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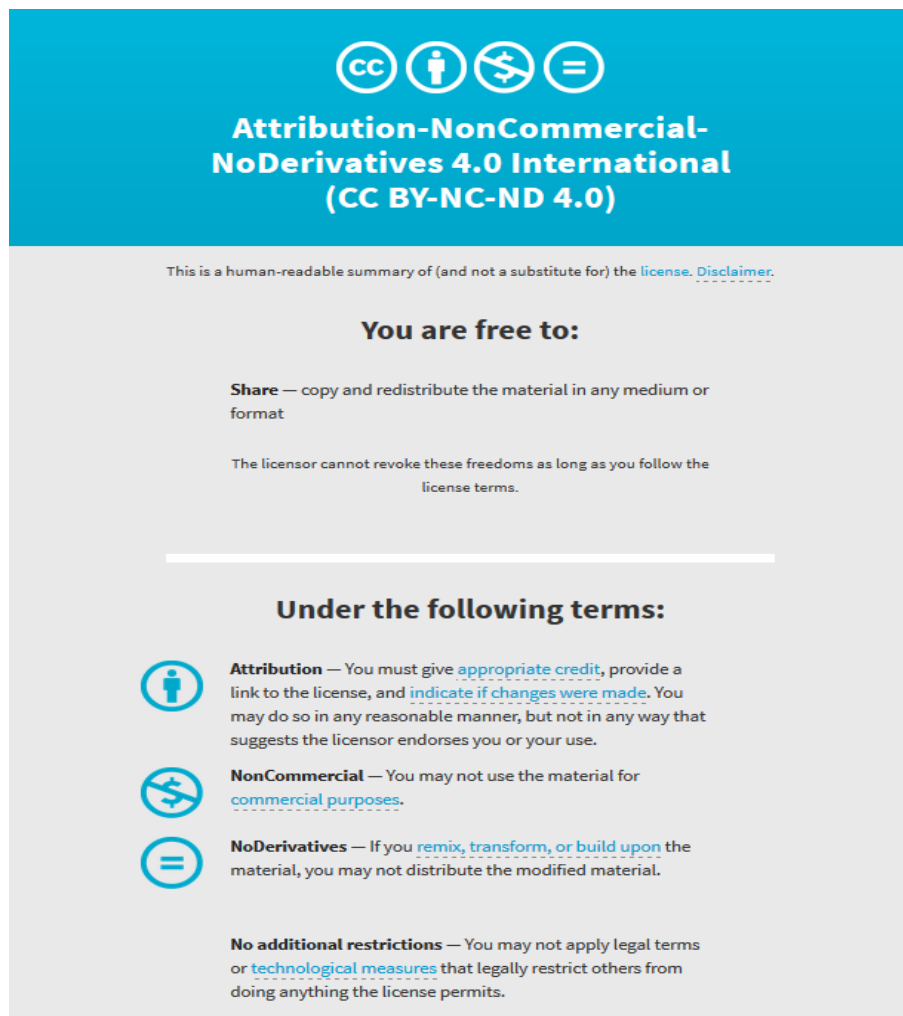
Human rights obligations as a collateral limit on the powers of the Security Council
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HUMAN RIGHTS OBLIGATIONS AS A COLLATERAL LIMIT ON THE POWERS OF THE SECURITY COUNCIL

MATTHEW STUBBS¹

INTRODUCTION

Professor Judith Gardam's distinguished record of scholarship speaks for itself. What is less well known is Judith's record as an inspiring teacher and colleague. To those of us who were fortunate to be her students, Judith conveyed not only her enthusiasm for, and commitment to, international law, but also her intellectual discipline. No student of Judith's could forget her admonitions on the importance to scholars of international law of striving to truly understand its sources. As a colleague, I found supervising doctoral candidates with Judith a pleasure because of her interest in their projects and her dedication to mentoring the next generation of scholars. The humanity that pervades Judith's scholarship and teaching is all the more powerful because of the rigorous and disciplined approach to the law which is her hallmark.

The limits of the powers of the Security Council have been the subject of considerable debate since the rise of the Security Council which accompanied the end of the Cold War.² Notwithstanding the absence of any organ competent to engage in

1 The author thanks Dr Kim Sorensen for his outstanding research assistance.

2 See, for example, Dapo Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 *International and Comparative Law Quarterly* 309, 338-9; Jose E Alvarez, 'Judging the Security Council'

a review of the Council's decisions,³ and irrespective of the political character of many of its most important functions,⁴ the Council's powers are nonetheless not unlimited. Indeed, the recent practice to be examined in this chapter has demonstrated that

(1996) 90 *American Journal of International Law* 1, 4; *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep 57, 64; Martti Koskenniemi, 'The Place of Law in Collective Security' (1996) 17 *Michigan Journal of International Law* 455, 455-90; Anne Peters, 'Article 25' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012) 787, 807-42; M Michael Reisman and Douglas L Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanction Programmes' (1998) 9 *European Journal of International Law* 86; Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 175, 175-93. On related debates about calls to reform the UNSC, see, for example, Yehuda S Blum, 'Proposals for UN Security Council Reform' (2005) 99 *American Journal of International Law* 632, 632-49; Richard Gowan and Nora Gordon, *Pathways to Security Council Reform* (May 2014) Center on International Cooperation, New York University <http://cic.nyu.edu/sites/default/files/pathways_sc_reform_final.pdf>; Panel of Eminent Persons on United Nations — Civil Society Relations, *We the Peoples: Civil Society, the United Nations and Global Governance — Report of the Panel of Eminent Persons on United Nations — Civil Society Relations*, UN Doc A/58/817 (11 June 2004) 10, 45-6 [95]-[100]; *Strengthening of the United Nations: An Agenda for Further Change — Report of the Security-General*, 57th sess, Agenda Item 53, UN Doc A/57/387 (9 September 2002) 8-9 [20]-[22]; Bart MJ Szewczyk, 'Variable Multipolarity and UN Security Council Reform' (2012) 53 *Harvard International Law Journal* 451, 451-70, 497-9, 500-4; Thomas G Weiss, 'The Illusion of UN Security Council Reform' (2003) 26 *Washington Quarterly* 147, 147-59.

3 Even the International Court of Justice has said it does not have the power to review SC decisions: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1975] ICJ Rep 16, 45 [89]. See generally Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff, 2009) 99-101; Kenneth Manusama, *The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality* (Martinus Nijhoff, 2006) 3-46; August Reinisch, 'Introduction' in August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press, 2010) 1, 1-17; Antonios Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions' in August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press, 2010) 54, 54-76. On debates about judicial review of the UNSC by the ICJ, see, for example, Alvarez, above n 2, 1-39; DW Bowett, 'Judicial and Political Functions of the Security and the International Court of Justice' in Hazel Fox (ed), *The Changing Constitution of the United Nations* (British Institute of International and Comparative Law, 1997) 73, 77-88; Charter of the United Nations art 36(3) ('Charter'); Kathleen Renée Cronin-Furman, 'The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship' (2006) 106 *Columbia Law Review* 435, 443-7, 460-1.

4 On the 'political', non-justiciable character of SC decisions, under art 39 of the Charter, to establish international criminal tribunals, see *Prosecutor v Kanyabashi (Decision on the Defence Motion of Jurisdiction)* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-96-15-T, 18 December 1997) [20]; *Prosecutor v Milošević (Decision on Preliminary Motions)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-02-54, 8 November 2001) [5]-[11]; *Prosecutor v Tadić (Decision on the Defence Motion on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1, 10 August 1995) [24], [44]. Cf *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) [24].

its powers are subject to important collateral limits arising from the human rights obligations of states.

The response of international law to the rise of the Security Council was a topic addressed by Judith Gardam in her 1996 article in the *Michigan Journal of International Law* entitled 'Legal Restraints on Security Council Military Enforcement Action'. Here, Gardam argued that, when undertaking military enforcement actions, the Security Council was bound by requirements of proportionality and necessity analogous to those applicable in the *jus ad bellum*,⁵ and also by the rules of international humanitarian law forming the *jus in bello*.⁶ This chapter looks not to uses of force, but to sanctions imposed by the Security Council. Nonetheless, two of Gardam's concluding observations make for a suitable starting point for this analysis. First, she noted the legal character of the Charter:

The text of the Charter, a legal document, is not only compatible with but arguably, through its emphasis on human rights and humanitarian values, requires the Security Council to measure its responses against legal criteria.⁷

Second, Gardam noted the significance of the rise of human rights law within the body of international law:

It is inconceivable that it was intended that the use of force in all circumstances, except self-defence, would be granted to a political body subject to no legal controls whatsoever. This runs counter to the increasingly important role that international law is perceived to play in the international community, particularly in the area of human rights.⁸

These two points apply with equal force to this chapter's consideration of non-forceful sanctions under Article 41 of the Charter as they do to authorisations to use force under Article 42.

Arguably, the most important context in which human rights obligations have been used as a collateral limit on the Security Council's powers in recent practice is in respect of states parties to the European Convention on Human Rights (ECHR).⁹ This chapter examines both the European practice and also challenges under

5 Judith Gardam, 'Legal Restraints on Security Council Military Enforcement Action' (1996) 17 *Michigan Journal of International Law* 285, 293, 301-12.

6 Ibid 294, 295 n 33, 301-2, 312-20, 322.

7 Ibid 321.

8 Ibid 322.

9 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force on 1 June 2010) ('ECHR').

international human rights law to the lawfulness of states' implementations of their obligations under the Charter.¹⁰

The second section of this chapter will address the potential conceptual approaches to the relationship between human rights obligations and the law of the Charter. The third section examines five key cases in which human rights obligations have been invoked before regional or international bodies to challenge the implementation of Security Council Resolutions.¹¹ This examination focuses solely on the question of the relationship between human rights obligations and the law of the Charter in each case. The final section offers observations on the significance of the practice examined in this chapter and identifies some unresolved issues that remain to be addressed in the future practice of states and institutions. The purpose of this chapter is to clarify current regional and international practice in respect of the use of the human rights obligations of states to serve as a collateral limit on the powers of the Security Council, and to consider what the future consequences of such practice might be.

CONCEPTUAL APPROACHES

The question of collateral limits on the powers of the Security Council is not one of interpretation of the Charter alone. These challenges impose *collateral* limits on the powers of the Security Council because each begins from the basis of human rights law, and then considers its relationship to the Charter. Thus the limitations that apply arise not from the Charter as a matter of internal logic, but from international human rights law overlaying a logic external to the Charter. For this reason, the extensive

10 A related topic, but one that is outside the scope of this chapter, is the potential for challenges within national courts to operate in a similar way. See, for example, *Abdelrazik v Minister of Foreign Affairs* [2009] FC 580 (Federal Court of Canada); *Abmed v Her Majesty's Treasury* [2010] 2 AC 534 (Supreme Court, UK); *R (Al-Jedda) v Secretary of State for Defence* [2008] 1 AC 332 (House of Lords, UK).

