Balancing fundamental principles of the EU and the primacy of UN law:

in search of a multilateral approach to the protection of human rights

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I certify that all material in this dissertation which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.

Signature: ……..

ABSTRACT

Which model should be applied to regulate the interaction between the UN and EU legal systems in the particular field of human rights, when international peace and security are at stake in the fight against terrorism? And how to reach a viable multilateral approach to the protection of said human rights? Starting from these questions this research focuses on the complex relationship between UN and EU law, particularly, with regard to individual counter-terrorism measures established by the UN Security Council and their implementation by the EU; a relationship that very much depends on the particular nature of the European Union as an international organisation, and the unique structure of its legal system. While a number of conflicts have aroused over the years between the two legal orders, the most relevant ones are related to the level of protection afforded to human rights and fundamental freedoms, regarded as 'constitutional' values of the EU. In fact, the most severe conflicts were sparked by the UN blacklisting system, aimed at preventing and combating the financing of transnational terrorism, and by the measures adopted at the EU level to give effect to such system. Solutions to these problems provided by a number of scholars and institutions failed to achieve a long-term balance between EU fundamental principles and the primacy of UN law, preventing the development of a multilateral and shared approach to the protection of human rights, while safeguarding international peace and security. Starting from the analysis of the well-known *Kadi I* case before the General Court and the Court of Justice, this research outlines the inadequacy of the monistic and dualistic approaches to settle the conflicts between UN and EU law in this particular field, proposing a more nuanced solution, based on a rigorous interpretation of the EU Treaties and of the UN Charter. In order to ground this approach, the second part of this research addresses Article 103 of

the UN Charter, to maintain that it shouldn't be interpreted as a rule of hierarchy, but rather as a particular kind of conflict avoidance clause. The final part of this work takes the diachronic evolution of UN counter-terrorism blacklists and their implementation by the EU as a case-study, to test the proposed solution and maintain that promoting the globalisation of EU fundamental values while safeguarding the primacy of UN law is – in fact – possible through the action and common attitude that EU Member States are bound to adopt at the UN level.

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INTRODUCTORY REMARKS

The focus of this research is to consider and understand the interaction between the United Nations (UN) and the European Union (EU) legal systems, with particular regard to the protection of fundamental human rights in the field of counter-terrorism measures, when international peace and security are at risk and a proper balance is often hard to strike. In this perspective, this research addresses the case of financial sanctions adopted by the Security Council of the United Nations against individuals suspected of being involved with transnational terrorism, and the implementing measures enacted by the European Union.

The complex and sometimes 'blurry' relationship between the two legal systems in this area of law is closely related to the particular nature of the European Union as an international organisation,[1] the first consequence of which is the equally peculiar structure of the EU legal system. The interaction at stake, in several cases, had the effect to generate legal conflicts,[2] whose scope is even

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[1] The very nature of the EU as an international organisation has been the subject for scholarly debate, where scholars tended to stress the differences between the EU and other organisations. According to the opinion of Joxerramon Bengoetxea, the EU can be regarded as a *sui generis* international organisation. In particular, the high degree of 'constitutional' development and rule of law features make it look more like a federation of states. Joxerramon Bengoetxea, 'The EU as (more than) an international organisation', in Jan Klabbers, Asa Wallendahl (eds) *Research Handbook on the Law of International Organisations* (Northampton 2011) 448, 449. Klaus-Dieter Borchardt stresses the importance of the EU being based on the rule of law, in order to maintain that the Union is much closer to a supranational structure (i.e. to a federation) than to an international organisation. Klaus-Dieter Borchardt, *The ABC of European Union Law* (Publications Office of the European Union 2018), 79. Following the idea of Armin Von Bogdandy, the specific relationship with the legal orders of the Member States and the concept of 'primacy' show how the EU is progressing towards a federation. Armin Von Bogdandy, 'Neither an International Organization Nor A Nation State: The EU as a Supranational Federation', in Erik Jones, Anand Menon, Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford 2012) 761, 765. A slightly different stance is taken by Marek Hlavac, who regards the EU as a unique experience, with some state-like features, within a closed number of policy areas. Marek Hlavac, 'Less Than a state, more than an international organization: the Sui generis nature of the European Union', *MPRA Paper* (2 December 2010), 12.

[2] The particular nature of the EU as an international organisation has given rise to a political tendency towards exceptionalism, when it comes to consider the relationship between EU law and international law. This point is analysed by Magdalena Ličková, 'European Exceptionalism in International Law' (2008) 19 EJIL 463, 465.

more significant as they affect the level of protection afforded to human rights and fundamental freedoms. Over the years, a number of questions arose with respect to the position to be taken by the EU itself, in relation to UN law. The crucial ones could probably be which model should be applied to regulate the interaction between the UN and EU legal systems and which path (if any) may lead to a viable multilateral approach to the protection of human rights.

In this respect, counter-terrorism policies that have been adopted by the UN over the last two decades are probably the field where conflicts between UN and EU law have most clearly emerged. On the one hand, transnational terrorism (and more generally jihadism) represent a significant threat to international peace and security,[3] the maintenance of which is the first purpose of the United Nations[4] and of the UN legal system in general; on the other hand, the 'constitutional' path followed by EU law strengthened its vocation for independence in the context of international law,[5] especially when it comes to safeguarding human rights. As a consequence, while the primacy of UN law (established by Article 103 of the Charter of the United Nations) was intended as a tool to ensure better protection for global peace and security, it now risks to overtly clash with the stronger stance of EU law in relation to individual rights.

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[3] An analysis of transnational terrorism and its qualification as a threat to peace is provided by René Värk, 'Terrorism as a Threat to Peace', (2009) XVI Juridica International 216. To this extent, the UN mechanism aimed at protecting international peace and security tended to adapt is operational models to the terrorist threat. These changes (towards a 'legislative' approach of the UN Security Council) are stressed by Paul C. Szasz, 'The Security Council starts legislating' (2002) 4 AJIL 901, 904 and Fionnuala Ní Aoláin, 'The 'war on terror' and extremism: assessing the relevance of the women, Peace and Security agenda' (2016) 92 International Affairs 275, 283.

[4] According to Article 1.1 of the Charter of the United Nations.

[5] The EU has developed its own fundamental principles of law – that derive from those enshrined in the constitutional charters of EU Member States – in a number of areas. This tendency has the effect of influencing both the relationship between Member States and the EU (as an institution), which is plainly something very different from what happens at the UN level, and the relationship between the EU and third countries or international organisations, where the EU increasingly tends to behave in a 'state-like' fashion, as explained by Ličková (n 2).

The relationship between EU and UN law in the particular field of human rights, has been addressed by scholars[6] and international institutions,[7] especially by the Court of Justice of the EU.[8] However, none of the proposed solutions were entirely convincing. In the wide majority of cases, problems concerning the interaction between the UN and the EU legal systems were addressed by resorting to two somehow classical models, namely the monist model and the dualist model. Adherence to one model or the other very much depends on the theoretical background of the interpreters. Those positions that support an historical approach to international law tend to embrace the monist theory and consider the EU legal system as an integral part of the international legal order.[9]

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[6] A relevant number of scholars have addressed this issue over the years, particularly in the light of the case-law of both the General Court of the EU and of the European Court of Justice, and some of these positions will be addressed within the following paragraphs (spec. in Chapter 1). For a first and comprehensive approach to the EU-UN relationship in terms of legal systems, see *inter al.* Franziska Brantner, Richard Gowan, 'Complex Engagement: the EU and the UN system' in Knud Erik Jorgensen (ed), *The European Union and International Organizations* (Routledge 2009) 37. A more focused overview with regard to the interaction of UN and EU law in the field of human rights is offered by Inger Österdahl, 'Defer and rule: The relationship between the EU, the European Convention on Human Rights and the UN' (2012) 5 Uppsala Faculty of Law Working Paper, available at https://uu.diva-portal.org/smash/get/diva2:575710/FULLTEXT01.pdf, 9. A complete analysis of the problem as well as an historical overview of relevant EU case-law is provided by Fiona de Londras, Suzanne Kingston, 'Rights, Security and Conflicting International Obligations: Exploring Inter-Jurisdictional Judicial Dialogues in Europe' (2010) 58 AJCL 359. A further perspective on the evolution of the relationship between UN and EU law (in judicial terms) is the one provided by Samantha Besson, 'European Legal Pluralims after *Kadi*' (2009) 5 ECLR 237.

[7] This subject has been considered both on the EU and on the UN side. One may recall the wide study edited by Martin Ortega for the EU Institute for Security Studies in 2005, which elaborates on a number of issues related to the EU-UN relationship in the field of human rights, Martin Ortega (ed), 'The European Union and the United Nations. Partners in effective multilateralism' (2005) 78 Chaillot Paper, available at iss.europa.eu/sites/default/files/EUISSFiles/cp078.pdf. In 2011 the Office of the High Commissioner for Human Rights of the United Nations published an extensive report, edited by Israel de Jesús Butler, focused on the relationship between the EU and general human rights law, whose third chapter provides relevant insight. Israel de Jesús Butler (ed), *The EU and International Human Rights Law* (OHCHR – Europe Regional Office 2011), available at https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf, 24.

[8] The reference is to the case-law of the General Court of the EU and that of the European Court of Justice on the subject matter, which will be analised within this work, both in Chapter 1 and in Chapter 3.

[9] Among others, a particularly recent and clear example of monist approach, with regard to the relationship between general international law, EU law and also domestic law, is the one adopted by Paul Gragl, 'The Pure Theory of Law and Legal Monism – Epistemological Truth and Empirical Plausibility' (2015) 70 Zeitschrift für öffentliches Recht 665. Paul Gragl starts from the teaching of the Vienna School (and of Hans Kelsen, regarded as a 'noble father' of legal monism) to contend that monism – based on the unity of the law – is still the more suitable theory to resolve and

Focusing on the necessary and intrinsic coherence of general international law, they are inclined to solve actual or potential conflicts in terms of hierarchy, A constitutional or quasi-constitutional interpretation of the Charter of the United Nations (UNC), pivoted on Article 103 of the same Charter as a hierarchical rule, often underlies this kind of approach. By contrast, those positions who focus on the independence, autonomy and separateness of the EU legal system, are likely to embrace the dualist theory,[10] stressing the closure of such legal system to any external interference, which is not consistent with the hard core of the EU 'constitutional principles'.

Both these approaches appear unsatisfactory, since they fail to balance the consistency needs of the international legal order (and the will of EU Member States to comply with their obligations under UN law) with the undoubtedly unique dimension of the EU legal system, grounded on common constitutional traditions and committed to ensure an increasing protection for human rights, within and beyond European borders.[11]

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prevent conflicts between different legal systems (including the UN and the EU). These ideas are further developed in Paul Gragl, *Legal Monism: Law, Philosophy and Politics* (Oxford 2018). The attitude of the Court of Justice of the EU towards UN law, at least until the early 2000, is described as generally monist. See Andrea Gattini, 'Effects of Decisions of the UN Security Council in the EU Legal Order' in Enzo Cannizzaro, Paolo Palchetti, Ramses A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 215, 216.

[10] An example of the dualist stance with regard to the relationship between UN and EU law in the field of human rights is offered, among others, by Piet Eeckhout, 'The Growing Influence of European Union Law' (2011) 33 Fordham International Law Journal 1490, 1497. Contrary to the opinion of Gattini (n 9), Piet Eeckhout also considers dualism as a natural evolution of the case-law of the Court of Justice of the EU. In relation to the dualist evolution in the case-law of the Court of Justice of the EU see also (with some critical remarks) Gráinne de Búrca, 'The European Court of Justice and the International Legal Order After Kadi (2010) 51 Harvard International Law Journal 1, 2.

[11] An analysis of both approaches and their 'failure' is provided by Ramses A. Wessel, 'General Issues: Monism, Dualism and the European Legal order. Reconsidering the Relationship Between International and EU law: Towards a Content-Based Approach?' in Enzo Cannizzaro, Paolo Palchetti, Ramses A. Wessel (eds) *International Law as Law of the European Union* (Martinus Nijhoff 2012) 5.

In order to set the scene of this research path, the first chapter starts by analysing one of the most relevant cases of the last two decades, in relation to this subject matter: the so-called *Kadi I* case, adjudicated by the General Court of the EU (GCEU) on first instance,[12] and then appealed before the European Court of Justice (ECJ).[13] A focused analysis of both judgments realises a complete comparison between the two classical models of legal systems interaction – the monist model relied on by the GCEU and the seemingly dualist model adopted by the Court of Justice – to expose the strengths and limits of both approaches. Based on the study of this case, the last section of the first chapter propose a more nuanced and reasonable approach to the relationship between UN and EU law in the particular field at stake, rooted on a rigorous interpretation of relevant provisions within the EU Treaties, in conjunction with Article 103 UNC. Such approach aims at balancing the need for safeguarding EU Member States obligations under UN law, and the necessary compliance of EU secondary legislation with the fundamental (or 'constitutional') principles of European law, based on the assumption that Article 103 UNC is not intended to establish a hierarchy of norms in international law.

The second chapter is entirely dedicated to discussing and supporting this latter assumption, providing an in-depth study of Article 103 UNC. In particular, the first section of this chapter retraces the genesis of the primacy clause, from its predecessor (Article 20 of the Covenant of the League of Nations) to the San Francisco Conference of 1945 and the *travaux préparatoires* that led to the text of Article 103 UNC. Subsequently, the chapter provides an overview of the

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[12] Case T-315/01 *Yassin Abdullah Kadi v. Council and Commission* [2005] ECR II-03649.
[13] Joined Cases C-402/05 P and C-415/05 P *Jassin Abdullah Kadi v. Council and Commission* [2008] ECR I-06351.

elements in favour and against each interpretation of Article 103 UNC and of the consequences of such interpretative choices, to uphold the idea of the primacy clause as a source of interpretation, rather than a ground for constitutionalising international law.

The third and last chapter offers an analysis of the so-called blacklists (i.e. the sanctions adopted by the UN Security Council in order to tackle the financing of transnational terrorism) as a case-study, to test the feasibility of the proposed approach. In particular, the Chapter provides a diachronic analysis of all the Resolutions adopted by the UN Security Council in this regard from 1999 to 2014, describing the measures adopted by the EU in order to implement them, as well as the critical issues that both UN Resolutions and EU implementing measures presented in terms of protection of human rights and fundamental freedoms. This analysis shows how UN secondary legislation at stake has evolved, in terms of substantial and procedural safeguards, right before and in the aftermath of the *Kadi I* judgment of the European Court of Justice, even if such decision could not and did not directly affect UN measures. It concludes that ensuring the primacy of UN law while promoting the 'globalisation' of EU standards in terms of human rights protection is, in fact, possible based on the EU Treaties, whose provisions encourage Member States to take action at the UN level in order to progressively overcome any inconsistencies between UN-derived obligations and EU law.

