest of states in cooperating within the framework of international organizations and the protection of fundamental rights provided for by the ECHR. So the need – strengthened by the *Kadi* judgment – to pursue this balancing of values could prompt the ECtHR to assess from a broader perspective whether such violations can be formally attributed to states party to the ECHR. More precisely, the Court could deem itself satisfied that conditions for the attribution of the relevant forms of conduct are fulfilled and thus exercise its own power of judicial review, bearing in mind that both listing and de-listing decisions regarding suspected terrorists are taken, by consensus, by the Security Council's

Sanctions Committee.¹³⁸ From this perspective, *not* having opposed the listing decision regarding a certain applicant, or *not* having voted in favour of de-listing – in cases in which such a choice will turn out to be a decisive obstacle to the de-listing itself – could in fact be considered an act attributable to states which are both party to the Convention and also members of the Sanctions Committee,¹³⁹ despite the absence of specific domestic acts implementing such decisions or of their incorporation into EC regulations.

Clearly, this is not the appropriate place to dwell on what outcome of the equivalent protection test might be obtained by the ECtHR on this basis, even though the test would presumably give negative findings, not only if it were implemented in the light of Article 6 of the Convention,¹⁴⁰ but also if it were only Article 13, which provides for the right to an effective remedy, which had

to be taken into account.¹⁴¹ What can be pointed out is that, by choosing to review the alleged violations and, therefore, to pursue a balance between the *substantive* values at stake, even in the situation just described, the ECtHR would be helping to eliminate the risk outlined a little earlier and also providing the domestic courts with clearer, unambiguous indications, in so far as such indications appear to be in line with those emerging from the case law of the ECJ.

¹³⁸ According to para. 4 (Decision making) (a) of the *Guidelines of the [Al-Qaida and Taliban Sanctions] Committee for the Conduct of its Work* (Adopted on 7 Nov. 2002, as amended on 10 Apr. 2003, 21 Dec. 2005, 29 Nov. 2006, and 12 Feb. 2007), '[t]he Committee shall make decisions by consensus of its members'; an identical provision can be found at para. 8 with regard to the de-listing procedure.

¹³⁹ And this in spite of any formal consideration on the attribution of the above acts to the UN: in this regard see De Sena, *supra* note 35, at 237, as well as Schilling, *supra* note 133, at 345; more generally see also M. Hartwig, *Die Haftung of Mitgliedstaaten für internationale Organisationen* (1993), at 277.

¹⁴⁰ In the light of which the balance pursued by the ECJ was actually carried out in the *Kadi* judgment (*supra* this sect.).

¹⁴¹ Unlike Art. 6 of the Convention, Art. 13 does not provide for a right to a *judicial* remedy (see, e.g., App. No. 9248/81, *Leander v. Sweden*, judgment of 26 Mar. 1987, at para. 77); from the relevant case law of the ECtHR it emerges, however, that both the availability of an *individual* remedy and the existence of *independent* controlling authorities (irrespective of their *non-judicial* nature or *non-binding* powers), as well as of *ultimate* judicial control over the acts of such authorities are the minimum conditions which must be in place to avoid arbitrary restrictions of the rights safeguarded by the ECHR, and thus by its Art. 13 (App. No. 5029/71, *Klass and others v. Germany*, judgment of 6 Sept. 1978, at paras 70–72). In the absence of these guarantees, what is ultimately impaired is the very essence of the right to an effective remedy, which goes against the general principle that the very essence of the Convention rights must be guaranteed, not only in any cases of restriction, but also in cases of derogation under Art. 15 of the Convention (see *supra* sect. 5.B). It can be underlined that the conditions just mentioned are *clearly* not met in the ambit of the freezing procedures provided for by SC resolutions, given that the de-listing procedure in fact continues to be *intergovernmental* in nature – in spite of the amendments to it introduced by SC Res. 1730 (2006) (*supra* this sect.) – and it is manifestly incompatible with the need for a genuine, *individual* remedy, as provided for by Art. 13. What is more, the irreconcilability of this procedure with the standards which can be drawn from the case law of the ECtHR is confirmed not only (and not so much) by the fact that the de-listing procedure is carried out by the same states which proposed the listing in the first place (that is, not by an *independent* authority), but also by the fact that the final decision is not subject to any form of judicial review.