11 These five decisions most clearly raise the issue of the resolution of potential conflicts between international human rights law and the law of the Charter. Other cases touch on these issues. However, even in *Al-Jedda v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 27021/08, 7 July 2011) ('*Al-Jedda* (ECtHR)'), there was no need to reconcile the two bodies of law due to the Grand Chamber's conclusion that the relevant Security Council Resolution did not in fact require the conduct which was alleged to be in breach of human rights obligations. As the Court said at 58 [105]:

The Court does not consider that the language used in this Resolution indicates unambiguously that the Security Council intended to place Member States ... under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments ... In the absence of clear provision to the contrary, the presumption must be that the Security Council intended States ... to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law.

literature on the internal limits of the powers of the Security Council¹² is not directly relevant to this chapter.

The question of the relationship between the Charter and the body of international human rights law may be resolved through the application of one of (at least) three conceptual approaches. Two of these approaches, which are interpretive tools of international law applicable generally and which were examined by the International Law Commission in its *Fragmentation of International Law* study, are *lex superior* and harmonisation.¹³ A third potential approach is autonomy.

The approach of autonomy would lead to human rights institutions applying their normal rules and procedures, ignoring any potential consequences for the law of the Charter (this has also been called dualism). The potential for autonomous application of particular areas of international law was the motivating concern behind the International Law Commission's work on the *Fragmentation of International Law*. Observing 'the emergence of specialised and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice'¹⁴ as a key challenge, the Commission's report formulated the problem posed by this development as being that

such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.¹⁵

12 See, for example, Fassbender, above n 3, chs 4-6; Joy Gordon, 'The Sword of Damocles: Revisiting the Question of Whether the United Nations Security Council is Bound by International Law' (2012) 12 *Chicago Journal of International Law* 605, 616-45; Martti Koskenniemi, 'The Police in the Temple: Order, Justice and the UN: A Dialectical View' (1995) 6 *European Journal of International Law* 325, 325-8, 338-48; Manusama, above n 3, 1-46; Gabriël H Oosthuizen, 'Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law' (1999) 12 *Leiden Journal of International Law* 549, 549-58; Aziz Tuffi Saliba, 'Is the Security Council *Legibus Solutus*? An Analysis of the Legal Restraints of the UNSC' (2012) 20 *Michigan State International Law Review* 401, 401-19. On the external limits of SC powers, see, for example, Devika Hovell, 'A Dialogue Model: The Role of the Domestic Judge in Security Council Decision-Making' (2013) 26 *Leiden Journal of International Law* 579, 579-97; Tzanakopoulos, above n 3, 54-76.

13 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, finalised by Martti Koskenniemi, UN Doc A/CN.4/L.682 (13 April 2006) 24-8 [36]-[43], 118-20 [229]-[231], 168 [328]-[330], 181-5 [365]-[367], 207 [410]-[411] ('Fragmentation of International Law').

14 Ibid 11 [8].

15 Ibid.

Whilst the purpose of the *Fragmentation* study was to respond to the dangers of autonomous application of individual legal regimes, autonomy remains one of the potential approaches to the relationship between international human rights law and the law of the Charter. Autonomy has the advantage of clarity, but raises critical questions about the special status of the Charter in international law, and is inherently unappealing due to the fact that the result of this approach is that a state must choose which of two competing regimes it will violate.

A second possible conceptual approach to the relationship between these international legal regimes is to apply the maxim *lex superior*. One of the classic examples of *lex superior* is the Charter,¹⁶ Article 103 of which dictates:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Adopting this approach to the question of the relationship between Charter obligations and obligations under international human rights law, the solution would be simple — the Charter obligation would prevail. This was the form of *lex superior* apparently invoked by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua* when, rejecting the assertion of the United States that Nicaragua was compelled to exhaust the Contadora process before it could invoke the jurisdiction of the Court, the Court added:

Furthermore, it is also important always to bear in mind that all regional, bilateral, and even multilateral, arrangements that the Parties to this case may have made, touching on the issue of settlement of disputes or the jurisdiction of the International Court of Justice, *must be made always subject to* the provisions of Article 103 of the Charter.¹⁷

The one qualification to this absolutist approach is that the Charter obligation could not prevail if the conduct required under the Charter were in violation of a *jus cogens* norm, because in that instance the *jus cogens* norm would prevail.¹⁸ Despite the simplicity of this approach, its problem is that it assigns no weight or significance to important areas of international law which are not the *lex superior*: in this case, the body of international human rights law.

¹⁶ Ibid 168-73 [328]-[340].

¹⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* [1984] ICJ Reps 392, 440 [107] (emphasis added).

¹⁸ Fassbender, above n 3, 590; *Fragmentation of International Law*, UN Doc A/CN.4/L.682, 176-8 [346]-[350]; Andreas L Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation' (2005) 74 *Nordic Journal of International Law* 297, 317-8 (but see 318-19); *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS (entered into force 27 January 1980) arts 53, 64.

A third possible conceptual approach, harmonisation (also known as systemic or systematic integration), is more nuanced. The need to harmonise competing regimes of international law is tacitly accepted in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which prescribes the rule of treaty interpretation: 'There shall be taken into account, together with the context ... any relevant rules of international law applicable in the relations between the parties'.

In *Fragmentation of International Law*, the International Law Commission examined harmonisation at length.¹⁹ Its report held out the hope that 'although ... two norms seemed to point in diverging directions, *after some adjustment*, it is still possible to apply or understand them in such way that no overlap or conflict will remain'.²⁰ This was said to require 'an attempt to reach a resolution that *integrates the conflicting obligations* in some optimal way in the general context of international law'.²¹ Later in the report, it was said that 'it seems more appropriate to play down that sense of conflict and to *read the relevant materials from the perspective of their contribution to some generally shared — "systemic" — objective*'.²² Similarly, it was argued that 'the principle of integration ... points to the need to carry out the interpretation so as to see the rules in view of *some comprehensible and coherent objective, to prioritize concerns that are more important at the cost of less important objectives*'.²³

Applying harmonisation to the interaction of the Charter with international human rights law is an inherently more complex process than applying either the

19 On the report's treatment of harmonisation, see Jörg Kammerhofer, 'Systemic Integration, Legal Theory and the ILC' (2008) 19 *Finnish Yearbook of International Law* 157. On harmonisation more generally, see, for example, Philippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (1998) 1 *Yale Human Rights & Development Law Journal* 85; Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279; Nele Matz-Lück, 'Harmonization, Systemic Integration, and "Mutual Supportiveness" as Conflict-Solution Techniques' (2006) 17 *Finnish Yearbook of International Law* 39; Duncan French, 'Treaty Interpretation and the Incorporation of Extraneous Rules' (2006) 55 *International and Comparative Law Quarterly* 281; Freya Baetens, 'Muddling the Waters of Treaty Interpretation? Relevant Rules of International Law in the *MOX Plant* OSPAR Arbitration and *EC-Biotech Case*' (2008) 77 *Nordic Journal of International Law* 197; Campbell McLachlan, 'Investment Treaties And General International Law' (2008) 57 *International and Comparative Law Quarterly* 361; Benn MacGrady, 'Fragmentation of International Law or "Systemic Integration" of Treaty Regimes: *EC-Biotech Products* and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2008) 42 *Journal of World Trade* 589.

20 *Fragmentation of International Law*, UN Doc A/CN.4/L.682, 28 [43] (emphasis added).

21 *Ibid* (emphasis added).

22 *Ibid* 207 [412] (emphasis added).

23 *Ibid* 211 [419] (emphasis added). In one instance, harmonisation is not necessary. See *Fragmentation of International Law*, UN Doc A/CN.4/L.682, 169 [331] (references omitted):

The question has sometimes been raised whether also Council resolutions adopted *ultra vires* prevail by virtue of Article 103. Since obligations for Member States of the United Nations can only derive out of

hierarchical rule of *lex superior* or the dualism of autonomy. Nonetheless, at the conceptual level, the desirability of harmonisation is clear: both the Charter and international human rights law are regimes of great importance, and neither should be permitted to obliterate the other. However, even at this level of abstraction, the difficulties of harmonisation are also apparent: there is no real sense of how the 'adjustment' spoken of is to be made, other than by reference to the identification of some 'shared' or 'coherent objective' which enables an interpreter to 'prioritize' a particular goal. Applying such an approach in practice will hardly be without its challenges.²⁴

The purpose of this section has been to identify the most important potential conceptual approaches to the relationship between the Charter and international human rights law. The clarity of the application of the Charter as *lex superior* (even allowing for the potential impact of *jus cogens* norms), or of human rights law autonomously, stands in contrast to the complexity of the harmonisation approach. Equally, however, the merits of harmonisation are also clear: as Judges Higgins, Kooijmans and Buergenthal noted in the *Arrest Warrant Case*, international law seeks an 'accommodation' of competing values 'and not the triumph of one norm over another'.²⁵ As the following analysis will demonstrate, the choice from amongst these three competing approaches will determine the extent to which the human rights obligations of states can function as a collateral limit on the powers of the Security Council.

such resolutions that are taken within the limits of its powers, decisions *ultra vires* do not give rise to any obligations to begin with.

If a decision of the Security Council is made *ultra vires*, there is no harmonisation required in the event of any inconsistency with other obligations. This approach is consonant with the wording of art 25 itself: 'to accept and carry out the *decisions* of the Security Council *in accordance* with the present Charter' (emphasis added).

Nonetheless, it will be a rare instance where this limit applies, given the broad scope of discretion the Security Council (and other organs) enjoys under the Charter after the ICJ in its *Certain Expenses (Advisory Opinion)* sanctioned the pursuit of any actions serving the Purposes of the Organization: 'These purposes are broad indeed ... when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization': (*Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Reps 151, 168).

24 Compare, for example, the approach of the majority of the Grand Chamber in *Hassan v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 29750/09, 14 September 2014) to the co-application of international humanitarian law and the ECHR, with the partly dissenting judgment of Judge Spano (joined by Judges Nicolaou, Bianku and Kalaydjieva) which derided the majority's 'attempt to reconcile norms of international law that are *irreconcilable*': at 59 [6] (emphasis in original).

25 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 86-7 [79] (Judges Higgins, Kooijmans and Buergenthal) ('Arrest Warrant Case').

USING THE HUMAN RIGHTS OBLIGATIONS OF STATES AS A MEANS OF
COLLATERAL ENFORCEMENT

Kadi v Council of the European Union

Mr Yassin Abdullah Kadi, a Saudi Arabian national, resident in Jeddah, was identified in the Security Council as a possible supporter of Al-Qaeda and, in October 2001, was placed by the Sanctions Committee on the list of individuals and entities whose assets were to be frozen. The first list of entities had been published in March 2001, and thereafter, the European Commission, complying with SC Resolution 1267 (1999),²⁶ issued regulations that implemented the European Union's own measures against possible supporters of Al-Qaeda.²⁷ These measures included a regulation with an amended annex of named supporters, including, amongst others, Mr Kadi, whose funds were to be frozen by the European Union (EU) and its member states.²⁸ Mr Kadi filed an application with the Court of First Instance seeking an annulment of the regulations as they pertained to him, arguing that the regulations violated certain fundamental rights — right to a fair hearing, right to respect for property and of the principle of proportionality, and right to effective judicial review — which were guaranteed in the ECHR.²⁹

Mr Kadi's argument, in essence, was that 'Community institutions cannot abdicate their responsibility to respect his fundamental rights by taking refuge behind

26 SC Res 1267 (1999), UN SCOR, 55th sess, 4051st mtg, UN Doc S/RES/1267(1999) (15 October 1999).

27 Commission Regulation (EC) No 2062/2001 of 19 October 2001, Amending, for the Third Time, Council Regulation (EC) No 467/2001, 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 Regulation (EC) No 337/2000 [2001] OJ L 227/25 ('Commission Regulation (EC) No 2062/2001 of 19 October 2001'); Council Regulation (EC) No 467/2001 of 6 March 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 Regulation (EC) No 337/2000 [2001] OJ J 67/1; Council Regulation (EC) No 881/2002 of 27 May 2002, Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida network and the Taliban, and Repealing Council Regulation (EC) No 467/2001 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 [2002] OJ L 139/9.