The research methodology that I applied is a classical one and is pivoted on analysing the evolution of a relevant case (the *Kadi I* case), in order to outline strengths and weaknesses in the arguments of involved courts and subsequently discuss a viable and rather innovative approach to the legal problem in question. While this inductive methodology may be regarded as less theoretical and mostly practical, it has the advantage of simplifying the understanding of complex legal

issues, focusing on the applicative solutions provided by courts and institutions, which are the ultimate interpreters of legal research.

The analysis of the leading case, offered within the first chapter, includes an overview of relevant treaty provisions and their judicial interpretation, on which the following theoretical proposals are rooted. In particular, the interpretation of Article 103 UNC that underlies (and grounds) the whole research, is developed and further explained within the second chapter: here, the non-hierarchical nature of the primacy clause is supported by means of an historical review that starts from the Covenant of the League of Nations and passes through the *travaux préparatoires* of the UN Charter. The final chapter switches back to a practical approach, showing how the evolution of UN measures (aimed at preventing the financing of transnational terrorism) may be indirectly influenced by EU law and the case-law of the Court of Justice, through the action of Member States within the UN.

The whole research has the ambition of providing a different point of view on a long debated topic, abandoning approaches that are based, alternatively, on international law as a comprehensive and entire system (monistic) or on the independence of European law (dualistic) and looking back at the legal tools offered by both the EU Treaties and the UN Charter to discuss chances for a unitary (or multilateral) approach to the problem. In particular the research aims at showing how the EU Treaties themselves contain a number of 'last resort' provisions that may help Member States complying with their obligations under UN law, while not acting in breach of EU law. Starting from these provisions and their interpretation, this research shows how compliance of UN institutions with EU legal standards in the field of human rights (as developed by the Court of Justice of the EU) should be promoted and achieved by Member States, acting

in their capacity as members of the United Nations. The case-study provided by this research empirically shows how the proposed approach may be effective and – in the long term – progressively reduce conflicts between UN and EU law in the field at stake.

CHAPTER 1

JUDICIAL REVIEW OF UN BLACKLISTS AT THE ECJ: MONISM, DUALISM AND MORE

I. Introduction – II. A monist approach: Kadi I *at the General Court – III. A dualist approach:* Kadi I *at the Court of Justice – IV. A different approach to the UN and EU legal systems interaction*

I. INTRODUCTION

The present chapter follows the path of the so-called *Kadi I* case, with the purpose of comparing the different approaches adopted by the General Court and the Court of Justice to the conundrum of legal systems interaction between UN and EU law. As I anticipated, the GCEU adhered to a strictly monist stance, regarding UN law as capable of interfering with and possibly outranking EU law; by contrast, the ECJ stressed the autonomy and independence of the EU legal system, focusing on the need to safeguard its 'constitutional' principles as enshrined in the EU Treaties. This chapter will discuss the pros and cons of each approach, maintaining that both are unsatisfactory in order to adequately resolve potential conflicts between UN and EU law in the field of human rights. This will set the scene for the emergence of a 'brand new' and autonomous model.

The case brought before the ECJ by Yassin Abdullah Kadi in 2001 was aimed at obtaining the annulment of a number of EC Regulations[14] – adopted

[14] Council Regulation (EC) 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) 337/2000 [2001] OJ L67/1; Commission Regulation (EC) 2062/2001 amending, for the third time, Regulation 467/2001 [2001] OJ L277/25; Council Regulation (EC) 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001 [2002] OJ L139/9.

both by the Council and the Commission – to implement the so-called blacklists system.[15] This system was designed by the UN Security Council to 'freeze' the assets of certain individuals or entities, allegedly linked to (the Taliban regime, Usama Bin-Laden and) the Al-Qaeda network, in the wider context of the UN counter-terrorism policy.

In dealing with the *Kadi I* case, the General Court and the Court of Justice were called to address a substantial number of challenging legal issues, both with respect to procedural aspects and with regard to the merits of the case. From a formal and procedural point of view, both courts focused their reasoning onto two aspects, namely the legal basis for the adoption of the contested regulations within the EU (then the Community) legal framework and the limits that the European judiciary should encounter in reviewing EU legislation, adopted to implement UN Security Council resolutions, in the light of the obligations set forth by the UN Charter (and by Article 103 UNC in particular). In both cases, as I will consider hereafter, the analysis of the merits – i.e. the violations of human rights alleged by the claimant – was greatly influenced by the Court's assessment of its own jurisdiction.

For the purpose of this research the critical analysis of the courts' words will be necessarily limited in scope to the nodal point of jurisdiction, to understand whether one of the existing models (monist or dualist) could apply to interactions between the EU and the UN legal systems in the delicate field of human rights or whether a different approach should be adopted.

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[15] On the blacklists system and its legal basis *vis-à-vis* EU law, in general, see the work of Alina Miron, 'Les sanctions ciblées' du Conseil de sécurité des Nations unies. Réflexions sur la qualification juridique des listes du Conseil de sécurité' (2009) Revue du marché commun et de l'Union européenne 355.

As is widely known, the monist and the dualist theory represent two classical approaches that were originally developed for addressing the interaction between national and international law.[16] The monist view is based on the work of prominent scholars in the early twentieth century,[17] where a central role was undoubtedly played by Hans Kelsen [18] and his pure theory of law. The fundamental assumption of monism can be synthesised in the idea of the unity of the legal world order,[19] which is directly derived from the adherence of Hans Kelsen to the neo-Kantian epistemological theory.[20] Applying a monist paradigm brings two substantial consequences, that can be summarised in the words 'unity' and 'hierarchy'. Firstly, monism considers international law and domestic law as a single legal system so that, in general terms, international law (i.e. be it conventional or customary) needs to be applied by domestic authorities and judges as they do with national law. Secondly, the monist theory tends to establish a rule of hierarchy that considers international law as the fundamental set of norms, from which municipal laws are derived.[21] In this context, conflicts of norms are resolved by means of the hierarchy rule: under a monist point of view,

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[16] For a general introduction to monism and dualism see Marko Novakovic (ed), *Basic concepts of public international law: monism & dualism* (Faculty of Law, University of Belgrade, Institute of Comparative Law, Institute of International Politics and Economics 2013). A brief and clear overview of the two theories and their application in practice is provided by Tom Ginsburg 'Locking in Democracy: Constitutions, Commitment, and International Law' (2006) 38 N.Y.U.J. Int'l. L. & Pol. 707, 713.

[17] Among the most relevant academic efforts of the time that contend a monistic idea around the relationship between domestic and international law, see Léon Duguit, *Soiveraineté et liberté* (La Mémoire du Droit 1922); Georges Scelle, *Précis de droit de gens: Principes et systématique* (vol. 1, Surey 1932); Alfred Verdross, 'Le Fondement du droit international' (1927) 16 Recueil des Cours de l'Académie de Droit International 247. See also Gragl, *Legal Monism: Law, Philosophy and Politics* (n 9).

[18] Hans Kelsen, 'Les rapports de système entre le droit interne et le droit international public' (1926) 14 Recueil des Cours de l'Académie de Droit International 227.

[19] See Hans Kelsen, *Pure Theory of Law* (UC Press 1967), 328 and criticism by Gaetano Arangio-Ruiz, 'International law and Interindividual law' in Janne Nijman, André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford 2007) 15, 18.

[20] Lando Kirchmair, 'Who Has the Final Say? The Relationship between International, EU and National Law' (2018) Special Issue, European Journal of Legal Studies 47, 55.

[21] Kelsen (n 19), 330.

therefore, national laws that are deemed incompatible with provisions of international law would plainly be outranked and invalid, giving precedence to the international law rule. In the specific context of the relationship between international law and EU law, a tendency of the EU (then-the EC) to lean towards a seemingly monist approach was maintained,[22] which implied acceptance of binding international norms as part of the EU legal order.[23] This idea is based on a very broad interpretation of Article 216.2 of the Treaty on the Functioning of European Union (TFEU)[24] and of the case-law of the ECJ[25] that may suggest some sort of 'automatic reception' of general international law within the EU legal order, as an 'integral part' of the latter.[26] Furthermore, it was maintained that a separation between EU law and international law would be inconceivable: on the one hand, international law would be a necessary 'functioning tool' for the EU itself;[27] on the other hand, a net separation would frustrate the contribution brought by EU law (then-EC law) to the development of general international law.[28]

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[22] Henry G. Schermers, 'Community Law and International Law' (1975) 12 C.M.L.Rev. 77, 87; Andrea Ott, 'Multilevel Regulations Reviewed by Multilevel Jurisdictions: The ECJ, the National Courts and the ECtHR' in Andreas Follesdal, Ramses A. Wessel, Jan Wouters (eds), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes* (Martinus Nijhoff 2008) 345, 347.

[23] Timothy Dunne, 'Good Citizen Europe' (2008) 84 International Affairs 13; Ott (n 22), 348.

[24] Article 216.2 TFEU reads as follows: '[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States'. While the scope of this provision is clearly limited to those international agreements that are concluded by the EU itself, still some reads it as way to consolidate a monist approach in the EU Treaties. As will be explained hereinafter, no other provisions in the EU Treaties suggest this approach.

[25] See Francis G. Jacobs, 'Direct Effect and Interpretation of International Agreements in the Recent Case Law of the European Court of Justice', in Alan Dashwood, Marc Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge 2008) 13, 33; Gattini (n 9).

[26] See Case C-181/73 *Haegeman v. Belgium* [1974] ECR 449, para. 5.

[27] This thesis is developed by Bruno de Witte, 'Using International Law for the European Union's Domestic Affairs' in Enzo Cannizzaro, Paolo Palchetti, Ramses A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 133,

[28] See Frank Hoffmeister, 'The Contribution of EU Practice under International Law' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford 2008) 37, 95.

For as simple as that it may seem, however, applying a straightforward monist paradigm to the relationship between EU law and general international law would raise a number of problems. It was argued[29] (and I share this point of view) that declaring general international law as being an 'integral part' of the EU legal system does not necessarily imply accepting a relationship of hierarchy between the two legal orders, where international law is set to prevail over EU law. In the same fashion, it is quite difficult to maintain that general international law would always enjoy direct applicability within EU law. In fact, while it welcomed international law as part of the EU legal system, the ECJ awarded it some sort of primacy over secondary sources of EU law, but not over primary sources.[30] As a consequence, when a rule of general international law may be valid under EU law, it still remains uncertain whether it would prevail over any conflicting rule of EU law, and such uncertainty has been further fostered by an interpretation of mentioned Article 216.2 TFEU, provided by the ECJ itself.[31] In terms of direct applicability, the same Court has long denied it in relation to the laws of the World Trade Organization (WTO)[32] – still undoubtedly valid within the EU legal order – and more recently in relation to the UN Convention on the Law of the Sea.[33]

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[29] Wessel (n 11), 13.
[30] See Case C-162/96 *Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR I-3655, para. 45.
[31] According to the Court, 'the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as possible, be interpreted in a manner that is consistent with those arguments'. Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, para. 52. At the time, the provision of current Article 216.2 TFEU was contained in Article 300.7 of the Treaty Establishing the European Community.
[32] Case C-377/02 *NV Firma Léon Van Parys v. Belgisch Interventie-en Restitutiebureau* [2005] ECR I-1465, para. 39, with ref. to Joined Cases 21 to 24/72 *International Fruit Company NV v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.
[33] Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport* [2008] ECR I-4057, para. 64.

A second problem arises from the possible overlap between the principle of primacy of EU law over Member States' laws (which is one of the fundamental principles, on which the functioning of the EU legal system is based) and the application of a monistic paradigm with regard to the relationship between EU law and general international law. It was argued[34] that the idea of considering general international law as an 'integral part' of the EU legal order would have necessarily granted general international law the same primacy that is granted to EU law, *vis-à-vis* the laws of Member States, irrespective of any divergent national traditions in this context. As a consequence, EU law would have been exploited as 'door opener' for general international law, to enter the legal orders of Member States. In sum, these main arguments show how applying a plain monist paradigm to the relationship between general international law and EU law would hardly be a simple and viable path. Eventually, a full-blown monist approach would, on the one side, conflict with the special nature of EU law as developed by the ECJ over the years[35] and, on the other hand, have distortionary effects on the relationship between the EU legal system and the laws of Member States, interfering with the individual approach of the latter towards general international law.

In contraposition to the monist paradigm, the dualist theory starts from the well-known position of Heinrich Triepel, according to whom the international legal order and municipal legal orders are like 'circles, which possibly touch, but never cross each other'.[36] Therefore, dualism considers international law and domestic

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[34] Franz C. Mayer, 'European Law as a Door Opener for Public International Law?', in *Droit International et Diversité des Cultures Juridiques – International Law and Diversity of Legal Cultures* (Pedone 2008) 241, 253; Wessel (n 11), 12.

[35] With particular regard to the position of international law in relation to primary EU law, discussed above, and the necessary prevalence of EU fundamental principles.

[36] Heirich Triepel, *Völkerrecht und Landesrecht* (Hirschfeld 1899), III, as translated by Lando Kirchmair, 'Who Has the Final Say? The Relationship between International, EU and National Law' (2018) Special Issue, European Journal of Legal Studies 47, 52.

legal systems as two separate 'entities', which are based on different grounds for validity, have different contents and are addressed at distinct categories of subjects. In particular, while national law is generally addressed to any natural or legal person within the relevant jurisdiction, international law is regarded as solely inter-state (*rectius* addressed at the international community of states, including international organisations and other subjects of international law), without having any direct effect or being direct applicable within domestic legal orders.[37] As a consequence, according to the dualist theory, it lies with national law to establish the conditions for recognising a certain norm of international law within a domestic legal system so that, ultimately, international law could be applied within national legal systems if and only if national laws so provide.

Looking for a moment at the relationship between EU law and the laws of Member States, the application of a dualist paradigm seems to be excluded: it is clear that a straightforward dualist approach would imply for EU law to be valid within the domestic legal systems of Member States under the conditions set forth by each national law;[38] in addition, EU law would only be addressed at Member States, thus excluding any direct effect for natural or legal persons actin within the legal orders of the same Member States. These consequences conflict with the idea of the EU legal system that the Court of Justice of the EU has been developing since its landmark judgments in *Van Gend & Loos* and *Costa*,[39] namely a system provided with autonomous grounds for validity that are

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[37] See Dionisio Anzilotti, *Cours de droit international* (Sirey 1929), 46.
[38] See, in general terms, Kirchmair (n 36), 54, with reference to the thesis elaborated by Joseph Gabriel Starke 'Monism and Dualism in the Theory of International Law' (1936) 17 Brit. Y.B. Int'l L. 66.
[39] Case C-26/62 *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1; Case C-6/64 *Flaminio Costa v. ENEL* [1964] ECR 585.

independent from national laws, the provisions of which system are to take precedence over the laws of Member States in case of conflict and can enjoy direct effect or being directly applicable within domestic legal systems, under the conditions set forth by EU law itself (not by Member States' laws). To this extent it was noted[40] that the position of the ECJ with regard to the relationship between EU law and the laws of Member States has coherently evolved over the years along the path of monism, in order to stress and preserve the concept of 'primacy of EU law'. By contrast, the position of the same Court has never been entirely monist (as it was briefly discussed above)[41] with regard looking at the relationship between international law and EU law, where it has introduced a number of distinctive features, showing drifts towards elements of the dualist paradigm.[42] As it was observed, the dualist path risk to stress the isolation of EU law from general international law, sacrificing any future opportunities for a fruitful cross-contamination.[43] Nonetheless, in more recent years, the ECJ was solicited to embrace a clear dualist position, in the sense that any interplay between international law and EU law should be regulated according to the latter,[44] which it adopted in *Kadi I*, focusing on the constitutional dimension of EU law. However, as this chapter will try to show hereafter, the adoption of a monist or a dualist

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[40] Lando Kirchmair, 'The 'Janus Face' of the Court of Justice of the European Union: A Theoretical Appraisal of the EU Legal Order's Relationship with International and Member State Law (2012) 4 Goettingen Journal of International Law 677, 680, 683, 685.

[41] The reference is to the approach of the ECJ to WTO law and to the UN Convention on the Law of the Sea, as cited in n 32 and n 33. In relation to this attitude of the Court of Justice See Jan W. van Rossem, 'Interaction between EU Law and International Law in the Light of *Intertanko* and *Kadi*: the Dilemma of Norms Binding the Member States but not the Community' (2009) 40 Netherlands Yearbook of International Law 183, 195.

[42] An evolution praised by Eeckhout (n 10) and criticised by de Bùrca (n 10).

[43] See de Witte (n 27) and Hoffmeister (n 28).

[44] According to Advocate General Poiares Maduro 'international law can permeate [the legal order of the EU] only under the conditions set by the constitutional principles [of the EU]'. Opinion of Advocate General Poiares Maduro in Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351, para. 21.

approach does not seem to solve the problems raised by the interaction between UN law and EU law in full, since differences between the two legal systems tend to be more nuanced.[45]

The sections that follow will retrace the path of the *Kadi I* case: section II will firstly analyse the monist approach of the General Court, which asserted the overwhelming primacy of UN law and led to a complete dismissal of the claimant's action. Section III will deal with the approach adopted by the Court of Justice, whose dualist solution of the case led the judgment of the General Court to be set aside and the disputed regulations to be annulled. Section IV will finally discuss the outcomes and consequences of these two opposite models, for the purpose of outlining their points of strength, but especially their weaknesses in the case at stake. This latter section will stress the need to develop an individual model to deal with the interactions and contrasts between the EU and the UN legal systems in the field of human rights. The analysis illustrated above carries with it a number of key theoretical questions, some of which were directly addressed by the courts, namely: does the EU have an obligation – either direct or indirect – to implement Security Council resolutions? If so, under what conditions is the EU entitled (or obliged) to implement UN law in place of its Member States? What limits does the ECJ jurisdiction encounter in reviewing EU

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[45] The works of Kirchmair (n 36), 60, 65, and Wessel (n 11), 22, 27, describe two further existing theories, beside monism and dualism, namely: global legal pluralism, which postulate the possible co-existence of more than a legal system within a certain jurisdiction, and global constitutionalism, that tends to address the relationship between different legal systems in terms of constitutional norms and principles. As pointed out by Kirchmair, both theories do not solve the problem. Global legal pluralism does not exclude, at the very end, conflicts between co-existent legal systems and the need for a set of rules aimed at resolving or preventing such conflicts. Global constitutionalism does not provide a solution for conflict arising between two legal systems that are, or claim to be, both constitutional or present constitutional-like features. In particular, it fails to determine which one – out of two 'constitutional systems' – is set to prevail. It was convincingly argued by Marcus Klamert that global legal pluralism ends up being nothing more than a nuanced evolution of dualism, which stresses the need to find area of cooperation and communication between different legal system. Marcus Klamert, *The Principle of Loyalty in EU law* (Oxford 2014), 227.

legislation, when it is passed to implement Security Council resolutions? What legal standard should the ECJ adopt to perform its review? What role should common 'constitutional traditions' of the EU Member States play within the ECJ review process and are such traditions outranked by Article 103 of the UN Charter? To these and some other questions, this chapter is aimed at providing an answer.

II. A MONIST APPROACH: KADI I AT THE GENERAL COURT

The first step of this analysis will consider the approach of the General Court (at the time of the case, officially known as Court of First Instance) to the interaction between the EU and UN legal systems in the field of human rights, and the answers it provided to the questions outlined above.

a. The Court's 'declaration of intent'

At the beginning of its judgment,[46] the Court pointed out that a prior assessment on the scope of its own jurisdiction should be regarded as a necessary precondition to 'rule on the pleas alleging breach of the applicant's fundamental rights', insofar as such breach could – 'if proved'[47] – lead to the annulment of the contested Regulations, as the applicant demanded. This preliminary statement on jurisdiction could be regarded as a 'declaration of intent' by the Court, of great importance for its whole reasoning, as it is accompanied by an unequivocal endorsement of the monist approach.[48] To this extent, the argumentative path of the Court can be divided into three steps. First, from a normative point of view,

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[46] Case T-315/01 *Yassin Abdullah Kadi v. Council and Commission* (*Kadi I*) [2005] ECR II-03649.
[47] Ibid, para 176.
[48] Patrick Daillier 'Contribution au débat entre monisme et dualisme de l'ordre juridique de l'Union européenne' (2009) Revue du marché commun et de l'Union européenne 394, 396.

the Court affirmed the prevalence of UN law over any other international obligations imposed onto Member States.[49] The Court did so by relying both on Article 103 of the UN Charter, and on its interpretation on a number of norms in the EU Treaties, and in particular Article 307 of the Treaty Establishing the European Community (EC), safeguarding international obligations undertaken by Member States pursuant to international law, prior of entering into the EU Treaties themselves. Secondly, the Court came to consider that, while it could not be affirmed that the EU is subject to UN law *per se*, Member States nonetheless imposed an indirect duty of compliance with UN law onto the EU, by means of the same EU Treaties.[50] In fact, according to the Court, as they transferred to the Union a number of powers, Member States implicitly made the EU bound to perform their obligations under the UN Charter, as long as their performance should be achieved by means of those transferred powers. Third, as long as EU institutions adopt measures in order to implement Security Council resolutions, they merely perform the Member States' obligations under the UN Charter (by virtue of the powers that the same Member States have transferred to the EU). The institutions have no discretionary power to determine the content of such measures.[51] Therefore, judicial review by the Court of Justice of the EU needs to be limited in scope to the sole compliance with the EU Treaties of the procedure followed by the EU to adopt the measures at stake. Hereafter, the arguments of the Court will be analysed in detail.[52]

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[49] *Kadi I* (n 46), paras 176-186.
[50] *Kadi I* (n 46), paras 192-204.
[51] *Kadi I* (n 46), paras 213-225.
[52] The position of the GCEU raised widespread criticism. Among others, Christina Eckes argues that the stance adopted by the GCEU in relation to the obligations of EU institutions under UN law and to the jurisdiction of the Court of Justice is contrary to the wording of the EU Treaties and to the ECJ previous case-law. Christina Eckes, 'Judicial review of European anti-terrorism measures – the *Yusuf* and *Kadi* Judgments of the Court of First Instance' (2008) 14 ELR 74. In relation to the 'self-restraint' approach adopted by the GCEU, Nikolaos Lavranos stresses the

From a normative standpoint, the position of the Court can be easily identified in the Court's words when it considered that 'the obligations imposed on the Community and its Member States by the Charter of the United Nations prevail over every other obligation of international, Community or domestic law'.[53] In line with its preliminary statement, the Court further specified its argument by stressing that 'from the standpoint of international law',[54] obligations imposed onto states by the UN Charter should always prevail over their commitments under different legal instruments, including the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) and the EU Treaties in particular.

According to the Court, Member States' national law should always yield to international obligations stemming from the UN Charter, by virtue of customary international law and the provisions set forth by Article 27 of the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT). In fact, Article 27 VCLT excludes conflict with domestic laws as a valid defence for a state's failure to comply with a treaty. Hence – in this sense – the whole set of national human rights guarantees, including constitutional ones, could possibly be 'set aside' (*rectius* derogated) by an incompatible obligation, deriving its authority from the Charter of the United Nations.[55]

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role that domestic courts should be playing in filling the gap opened by the GCEU, as regards a full judicial review of UN-derived legislation. Nikolaos Lavranos, 'Judicial review of UN Sanctions by the Court of First Instance' (2006) 11 European Foreign Affairs Review 471.

[53] *Kadi I* (n 46), para 177.

[54] *Kadi I* (n 46), para 181.

[55] *Kadi I* (n 46), para 182. The firm position of the GCEU is criticised by Piet Eeckhout, who considers the choice made by the GCEU as the worst possible option and calls for a more constitutionally oriented approach to the case. Piet Eeckhout, 'Community terrorism listings, fundamental rights, and UN Security Council resolution. In search of the right fit' (2007) 3 ECLR 183, 195, 197.

With regard to conventional international law, the Court explicitly made reference to Article 103 of the UN Charter and the case-law of the International Court of Justice (ICJ) to infer that even regional and multilateral treaties – such as the EU Treaties and the ECHR – are hierarchically subordinate to the Charter of the United Nations, whose provisions enjoy unconditional priority over these treaties in case of conflict, irrespective of them preceding or following the Charter in time.[56] Moreover, according to the established case-law of the ICJ, Article 103 of the UN Charter should apply not only to primary law, but also to UN secondary law, such as binding Security Council resolutions, whose authority and binding value is derived from the Charter itself. As a consequence, in the 'hierarchy of norms' considered by the Court, even Security Council resolutions could potentially outrank the EU Treaties (and the ECHR), regardless for the derivative nature of the obligations they entail.[57]

From a European perspective, the Court offered a strict interpretation of EU treaty norms, to conclude that even those provisions entailed a classical monist idea of the international legal order, where the European legal system made no exception at all. In the view of the Court, EU Treaties – and Article 307 EC[58] in particular – exclude that any international agreement entered into by Member States prior to their accession to the Community (now to the Union) can howsoever be repealed, derogated or affected by Member States' obligations under European law. Such an interpretation, according to the Court, would have been confirmed by the ECJ case-law on Article 307 EC, which always subjected Member States obligations under EU law to the full performance of their duties

[56] To this extent, the VCLT provides an express derogation to the usual rule of 'succession of laws' with regard to Article 103 of the UN Charter.
[57] *Kadi I* (n 46), para 183-184.
[58] Now Article 351 TFEU.

toward third states, under pre-existing international instruments.[59] Furthermore, in the view of the Court, Article 297 EC,[60] which prompts Member States to consult in order to 'prevent the functioning of the common market being affected by measures which a Member State may be called upon to take […] in order to carry out obligations it has accepted for the purpose of maintaining peace and international security, should apply to the duties vested into Member States by the Charter of the United Nations. Therefore, a joint interpretation of general international law (either customary or conventional) and the EU Treaties would imply for Member States a specific obligation to take action together, 'in that capacity'[61], to abide by Security Council resolutions, as long as they may interfere with the functioning of the common market.[62]

As a consequence, according to the Court, Member States bear a specific duty to disregard ('leave unapplied')[63] European law – be that a provision of the EU Treaties or a general principle of the EU legal system – to the extent that it may prevent their compliance with the UN Charter.[64] What is more, the Court's interpretation of Article 347 TFEU requires Member States to perform their obligations and duties under the Charter of the United Nations by means of common actions, given that they may affect the functioning of the common market.

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[59] *Kadi I* (n 46), para 187.
[60] Now Article 347 TFEU
[61] *Kadi I* (n 46), paras 188-189.
[62] In this respect, the reading of the GCEU seems to go beyond the very same words of the EU Treaties, as pointed out by Eckes (n 52). Partially *contra* Peter Hilpold, who considers the choice made by the GCEU as coherent with the Court's previous case-law. Peter Hilpold, 'EU Law and UN Law in Conflict: the *Kadi* Case', in Armin Von Bogdandy, Rudiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, (vol. 13, Brill 2009) 141, 169.
[63] *Kadi I* (n 46), para 190.
[64] The potential 'fragmentation' brought along by this stance of the GCEU is particularly criticised by Martin Nettesheim, who points out the risks of weakening the autonomy of the EU legal system *vis-à-vis* international law. Martin Nettesheim, 'U.N. Sanctions against individuals – a challenge to the architecture of European Union governance' (2007) 44 C.M.L.Rev. 567, 600.

It is worth noting, at this point, how the General Court strictly adhered to the monist model[65] and came to postulate not only the possibility for EU law of being derogated by conflicting UN law (according to the general hierarchy principle *lex superior derogat legi inferiori*), but also a positive duty placed upon Member States to completely disapply EU law, including general principles such as the protection of human rights and fundamental freedoms, in order to perform their obligations under the UN Charter. To this extent, following the reasoning of the Court, actions undertaken by Member States beyond and against EU law would not only be justified, but rather desirable, in the view of complying with obligations higher in rank. Moreover, while being adopted 'in contrast' with European law (even against EU core principles, such as human rights protection), these actions should nonetheless be concerted, to prevent the common market from being jeopardised.

b. *Effects of UN law on the EU*

Following its logical path, the Court subsequently proceeded to discuss two of the key questions outlined above: whether or not the EU itself, separately from its Member States, bears an obligation to comply with the UN Charter and to what extent, therefore, it should act in order to implement Security Council resolutions.