28 Commission Regulation (EC) No 2062/2001 of 19 October 2001 [2001] OJ L 227/25, 25.

29 *Kadi v Council of the European Union* (Court of First Instance of the European Union, Second Chamber, Extended Composition, 21 September 2005) [37]-[41], [59], [139] ('Kadi').

decisions adopted by the Security Council'.³⁰ The Council of the European Union and the Commission of the European Communities responded with a plea of Article 103:

Member States ... have agreed to carry out without reservation the decisions taken in their name by the Security Council, in the higher interest of the maintenance of international peace and security ... [O]bligations imposed on a Member of the United Nations under Chapter VII of the Charter ... prevail over every other international obligation to which the member might be subject. In that way Article 103 of the Charter makes it possible to disregard any other provision of international law ... in order to apply the resolutions of the Security Council.³¹

The five judges of the Court of First Instance, handing down their judgment on 21 September 2005, generally rejected Mr Kadi's arguments. The Court used Article 103 of the Charter as the basis for asserting that the obligations of EU members under the Charter 'clearly prevail over every other obligation of domestic law or of international treaty law' (including the ECHR)³² and, pointing to Article 25 of the Charter, argued that '[t]hat primacy extends to decisions contained in a resolution of the Security Council'.³³ The Court expressly stated that 'Member States may, and indeed must, leave unapplied any provision of Community law ... that raises any impediment to the proper performance of their obligations under the Charter of the United Nations'.³⁴ Given these conclusions, the Court of First Instance declined to review the legality of the contested regulations, arguing that such review would amount to judicial review of the Security Council,³⁵ and be forbidden by Article 103.³⁶

Nonetheless, the Court also held that it had the capacity to engage in indirect judicial review of the implementation of Security Council resolutions vis-à-vis *jus cogens*,³⁷ noting: 'The indirect judicial review carried out by the Court ... may therefore, highly exceptionally, extend to determining whether the superior rules of international law falling within the ambit of *jus cogens* have been observed'.³⁸

30 Ibid [150].

31 Ibid [156].

32 Ibid [181].

33 Ibid [183].

34 Ibid [190].

35 Ibid [209]-[225].

36 Ibid [222].

37 Ibid [226]-[230].

38 Ibid [231].

Although this step has been described as 'bold' and 'unexpected',³⁹ it appears to be a simple recognition that, because the Charter cannot authorise conduct in breach of *jus cogens*, Article 103 cannot shield any such conduct from review.⁴⁰ The Court found, however, on the facts that the disputed regulations did not violate Mr Kadi's *jus cogens* rights.⁴¹

Mr Kadi appealed to the Grand Chamber of the Court of Justice of the European Union (CJEU), which adopted a radically different approach to the Court of First Instance, giving no discernible weight to Article 103 of the Charter.⁴² Instead, the Grand Chamber emphasised its role of enforcing EU law irrespective of which Charter principles might be invoked. Indeed, the Grand Chamber's approach was (with one exception to be considered below) to consider the EC Treaty law in isolation and without reference to the Charter at all.⁴³ Aust has gone so far as to state that the CJEU 'did not seem fully to appreciate that EU Member States are legally bound by Chapter VII resolutions'.⁴⁴

The Grand Chamber reasoned that, because 'the Community is based on the rule of law ... neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty'.⁴⁵ Referring repeatedly to the Charter as 'an international agreement', as if to deny it any special status,⁴⁶ the Grand Chamber asserted that its role was unaffected by the Charter: '*an international agreement* cannot affect ... the autonomy of the Community

39 Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After Kadi' (2010) 51 *Harvard International Law Journal* 1, 20.

40 See above n 18.

41 *Kadi* (CFI, Second Chamber, Extended Composition, 21 September 2005) [37]-[41], [59], [139], [232]-[292]. See also Sara Poli and Maria Tzanou, 'The *Kadi* Rulings: A Survey of the Literature' (2009) 28 *Yearbook of European Law* 533, 552-3. For an argument that there had been a breach of *jus cogens*, see Luis M Hinojosa Martínez, 'Bad Law for Good Reasons: The Contradictions of the *Kadi* Judgment' (2008) 5 *International Organizations Law Review* 339, 349-52.

42 The CJEU has been said to have proceeded by 'ignoring the international law elements pertinent to the case': Jan Klabbers, 'Book Review: Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*' (2011) 8 *International Organizations Law Review* 483, 484.

43 *Treaty Establishing the European Community*, opened for signature 7 February 1992, [1992] OJ C 224/6 (entered into force 1 November 1993) ('EC Treaty').

44 Anthony Aust, 'Kadi: Ignoring International Legal Obligations' (2009) 6 *International Organizations Law Review* 293, 295.

45 *Kadi v Council of the European Union* (Court of Justice of the European Union, Grand Chamber, C-402/05 P and C-415/05 P, 3 September 2008) [281] ('Kadi').

46 A more orthodox description acknowledges 'the constitutional role of the UN Charter in international law': Martínez, above n 41, 340. See also de Búrca, above n 39, 23, 26; Martínez, above n 41, 343.

legal system'.⁴⁷ The Grand Chamber expressly held that 'obligations imposed by *an international agreement* [that is, the Charter] cannot have the effect of prejudicing the constitutional principles of the EC Treaty'.⁴⁸ Indeed, according to the Grand Chamber, Article 103 was simply irrelevant to its task:

[I]t is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation ... is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.⁴⁹

Reasserting the autonomy of EC law, the Grand Chamber held that

review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty *as an autonomous legal system* which is not to be prejudiced by *an international agreement*.⁵⁰

The Court again referred to its role within 'the internal and autonomous legal order of the Community'⁵¹ requiring it to

ensure the review, *in principle the full review*, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.⁵²

Thus, according to the Grand Chamber, no Charter principles required any deviation from the application of the full rigours of review by the CJEU of measures implementing the Security Council sanctions regime.

The Grand Chamber asserted, somewhat unpersuasively, that such review of Community acts was not relevant to the Charter: 'the review of lawfulness ... by the Community judiciary applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such'.⁵³ The Court declared, emphasising the separation between EU law and that of the Charter, that 'any judgment given by the Community judiciary deciding that a Community

47 *Kadi* (CJEU, Grand Chamber, C-402/05 P and C-415/05 P; 3 September 2008) [282] (emphasis added).

48 *Ibid* [285] (emphasis added).

49 *Ibid* [299].

50 *Ibid* [316] (emphasis added).

51 *Ibid* [317].

52 *Ibid* [326] (emphasis added).

53 *Ibid* [286].

measure ... is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law'.⁵⁴

These claims, however, assert a distinction between European and international law which cannot be accepted in full.⁵⁵ As Aust observed, 'this was correct only in a formal sense. But, its effect is that EU Member States may now have to act in conformity with EU law as laid down by the ECJ even if it conflicts with their legal obligations under a Chapter VII resolution'.⁵⁶ Indeed, Martínez's criticism of the CJEU in *Kadi* referred to 'the artificiality of its dualist discourse',⁵⁷ explaining that 'when the European Regulation simply applies the SC decision with no margin of discretion, the frontier between both norms disappears, and the judicial review of one entails the parallel evaluation of the other'.⁵⁸ In such a case, as Cuyvers has noted, 'UN primacy sits uneasily with any judicial review at the EU or national level'.⁵⁹ Perhaps implicitly recognising this, the Grand Chamber attempted to establish a leeway within the international sphere to accommodate the European requirements:

[T]he Charter ... does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter ... leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.⁶⁰

Wherever such leeway might arise, it certainly is not obvious in Articles 25 or 103 of the Charter.⁶¹

By asserting the autonomy of the EU legal system in unequivocal terms, and thereby adopting a dualist approach to the relationship between international law

54 Ibid [288].

55 See, for example, Miša Zgonec-Rošej, 'Yassin Abdullah Kadi & Al Barakaat International Foundation v Council and Commission, Joined Cases C-402/05 P & C-415/05 P' (2009) 103 *American Journal of International Law* 305, 311: 'While the judgment does not compromise the primacy of the relevant Security Council resolutions on the international plane, it affects their implementation at the EC and domestic levels'.

56 Aust, 'Kadi', above n 44, 297.

57 Martínez, above n 41, 341.

58 Ibid 342; cf Jean d'Aspremont and Frédéric Dogagne, 'Kadi: The ECJ's Reminder of the Elementary Divide Between Legal Orders' (2008) 5 *International Organizations Law Review* 371, 371-2, 374-8.

59 Armin Cuyvers, 'The *Kadi II* Judgment of the General Court: The ECJ's Predicament and the Consequences for Member States' (2011) 7 *European Constitutional Law Review* 481, 483.

60 *Kadi* (CJEU, Grand Chamber, C-402/05 P and C-415/05 P, 3 September 2008) [298].

61 This is also not the sort of leeway that was found in the particular Resolution in question in *Al-Jedda* (ECtHR, Grand Chamber, Application No 27021/08, 7 July 2011): see above n 11.

and EU law, the Grand Chamber might be seen to have sidestepped the issue of the primacy of Article 103 of the Charter.⁶² In fact, however, the significance of the decision in *Kadi* is unmistakable: decisions of the Security Council which member states are required under Article 25 to carry out, and which in theory enjoy the primacy given to Charter obligations under Article 103, are nonetheless vulnerable to collateral attack through regional judicial institutions on the basis of human rights obligations.

In its application of the law to the facts, the Grand Chamber made at least some concessions. Although the Court had referred to 'in principle ... full review',⁶³ in fact it allowed some measure of latitude in the implementation of ECHR standards (although this was less a concession to the Charter than to security concerns). Thus, the Grand Chamber accepted that

with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.⁶⁴

Nonetheless, the Grand Chamber cautioned that 'that does not mean ... that restrictive measures ... escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism'.⁶⁵ Instead, the Court proposed some balancing — albeit not of Charter considerations against EU law, but of security concerns against human rights — through the use of

techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice.⁶⁶

62 See, for example, de Búrca, above n 39, 22-6, 29, 40-9; Christian Tomuschat, 'The *Kadi* Case: What Relationship is There Between the Universal Legal Order Under the Auspices of the United Nations and the EU Legal Order?' (2009) 28 *Yearbook of European Law* 654, 657-60; Katja S Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights' (2009) 9 *Human Rights Law Review* 288, 293-8. Cf Piet Eeckhout, '*Kadi* and *Al Barakaat*: Luxembourg is not Texas — or Washington DC' on *EJIL: Talk!* (25 February 2009) <<http://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/>>.

63 A point emphasised in Koen Lenaerts, 'The *Kadi* Saga and the Rule of Law Within the EU' (2014) 67 *Southern Methodist University Law Review* 707, 715.

64 *Kadi* (CJEU, Grand Chamber, C-402/05 P and C-415/05 P, 3 September 2008) [342].