As a preliminary theoretical point, the Court plainly stated that the EU cannot be regarded to be bound by the Charter of the United Nations *per se*. To this extent, in the opinion of the Court, no obligation of general public international

[65] According to Koen Lenaerts, the GCEU approach should be defined as an 'internationalist' one, rather than a monist one, since the Court did not disregard existing differences between EU law and international law but argued in favour of an (indirect) obligation of EU institution to comply with UN law. Koen Lenaerts, 'The Kadi Saga and the Rule of Law within the EU' (2014) 67 SMU Law Review 708, 709.

law has ever required the EU to comply with Security Council resolutions. Nor can Article 103 of the UN Charter impose the EU to act in coherence with UN law. The reason for such non-application, in the words of the Court, lays in the EU not being a member of the UN, nor 'an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law'.[66] This is a particularly important step in the Court's line of argument, since it appears to suggest (in a seeming contradiction with the monist approach adopted by the Court) that no obligation can be imposed on the EU itself – by virtue of the UN Charter – given that the Union is a self-standing legal order, in a way *superiorem non recognoscens.* Such an unobjectionable logical premise, by contrast, led the court to affirm the contrary: while the Charter of the United Nations cannot exert any direct binding effect on the EU (following a 'top-down scheme'), the duties and obligations that stem from that Charter can however have effect within the EU legal system, since they are absolutely binding for Member States (hence, following a 'bottom-up scheme').[67]

The reasoning of the Court in this respect is of especial interest and can be divided into four steps. Firstly, as a matter of fact, at the time they established or entered into the European Community, Member States were already part of the UN and bound by the UN Charter (with the relevant exception of Germany). Secondly, by entering into a treaty between each other, establishing a new international organisation, they could not transfer to this organisation 'more powers than they possessed' (according to the well-established principle *nemo plus iuris ad alium transferre potest quam ipse habet*), nor free themselves from

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[66] *Kadi I* (n 46), para 192.
[67] Ibid, para 193.

prior obligations towards third parties.[68] As a consequence, in the opinion of the Court, since the Charter of the United Nations – and Article 103 in particular – limited UN member states sovereign powers within the scope of the Charter itself, any further transfer or delegation of such powers to newly established international bodies, should be affected by that very same limit. Thirdly, Member States voluntarily reaffirmed within the EU Treaties their obligations under the UN Charter by providing, in this regard, express safeguards and derogations to EU law, by means of the aforementioned Articles 347 and 351 TFEU. These derogations, according to the Court, imply a specific duty for EU institutions not to interfere with Member States performance of their obligations under the UN Charter.[69] Fourthly, insofar as Member States decided to transfer to the EU all (or some of) the powers required to comply with their duties within the UN legal system, they implicitly agreed to make the EU itself bound by UN law and required to comply with Security Council resolutions, taking action to implement them as appropriate.[70]

In brief, while it excluded the EU to be directly bound by the Charter of the United Nations in terms of public international law *stricto sensu*, someway refusing to admit the existence of an autonomous hierarchical relationship between UN and EU law, nonetheless the Court considered EU Treaties to be the source of an indirect bond,[71] that subjected the EU to the authority of UN law

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[68] Ibid, para 195 with expl. reference to Joined Cases C-21/72 to C-24/72 *International Fruit Company and Others v. Produktschap voor Groenten en Fruit* (*International Fruit*) [1972] ECR I-1219, para 11.
[69] Ibid, para 196-197.
[70] Ibid, para 198.
[71] To this extent, as it was briefly noted above, the Court appears to imply a particular relationship between Member States and the EU: while the Union is an international organisation, provided with its own legal personality and – in general terms – its self-standing legal system, still Member States cannot be regarded altogether as 'third parties' with respect to the EU. In particular, the powers that the EU autonomously exerts do exist insofar as Member States have transferred them to the Union in order to fulfil its functions. On the basis of this idea, the assumption that

by virtue of a self-imposed obligation (*rectius* an obligation placed on the EU by Member States).

This obligation, according to the Court, appears to be particularly relevant in the field of economic sanctions: in fact, Article 215 TFEU[72] specially provides the legal basis for the adoption of financial and economic restrictive measures, decided by Member States for political reasons within the Common Foreign and Security Policy (CFSP), as the same Court pointed out, 'most commonly pursuant to a resolution of the Security Council requiring the adoption of such sanctions'.[73] This is exactly the case – in the view of the Court – of the measures adopted by the EU to implement the Security Council resolutions that established the UN blacklists systems, with the purpose of striking down the flow of funds towards Usama Bin-Laden and the Al-Qaeda network around the world. In conclusion, as the General Court clearly spelled out, 'the applicant's arguments based on the view that the Community legal order is a legal order independent of the United Nations, governed by its own rules of law, must be rejected'.[74]

c. *Limits to the jurisdiction of the Court*

Affirming – as the Court did – that the EU carries an obligation to comply with and implement UN law, and Security Council resolutions in particular, bears fundamental consequences with regard to some of the other questions this research aims at addressing, namely: what limits does the jurisdiction of the Court of Justice of the EU encounter in reviewing EU legislation, when it is passed to

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seems to underlie the argument of the Court is that Member States somewhat reflected their own obligations (under the UN Charter) onto the EU, by means of the EU Treaties and indirectly subjected the Union to those very same obligations.

[72] Former Article 301 EC.

[73] *Kadi I* (n 46), para 202.

[74] Ibid, para 208.

implement Security Council resolutions? And what legal standard the same Court of Justice of the EU should adopt to perform its review?

Opening the argument with regard to its own jurisdiction, the Court firstly considered that, the EU being a legal order based on the rule of law, Member States established the Court of Justice, vested with the power to review compatibility of their own actions – as well as the actions of the institutions – with the 'constitutional charter' (the EU Treaties)[75]. In this respect, the Court regarded judicial review as a fundamental principle of EU law, which derives from the constitutional traditions common to Member States, as well as from the long-standing interpretation of the ECHR. In compliance with this fundamental principle, Article 263 TFEU[76] is such as to ensure every individual – directly affected by an act of EU institutions – to challenge its legitimacy before the GCEU (and the ECJ in second instance), both from a procedural and from a substantive point of view. However, according to the Court, judicial review may encounter structural limits, which can be set by general international law or by the same EU Treaties, depending on the different kind of power that was exerted by EU institutions to adopt each particular act.

In particular, as the Court pointed out, when they enact legislation in order to implement Security Council resolutions, EU institutions have their powers limited by the scope of UN law, whose substantial content they can neither question nor amend. As a consequence, should the Court review the 'internal lawfulness' of said legislation *vis-à-vis* the general principles of EU law, including

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[75] Ibid, para 209, with expl. reference to Case C-294/83 *Les Verts v Parliament* [1986] ECR I-1339, para 23; Case C-314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para 16; Case C-314/91 *Weber v Parliament* [1993] ECR I-1093, para 8; Joined Cases T-222/99, T-327/99 and T-329/99 *Martinez and Others v Parliament* [2001] ECR II- 2823, para 48.
[76] Former Article 230 EC.

protection of human rights and fundamental freedoms, its assessment would come to consider, *de facto*, compliance of Security Council resolutions with EU founding principles.[77] Hence, any action seeking annulment of EU regulations – adopted to implement Security Council resolutions – alleging violation of the claimant's fundamental rights protected by EU law, may lead 'the Court to declare by implication that the provision of international law at issue [i.e. the resolution] infringes the fundamental rights of individuals', protected by the EU Treaties within the EU legal order.[78] According to the Court, such an outcome is neither admissible nor desirable. Conversely, since the UN Charter imposes binding obligations onto the EU and its institutions (for all the reasons described above), these obligations represent a limit for European judiciary as well. In the opinion of the General Court, as a consequence, judicial review of EU regulations, implementing Security Council resolutions, should be limited in scope to the assessment of 'formal and procedural requirements' being respected by EU institutions – including reference to the proper legal basis – and to evaluate whether EU legislation at stake respected the principles of necessity and proportionality, in relation to the Security Council resolutions it was to implement. Any evaluation whatsoever as of the respect of human rights and fundamental freedoms by Security Council resolutions (implemented by means of EU legislation) falls outside of the Court's jurisdiction and would overtly clash with the EU Treaties and general international law that the Court is bound to enforce. Moreover, it would be devoid of practical implications since it could not, in any

[77] *Kadi I* (n 46), paras 213-215
[78] Ibid, para 216.

case, 'affect the validity of a Security Council measure or its effect in the territory' of the EU, as per the ECJ's well-established case-law.[79]

Having established a strict perimeter to circumscribe its jurisdiction on UN-derived EU regulations, the General Court nonetheless acknowledged that, whether a substantial and indirect evaluation of the legitimacy[80] of Security Council resolutions may take place at the European level, it should occur with sole regard to *jus cogens*: a hard core of peremptory international norms, 'from which no derogation is possible',[81] neither by UN institutions.[82] To this extent the General Court further observed that the UN Charter has always regarded the protection of fundamental human rights as a mandatory principle of international

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[79] Ibid, paras 224-225 with expl. reference to Case C-11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR I-1125, para 3; Case C-234/85 *Staatsanwaltschaft Freiburg v Keller* [1986] ECR I-2897, para 7, and Joined Cases C-97/87 to C-99/87 *Dow Chemical Ibèrica and Others v Commission* [1989] ECR I-3165, para 38.

[80] *Rectius* validity.

[81] *Kadi I* (n 46), para 226. Resort to *jus cogens* as a way to perform some kind of judicial review of UN-derived measures is praised by Hilpold (n 62), 169, 172.

[82] It is not for this research to deal extensively with the concept of *jus cogens*. On this concept see, *inter alia*, Christos L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (North Holland Publishing 1976); Marjorie M. Whiteman 'Jus Cogens in International Law, with a Project List' (1977) 7 Georgia Journal of International and Comparative Law 609; Antonio Gomez Robledo, 'Le *ius cogens* international; Sa genèse, sa nature, ses fonctions.' (1981) 172 Collected Courses of the Hague Academy of International Law 12; Mark W. Janis, 'Nature of Jus Cogens' (1988) 3 Connecticut Journal of International Law 359; Arthur Mark Weisburd, 'The Emptiness of the Concept of *Jus Cogens*, as Illustrated by the War in Bosnia-Herzegovina' (1995) 17 Michigan Journal of International Law 1; Michael Byers, 'Conceptualizing the relationship between jus cogens and erga omnes rules' (1997) 66 Nordic Journal of International Law 211; Robert Kolb, *Théorie du* ius cogens *international: essai de relecture du concept* (Presses Universitaires de France 2001); Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under the U.N. Charter' (2005) 2 Santa Clara Journal of International Law 72; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford 2006); Christian Tomuschat, Jean-Marc Thouvenin (eds) *The Fundamental Rules of the International Legal Order* (Martinus Nijhoff 2006); Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 EJIL 491; Ulf Linderfalk 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did Your Ever Think About the Consequences?' (2008) 18 EJIL 859; Evan J. Criddle, Evan Fox-Decent, 'A Fiduciary Theory of Jus Cogens' (2009) 34 Yale Journal of International Law 331; Ulf Linderfalk 'The Creation of *Jus Cogens* – Making Sense of Article 53 of the Vienna Convention' (2011) 71 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 359; Jochen A. Frowein, 'Jus Cogens' in Rudiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford 2013), available at http://www.mpepil.com; Enzo Cannizzaro (ed), *The Present and Future of Jus Cogens* (Sapienza Università Editrice 2015); Robert Kolb, *Peremptory International Law* – Jus Cogens*: A General Inventory* (Hart 2015); Thomas Weatherall, Jus Cogens: *International Law and Social Contract* (Cambridge 2015); Kennedy Gastorn 'Defining the Imprecise Contours of *Jus Cogens* in International Law' (2017) 16 Chinese Journal of International Law 643; Thomas Kleinlein '*Jus Cogens* Re-examined: Value Formalism in International Law' (2017) 28 EJIL 295.

law, pre-existent to the Charter itself. Such principle being at any effect an integral part of UN law, it certainly requires UN bodies not to infringe fundamental human rights while performing their duties under the Charter, insofar as protection of these rights falls within the scope of *jus cogens*. Should the Security Council adopt a resolution contrary to *jus cogens*, it would be considered null and void *ab origine* and would not enjoy any binding effect, neither for Member States nor for the EU.[83]

d. On the merits of the Kadi I case

As a consequence, the Court undertook the analysis of the contested regulations with the purpose of understanding whether or not those regulations and the Security Council resolutions they implemented violated the claimant's fundamental rights as protected by peremptory norms of general international law. In this regard, it has to be stressed that the legal reasoning of the General Court seems to be grounded on a (implicit but still) essential assumption that the fundamental human rights recalled by the preamble to the UN Charter, as an integral part of the general principles of UN law, are all and only those human rights that can be considered a part of *jus cogens* norms too. That is to say that general principles of UN law, which should in any case be respected by UN institutions, cannot be extended, by means of interpretation, beyond the scope of *jus cogens,* at least in the field of human rights.[84]

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[83] *Kadi I* (n 46), paras 226-230.

[84] Alexander Orakhelashvili argues in favour of the opinion expressed by the GCEU. Alexander Orakhelashvili, 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 Max Planck UNYB 143, 178. A completely different stance is the one taken – in broader terms – by Armin Von Bogdandy, who argues in favour of a full assessment of UN measures *vis-à-vis* 'constitutional' principles (such as human rights protection). Armin Von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' (2008) 6 I.CON 396, 412. The issue is closely linked to the human rights

On these grounds, the General Court addressed the analysis of the disputed regulation *vis-à-vis* the protection of human rights awarded by *jus cogens* and eventually considered the complaint filed by the applicant to be ill founded. In fact, being an *ensemble* of public international law norms, generally regarded and accepted as peremptory by the community of States, *jus cogens* entails a standard level of protection for human rights and fundamental freedoms, which is less comprehensive by far in comparison with internationally recognised best practices. In this sense, having established *jus cogens* as the standard of reference, the judgment of the General Court provided a brief and at times superficial assessment of the claimant's allegations, whose outcome is as obvious as it is unsatisfactory. As regards the alleged breach of the right to own property, the Court grounded its evaluation on Article 17 of the Universal Declaration of Human Rights (UDHR), adopted by the General Assembly of the United Nations in 1948, the second paragraph of which provides that '[n]o one shall be arbitrarily deprived of his property'. In the Court's view, the measures adopted by the UN Security Council and implemented by the disputed regulations, were not to be considered an arbitrary deprivation of property. On the one hand, they were not arbitrary, since they were adopted to pursue 'an objective of fundamental public interest for the international community'[85], such as the fight against international terrorism. Furthermore, they were especially targeted to a number of individual and entities, whose alleged links with Usama Bin-Laden or the Al-Qaeda network made it reasonable to adopt restrictive measures at the administrative level, to prevent them from providing financial

standards to be applied by the UN Security Council, which I briefly deal with in the Introduction to Chapter 3.

[85] *Kadi I* (n 46), para 247.

support to international terrorists. On the other hand, the freezing of one's assets was considered by the General Court to be a 'temporary precautionary measure', which did not entails – *per se* – a deprivation of property, but only a provisional prohibition on the use of assets, with the essence of the right remaining undisputed.[86] Moreover, Security Council resolutions (and in parallel the EU regulations that implemented them) provided for a number of relevant exceptions that competent national authorities may grant, to allow the individuals affected by freezing measures to make use of their properties and funds in order to assure them and their family the necessary material support for the needs of everyday life, including (upon authorisation of the Sanction Committee of the Security Council) extraordinary expenses that may occur. In this sense, the freezing measures were not such to submit targeted individuals and their families to 'inhuman or degrading treatment'.[87]

As regards the alleged violation of the applicant's right to be heard, the Court adopted a distinction between the right to be heard by EU institutions – the Council in particular – prior to adopting the disputed regulations, and the right to a fair hearing before the Sanctions Committee of the Security Council, in relation to the inclusion of the claimant within the list of person and entities whose assets were to be frozen. With respect to the EU, the General Court maintained that, while the right to be heard represents a general principle of EU law in all proceedings that may lead to the adoption of measures directly affecting an individual, nonetheless such a principle 'is correlated to the exercise of discretion by the authority which is the author of the act at issue'.[88] As a consequence, the

[86] Ibid, para 248.
[87] Ibid, paras 236-240.
[88] Ibid, para 257

right to a fair hearing should not *ab origine* be applied to EU regulations when they are adopted to implement Security Council resolutions, given that in those cases no authority to reconsider individual situations is granted to EU institutions, neither the hearing of concerned individuals may lead to a factual review of their position.[89] With regard to the UN, the Court considered the UN law at issue to be consistent with *jus cogens*, since it allowed concerned individuals to address their request for re-consideration to the Security Council, through the intermediary of competent national authorities. According to the Court, even if the review procedure provided by UN law did not award concerned individuals with a right to be heard in person by the Sanctions Committee (relying, by contrast, on the role of each national authority, entitled to receive applications for reconsideration by its own nationals), this restriction is nonetheless justified by the administrative nature of the measures at stake, where national authorities 'play an indispensable part'.[90]

Finally, taking into account the alleged breach of the applicant's right to effective judicial review, the General Court briefly reaffirmed the findings on its own jurisdiction: according to the Court, from a European point of view, the right to challenge the lawfulness of disputed regulations was – in fact – guaranteed to the applicant, since the same Court was able to assess the correctness of the procedure followed by EU institutions to adopt such regulations and their legal basis, besides their consistency and proportionality, having regard to the Security Council resolutions they were to implement. From a UN law point of view, in turn, the General Court considered the absence of any available judicial protection *per se* not to be contrary to *jus cogens*. The Court further observed that the right of

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[89] Ibid, paras 258-260.
[90] Ibid, paras 264-268.

access to the courts – provided by Article 8 UDHR – should not be considered as absolute in nature.

In fact, this right encounters major limitations both in the case of a 'public emergency which threatens the life of the nation',[91] and with regard to the 'doctrine of State immunity'[92] (itself a norm of *jus cogens*) that excludes liability of UN member states in domestic courts, for those measures adopted pursuant to Security Council resolutions. Moreover, in the opinion of the General Court, the 'absence of an international court having jurisdiction to ascertain whether acts of the Security Council are lawful' did not prevent the fundamental right of concerned individuals, as guaranteed by *jus cogens*, to be adequately protected by means of the administrative review procedure described above.[93]

The General Court's assessment of the merits of the case clearly reflect the rigorous monist approach of the judges and the great institutional deference paid to the UN legal system at large. On the one side, the Court reaffirmed the primacy of UN law, which leaves EU institutions no discretion when they are called upon to implement Security Council resolutions. On the other side, the Court stressed the need for ECJ jurisdiction to be strictly limited to the external lawfulness of disputed legislation under EU Treaties and the respect of *jus cogens* norms.[94] To this extent, the appropriateness and the legality of the resolutions adopted by the Security Council could not be called into question within the EU legal system, neither by EU political institutions, nor by the ECJ, being the 'question whether an individual or organisation poses a threat to international peace and security'

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[91] Ibid, para 287.
[92] Id.
[93] Ibid, para 290.
[94] cf. Robert Kolb, 'Le contrôle de Résolutions contraignantes du Conseil sécurité des Nations Unies sous l'angle du respect du jus cogens' (2008) 18 SRIEL 401, 404; Orakhelashvili (n 84), 178.

and the choice on the measures to take in order to confront that threat, the sole province of the Security Council of the United Nations, pursuant to the mandate conferred on it by the UN Charter.[95]

III. A DUALIST APPROACH: *KADI I* AT THE COURT OF JUSTICE

Following the path of the judicial case, this section will be dedicated to the analysis of the different approach adopted by the ECJ[96] with regard to the problem of regime interaction between the UN and EU legal systems in the field of human rights. The aim of this section, in particular, is understanding the arguments that led the judges at second instance to embrace a dualist model,[97] setting aside the judgment of the General Court.[98]

a. The autonomy of the EU legal order under its 'constitutional' Treaties

First of all, the reasoning of the ECJ focused on the matter of jurisdiction, which the General Court had limited to the sole review of the external lawfulness of EU

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[95] *Kadi I* (n 46), para 284.

[96] Joined Cases C-402/05 P and C-415/05 P *Jassin Abdullah Kadi v. Council and Commission* (*Kadi I*, Appeals) [2008] ECR I-06351. For a brief case-note see Angus Johnston, 'Frozen in time? The ECJ finally rules on the Kadi appeal' (2009) 68 The Cambridge Law Journal 1, and Jean-Paul Jaqué, 'Primauté du droit international versus protection des droits fondamentaux' (2009) 45 Revue trimestrelle de droit europeén 161.

[97] In the idea of Lenaerts (n 65), 709, 712, it would be better to talk about a constitutional approach, rather than a dualist approach. This author, in particular, stresses the fact that the ECJ resorted to legal categories that are typical of constitutional courts. This idea seems coherent with the concept of 'legal pluralism', invoked by Von Bogdandy (n 84), 412. Indeed, as noted by Klamert (n 45), the constitutional approach of the ECJ implies a clear claim of final authority. In my view, this claim is coherent with a dualist approach, which tends to affirm that the conditions for a provision of international law to be recognised and applied within the EU legal system must be determined under EU law.

[98] On the importance of this position for the 'constitutionalisation' of the EU legal system, see Takis Tridimas, Jose A. Gutierrez-Fons, 'EU Law, International Law and Economic Sanctions Against Terrorism: the Judiciary in Distress?' in (2009) 32 Fordham Int'l L.J. 660, 729. More generally, on the very same position, see Conor Gearty, 'In praise of awkwardness: Kadi in the CJEU' (2014) 10 ECLR 15. Giuseppe Martinico points out that the constitutional evolution of the ECJ language was, in fact, gradual starting from the Court's judgment in *Le Verts* (Case C-294/83 *Parti écologiste 'Les Verts' v. European Parliament* [1986] ECR 1339). Giuseppe Martinico 'The Federal Language and the European Integration Process: The European Communities viewed from the US' (2016) 3 Politique européenne 38, 39, 40.

legislation and the respect of *jus cogens* norms. In this respect, the ECJ immediately made clear its different point of view, reaffirming its 'universal' jurisdiction to perform a full review of the acts adopted by European institutions and Member States, on the basis of EU 'constitutional' Treaties.[99] According to the ECJ, the EU being based on the rule of law, it provided for an autonomous system of judicial remedies, which conferred upon the Court itself a full mandate to enforce its constitutional charter, ensuring the primacy of the same rule of law and the 'closure' of the EU legal system.[100] To this extent, in the view of the Court, no international agreement (such as the UN Charter) can interfere with the 'allocation of powers fixed by the Treaties' or curtail the jurisdiction of the ECJ, provided by Article 5 TFEU, which is a crucial part of the constitutional structure of the Union. What is more, in the opinion of the ECJ, its exclusive jurisdiction is such to safeguard the autonomy of the European legal system that should under no circumstance be put into question.[101]

Following this paradigm, when the ECJ is called to perform a judicial review of European regulations adopted to implement Security Council resolutions pursuant to Chapter VII of the UN Charter, it should not address the lawfulness of such resolutions, neither in relation to peremptory norms of public international law, but rather assess the complete consistency of the regulations at issue with the EU 'constitutional' Treaties. According to the Court, should the European judiciary consider that EU legislation adopted to implement Security

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[99] According to Erika de Wet, the clear stance of the ECJ on the fundamental principles of EU law provides an evidence of constitutionalisation of the EU legal system, pivoted on the role of the Court of Justice as a *lato sensu* constitutional court. Erika de Wet, 'The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalisation?' (2009) 5 EUConst 284, 305. *Contra*, and in favour of the 'fictious' nature of the constitutional language as used by the ECJ, Paola Mariani, *Lasciare l'unione europea. Riflessioni giuridiche sul recesso nei giorni di Brexit* (Egea 2018), 45.

[100] *Kadi I,* Appeals (n 96), paras 278-281.

[101] *Kadi I,* Appeals (n 96), para 282.

Council resolutions is contrary to a higher norm in the EU legal order, it 'would not entail any challenge to the primacy of that resolution in international law'.[102]

By means of this opening argument, the ECJ overtly declared its endorsement for the dualist model, which considers the EU legal system as an autonomous and separate order from the UN legal system and international law in general.[103] In so doing, the ECJ marked a clear contrast with the General Court, whose entire judgment was rooted in the unconditional adherence to the monist theory. Furthermore, the Court directly addressed another of the fundamental questions this chapter is aimed at answering, namely: what role should common 'constitutional traditions' of EU Member States play within the ECJ review process and are such traditions outranked by Article 103 of the UN Charter?

Indeed, the key element that led the ECJ to disavow the opinion of the General Court must be found in the profound difference between the two Courts as to the theoretical framing of the EU legal order. While the General Court clearly considers the EU legal order to be a subset of general international law, much akin to other treaty-established international organisations and substantially part of the hierarchy of norms which is characteristic of that area of law, the ECJ identified the EU legal system as a constitutional order and grounded its reasoning on the theoretical categories that are typical of constitutional law. Not only did the ECJ refer to the EU Treaties as a 'constitutional charter',[104] but also

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[102] Ibid, para 288.
[103] In this regard, Katja S. Ziegler underlines the risk of fragmentation that such a 'radical' position of the ECJ represents for international law. Katja S. Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the CJEU from the Perspective of Human Rights' (2009) 9 HRLR 288, 300. This view is at least partially shared by Gráinne de Búrca (n 10), 44, who stresses the risk of undermining the credibility of the EU as a reliable international actor.
[104] *Kadi I,* Appeals (n 96), para 281.

recalled the 'constitutional traditions common to the Member States'[105] and the rules set forth by the ECHR as the fundamental principles to be followed by the European judiciary when assessing the lawfulness of EU legislation. To this extent, following the path of many European constitutional courts,[106] the ECJ identified a set of 'hard-core' constitutional norms at the basis of the EU legal order, which should admit no derogation by virtue of international agreements whatsoever (neither by the Charter of the United Nations). In fact, in the opinion of the ECJ, respect for fundamental rights (as they stem from the constitutions of Member States and the ECHR) represents a condition of constitutional lawfulness for any act of EU institutions, regardless of it being adopted to comply with obligations imposed onto Member States by the UN Charter.[107]

Notwithstanding these findings, the ECJ considered that – according to its earlier case-law – the EU in fact has an obligation to act consistently with international law while exercising its powers. In particular, special attention should be paid to the fact that Article 24 of the UN Charter identifies the Security Council as the primary responsible organ for the maintenance of international peace and security at the global level and such responsibility 'includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them'.[108] While Article 215 TFEU in fact provides a legal basis for the adoption of European regulations

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[105] Ibid, para 283.
[106] For further comments on the role played by the ECJ as the 'constitutional court' of the EU, with particular regard to common constitutional traditions, see Giuseppe Franco Ferrari, 'Kadi: verso una Corte di giustizia costituzionale?' (2009) 1 DPCE 187; Oreste Pollicino, Vincenzo Sciarabba, 'Lotta al terrorismo, diritti e principi fondamentali, rapporti tra ordinamenti: un importante capitolo della giurisprudenza 'costituzionale' europea' (2009) I DPCE 159. A different flavour on the costitutional approach of the ECJ is provided by Giacinto della Cananea, 'Administrative Due Process in Liberal Democracies: a Post-9/11 World' (2011) 3 Italian Journal of Public Law 195. 216.
[107] *Kadi I*, Appeals (n 96), paras 283-285.
[108] Ibid, para 294.

implementing Security Council resolutions – pursuant to Chapter VII of the UN Charter – procedures for implementation should always be coherent with the legal order in which they take place as, in the case at stake, that of the European Union. Since the UN Charter does not provide for a specific model in order to give effect to Security Council resolutions in the 'recipient' legal systems, one could not infer that judicial review addressing the internal lawfulness of the EU regulations in question is such as to jeopardise the principles presiding over the international legal order, including the primacy of UN law.[109]

According to the Court, within the EU 'constitutional' order, immunity from jurisdiction granted to acts adopted by UN bodies (i.e. Security Council resolutions), as a consequence of the principle of primacy 'at the level of international law' provided by Article 103 of the UN Charter, does not extend to EU regulations adopted to comply with such act of the United Nations.[110] Even if Article 351 TFEU[111] prevents any international agreement entered into by Member States prior to their accession to the EU from being affected by Member States' obligations under European law, it does not – under any circumstance – allow any derogation from the fundamental principles of the EU, such as 'liberty, democracy and respect for human rights', derived from national constitutions and the ECHR.[112] Neither does Article 347 TFEU, which safeguards international obligations imposed onto Member States to protect international peace and security. In the opinion of the Court, consequently, the primacy of prior

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[109] Ibid, paras 294-299.
[110] Ibid, para 300. Enzo Cannizzaro criticises the insulation of EU law that may derive from this stance of the Court, theorising the chance to review UN Security Council Resolutions *incidenter*, on the basis of international law. Enzo Cannizzaro 'Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the *Kadi* Case' (2009) 28 Yearbook of European Law 593, 599, 599.
[111] Former Article 307 EC.
[112] *Kadi I*, Appeals (n 96), para 303.

international agreements would only apply to secondary EU law, but not to primary law and in particular 'to the principles that form part of the very foundation of the [EU] legal order' that includes the necessary protection of fundamental human rights and a full judicial review of EU measures, *vis-à-vis* those rights. Within the EU legal order (similarly to what happens with domestic legal systems), basic constitutional principles could never be outranked by the obligation to implement Security Council resolutions, notwithstanding the 'alleged' absolute primacy of these resolutions under Article 103 of the UN Charter.[113]

To support its argument with a comparative perspective, the ECJ made reference to the case-law of the European Court of Human Rights. In particular, as the ECJ pointed out, the Court of Strasbourg has always denied its jurisdiction *ratione personae*, in those case involving measures directly attributable to the United Nations as an international organisation other than the Council of Europe, that enjoys full immunity within the international legal order.[114] Conversely, the European Court of Human Rights unequivocally claimed its jurisdiction over those measures that – although enacted to implement Security Council resolutions under Chapter VII of the UN Charter – were adopted by national authorities of a state member of the Council of Europe and where therefore referable to that

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[113] *Kadi I*, Appeals (n 96), paras 304-309.