65 *Ibid* [343].

66 *Ibid* [344].

Even adopting such techniques and permitting, for example, actions to be taken without prior notice to affected individuals (so long as subsequent options for challenging a decision were available to them), the Court nonetheless found violations of rights to make a defence, to effective legal remedies, and to be free from arbitrary deprivation of property.⁶⁷ The Court therefore annulled the relevant regulations.⁶⁸

Thus the Grand Chamber in *Kadi* departed significantly from the Court of First Instance. In place of an application of Article 103 to shield from judicial review actions implementing Security Council Resolutions (except in the case of violations of *jus cogens*), the Grand Chamber largely ignored the Charter and instead repeatedly emphasised the autonomy of European law, calling into question the special status of the Charter. The polarity of these two approaches led Hilpold to observe that *Kadi* is 'a leading case in the EU judicial system without furnishing — in itself — definite hints for the solution of the underlying problems'.⁶⁹ *Kadi* raises but does not answer many questions of interest to international lawyers.

The significance of *Kadi* is in its demonstration that the effective powers of the Security Council on a broad reading of Articles 25 and 103 may be subject to powerful collateral limits. These limits can be brought to bear through legal attacks on actions implementing Security Council Resolutions brought on the basis of rules contained in other spheres of international, regional or municipal law (in this case human rights law). This situation results from the Grand Chamber of the CJEU insisting on the autonomous application of the EC Treaty to the exclusion of the Charter, without any attempt at harmonisation or acceptance of any status of *lex superior*.

Sayadi v Belgium

*Sayadi v Belgium*⁷⁰ concerned an individual communication to the Human Rights Committee (HRC) alleging violations by Belgium of rights under the International Covenant on Civil and Political Rights (ICCPR) enjoyed by Mr Nabil Sayadi and

67 Ibid [348], [349], [370].

68 Ibid [372].

69 Peter Hilpold, 'EU and UN Law in Conflict: The *Kadi* Case' (2009) 13 *Max Planck Yearbook of United Nations Law* 141, 142.

70 Human Rights Committee, *Views: Communication No 1472/2006*, 94th sess, UN Doc CCPR/C/94/D/1472/2006 (29 December 2008) annex ('Views of the Human Rights Committee Under Article 5, Paragraph 4, of the *Optional Protocol to the International Covenant on Civil and Political Rights*') ('*Sayadi*'). For a summary of the case, see Annalisa Ciampi, 'Security Council Targeted Sanctions and Human Rights' in Bardo Fassbender (ed), *Securing Human Rights? Achievements and Challenges of the UN Security Council* (Oxford University Press, 2011) 98, 123-7. For an extended critique, see Marko Milanović, 'The Human Rights Committee's Views in *Sayadi v Belgium*: A Missed Opportunity' (2009) 1 *Goettingen Journal of International Law* 519, 519-38.

Ms Patricia Vinck, married Belgian nationals residing in Belgium.⁷¹ The authors of the communication had been placed on the Sanctions Committee's list of possible supporters of Al-Qaeda when the Belgian Government, on 19 November 2002, informed the Committee that Mr Sayadi and Ms Vinck 'were, respectively, the director and secretary of Fondation Secours International, reportedly the European branch of the Global Relief Foundation, an American association that has been on the sanctions list since 22 October 2002'.⁷² Subsequently, and while Mr Sayadi and Ms Vinck were not charged with an offence, EU and Belgian legislation froze their assets and banned them from travelling internationally.⁷³ In 2005, Mr Sayadi and Ms Vinck sought, and were granted, an order from the Brussels Court of First Instance requiring the Belgian Government 'to initiate the procedure to have their names removed from the Sanctions Committee's list';⁷⁴ however, the Committee refused to delist the applicants.⁷⁵

At issue in *Sayadi* was both the admissibility of the applicants' communication to the HRC, and their substantive claims of violations of, *inter alia*, rights to freedom of movement under the ICCPR through Belgium's implementation of the 1267 Sanctions regime.⁷⁶

The HRC concluded that the communication was admissible under Article 1 of the Optional Protocol to the ICCPR.⁷⁷ In its reasons at the admissibility stage handed down on 30 March 2007, the HRC rejected an argument that it was not competent to rule on implementations of Security Council Resolutions. The HRC emphasised the autonomy of its role (much as the Grand Chamber of the CJEU would do in *Kadi* the following year), explaining:

While the Committee could not consider alleged violations of other instruments such as the Charter of the United Nations ... the Committee was competent to admit a communication alleging that a State party had violated rights set forth in the Covenant, regardless of the source of the obligations implemented by the State party.⁷⁸

In its reasons at the merits stage handed down on 22 October 2008, the HRC examined Article 46 of the ICCPR, which relevantly provides: 'Nothing in the

71 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

72 *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, 4 [2.2].

73 *Ibid* 4 [2.3].

74 *Ibid* 5 [2.5].

75 *Ibid* 21 [8.3].

76 *ICCPR* arts 2(3), 12, 14(1)-(3), 15, 17, 18, 22, 26, 27.

77 *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, 18 [7.2].

78 *Ibid* 18 [7.2].

present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations'. However, as the Grand Chamber of the CJEU had done one month before in *Kadi*, the HRC emphasised the autonomy of its role, stating that

there is nothing in this case that involves interpreting a provision of the Covenant as impairing the provisions of the Charter of the United Nations. The case concerns the *compatibility with the Covenant of national measures taken by the State party* in implementation of a Security Council resolution.⁷⁹

The HRC therefore proceeded to examine whether Belgium had violated the ICCPR when it complied with its Charter obligations to enforce the relevant Security Council Resolutions. Although the parties had referred to Article 103 of the Charter, in its merits decision the HRC did not expressly take that provision into account. Indeed, the HRC did not take into account Belgium's Charter obligations at all.

The HRC found that Belgium had breached the authors' right to freedom of movement in Article 12 of the ICCPR, because the restrictions imposed were not 'necessary to protect national security'. The HRC noted that Belgium had originally submitted the authors' names to the Sanctions Committee.⁸⁰ It further noted that, after the termination of a criminal investigation with no adverse findings against the authors, Belgium had submitted two delisting requests in respect of the authors.⁸¹ This was not enough to satisfy the HRC, which relied on the outcome of the criminal investigation and the delisting requests to prove that the original submission of names, and enforcement of the Security Council Resolutions in the interim, were in breach of Article 12.⁸² No allowance was made for Belgium's Charter obligations in the HRC's reasoning regarding Article 12.⁸³

In finding a breach of the Article 17 right not to be subjected to unlawful attacks on the authors' honour and reputation (through their appearance on published lists of sanctions targets), the HRC again ignored Belgium's Charter obligations.⁸⁴ Placing no weight on Belgium's claim that it was obliged to transmit the authors' names to the Sanctions Committee (whilst not disputing the accuracy of that claim), the HRC

79 Ibid 22 [10.3] (emphasis added).

80 Ibid 23-4 [10.7].

81 Ibid 24 [10.8].

82 Ibid 23-4 [10.7]-[10.8]. Milanović has heavily criticised the approach here: 'This is not reasoning, not even result oriented jurisprudence — this is simply the Human Rights Committee's wishful thinking'. Marko Milanović, '*Sayadi*: The Human Rights Committee's *Kadi* (or a pretty poor excuse for one ...)' on *EJIL: Talk!* (29 January 2009) <<http://www.ejiltalk.org/sayadi-the-human-rights-committee%E2%80%99s-kadi-or-a-pretty-poor-excuse-for-one>>.

83 Contrary to the authors' submissions, on the facts the HRC found no breach of arts 14 or 15, again without taking any account of Charter obligations: *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, 24-5 [10.9]-[10.11].

84 Ibid 25-6 [10.12]-[10.13].

found a violation of Article 17 as 'even though the State party is not competent to remove the authors' names ... it is responsible for the presence of the authors' names on those lists'.⁸⁵

The HRC in *Sayadi* thus pursued a similar approach to *Kadi*, in that Belgium's Charter obligations were ignored, Article 103 was given no weight, and instead the ICCPR was applied without modification or harmonisation. There were, however, a significant number of individual opinions, some strongly dissenting from the approach of the majority of the HRC.

Sir Nigel Rodley, Ivan Shearer and Iulia Antoanella Motoc dissented on the issue of jurisdiction, stating that

the State party has done what it could to secure the authors' de-listing. In so doing it has provided the only remedy within its power ... [U]nless the Committee believes that the State party's mere compliance with the Security Council listing procedure ... is capable of itself of violating the Covenant, it is not clear how the authors can still be considered victims ... of violations of the State party's obligations.⁸⁶

To similar effect was the dissenting opinion of Ruth Wedgwood. She first expressed the view that the allegations were not really against Belgium at all, but against the Security Council:

The complaint ... is inadmissible because it pleads no cognizable violation by the State party.

The authors are complaining about the actions and decisions of the United Nations Security Council, not the acts of Belgium.⁸⁷

Second, Wedgwood referred to Articles 25 and 103 of the Charter, relying on these as excluding the jurisdiction of the HRC:

The Committee is not entitled to use the hollow form of a pleading against a State to rewrite those provisions ... [I]t has no appellate jurisdiction to review decisions of the Security Council. Neither can it penalize a State for complying with those decisions. It would be inconsistent with the constitutional structure of the United Nations Charter, and its own responsibilities under the Covenant.⁸⁸

Ivan Shearer's dissenting opinion on the merits took a similar approach. Expressly applying Articles 25 and 103 of the Charter, Shearer noted that '[t]he Committee's reasoning ... appears to regard the Covenant as on a par with the United

85 Ibid 26 [10.13].

86 Ibid, app A, 27 (Sir Nigel Rodley, Ivan Shearer and Iulia Antoanella Motoc).

87 Ibid app A, 29 (Ruth Wedgwood).

88 Ibid, app A, 30.

Nations Charter, and as not subordinate to it'.⁸⁹ Instead, Shearer stated (drawing an analogy to the application of the *lex specialis* maxim to determine the co-application of human rights and humanitarian law):⁹⁰ 'Human rights law must *be accommodated within*, and harmonized with, the law of the Charter'.⁹¹ However, it was *lex superior*, rather than harmonisation, that Shearer applied in his conclusion that 'the State party acted in good faith to discharge its obligations *under a superior law*. There can be no violation of the Covenant in these circumstances'.⁹²

In these dissenting opinions, Charter provisions were applied to the exclusion of the ICCPR (an approach that had been taken by the Swiss Federal Court in *Nada*, as detailed below, and Court of First Instance in *Kadi*, but not by the CJEU). One interesting feature of the HRC opinions is the lack of a middle ground. No attempt at harmonisation was made; members adopted polar positions. Perhaps, therefore, *Sayadi* was the HRC's *Kadi*. Of course, one vital difference is that there is no immediate consequence of a finding by the HRC that Belgium had violated the authors' rights under the ICCPR, unlike within the European system where decisions of the CJEU and the European Court of Human Rights (ECtHR) are likely to be enforced or carried out.⁹³

Nada v Switzerland

Mr Youssef Nada, an elderly Italian/Egyptian national living in a small Italian enclave, Campione d'Italia, within Switzerland, was severely impacted by Swiss implementation of the transit ban required by SC Resolution 1390 (2002) in respect of individuals (including Mr Nada) listed pursuant to SC Resolutions 1267 (1999) and 1333 (2000).⁹⁴ Mr Nada had unsuccessfully applied to the Focal Point for Delisting established under SC Resolution 1730 (2006) to be removed from the

89 Ibid, app B, 32 (Ivan Shearer).

90 See, for example, Roberta Arnold and Noëlle Quéniévet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff, 2008); Samaneh Hassanli, A Proposal for the Implementation of Human Rights Treaty Obligations in Armed Conflict (PhD Thesis, University of Adelaide, 2014) [a thesis I was privileged to co-supervise under Professor Gardam's guidance]; Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011).

91 *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, 32 (Ivan Shearer) (emphasis added).

92 Ibid 33 (emphasis added).

93 See, for example, Milanović, 'A Missed Opportunity', above n 70, 536-7.

94 SC Res 1267 (1999), UN SCOR, 55th sess, 4051st mtg, UN Doc S/RES/1267(1999) (15 October 1999); SC Res 1333 (2000), UN SCOR, 56th sess, 4251st mtg, UN Doc S/RES/1333(2000) (19 December 2000); SC Res 1390 (2002), UN SCOR, 57th sess, 4452nd mtg, UN Doc S/RES/1390(2002) (28 January 2002).

list.⁹⁵ His case before the Grand Chamber of the ECtHR alleged violations of his right to liberty and right to respect for private and family life (during the period from 2003, when he was first refused passage through Switzerland, to 2009, when he was delisted and again allowed to transit through Switzerland).⁹⁶ Resolution of Mr Nada's claims necessarily required the Court to reconcile Switzerland's obligations under the ECHR with its obligations under the Charter.

Before the Swiss authorities, Mr Nada argued that 'the Security Council's sanctions were contrary to the United Nations Charter and to the peremptory norms of international law (*jus cogens*)' and that accordingly 'Switzerland was not obliged to implement them'.⁹⁷ The Swiss Federal Court, handing down its decision on 14 November 2007, disagreed.⁹⁸ The Court accepted that 'the delisting procedure fails to meet both the requirement of access to a court ... and that of an effective remedy'.⁹⁹ Nonetheless, the Federal Court noted the obligation on Switzerland as a member state to carry out the decisions of the Security Council under Article 25 of the Charter, and the primacy of Charter obligations under Article 103.¹⁰⁰ The Court concluded that only breach of a *jus cogens* obligation would justify a state failing to fulfil its Charter obligations,¹⁰¹ that Mr Nada's affected rights did not enjoy the status of *jus cogens*,¹⁰² and thus that Mr Nada's claim must fail because the sanctions regime allowed 'member States no margin of appreciation in their implementation'.¹⁰³

Mr Nada appealed to the European Court of Human Rights. Handing down its decision on 12 September 2012, the Grand Chamber noted that Article 30(1) of the Vienna Convention on the Law of Treaties specifically excepts Article 103 of the Charter from its general rules regulating the application of successive treaties relating

95 SC Res 1730 (2006), UN SCOR, 62nd sess, 5599th mtg, UN Doc S/RES/1730 (2006) (19 December 2006).

96 *Nada v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 10593/08, 12 September 2012) 1 [3], 37-8 [126]-[128] ('*Nada*').

97 *Ibid* 7 [38].

98 For an English summary, see *Nada v State Secretariat for Economic Affairs* (2007) ILDC 461.

99 *Nada v State Secretariat for Economic Affairs* (Swiss Federal Court, 14 November 2007) [8.3] ('*Nada v SSEA*'), quoted in *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 10 [50].

100 See the discussion of the Federal Court judgment in *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 8 [42].

101 *Ibid* 9 [46].

102 *Ibid* 9 [47].

103 *Nada v SSEA* (Swiss Federal Court, 14 November 2007) [8.1], quoted in *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 10 [50].

to the same subject matter.¹⁰⁴ The Grand Chamber also quoted from *Fragmentation of International Law*:¹⁰⁵

Article 103 does not say that the Charter prevails, but refers to *obligations under the Charter* ... [T]his also covers duties based on binding decisions by United Nations bodies [including] ... resolutions of the Security Council that have been adopted under Chapter VII of the Charter.¹⁰⁵

Observing that '[t]wo diverging commitments must ... be harmonised as far as possible',¹⁰⁶ the Grand Chamber of the ECtHR contemplated the application of a presumption that '[i]n the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations'.¹⁰⁷ The Court confirmed this interpretive principle, but whereas in its earlier decision in *Al-Jedda* the failure to specify a consequence of interment without trial had left room for its application, in *Nada* the relevant SC Resolutions were explicit.¹⁰⁸

The critical step in the Grand Chamber's reasoning was its finding that Switzerland's obligations under the ECHR could be reconciled with its obligations under the Charter because 'Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UN Security Council'.¹⁰⁹ This finding was possible only because the Grand Chamber adopted a loose interpretation of the relevant Charter obligations. First, the Court argued that

the United Nations Charter does not impose on States a particular model for the implementation of the resolutions adopted by the Security Council under Chapter VII. Without prejudice to the binding nature of such resolutions, the Charter in principle leaves to UN member States a free choice among the various possible models for transposition of those resolutions into their domestic legal order. The Charter thus imposes on States an obligation of result, leaving them to choose the means by which they give effect to the resolutions.¹¹⁰

104 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 25 [80].

105 *Fragmentation of International Law*, UN Doc A/CN.4/L.682, 168-9 [331] (emphasis in original), quoted in *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 26 [81].

106 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 46 [170].

107 *Ibid* 46 [171], quoting *Al-Jedda* (ECtHR, Grand Chamber, Application No 27021/08, 7 July 2011) 57 [102].

108 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 47 [102].

109 *Ibid* 49 [180].

110 *Ibid* 48 [176].

Second, the Grand Chamber relied on the text of SC Resolution 1390 (2002) as allowing leeway, both in the exception to the travel ban in Paragraph 2(b) where 'necessary for the fulfillment of a judicial process'¹¹¹ and in Paragraph 8, which referred to the taking of 'immediate steps to enforce and strengthen through legislative enactments or administrative measures, where appropriate, the measures imposed under domestic laws or regulations'.¹¹²

The Court therefore concluded that Switzerland had failed to take advantage of 'the possibility of deciding how the relevant Security Council resolutions were to be implemented in the domestic legal order' to achieve 'some alleviation of the sanctions regime applicable to the applicant ... without however circumventing the binding nature of the relevant resolutions or compliance with the sanctions provided for therein'.¹¹³

Formally, in reaching its conclusions regarding Article 8 of the ECHR, the Court did not address the question of primacy:

That finding dispenses the Court from determining the question ... of the hierarchy between the obligations of the States Parties to the Convention ... and those arising from the United Nations Charter ... [T]he important point is that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent.¹¹⁴

The significance of the Grand Chamber's decision lies in its attempt to achieve harmonisation of Switzerland's obligations under the Charter and the ECHR. Its actual reasoning, finding that Switzerland enjoyed a measure of latitude in how it implemented the relevant Security Council Resolutions, might well be questioned (and, indeed, was by some judges — a matter considered below), but it is the attempt to achieve harmonisation between the two relevant legal regimes that puts *Nada* in a different position to *Kadi*.¹¹⁵ Notwithstanding this attempt at harmonisation, however, the end result remained the same — implementation of the relevant Security Council Resolution by the member state was limited by a regional court on the basis of the state's human rights obligations.

Two concurring opinions are worth noting. Judges Bratza, Nicolaou and Yudviska expressed 'considerable doubts' about the conclusion that Switzerland enjoyed latitude in carrying out its obligations under the Security Council Resolutions,

111 Ibid 48 [177].

112 Ibid 48 [178].

113 Ibid 52 [195].

114 Ibid 53 [197].

115 One commentator called the reasoning 'milder' than *Kadi*: Solène Guggisberg, 'The Nada Case Before the ECtHR: A New Milestone in the European Debate on Security Council Targeted Sanctions and Human Rights Obligations' (2012) 8 *Croatian Yearbook of European Law and Policy* 411, 428.

instead holding that 'the obligation imposed ... was a binding one which ... allowed no flexibility or discretion to the States as to whether to give full effect to the sanctions imposed'.¹¹⁶ Nonetheless, even for these judges, Switzerland had failed 'to take such steps as were open to them to mitigate the effects of the measures' implementing the Security Council Resolution.¹¹⁷

Similarly, Judge Malinverni held that 'it is difficult ... to sustain the argument that Switzerland had any room for manoeuvre in the present case'.¹¹⁸ However, the judge also found human rights obligations relevant to the Security Council, asking of Articles 25 and 103 'do those two Charter provisions actually give the Security Council carte blanche? That is far from certain'. Instead, referring to Article 24(2) requiring the Security Council to 'act in accordance with the Purposes and Principles of the United Nations' and Article 1(3) as establishing one of those purposes to be 'respect for human rights and for fundamental freedoms', Judge Malinverni stated that '[o]ne does not need to be a genius to conclude from this that the Security Council itself must also respect human rights'.¹¹⁹

These provisions of the Charter thus gave Judge Malinverni an opening to harmonise Switzerland's Charter obligations and human rights obligations in a manner favourable to human rights. The judge also took inspiration from *Kadi* and *Sayadi*,¹²⁰ asking 'should the Court, as guarantor of respect for human rights in Europe, not be more audacious than the European Court of Justice or the Human Rights Committee'?¹²¹ The judge criticised any broad application of Article 103 as liable to upset 'the balance that States should strike between the requirements of collective security and respect for fundamental rights, since it means that rights will be sacrificed for the sake of security'.¹²²

These concurring opinions demonstrate that, even to the extent that some judges recognised the limited leeway available to states in the implementation of Security Council Resolutions, there remained nonetheless, through the process of

116 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 66 [5] (Judges Bratza, Nicolaou and Yudviska). See also *Nada* at 65 [1], 67 [8] (Judges Bratza, Nicolaou and Yudviska). Similarly: 'looking at the text of the relevant UNSC resolution this argument is not entirely convincing': Auke Willems, 'The European Court of Human Rights on the UN Individual Counter-Terrorist Sanctions Regime: Safeguarding Convention Rights and Harmonising Conflicting Norms in *Nada v Switzerland*' (2014) 83 *Nordic Journal of International Law* 39, 56.

117 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 67 [9] (Judges Bratza, Nicolaou and Yudviska).

118 *Ibid* 72 [10] (Judge Malinverni).

119 *Ibid* 73 [15].

120 *Ibid* 73-5 [15]-[20].

121 *Ibid* 74 [20].

122 *Ibid* 75 [21].

harmonisation, a requirement to offer procedural and substantive safeguards where those were lacking in the United Nations system. Again, harmonisation seemed to water down the significance of Articles 25 and 103 of the Charter, and was held to require member states to take steps to remedy human rights problems in the manner of their implementation of Security Council Resolutions if the Security Council had not itself responded to its own dictate to observe human rights. While *Nada* was undoubtedly more nuanced than *Kadi* in its insistence on a harmonisation of human rights obligations and Charter imperatives, the result reached in the case demonstrates the extent to which even harmonisation can marginalise Article 103 of the Charter.