[114] See *Behrami v France and Saramati v France, Germany and Norway* (2007) 45 EHRR 85. The merits and the reasoning lying behind the judgment of the European Court of Human Rights are explained in Stephanie Farrior, 'Introductory Note to *Behrami and Behrami v. France* and *Sarmati v. Germany & Norway* European Court of Human Rights Grand Chamber' (2007) 46 ILM 743; Pierre Bodeau-Livinec, Gionata P. Buzzini, Santiago Villalpando, 'Agim Behrami & Bekir Behrami v. France; Ruzhdi Saramati v. France, Germany & Norway. Joined App. Nos. 71412/01 & 78166/01' (2008) 102 AJIL 323. For a critical reading of the stance adopted by the European Court of Human Rights see Bernard Knoll, 'Rights Without Remedies: The European Court's Failure to Close the Human Rights Gap in Kosovo' (2008) 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 431; Marko Milanovic, Tatjana Papic, 'As Bad as it Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law' (2009) 58 International and Comparative Law Quarterly 1.

state.[115] While the judicial review performed by the ECJ should under no circumstance address the lawfulness of Security Council resolutions as such, this is without prejudice for the duty to ensure the full compliance of EU regulations with the constitutional principles enshrined in the EU Treaties, as an autonomous legal system.[116]

b. The Court as master of its own jurisdiction

To conclude its reasoning as regards jurisdiction, the ECJ considered whether the administrative review procedure established by the Security Council resolution at issue could itself be the ground for affirming a 'generalised immunity from jurisdiction', to be granted to EU measures implementing these resolutions.[117] Indeed, after the judgment of the General Court in *Kadi I*, few amendments were made to the review procedure, to allow individuals or entities, whose assets were frozen, to directly address the Sanctions Committee of the Security Council, seeking reassessment of their position. In this respect, the ECJ maintained that the administrative review procedure provided by UN law (as amended after the judgment of the General Court) was not such as to offer the same guarantees as the judicial review performed by the Court, within the EU legal order. The ECJ further stressed how the administrative procedure was 'still in essence diplomatic and intergovernmental',[118] governed by the unanimity rule, with neither a factual chance for those seeking review to present their position and assert their rights before the Committee, nor any obligation to make them

[115] The ECJ compared the case-law of the European Court of Human Rights in *Behrami* (n 114) and *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1.
[116] *Kadi I*, Appeals (n 96).
[117] *Kadi I*, Appeals (n 96), para 321.
[118] Ibid, para 323.

known the reason for their assets to be frozen.[119] These being the safeguards provided by UN law, according to the ECJ, the European judiciary could not refrain from exerting a full judicial review of EU regulations, as provided by the EU Treaties.[120]

With this latter brief argument, the ECJ seemed to evoke the well-known *Solange II* case-law of the German Constitutional Court,[121] to apply the principles outlined therein to the relationship between the UN and EU legal systems.[122] In particular, the reasoning of the ECJ implied its own power to decide whether to exert a full judicial review and ultimately whether to assert or deny its jurisdiction, on the basis of the level of protection for fundamental human rights, afforded within a legal system other than the EU, whose norms European measures were called to implement.[123] As a consequence, in the opinion of the Court, the ECJ could refrain from reviewing the lawfulness of EU legislation, adopted to comply with obligations provided by the UN Charter, insofar as the UN legal system provided a level of protection for fundamental human rights, which the ECJ itself considered equivalent to the one afforded by the EU legal system. In any other

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[119] According to Giacinto della Cananea, the judgment of the ECJ had the positive effect to stress the importance of procedural guarantees in order for the UN sanctions system to be legitimate. Giacinto della Cananea, 'Global Security and Procedural Due Process of Law Between the United Nations and the European Union' (2009) 15 Columbia Journal of European Law 511, 527. A view shared by Juliane Kokott and Cristoph Sobotta, who praise ECJ's efforts in leaving the door open to procedural improvements within the UN system. Juliane Kokott, Cristoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' (2012) 23 EJIL 1015, 1019. Vanessa Arslanian takes a further step, stressing the importance of establishing a form of independent judicial review for UN sanctions. Vanessa Arslanian, 'Great Accountability Should Accompany Great Power: The ECJ and the U.N. Security Council in *Kadi I & II*' (2013) 35 B.C. Int'l & Comp. L. Rev. 1, 13.

[120] *Kadi I*, Appeals (n 96), paras 324-326.

[121] Judgment of 22 October 1986. 73 BVerfGE 339.

[122] See also, Francisco Javier Mena Parras, 'Retour sur Kadi: de la nécessité d'une jurisprudence de type Solange I dans les rapports entre le droit de l'Union européenne et le droit des Nations Unies' (2010) 5-6 Cahiers de droit européen 683.

[123] This kind of 'constitutional' approach by the ECJ, which enables the Court to decide on the scope of its own jurisdiction, is welcomed by André Nollkaemper as a proper tool to deal with the lack of judicial review at the international level. André Nollkaemper, 'The Rapprochement Between the Supremacy of International Law at International and National Levels' (2008) 2 Select Proceedings of the European Society of International Law 239, 240.

case, it would be for European judges to fully assess the compatibility of EU measures with the EU constitutional Treaties, irrespective of them being adopted to implement Security Council resolutions.[124]

Hence, while on the one hand the ECJ asserted its universal jurisdiction over any source of secondary EU law, to assess its constitutional lawfulness *vis-à-vis* the EU Treaties, on the other hand it admitted its power to decline such jurisdiction, should the EU legislation at stake be derived from UN measures, and the Court consider the UN legal system to provide an adequate level of protection for fundamental human rights. This apparent contradiction (which will be further analysed in section IV hereinafter), made the ECJ the ultimate 'master' of its own jurisdiction, the broadness of which could be substantially varied, upon the Court's consideration, on a case-by-case basis.[125]

IV. A DIFFERENT APPROACH TO THE UN AND EU LEGAL SYSTEMS INTERACTION

Having carefully analysed the sometimes diametrically opposite answers provided by the General Court and the ECJ to some of the key questions that have been outlined since the introduction of this chapter, it is now time to consider whether these answers were convincing or, by contrast, whether a different approach seems preferable to reach a comprehensive settlement of the interaction between the UN and EU legal systems in the delicate field of human rights. To do so, the findings of both Courts will be critically evaluated, in order to understand their points of strength and, in turn, their possible weaknesses.

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[124] *Kadi I*, Appeals (n 96), para 324.
[125] An overview of the case-law that followed *Kadi I Appeals* is provided by Takis Tridimas, who maintains that the judgment of the ECJ did not say the final word on the problem of legal systems interaction between UN and EU law. Takis Tridimas, 'Economic Sanctions, Procedural Rights and Judicial Scrutiny: Post-Kadi Developments' in Catherine Barnard, Okeoghene Odudu (eds), *Cambridge Yearbook of European Legal Studies 2009-2010* (vol. 12, Hart 2010), 455, 489.

a. On the effects of UN law for the EU

Once again, the path towards a possible solution to the proposed 'academic dilemma' starts with two (by now) well-known questions, namely: does the EU have an obligation – either direct or indirect – to implement Security Council resolutions? If so, under what conditions is the EU entitled (or obliged) to implement UN law, in place of its Member States? More generally, any analysis of the interaction between the UN and the EU legal systems cannot boast a solid foundation without having offered an answer to a somehow simpler question: is the EU under any obligation (either direct or indirect) to comply with UN law?

It should firstly be observed that, as the General Court correctly stressed in *Kadi I*, the EU – as an international organisation with its own legal personality – cannot be deemed as being directly bound by the duties and obligations stemming from the UN Charter, separately from its Member States. Indeed, since the EU is neither a member of the United Nations, nor it is 'an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States' [126] under UN law, no obligation of general (public) international law could possibly require the EU to comply with or implement Security Council resolutions, nor Article 103 of the UN Charter (which refers to the obligations of the 'Members of the United Nations') can be considered as directly applicable to the EU itself. However, maintaining (as I do assume) that the UN Charter cannot (and does not) impose any obligation onto the EU *per se*, should not lead the interpreter to affirm its complete irrelevance from the point of view of EU law, as I will try to explain hereafter.

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[126] *Kadi I* (n 46), para 192.

As the General Court further observed, on the one hand, pursuant to Article 103 of the UN Charter, obligations imposed onto Member States by the same Charter should normally be regarded as prevailing over any other commitments under different instruments of international law, such as the EU Treaties and the ECHR. In this regard, Article 103 UNC (expressly safeguarded by the first paragraph of Article 30 VCLT) seemingly provide for UN primary and secondary law, including Security Council resolutions adopted under Chapter VII of the UN Charter, to take precedence over any other regional or multilateral treaties, whose obligations should yield to UN law, in case antinomies occur.

On the other hand, from the point of view of European law, Member States felt the necessity to introduce, within the EU Treaties, a set of specific clauses, to regulate in advance the relationship between their obligations under EU law and any previous obligation under general international law. In particular, the first paragraph of Article 351 TFEU was set to explicitly safeguard any international agreement entered into by Member States prior to their accession to the Community (as is the case of the UN Charter) from being repealed, derogated or anyhow prejudiced by their obligations under European law. In addition, Article 347 TFEU provides for Member States a specific duty to '*consult*', in order to 'carry out obligations' they have 'accepted for the purpose of maintaining peace and international security', without prejudice for the functioning of the common market.

Do such normative arguments, as the General Court finally held, entail an obligation for Member States to disregard European law, as far as it may interfere with their duties under UN law? And, what is more, should Member States take all the necessary steps to abide by their obligations under the UN Charter by means of common initiatives, in their capacity as members of the EU? Providing

an answer to these two (seemingly related) questions is not as straightforward as it may appear.

First of all (to follow the argumentative path of the Court) it is certainly true that, by the time they entered into the Treaties that established the European Community (a regional organisation of states, with its own legal personality of international law) or became part of such Treaties, by means of accession, most of EU Member States were already bound by the Charter of the United Nations. To this extent, since not every member state of the United Nations is at the same time a member state of the European Union, by entering into the EU Treaties, EU Member States could not consider to free themselves from prior obligation they undertook towards third states (i.e. the other members of the UN). Such a conclusion can be generally upheld regardless of Article 103 of the UN Charter, establishing the primacy of said Charter over other international agreements. In fact, codifying the general principle *pacta sunt servanda*, paragraph 4 of Article 30 VCLT provided that 'When the parties to the later treaty do not include all the parties to the earlier one […] as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations'. Therefore, if one were to apply the law of treaties, as relationships between EU Member States and other member states of the UN come into question, the UN Charter should certainly take precedence over the EU Treaties.[127]

Secondly, again without making reference to Article 103 of the UN Charter, the very same conclusion may be reached on the basis of the first paragraph of

[127] Indeed, also the UN itself could insist on the performance of any duties it is owed by EU Member States under the UN Charter, since from the UN point of view the EU Treaties could legitimately be regarded as *pacta tertiis*.

Article 351 TFEU, as interpreted by the ECJ over the years. In providing that '[the] rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties', Member States showed the undeniable intention to resolve *a priori* any conflict between their obligations under the EU Treaties and any prior commitment towards third states (as in the case of the UN Charter), in favour of the latter. In general terms, the first paragraph of Article 351 TFEU represents a paradigmatic example of 'conflict avoidance clause', in the sense of paragraph 2 of Article 30 VCLT, according to which '[when] a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'. As a consequence, when it comes to decide whether Member States' obligations under the UN Charter should prevail over their obligations under the EU Treaties in case of a conflict, a first answer can be drawn from the EU Treaties themselves and be an affirmative one. It follows from Article 351 TFEU that Member States performance of their obligations under the UN Charter cannot – in any case – entail a violation of EU law and European institutions bear a duty not to interfere with such performance.[128]

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[128] The principle of 'non-interference' was developed by the ECJ on the basis of Article 351 TFEU. It postulates that, since Member States have drafted Article 351 TFEU in order to ensure prior international obligations not being set aside by the EU Treaties, they also have imposed an obligation onto EU institutions (including the Court of Justice) not to impede their legitimate performance (see, *inter al.* Court of Justice, Case C-812/79, *Attorney General v. Burgoa*, [1980] ECR I-2787, para 9). In this regard, see also Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States, (2011) 34 Fordham International Law Journal 1304, 1321; Pietro Manzini 'The Priority of Pre-existing Treaties of EC Member States within the Framework of International Law' (2001) 12 EJIL 781. While the ECJ, over the years, has progressively stressed the importance of eliminating the incompatibilities between previous international agreements and the EU Treaties (pursuant to the second paragraph of Article 351 TFEU), still this principle is of the utmost importance in case paragraph 1 of Article 351 TFEU does apply.