Kadi II

Following *Kadi*, the Chairman of the Sanctions Committee released to France and thence to the European Commission and Mr Kadi a 'narrative summary of the reasons' for Mr Kadi's listing.¹²³ Mr Kadi was given an opportunity by the Commission to respond, before the Commission adopted a new regulation re-imposing sanctions on Mr Kadi.¹²⁴ Mr Kadi challenged that new regulation on similar grounds to his initial challenge.

The three judges of the General Court, handing down their decision in *Kadi II* on 30 September 2010, noted the argument that, if *Kadi* were followed, the CJEU's 'judicial review is liable to encroach on the Security Council's prerogatives'.¹²⁵ It also noted that

certain doubts may have been voiced in legal circles as to whether the judgment of the Court of Justice in *Kadi* is wholly consistent with, on the one hand, international law and, more particularly, Articles 25 and 103 of the Charter of the United Nations and, on the other hand, the EC and EU Treaties.¹²⁶

The General Court in *Kadi II* also observed that in *Kadi*

the Court of Justice ... seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law — in this case the law deriving from the Charter of the United Nations.¹²⁷

123 *Kadi v European Commission* (Court of Justice of the European Union, General Court, Seventh Chamber, T-85/09, 30 September 2010) [27] ('*Kadi II*').

124 Commission Regulation (EC) No 1190/2008 of 28 November 2008, Amending for the 101st time Council Regulation (EC) No 881/2002 Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida network and the Taliban [2008] OJ L 322/25.

125 *Kadi* (CJEU, General Court, Seventh Chamber, T-85/09, 30 September 2010) [114].

126 *Ibid* [115].

127 *Ibid* [119].

The General Court in *Kadi II* went so far as to state that 'those criticisms are not entirely without foundation'.¹²⁸ As Cuyvers has noted, these observations by the General Court in *Kadi II* amount to a 'candid and fundamental criticism' of *Kadi*.¹²⁹

Nonetheless, the General Court in *Kadi II*, although noting that it was not bound by the decision of the Grand Chamber in *Kadi*,¹³⁰ decided to defer to that decision.¹³¹ It therefore undertook the 'full review'¹³² mandated by *Kadi*, and unsurprisingly reached the same conclusion that the sanctions measures were invalid. The General Court held that 'the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection'.¹³³ Discounting the significance of the focal point for delisting and the Office of the Ombudsperson,¹³⁴ the General Court catalogued some of the human rights difficulties with the Security Council's sanctions regime:

[T]he Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining ... actions against individual decisions taken by the Sanctions Committee ... [R]emoval of a person from the Sanctions Committee's list requires consensus within the committee ... [T]here is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively ... For those reasons at least, the creation of the focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee.¹³⁵

The General Court therefore held that the process leading to the making of the contested regulation did not satisfy the requirements of the ECHR, and annulled the

128 Ibid [121].

129 Cuyvers, above n 59, 488.

130 *Kadi* (CJEU, General Court, Seventh Chamber, T-85/09, 30 September 2010) [112].

131 Ibid [121], [123].

132 Ibid [126].

133 Ibid [127].

134 See, for example, Erica de Wet, 'From *Kadi* to *Nada*: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions' (2013) 12 *Chinese Journal of International Law* 787, 789 [3] (references deleted):

The most meaningful qualitative improvement from the perspective of listed individuals and entities has been the introduction of the Ombudsperson through UNSC Resolution 1904 (2009), who replaced the Focal Point in relation to the *Al Qaida* sanctions committee ... However, despite the undisputed relief that her conscientious efforts have brought to those de-listed, the ultimate decision for de-listing remains a political one in the hands of the sanctions committee and the UNSC.

135 *Kadi* (CJEU, General Court, Seventh Chamber, T-85/09, 30 September 2010) [128].

regulation.¹³⁶ This decision was challenged, ultimately, by the European Commission, the Council of the European Union and no less than fourteen EU member states.¹³⁷

Delivering its judgment on the appeal on 18 July 2013, the Grand Chamber dealt remarkably briefly with the arguments regarding the clash between ECHR and Charter obligations. The Grand Chamber in *Kadi II* stated that *Kadi* was based on

the constitutional guarantee which is exercised, in a Union based on the rule of law ... by judicial review of the lawfulness of all European Union measures, including those which, as in the present case, implement an international law measure, in the light of the fundamental rights guaranteed by the European Union.¹³⁸

The Grand Chamber in *Kadi II* simply indicated 'there has been no change in those factors which could justify reconsideration of that position'.¹³⁹

The Grand Chamber's reasons made clear how onerous the 'full review' it demanded in order to meet the ECHR obligations would be.¹⁴⁰ Very few, if any, concessions were made to peace and security imperatives or Charter obligations.¹⁴¹ Although the Grand Chamber rejected the General Court's approach to some ECHR issues,¹⁴² it nonetheless concluded that the regulation was correctly annulled, because

136 Ibid [188].

137 United Kingdom, Republic of Bulgaria, Czech Republic, Kingdom of Denmark, Ireland, Kingdom of Spain, French Republic, Italian Republic, Grand Duchy of Luxembourg, Hungary, Kingdom of the Netherlands, Republic of Austria, Slovak Republic and Republic of Finland. See *European Commission v Kadi* (Court of Justice of the European Union, Grand Chamber, C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013) [71].

138 Ibid [66].

139 Ibid.

140 Ibid [111]-[134].

141 This is not to say that the CJEU's review was stricter than the General Court's, but to emphasise the strictness of the CJEU's review itself. It has been observed that the CJEU 'sought to reiterate the principles upon which the General Court's judgment was based, albeit tempering its conclusions with a measure of practicality and deference to the complexities of foreign relations': Harley J Hooper, 'An Unsteady Middle Ground: Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission and United Kingdom v Yassin Abdullah Kadi (No 2)* [2013] ECR 00000 (18 July 2013)' (2014) 20 *European Public Law* 409, 414. Nonetheless, as de Wet observes, the CJEU applied a 'high level of scrutiny': de Wet, above n 134, 791 [10]. Similarly, van den Herik underscores the CJEU's 'high standard of judicial review': Larissa J van den Herik, 'Peripheral Hegemony in the Quest to Ensure Security Council Accountability for its Individualized UN Sanctions Regimes' (2014) 19 *Journal of Conflict and Security Law* 427, 447. Feinäugle describes the CJEU's review as 'a praiseworthy continuation of badly needed human rights protection in the sanctions context': Clemens A Feinäugle, '*Commission v Kadi*' (2013) 107 *American Journal of International Law* 878, 882.

142 *Kadi* (CJEU, Grand Chamber, C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013) [138]-[140], [142]-[149].

none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.¹⁴³

Although the Grand Chamber sought to draw support from the result in *Nada*,¹⁴⁴ in fact the reasoning underlying *Kadi II* is quite different. Notwithstanding the arguments of the European Union institutions and fourteen member states (and the views of the General Court), in *Kadi II* the thirteen judges of the Grand Chamber of the CJEU once again treated EU law as autonomous, and applied it without any expressed or evident attempt at harmonisation with the law of the Charter.

Al-Dulimi v Switzerland

Less than two months after the decision of the CJEU in *Kadi II*, the Second Section of the ECtHR handed down its decision in *Al-Dulimi v Switzerland*.¹⁴⁵ Mr Khalaf M Al-Dulimi, a resident of Jordan, is alleged to have been the head of finance for Saddam Hussein's Iraqi secret service. His assets, and those of a company of which he was formerly the managing director (Montana Management Inc), were frozen by Switzerland from 7 August 1990, implementing SC Resolution 661,¹⁴⁶ and became liable to confiscation by Switzerland from 18 May 2004 in its implementation of the listing of Mr Al-Dulimi and the company by the 1518 Sanctions Committee.¹⁴⁷ Mr Al-Dulimi's challenges, both to the Swiss measures implementing the sanctions before the Swiss Federal Court¹⁴⁸ and to his listing by the Sanctions Committee through an application to the Focal Point for Delisting,¹⁴⁹ were unsuccessful. His argument was that Switzerland had breached his right of access to a court under Article 6 of the ECHR.

The judges of the Court agreed that *Nada* could be distinguished on the basis that the discretion to implement that was (perhaps unconvincingly) asserted

143 Ibid [163]. See also [141], [151]-[162].

144 Ibid [133].

145 *Al-Dulimi v Switzerland* (European Court of Human Rights, Second Section, Application No 5809/08, 27 November 2013 ('*Al-Dulimi*').

146 SC Res 661 (1990), UN SCOR, 45th sess, 2933rd mtg, UN Doc S/RES/661(1990) (6 August 1990).

147 *Al-Dulimi* [3]-[31].

148 Ibid [38] (Judges Karakaş, Vučinić and Keller, supported by the partly dissenting Judge Sajó).

149 Ibid [39].

there did not exist in *Al-Dulimi*.¹⁵⁰ The majority professed to apply harmonisation, stating that the ECHR 'cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law'.¹⁵¹ However, the judges referred to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, but then identified the relevant body of law for this purpose (in addition to the ECHR) as being 'the rules concerning the international protection of human rights',¹⁵² and not the Charter. Moreover, there was no attempt to harmonise Charter obligations. Instead, the majority stated that

where the relevant organisation protects fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides ... the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.¹⁵³

In other words, if the sanctions regime met ECHR standards (the 'equivalent protection' test), the Court would presume that the ECHR was not violated when a state implemented those sanctions. It was not argued that the sanctions regime did meet ECHR standards, so a finding that Switzerland had breached its obligations was inevitable.¹⁵⁴ This judgment applied pure autonomy, as it did not take the Charter into account at all when examining the standard that must be met by a state in order to meet its ECHR obligations.

The dissenting judgment of Judge Lorenzen, joined by Judges Raimondi and Jočiené, indicated that, on the facts, the 'conflict between obligations under the United Nations Charter and under the Convention could only be solved by giving one of them priority'.¹⁵⁵ The dissenting judges would have resolved the issue of priority by applying the *lex superior*: 'in case of a conflict between the obligations under Article 103 of the Charter and obligations under the Convention, States parties to both legal instruments are bound to give the Charter obligations priority'.¹⁵⁶

Unlike *Nada*, there was no attempt at harmonisation in *Al-Dulimi*. Instead, four judges applied autonomy, and three applied *lex specialis*. An appeal to the Grand Chamber was heard on 10 December 2014; judgment was delivered on 21 June 2016, when this book was already in press.

150 Ibid [117], 67.

151 Ibid [112].

152 Ibid.

153 Ibid [114].

154 Ibid [123]-[135].

155 Ibid 69 (Judge Lorenzen, joined by Judges Raimondi and Jočiené).

156 Ibid.

THE CONSEQUENCES OF CURRENT PRACTICE AND ISSUES FOR THE FUTURE

Current practice in the use of the human rights obligations of states as a collateral limit on the powers of the Security Council has some important consequences, and leaves unresolved some significant issues for the future. This section reflects on the present state of the jurisprudence, and the underlying conceptual approaches at play in existing decisions. It then considers these decisions in the broader context of the idea of an equilibrium in the international legal order, and notes the impact on these decisions of the Security Council's intransigence about how its sanctions regimes impact human rights. Next, the most significant limitation on the practice examined in this chapter is considered. Whatever might be the merits of the nascent European constitutionalism on display in *Kadi* and *Kadi II* for EU members, in order to influence international law, the new (weakened) understanding of Article 103 of the Charter will have to be reflected in general state practice if it is to impact on the Charter's application as a matter of international (and not European) law. Finally, the chapter considers whether Article 103 is, in fact, dead.

A Fractured Jurisprudence

Kadi, *Sayadi*, *Nada*, *Kadi II* and *Al-Dulimi* all resulted in findings that human rights obligations had been breached in the implementation of Security Council Resolutions imposing targeted sanctions, even under the improved procedures now prevailing with the Security Council having established the Focal Point for Delisting (in 2006) and Office of the Ombudsperson (in 2009, in respect of what is now called the ISIL (Da'esh) and Al-Qaida sanctions regime). These decisions demonstrate the potential for regional courts (both the CJEU and ECtHR) and international institutions (the HRC) to restrict the ability of states to implement Security Council Resolutions, and thus demonstrate the ability of affected individuals to use human rights obligations as a collateral limit on the powers of the Security Council.

However, the jurisprudence is far from coherent. The Court of First Instance in *Kadi* would have applied Article 103 to prevent review, except in the case of a violation of *jus cogens* norms; it was the Grand Chamber of the CJEU that applied European law autonomously without reference to the law of the Charter. *Sayadi* took a similar view of the autonomy of the ICCPR, but with some notable dissenting opinions in favour of the application of the law of the Charter. The General Court in *Kadi II* expressed considerable sympathy for criticisms of *Kadi*, although in the end it chose to follow *Kadi*; and the Grand Chamber in *Kadi II*, although retaining its autonomous approach to European law, nonetheless adopted quite different reasoning than the General Court in finding that the regulations should be annulled.

In *Al-Dulimi*, four judges applied autonomy, while three dissented and applied *lex specialis*. The jurisprudence is thus fractured in important respects — once lower court decisions and dissenting judgments are taken into account, it ranges from applications of Article 103 to the exclusion of human rights law to full applications of human rights law without reference to the Charter.

The reasoning employed by the Grand Chamber of the ECtHR in *Nada* is significantly different.¹⁵⁷ Departing from the approach of autonomy employed in the other decisions, *Nada* expressly sought to harmonise human rights law with the requirements of the Charter. Although on the facts the relevant regulations were held to breach the ECHR, in *Nada* the ECtHR at least attempted to achieve harmonisation of potentially conflicting ECHR and Charter obligations, an approach which was both more nuanced and more compelling than those taken in *Kadi*, *Sayadi*, *Kadi II* and *Al-Dulimi*.

The Surprising Rise of Autonomy, Demise of *lex superior* and Search for Harmonisation

Perhaps the most striking feature of current practice is the absence of applications of the *lex superior* maxim (notwithstanding its frequent invocation by the states and organisations whose actions have been challenged).¹⁵⁸ Instead, with the exception of some overruled lower court decisions and dissenting opinions, the predominant judicial approach has been one of autonomy, with some increasing attention being paid to harmonisation.

That autonomy was the approach chosen by the CJEU in *Kadi* and *Kadi II* and by the HRC in *Sayadi* is surprising. As Reinisch has noted, the CJEU in *Kadi* was 'radical in its overall attitude and ... uncompromisingly dualist with regard to its view of the relationship between international law and European law'.¹⁵⁹ Indeed, Tomuschat has observed strikingly: 'Human rights should never suffer. Yet, the EC/EU and its Court should attempt to remain within the agreed international frameworks rather than opting for the construction of a fortress Europe'.¹⁶⁰ Conversely, Lenaerts has praised the giving of 'priority to the constitutional identity of the EU'.¹⁶¹ Notwithstanding the simplicity of autonomy, which requires (largely) only the application of existing

157 See, for example, de Wet, above n 134, 790.

158 This approach has not been without academic support. See, for example, Aust, 'Kadi', above n 44, 295-6.

159 Peter Hilpold, 'UN Sanctions Before the ECJ: The *Kadi* Case' in August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press, 2010) 18, 19.

160 Tomuschat, above n 62, 663.

161 Lenaerts, above n 62, 709.

legal tests and doctrines, it fails to consider the relationship between the human rights obligations of states and their obligations under the Charter. D'Aspremont and Dopagne have celebrated the decisions as a welcome reminder 'that legal orders are naturally and inextricably estranged from each other',¹⁶² but even they concede that the decisions create 'sweeping practical difficulties which member States now face to comply with their UN obligations'.¹⁶³

Autonomy is only as persuasive as the frequent attempts made by its proponents to characterise the resulting review as relevant only to national or regional measures, and not impacting Security Council Resolutions.¹⁶⁴ Given that the result is to deny implementation of those Resolutions, this distinction is difficult to support. Nonetheless, it is autonomy that is the chief conceptual approach employed in the decisions examined in this chapter.

The rise of autonomy has resulted in the demise of *lex superior* as a conceptual approach to the relationship between international human rights law and the law of the Charter. Although at the opposite end of the spectrum to autonomy, the application of *lex superior* would not have been surprising, given the wording of Article 103. Instead, the demise of *lex superior*, confined to overruled lower court decisions and dissenting opinions, has been remarkable.¹⁶⁵

Harmonisation, the approach arguably most apposite to the relationship between human rights law and the law of the Charter, was a surprising omission from *Kadi*, *Sayadi*, *Kadi II* and *Al-Dulimi*. In its decision in *Nada*, however, the Grand Chamber of the ECtHR adopted harmonisation as its conceptual approach. Whilst the result reached was the same (the sanctions-implementing measure was held to breach human rights law), the fact that an attempt was made to co-apply the two systems of international law was an important departure from the approaches of the CJEU and HRC. It remains to be seen how the Grand Chamber of the ECtHR

162 D'Aspremont and Dogagne, above n 58, 372.

163 Ibid 377.

164 'Of course, formally, the ECJ is right: the Security Council measures cannot be affected by EU courts' review of EU implementing measures ... But the ECJ decision does force the EU member states to violate their obligations under the Charter of the UN: it forces them to disobey the Security Council, lest they disobey the EU court': Antonios Tzanakopoulos, 'Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ' on *EJIL: Talk!* (19 July 2013) <<http://www.ejiltalk.org/kadi-showdown/>>.

165 This is so even accepting that '[i]n view of its exceptional character ... [b]efore Art. 103 is used, conflict avoidance techniques need to be applied (such as harmonization ...) to avoid incompatibilities between Charter law and other international agreements': Andreas Paulus and Johann Ruben Leiß, 'Article 103' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012) 2110, 2120.

will approach the issues when it decides the appeal in *Al-Dulimi*, after the Second Section's split between autonomy and *lex specialis*.

Questions of harmonisation are perhaps particularly relevant given that respect for human rights is contained within the Charter itself. Article 24(2) of the Charter requires the Security Council to 'act in accordance with the Purposes and Principles of the United Nations'. Relevantly, those 'Purposes and Principles' include in Article 1(3) 'promoting and encouraging respect for human rights and for fundamental freedoms'.¹⁶⁶ Moreover, as de Wet has noted, the approach of harmonisation 'reduces the risk of an open rebellion against and destabilisation of the United Nations system for the protection of international peace and security'. De Wet further notes that harmonisation 'contributes to the unity of the international legal order and serves as a counter-force against fragmentation of international law'.¹⁶⁷ In short, harmonisation is the appropriate tool to reconcile the co-application of potentially competing regimes of international law. As Klabbers has noted regarding the decisions examined in this chapter, 'the international legal order has far more to offer than the stark choice between blind obedience and outright disobedience'.¹⁶⁸

Of course, the difficulties of harmonisation should not be underestimated. They are patent in the dissenting opinion of Ruth Wedgwood in *Sayadi*: 'Human rights and the enforcement decisions of the Security Council share a common concern for the lives of innocent people'.¹⁶⁹ This identification of a common purpose says little about which regime is to prevail in case of conflict. For Wedgwood (dissenting) in *Sayadi*, it was the Charter obligation.¹⁷⁰ For the ECtHR in *Nada*, it was the human rights obligation.¹⁷¹ How harmonisation can be achieved remains an open question for the future. The ECtHR's approach in *Nada* is not the last word on this topic,¹⁷²

166 Art 55(c) further provides that 'the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion', albeit that the responsibility for this provision falls to the General Assembly and the Economic and Social Council.

167 De Wet, above n 134, 806 [48].

168 Klabbers, above n 42, 489.

169 *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, app A, 30 (Ruth Wedgwood). See also Clementine Olivier, 'Human Rights and the International Fight Against Terrorism: How do Security Council Resolutions Impact on States' Obligations under International Human Rights Law? (Revisiting Security Council Resolution 1373)' (2004) 73 *Nordic Journal of International Law* 399, 403-4.

170 *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, app A, 30 (Ruth Wedgwood).

171 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 46-53 [170]-[199].

172 The actual application of the principle in *Nada* has been criticised as 'an example of covert rejection of ... UNSC obligations which are perceived as violating human rights norms': de Wet, above n 134, 807 [49].

nor will its pending decision in *Al-Dulimi* resolve all of the issues. Nonetheless, as a conceptual approach to resolving the need to co-apply human rights law and the law of the Charter, harmonisation is the best hope for the development over time of a coherent jurisprudence.

Equilibrium

In an important sense, the cases examined in this chapter show the international legal system returning to a position of equilibrium. Reflection on two earlier comments appears illustrative. In 1994, Wilhelm Grewe wrote that

the more the SC appears willing and capable of operating in the way originally envisaged by the drafters of the Charter, the more apparent it becomes that there are virtually no substantial limitations on the powers conferred upon the Council.¹⁷³

Conversely, the Separate Opinion of Judge Shahabuddeen in the *Lockerbie Case* asked:

Are there any limits to the Council's powers of appreciation? In the *equilibrium of forces* underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results?¹⁷⁴

One interpretation of the cases examined in this chapter, which use international human rights law as a collateral limit on the power of the Security Council, is that equilibrium in the international order is being restored after the earlier rise of the Security Council.¹⁷⁵

These cases also reveal two other forms of equilibrium being sought: first, the balance of power between the EU and UN (a topic generally outside the scope of this chapter); and second, as Hilpold's description of *Kadi* reminds us, 'equilibrium between the need to fight terrorism more effectively and the parallel need to uphold fundamental rights in this struggle'.¹⁷⁶

173 Wilhelm G Grewe, 'The History of the United Nations' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 1994) 1, 22.

174 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*) [1992] ICJ Rep 3, 32 (emphasis added). Judge Shahabuddeen did not answer these questions, but observed (at 32): 'If the answers to these delicate and complex questions are all in the negative, the position is potentially curious. It would not, on that account, be necessarily unsustainable in law'.

175 See, for example, van den Herik, above n 141, 4-12.

176 Hilpold, 'EU and UN Law in Conflict', above n 69, 181. Similarly, Margulies states that the CJEU in *Kadi II* 'failed to pay sufficient heed to the delicate balance between fairness and efficacy in counterterrorism sanctions': Peter Margulies, 'Aftermath of an Unwise Decision: The UN Terrorist

The cases examined in this chapter can be seen as searching for an equilibrium in the power dynamic between EU and UN law, between the Security Council and its non-members, and between the suppression of terrorism and protection of human rights. It should not be expected that the equilibrium represented on any of these three issues by the cases examined will remain static into the future: these will each be dynamic areas of future practice.