According to the ECJ, '[t]he purpose of [Article 351.1 TFEU] is to lay down, in accordance with the principles of international law, that the application of the Treaty does not affect the duty of the member state concerned to respect the right of non-member countries under a prior agreement and to perform its obligations thereunder'.[129] In other words, as stressed by Advocate General Kokott in *Air Transport Association of America*,[130] 'membership of the European Union does not impose an obligation on Member States to act, *vis-à-vis* third countries, in breach of international agreements previously entered into'. Moreover, following the case-law of the ECJ, Article 351.1 TFEU can allow derogation from primary EU law[131] and 'implicitly permits obstacles to the operation of the common market when they are caused by measures taken by a Member State to carry out the international obligations'.[132]

Article 351.2 TFEU, which provides that '[t]o the extent that such [prior] agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established' and further specifies that 'Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude', does not limit the full force and application of Article 351.1 as explained above. However, it obliges Member States to guarantee, to the widest possible extent, that their international treaties comply with EU law. This obligation, as explained by the ECJ, is governed by the principle of proportionality and does not

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[129] Court of Justice, Case C-812/79, *Attorney General v. Burgoa*, [1980] ECR I-2787, para 8, but also Case C-324/93, *Evans Medical and Macfarlan Smith*, [1995] ECR I-563, para. 27; Case 10/61, *Commission v. Italy* [1962] ECR 1; Case C-158/91, *Levy* [1993] ECR I-4287; Case C-124/95, *Centro-Com* [1997] ECR p. I-81, para. 57.
[130] Opinion of Advocate General Kokott in Case C-366/10, *Air Transport Association of America and Others*, [2011] ECR I-3765, para. 56.
[131] Case C-124/95, *Centro-Com* (n 129), paras. 56-61.
[132] *Kadi I Appeals* (n 96), para 302.

curtail the right of Member States to perform their obligations under international law (as protected by Article 351.1 TFEU),[133] but impose an active duty on the same Member State, to take all possible steps (also at the diplomatic level, if appropriate) in order to remove conflicts between EU law and the treaties at stake,[134] irrespective of any political difficulties,[135] and safeguard the entirety of the EU legal system. As a consequence, derogation to EU Treaties cannot reasonably be unlimited in time and Member States are duty bound to provide each other any possible assistance – including diplomatic support in any international *fora* – to overcome the need for such derogation. It must be clear, however, that Article 351.2 TFEU does not and cannot impose any obligation on Member State to achieve a specific result within a given lapse of time (i.e. does not represent any 'sunset clause' for Article 351.1 TFEU), but only to promptly take any proportional and legally available step to restore their full compliance with EU law.

Lastly, in the particular case of Germany, which was admitted as a member of the UN only in 1973, more than a decade after the establishment of the European Community, conflicts between the UN Charter and the EU Treaties can be solved by resorting to general public international law. In fact, by the time Germany undertook to abide by the Charter of the United Nations, all members of the European Community were also long-time members of the UN. According to paragraph 3 of Article 30 VCLT, '[when] all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59 [VCLT], the earlier treaty applies only to the extent

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[133] Case C-84/98, *Commission v. Portugal* [2000] ECR I-5215, paras. 37-59.
[134] Case C-84/98, *Commission v. Portugal* (n 133), para. 38.
[135] Case C-84/98, *Commission v. Portugal* (n 133), para. 48; Case C-170/98, *Commission v. Belgium* [2002] ECR I-9681, paras. 37-42.

that its provisions are compatible with those of the latter treaty'. Plainly, as the treaty that marked the admission of Germany to the United Nations came into force in 1973 and the UN Charter has started to apply to Germany since that same date, as regards the German case the UN Charter should be considered as *lex posterior* with respect to the EU Treaties and, to this extent, it should take precedence in case a conflict occurs.

b. A normative approach

In this context, as I showed above, a reasoning based on general rules of international public law can lead to legal consequences that seem altogether consistent with Article 103 of the UN Charter and ensure the primacy of the obligations imposed onto EU Member States by the Charter itself, against their commitments pursuant to the EU Treaties. Therefore, either by making reference to the special primacy clause provided by Article 103 of the UN Charter, or by simply resorting to general rules of international public law (and Article 30 VCLT in particular), a duty of EU Member States should be maintained, to leave European law unapplied, as far as it may interfere with their obligations under UN law. However, contrary to the opinion of the General Court, said conclusion, does not necessarily imply a further duty for EU Member States to abide by their obligations under the UN Charter by means of joint measures, in their capacity as members of the EU. By contrast, this assumption can be founded neither on Article 103 of the UN Charter, nor on Article 351 TFEU and the other norms of the EU Treaties, which directly or indirectly make reference to UN law.

In this regard, the reasoning of the General Court, which clearly upheld the latter duty as one necessarily derived from the primacy of UN law over the EU Treaties in case of conflict (both from the standpoint of general international public law, and from a strictly European perspective), does not seem to entirely

grasp the complexity of the problem. First and foremost, the argument according to which Article 103 of the UN Charter entails *stricto sensu* a limitation of sovereignty for Member States, whose powers to enter into new treaties should be 'physically' limited by the powers granted to the UN and its bodies (following the principle *nemo plus iuris ad alium transferre potest quam ipse habet*) seems questionable. Indeed, even if its effect can be, *de facto*, that of compelling states not accept international obligations that appears to be conflicting with the UN Charter (or to repeal those conflicting obligations they may have previously accepted), Article 103 of the UN Charter does not 'dare' [136] to limit the international legal capacity of states *per se*. By contrast, it is set to establish that any conflict, which may arise between their obligations under the UN Charter and their duties under any other instruments of conventional international law, should be solved ensuring precedence to the former, irrespective of the conflicting norm being prior or subsequent to the Charter itself. Not to mention the fact that conflicts between UN law (either primary or secondary) and other international obligations of conventional law may not be evident *prima facie* and arise as a matter of interpretation or through the evolution of UN secondary law, as it happened in the case at stake. What is more, in the case of Germany, the limitation of sovereignty that the General Court envisaged, does not seem a

[136] This assumption is based on the idea that Article 103 of the UN Charter is – in fact – a (particular kind of) conflict avoidance clause and not a rule establishing a 'constitutional-like' hierarchy in international law. The interpretation of Article 103 UNC as a conflict avoidance clause is coherent with the explicit reference made to it by Article 30 VCLT. On this particular stance, see the comment on Article 103 of the UN Charter in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus (eds), *The Charter of the United Nations. A Commentary* (3rd edn, Oxford 2012). See also, *inter al.*, Rain Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter', (2008) 55 ICLQ 583, 584; Marko Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke Journal of Comparative & International Law 69,76, all of whom share this point of view. For a slightly different perspective see the work of Samantha A. Miko, who considers the material effect of Article 103 UNC as a *de facto* hierarchisation of international law. Samantha A. Miko, 'Norm Conflict, Fragmentation, and the European Court of Human Rights' (2013) 54 Boston College Law Review 1351, 1361.

viable solution: in fact, the UN Charter – which Germany entered into in 1973 – could not have had any effect on its sovereignty back in 1958. As a consequence, from a strictly legal point of view, it is advisable to address Article 103 of the UN Charter as a clause, drafted to ensure the primacy of UN law but not to overtly interfere with the sovereignty of states in terms of their international legal capacity. Otherwise any conventional obligation conflicting with the UN Charter should be considered as illegitimate or void, while it merely entails the international responsibility of states, in case such obligation is performed in breach of the Charter.

Secondly, it can be questioned that (as the General Court maintains) Member States implicitly agreed to make the EU bound by UN law and required to comply with Security Council resolutions. In fact, such an agreement cannot be envisaged within the EU Treaties,[137] neither can it be derived from the (supposed) transfer to the EU of the powers required to comply with some duties under the Charter.

Indeed, unambiguous references to the United Nations (or to the UN Charter as such) can be found in various provisions within both the EU Treaties. Nevertheless, even if the number of such mentions has notably increased after the amendments brought by the Treaty of Lisbon in 2009, this circumstance had (and still have nowadays) no effect on the overall relationship between UN law and the EU legal system, whose autonomy cannot be brought into question, and did not entail any general rule, aimed at making the EU 'conventionally subject'

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[137] In relation to the absence of this kind of provision within the EU Treaties see Paul Gragl, 'The Silence of the Treaties: General International Law and the European Union' (2014) 57 German Yearbook of International Law 1, 2. Partially *contra*, in relation to the scope of the principle of loyalty towards international law provided by the EU Treaties, see Judicaël Etienne, 'Loyalty Towards International Law as a Constitutional Principle of EU Law?' (2011) 03 Jean Monnet Working Paper Series – NYU School of Law, 25.

to UN law.[138] Their relevance to the EU, by contrast, should be evaluated on a 'case by case' basis, by contextualising them within the EU treaty norms (or groups of norms) in which they are contained. To this extent, it is useful to briefly recall those provisions of the EU Treaties, which makes explicit reference to the Charter of the United Nations or UN law, to clearly show how said references cannot be read as to implying any explicit or implicit general subjection of the EU to the obligations provided by the UN Charter.

Within the first articles of Treaty on European Union (TEU), which address the aims and purposes of the EU in general terms, Article 3.5 TEU provides that 'the Union shall contribute to […] the development of international law, including respect for the principles of the United Nations charter', when it comes to 'its relations with the wider world'. Similarly, in the preamble of TFEU, Member States solemnly declare their intent to 'confirm the solidarity which binds Europe and the overseas countries […] in accordance with the principles of the Charter of the United Nations'. Both provisions could be classified as 'programmatic norms' and generally refer to the action of Member States and the Union within the international community, establishing such action to be 'consistent with' or 'inspired by' the UN Charter in terms of 'principles' (i.e. those set forth by Article 1 and Article 2 of the Charter). Reasonably none of the aforementioned provisions could have the effect or being interpreted as to have the effect of 'conventionally subjecting' the EU to any positive obligation provided by the

[138] This does not mean, however, that the EU can remain completely indifferent to Member States obligations under the UN Charter: such obligations are relevant to the EU insofar as the Union shall be aware of their existence and cannot prevent Member States from complying with them. Furthermore, as I noted above, in case Member States decide to address these obligations by means of actions taken in their capacity as members of the EU, the Union itself will certainly be called to comply with both EU and UN law.

Charter of the United Nations, nor the specific obligations imposed onto UN member states by Chapter VII of the same Charter.[139]

Similarly, Article 21 TEU, related to the 'Union's action on the international scene', provides it to be 'guided [inter alia] by the principles of the United Nations Charter', developing relations and partnerships with 'regional or global organisations' and promoting 'multilateral solutions to common problems, in particular in the framework of the United Nations'. The provision in question appears to be, once again, a programmatic one, aimed at shaping the EU external action in order to 'preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter', but still having limited or no effects on EU policies other than the 'external action', nor establishing any 'self-imposed' obligations of compliance with the UN Charter whatsoever, in terms of abiding by or implementing Security Council resolutions by means of EU legislative acts. The very same rationale lies behind Article 220 TFEU, while it provides for the EU to 'establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe', the OSCE and the OECD.

A further commitment to strengthen international security 'in accordance with the principles of the United Nations Charter' is provided by Article 42 TEU, with limited regard to the common security and defence policy. To this extent, the seventh paragraph of said Article 42 TEU (the so-called 'mutual assistance clause') explicitly provides for Member States an 'obligation of aid and assistance' towards each other, acting 'in accordance with Article 51 of the United Nations

[139] Ultimately, based on the wording of the norm at stake, it is only 'solidarity' that should be confirmed in accordance to the principles of the Charter of the United Nations.

Charter' (collective self-defence). While Article 42 TEU makes express reference to Article 51 of the UN Charter, still it does not provide any obligation for the EU as such, but for EU Member States in their autonomous defence capacity, neither it provides any general obligation of compliance to be (self-) imposed onto the EU.[140] An analogous point could be made with regard to the second paragraph of Article 34 TEU, which establish for those Member States, which are also members of the UN Security Council – 'without prejudice to their responsibilities under the provisions of the United Nations Charter' – specific obligations to keep other Member States and the High Representative (of the Union for Foreign Affairs and Security Policy) fully informed and 'defend the positions and the interests of the Union'.

The only explicit (bur rather bland) self-imposed obligations for the EU to comply with the UN Charter and UN policies in general can be found in Articles 208 and 214 TFEU, related to the specific fields of development cooperation and humanitarian aid. In these particular cases, Member States considered it appropriate to ensure for the Union to 'comply with the commitments […] they have approved in the context of the United Nations' (with regard to development cooperation) and to act in coordination and consistence with UN-governed operations as regards humanitarian aid. On the one hand, such explicit obligations seems justified by the specific competence vested in the UN and its bodies with respect to these particular subject matters; on the other hand these examples serve to show how Member States – as long as they considered it

[140] In relation to Article 42.7 TEU as a norm addressed to Member States (and not to the EU as an international organisation) see Niklas I. M. Nováky, 'The Invocation of the European Union's Mutual Assistance Clause: A Call for Enforced Solidarity' (2017) 22 European Foreign Affairs Review 357; Mattias G. Fischer, Daniel Thym, 'Article 42' in Hermann-Josef Blanke, Stelio Mangiameli (eds), *The Treaty on European Union (TEU). A Commentary* (Springer 2013) 1201, 1222.

appropriate to make the EU subject to specific UN laws and policies – either considered it necessary to establish said subjection by means of specific norms, which are clearly limited in scope.

As the brief analysis above has shown, no conventional obligation (be it defined 'voluntary' or 'self-imposed) for the EU to comply with the UN Charter can be asserted, in general terms, on the basis of the EU Treaties as such. Apart from a general reference to the principles of the UN Charter when it comes to the 'Union's action on the international scene', references to the UN Charter within the EU Treaties are either addressed solely to Member States (e.g. Articles 34 and 42 TEU), or specific and explicitly limited in scope (e.g. Articles 208 and 214 TFEU). What is more, as I widely clarified above, Article 351 TFEU does not imply for the Union itself, and therefore for the EU legal system, any subjection to the international obligations stemming from the UN Charter, but simply set forth a conflict avoidance clause, in order to safeguard Member State's performance of their own obligations under the same Charter from being impeded by the application of EU law.