The Security Council Has Only Itself to Blame

To a significant extent, the Security Council's troubles are of its own making. Its disregard of human rights issues can hardly have endeared it to the various judicial bodies before whom claims have been made seeking to impose collateral limits on the Council's powers. The Security Council also had no lack of forewarning of the human rights difficulties of its Resolutions.¹⁷⁷ The dissenting opinion (on admissibility) of Sir Nigel Rodley, Ivan Shearer and Iulia Antoanella Motoc in *Sayadi* was clear in its view of the Council's failings:

We acknowledge, of course, that the authors may have been unjustly harmed by operation of the extravagant powers the Security Council has arrogated to itself, including the obstacles it has created to the correction of error. It is more than a little disturbing that the executive branches of 15 Member States appear to claim a power, with none of the consultation or checks and balances that would be applicable at the national level, to simply discard centuries of States' constitutional traditions of providing bulwarks against exorbitant and oppressive executive action. However, the Security Council cannot be impleaded under the Covenant, much less the Optional Protocol.¹⁷⁸

Similarly, Judge Malinverni in *Nada* sought to show that the problem was of the Security Council's own creation, quoting Constance Grewe's statement that

Sanctions Regime After *Kadi II*' (2014) 6 *Amsterdam Law Forum* 51, 63. Notably, the resurgence of human rights protection in the cases examined in this chapter responds to the observation 'that since 2001 the balance between rights and security has shifted towards the latter, the UN individual counter-terrorist sanctions being a prime example of the shift towards protection of the security of the state at the cost of human rights guarantees': Willems, above n 116, 55.

177 See, for example, Iain Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72 *Nordic Journal of International Law* 159; Andrew Hudson, 'Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights' (2007) 25 *Berkeley Journal of International Law* 203; Ian Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' (2008) 102 *American Journal of International Law* 275, 294-9.

178 *Sayadi*, UN Doc CCPR/C/94/D/1472/2006, app A, 27.

for as long as the United Nations has not introduced a human rights protection mechanism ... comparable or equivalent to that introduced in the member States and at European level, the domestic and European courts remain competent to verify that acts implementing Security Council decisions respect fundamental rights.¹⁷⁹

Judge Malinverni added:

Accordingly, any insufficient, or even deficient, protection of those rights in the context of the United Nations system, where it has not been compensated for by a review of such respect at domestic level, should lead the Court to find a violation of the Convention.¹⁸⁰

The corollary of the point that the Security Council has only itself to blame is that part of the solution might lie with the Council as well. If a more careful approach to human rights had been taken by the Security Council from the outset, one wonders whether there would have been as much practice imposing collateral limits on the powers of the Council.¹⁸¹ It seems too late, however, for a return to the Security Council's perception as all-powerful under an application of the *lex superior* maxim.¹⁸²

Nonetheless, as de Wet has suggested, improved protection of human rights at the Security Council level, perhaps by a judicial or quasi-judicial procedure, could lead to some level of 'judicial deference by the European courts' in their review of EU measures implementing Security Council Resolutions.¹⁸³ Similarly, Martínez suggests that '[t]he most reasonable solution ... would consist of the establishment of an independent body at the UN with power to adjudicate on claims of individuals and entities against their inclusion on the consolidated list'.¹⁸⁴ Greater action to protect human rights by the Security Council could, therefore, both increase the likelihood of judicial deference from international, regional and national courts and

179 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 76 [24] (Judge Malinverni), quoting Constance Grewe, 'Les exigences de la protection des droits fondamentaux', in Constance Grewe et al (eds), *Sanctions ciblées et protections juridictionnelles des droits fondamentaux dans l'Union européenne; équilibres et déséquilibres de la balance* (Bruylant, 2010) 71, [no pinpoint reference is provided by Judge Malinverni].

180 *Nada* (ECtHR, Grand Chamber, Application No 10593/08, 12 September 2012) 76 [24].

181 See, for example, Eeckhout, above n 62.

182 Cf *ibid*; Hilpold, 'EU and UN Law in Conflict', above n 69, 179.

183 De Wet, above n 134, 799 [29]. De Wet cautions: 'Until such a time as impartial and independent judicial review is introduced at the United Nations level ... judicial rebellion ... is unlikely to subside in Europe': at 807 [50].

184 Martínez, above n 41, 356-7.

monitoring bodies, and increase the potential for harmonisation to result in some meaningful application of Article 103.

Europe Is Not the World: Wider Practice Will Be Important

The relationship between the Charter and international human rights law is far from settled, even in the context of the sanctions regimes which are the subject of the decisions examined in this chapter. Amongst other issues, much of the existing practice is European, and European law is not international law. *Kadi* might be a high-water mark of European constitutionalism,¹⁸⁵ but it is its significance for international law that is of global interest.

To return to one of Professor Gardam's most helpful admonitions to students, it is important to consider the sources of international law. Whatever their status within the EU under its treaty arrangements, at best, judicial decisions can be a subsidiary source of international law.¹⁸⁶ If there is to be a change in the interpretation and application of Article 103 at international level, in the absence of a formal agreement amending the Charter, this can occur only as an instance of 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' under Article 31(3)(b) of the Vienna Convention on the Law of Treaties.¹⁸⁷

One of the clearest examples of the evolution in application of a treaty provision comes from the Charter itself: Article 27(3) is interpreted, notwithstanding its text, to prevent a Resolution being passed only if a 'no' vote is cast by a permanent member.¹⁸⁸ It may well be the case that a less absolute interpretation of Article 103

185 See, for example, D'Aspremont and Dogagne, above n 58; Giuseppe Martinico, Oreste Pollicino and Vincenzo Sciarabba, 'Hands off the Untouchable Core: A Constitutional Appraisal of the *Kadi* Case' (2010) 11 *European Journal of Law Reform* 281.

186 Statute of the International Court of Justice art 38(1)(d).

187 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). As to subsequent agreement and practice in treaty interpretation, see Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3rd ed, 2013) 212-16; Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 633-4; Oliver Dörr, 'Article 31' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 521, 552-60; Hazel Fox, 'Article 31(3)(a) and (b) of the Vienna Convention and the *Kasikili/Sedudu Island* Case' in Malgosia Fitzmaurice, Olufemi A Elias and Panos Merkouris (eds), *Issues of Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff Publishers, 2010) 59; Richard K Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 216-49; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 2nd ed, 1984) 135-8.

188 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971]

becomes evident in the future practice of states, in line with the decisions examined in this chapter; but there is as yet no compelling account of state practice in the interpretation of the Charter to suggest that international law has in fact changed to align with the judgments issued in *Kadi*, *Sayadi*, *Kadi II* and *Al-Dulimi*. Whether state practice from outside the EU will follow where the CJEU and HRC have led remains to be seen in the future.

Reports of the Death of Article 103 Are Greatly Exaggerated¹⁸⁹

James Crawford's verse about Mr Kadi's litigation ran as follows:

*While wandering through a wadi
in the wastes of Saudi
I came across Mr Kadi
cracking rather hardy.
I said 'you must feel blue
at what they've done to you';
he said to me 'that's true,
but I've got the CJEU,
lacking whose authority
the P5 sorority
are now a small minority,
who've lost their old priority'.
And so went Mr Kadi
wandering down his wadi:
'it's all because of me;
I killed Article 103!'¹⁹⁰*

As the analysis in this chapter demonstrates, Article 103 may not be dead yet. However, even at best (in *Nada*) it has been seriously harmonised. Article 103 remains an essential part of the international legal order ('maintaining the coherence and the unity of the international legal system'),¹⁹¹ although it is now possibly of more limited

ICJ Reps 16, 22. See, for example, Aust, *Modern Treaty Law and Practice*, above n 187, 215-16; Dörr, above n 187, 558; Fox, above n 187, 62; Gardiner, above n 187, 226, 245; Sinclair, above n 187, 137-8.

189 With apologies to Mark Twain.

190 James Crawford, 'Mr Kadi and Article 103 (A Poem)' on *EJIL: Talk!* (29 July 2013) <<http://www.ejiltalk.org/mr-kadi-and-article-103-by-james-crawford-a-poem/>>.

191 Paulus and Leiß, above n 165, 2136.

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scope than previously thought. Of course, Crawford's implication that the Security Council has had its wings clipped is entirely apposite.¹⁹²

Only future practice will further illuminate how Article 103 is to be harmonised with international human rights law, and how (and whether) it will also need to be harmonised with other branches of international law (perhaps the most obvious being international humanitarian law). It seems clear, however, that the application of Article 103 will require nuanced examination, and where necessary harmonisation with other norms, and that the *lex superior* status of the Charter can no longer be relied upon to trump other areas of law. An absolutist understanding of Article 103 is dead; how the law of the Charter can be harmonised with other areas of law is the real question for the future.

CONCLUDING OBSERVATIONS

It is now a reality, at least in the EU, that the human rights obligations of states function as a collateral limit on the powers of the Security Council through restricting the implementation of Security Council Resolutions at national or regional level. At the time of Professor Gardam's 1996 article on the Security Council and humanitarian law, such a result might have seemed improbable. In that respect, much has changed. Indeed, the potential for collateral challenges to Security Council Resolutions has been recognised as 'a far greater threat to the authority of the UN than challenges to the bindingness of a particular Security Council resolution as in the *Lockerbie Cases*'.¹⁹³

The possible conceptual approaches to the relationship between the law of the Charter and human rights law range from *lex superior*, a strict application of Article 103 of the Charter to exclude any form of review of measures implementing Security Council Resolutions, to autonomy, a strict application of human rights law with no consideration of the Charter. In the critical cases examined in this chapter, both of these extremes are represented, although the more moderate and nuanced approach of harmonisation has at least entered consideration in *Nada*.

It was the application of autonomy by the Grand Chamber of the CJEU in *Kadi* and *Kadi II*, the HRC in *Sayadi*, and later by the Second Section of the ECtHR in *Al-Dulimi* that sent shockwaves through the international legal community. In *Nada*, however, the Grand Chamber of the ECtHR signalled the middle ground

192 But see James Crawford, 'International Law and the Rule of Law' (2003) 24 *Adelaide Law Review* 3, 10: 'It may be that decisions of the Security Council are subject to the authority of the Charter, but the fact is that there is no regular institutional means for bringing Charter constraints to bear on the Security Council'.

193 *Ibid.*

that should be the focus of future practice (notwithstanding that it did not persuade the CJEU to use this approach in *Kadi II*, and that it was not adopted in the Second Section's decision in *Al-Dulimi*) — the question of harmonising Charter obligations with those of human rights law, seeking to accommodate both as far as possible.

The current practice arising from the challenges in regional and international institutions to the implementation of Security Council Resolutions reflects the tension that Professor Gardam observed between the law of the Charter and the humanitarian project reflected in human rights law (and humanitarian law). The process of exploring and defining these relationships has only just begun, although the potential for the human rights obligations of states to serve as a potent collateral limit on the powers of the Security Council is abundantly clear. However, enforcing collateral limits on the Security Council, and achieving harmonisation of the law of the Charter with human rights law, is only necessary where there is potential normative conflict. An alternative would be to follow Professor Gardam's advice:

[O]ne method by which the Security Council can fulfill its Charter duty to encourage respect for human rights and humanitarian principles is to set an example and ensure its ... actions are conducted in an exemplary fashion.¹⁹⁴

194 Gardam, above n 5, 322.