Thirdly, in the particular case of restrictive financial measures adopted towards individuals or legal entities, it cannot be maintained that Member States have, in fact, transferred (or delegated) all the necessary power to the EU, so as to any measure aimed at implementing UN Security Council resolutions in that particular field should – *de facto* – be jointly adopted by Member States, within the EU legal framework. At a closer look, while it provides that 'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take [*inter alia*] in order to carry out obligations it has accepted for the purpose of maintaining peace and international

security', Article 347 TFEU does not imply any delegation of power or obligation whatsoever for Member States to adopt such 'measures' by resorting to the EU legal framework. Indeed, it simply requires EU Member States to 'consult' in order to take 'together the steps needed' to prevent such measures – be they adopted by one or more states – to endanger the internal market (i.e. what Member States are required to do together is taking action to avoid the internal market being affected by the measures at stake, not to adopt said measures),[141] which is plainly something very different from what the General Court has maintained.

To this extent, Article 347 TFEU pairs with Article 348.1 TFEU, according to which '[i]f measures taken in the circumstances referred to in [Article 347 TFEU] have the effect of distorting the conditions of competition in the internal market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaties'. The duty imposed by Article 348.1 TFEU (onto both the Commission and Member States), clarifies the 'procedural' scope of both provisions and realises an ideal link with Article 351.2 TFEU, which was mentioned and explained above: Article 351.2 TFEU – as a general rule – commits Member States to 'take all the appropriate steps' in order to ensure that no conflicts occurs between their pre-existing international obligations and the EU Treaties. To this extent, Member States are encouraged to 'assist each other to this end and […], where appropriate, adopt a common attitude'. In the particular case of measures adopted 'in order to carry

[141] Article 347 TFEU clarifies once again (as Article 351 TFEU does) that the EU is not indifferent to the existence of Member States obligations under the UN Charter and recognises their need to comply with said obligations. This sort of 'emergency clause', however, imposes a duty of cooperation and consultation, which cannot be confounded with a duty of joint compliance, by means of EU measures. In this sense see also Eva Nanopulos, 'Judicial Review of Measures Implementing UN Resolutions. The Relevance of the EU Principle of Loyal Cooperation', in Catherine Barnard, Albertina Albors Lorens, Marcus W. Gehring (eds), *Cambridge Yearbook of European Legal Studies 2012-2013* (vol. 15, Hart 2013) 669, 681.

out obligations [that Member States] accepted for the purpose of maintaining peace and international security', which may have an effect on the functioning of the internal market, Article 347 TFEU provides for Member States to consult each other, 'with a view to taking together the steps' that are needed to safeguard said functioning of the internal market. Once again, coherently with the general rule set forth by Article 351.2 TFEU, Member States are encouraged to, 'assist each other' to overcome the conflict. Lastly, when the measures at stake may affect competition in the internal market, Article 348.1 provides for the Commission – whose responsibility is, *inter alia*, to enforce EU pro-competition and antitrust rules – to interact directly with Member States and to assist them in order to introduce all adjustments that are needed to minimise the distortionary effect on market competition.

Nothing in these provisions suggests that Member States are obliged to take action within the EU legal framework in order to comply with their obligations under the UN Charter ('for the purpose of maintaining peace and international security'). They are, by contrast, the logical counterpart of the conflict avoidance clause contained in Article 351.1 TFEU and within the same Article 347 TFEU: while Member States are free to comply with pre-existing treaty obligations and to implement those measures that are set forth by the UN Security Council, still the unique nature of the EU as an international organisation and the fundamental principles that underlies its legal system need to be safeguarded to the maximum possible extent. As a consequence, Member States shall act in the international *fora*, providing each-other mutual assistance and working with the Commission in order to limit, both in scope and (possibly) in time, any derogations to EU law, especially if they affect the internal market and competition. This interpretation may be supported by looking at Article 348.2 TFEU, which enables any Member

State and the Commission to refer the matter to the ECJ in case of any suspected abuse of the 'derogatory power'[142], contained in Article 347 TFEU. At a closer look, Article 348.2 TFEU *de facto*, recalls the principles of proportionality and adequacy that are inherent to EU law, to be applied also for the evaluation of any (legitimate) derogation to the EU Treaties.

This does not mean, however, that Member States could not decide to adopt restrictive financial measures as those provided by the UN Security Council resolutions, by means of decisions taken within the EU legal framework and resorting to the appropriate legal basis. In fact, Article 215 TFEU[143] does provide such legal basis,[144] but it neither implies any obligations for the EU to implement UN-derived measures, nor entails any necessary transfer or delegation of powers to the Union. It is up to the Council to consider whether to adopt a decision 'in accordance with Chapter 2 of Title V' TEU (referred to the CFSP), aimed at implementing Security Council resolutions and, if this is the case, to enact all the necessary measures. Plainly, there is no obligation for the Council to adopt such a decision under EU Treaties.

In conclusion, neither did the Member States decide to subject the EU to the obligations that stem from the UN Charter (one of which is implementing

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[142] The reference to Article 347 TFEU as a 'derogatory' or 'emergency' clause is clear in the View of Advocate General Kokott, delivered on 13 June 2014 in the Opinion procedure 2/2013 of the Court of Justice, where Advocate General Kokott stresses the similar scope of Article 347 TFEU and Article 15 ECHR.

[143] Former Article 301 EC.

[144] Article 215 TFEU reads as follows: '1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities. 3. The acts referred to in this Article shall include necessary provisions on legal safeguards.

Security Council resolutions) nor did they provide an exclusive transfer or delegation of powers to the union in the field of 'financial sanctions', so that they are obliged to implement UN Security Council resolutions in that field, by means of common measures in their capacity as EU Member States; still they may voluntarily decide to do so, should they consider it appropriate within the common foreign and security policy. Having clarified that Member States' joint performance of duties and obligations provided by the UN Charter (in the particular field of financial sanctions), although not necessary pursuant to the EU Treaties and to the Charter itself, still can occur on a voluntary basis, it now come to understand which legal framework should be applied in case Member States decide to address UN Security Council resolutions by means of an act of the EU.

c. *In favour of a 'case-by-case' relationship*

Paragraphs above have shown that the relationship between EU law and UN law with regard to protecting fundamental rights, while preventing and countering the financing of terrorism, cannot be addressed by adopting a 'one-fits-all' model. On the one hand, both the primacy clause enshrined in Article 103 UNC and the conflict avoidance clause set forth by Article 351.1 TFEU has proven insufficient (and indeed were not construed) to establish a formal hierarchy between the legal systems at stake; on the other hand, while Member States' obligations under the UN Charter are not howsoever superseded by the EU Treaties, their performance remains the sole duty of Member States themselves, without being transferred to the EU. However, the EU is obviously not indifferent to its Member States' duties provided by the Charter: firstly, the EU Treaties as interpreted by the Court of Justice provide an obligation onto the EU not to interfere with the performance of Member States' obligations derived from their membership of the UN; secondly, Member States are entitled to agree on the joint performance of said obligations

by mean of an act of the EU, being the appropriate legal basis enshrined in the EU Treaties.

These considerations lead to address three of the questions I proposed above at the beginning of this chapter, namely: under what conditions is the EU entitled to implement UN law, in place of its Member States? What limits does the ECJ jurisdiction encounter in reviewing EU legislation, when it is passed to implement Security Council resolutions? What legal standard the ECJ should adopt to perform its review? Given that the obligations provided by the UN Charter do not bind the EU *per se* and Member States did not decide to make the Union subject to the Charter on a voluntary basis, the monist stance adopted by the General Court does not seem to be a viable choice in order to establish under what conditions the EU could implement UN law, in place of its Member States. In fact, no relationship of direct hierarchy can be established between UN law and EU law, in 'absolute' terms,[145] such as to entitle an act adopted pursuant to UN law, by a UN body, to generally repeal or derogate an act adopted pursuant to EU law, within the EU legal system. If a hierarchy does exist between UN and EU law, it can only be asserted in 'relative' terms, with respect to each Member State and its legal position under international law. In other words, given the nature of international law, a relationship based on hierarchy between the UN Charter and the EU Treaties cannot be construed as for a 'constitutional model', where the non-compliance of the lower norm with the higher causes the former to succumb; conversely it should be construed as for concurring obligations, one of which should be 'preferred' by Member States in case a simultaneous

[145] One should consider, however, that particular provisions of the UN Charter may – in fact – be applicable to the EU, insofar as they express general principles of international customary law (e.g. the prohibition of threat or use of force in international relations, provided by Article 2 paragraph 4 of the UN Charter) or *jus cogens*.

performance of both cannot be achieved. To summarise: Member States are certainly bound to perform their obligations under the UN Charter and their status as members of the EU does not affect, nor limit their duty of compliance. If Member States obligations under UN law can be performed consistently with EU law, they may legitimately be performed by means of EU measures (provided that a legal basis does exist within the EU Treaties). If, by contrast, Member States obligations under UN law appear to contrast with EU law, they should nonetheless be performed 'outside' the EU legal framework, whose norms, in that particular case, should simply remain unapplied.[146] The violation of such rule of preference (e.g. performing an obligation pursuant to the EU Treaties instead of a conflicting obligation pursuant to the UN Charter) would certainly entail the international responsibility of the Member State in question, still having no strictly legal effect for the EU legal framework and the internal lawfulness of the acts adopted therein. Obviously, as it was clarified above, one cannot reasonably maintain that the EU should remain completely indifferent to Member States obligations under the UN Charter, even in case they conflict with EU law (and cannot be jointly performed by Member States, by means of EU measures). By contrast, EU institution should acknowledge said obligations are validly imposed

[146] It should be noted that, as specified above, the conjunction of Article 103 UNC (Article 30 VCLT) and Article 351.1 TFEU is such to allow Member States to perform their obligations under the UN Charter by means of individual or intergovernmental actions, outside the EU legal framework, in case these obligations are incompatible with EU law. To this extent, the wording of Article 351.1 TFEU ('[the] rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, [with third countries], shall not be affected by the provisions of the Treaties') is unequivocally referred to the EU Treaties as a whole, including those norms that attribute or delegate exclusive competence to the EU in certain subject matters, such as the common commercial policy and the single market at large. Being themselves part of the Treaties, provision related to the competence of the EU make no exception in relation to the application of Article 351.1 TFEU, which is applicable to the whole set of EU primary norms. In line with this view, Article 347 TFEU obliges Member States to 'consult each other' to adopt the actions needed to prevent the single market (and obviously the common commercial policy) from being affected by domestic measures, adopted to comply with UN-derived obligations.

on Member States by the UN Charter and refrain from impeding or interfering with their performance.[147]

Indeed, by means of the EU Treaties, regarded as conventional instruments of international law, Member States established (the Community and then) the EU as a brand-new complex international organisation; an autonomous supranational legal system, provided with its founding and fundamental principles, its 'law-making' procedures, its specific set of norms on the allocation of powers and its own jurisdiction, vested with the authority – *inter alia* – of adjudicating the legitimacy of EU secondary legislation. Irrespective of the solemn emphasis placed by the ECJ on the 'constitutional nature' of the EU Treaties and the legal order they establish (that can still be questioned), the EU framework can more smoothly be considered as a conventionally established, self-standing legal system, characterised by entirety, separateness and closure.[148] In general terms, the EU legal order does not admit (or require) any

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[147] To this extent it is interesting to consider, *mutatis mutandis*, the stance of the European Court of Human Rights in the *Behrami* case (*supra* n 116). In the judgment at stake the Court admits that the ECHR cannot be applied to COE member states, acting as 'delegates' of the Security Council under Chapter VII of the UN Charter (since their acts are attributable to the UN itself).

[148] These assumptions reflect the idea of the EU legal system as developed by the ECJ over the years. For a critical point of view on the whole issue, see Bruno Simma and Dirk Pulkowsky, who reject the idea of a complete separation of the EU legal system from general international law, in favour of an approach based on the *lex specialis* rule. Bruno Simma, Dirk Pulkowsky, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 483, 510. The separateness of the EU legal system is analysed, *inter alia*, by Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. *Report of the Study Group of the International Law Commission*, International Law Commission of the United Nations, 13 April 2006, and Marjorie Beulay 'Les arrêts Kadi et Al Barakaat International Foundation. Réaffirmation par la Cour de justice de l'autonomie de l'ordre juridique communautaire vis-à-vis du droit international' (2009) Revue du marché commun et de l'Union européenne 32. Bruno de Witte tends to scale back the idea of autonomy, as regards the EU legal system, in favour of a 'relative autonomy', which does not exclude EU law from being part of international law. Bruno de Witte, 'European Union Law: How Autonomous is its Legal Order?' (2010) 65 Zeitschrift für Öffentliches Recht 141, 142; meanwhile Jan-Willelm van Rossem maintains that the call for autonomy of the EU legal order hides a disguised call for (a sort of) sovereignty, taking the EU closer to the perspective of a state-like entity. In this respect, the EU could refrain from abiding by external norms of general international law if and only if such norms put the constitutional identity of the EU at risk. Jan-Willelm van Rossem, 'The Autonomy of EU Law: More is Less?' in Ramses A. Wessel, Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (Springer 2013) 13, 28. See also, in more general terms, Inge Govaere, 'The importance of International

interference or integration with extraneous legal systems, unless it is explicitly provided by the EU Treaties themselves. To this extent, for any act adopted within the EU legal framework to be valid (or rather lawful), it should necessarily be consistent with the law-making norms and procedures provided within the EU Treaties, that is to say: *(i)* the EU should enjoy the power and/or be competent to adopt that particular act in the field in question (necessity of a legal basis); *(ii)* the act should be adopted by the competent institutions within the EU; *(iii)* the act should be adopted following the proper law-making procedures; *(iv)* the act should be consistent with the fundamental principles, which Member States conventionally established within the EU Treaties as general parameters of legitimacy for any act of the EU.

To be part of the conventional legal system established by the EU Treaties (i.e. to be a valid part of the EU legal order), any secondary legislation adopted by EU institutions should verify all the four conditions outlined above, without reservation. In fact, given that the EU Treaties are 'rigid' conventional norms, Member States are not entitled to freely derogate or amend the provisions contained therein, unless they follow the specific procedures the EU Treaties themselves provide for that purpose.[149] Hence, in terms of lawfulness under the EU legal system, no distinction whatsoever can be made between secondary legislation, adopted by EU institutions in order to perform Member States

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Developments in the case-law of the European Court of Justice: Kadi and the autonomy of the EC legal order' (2009) 1 College of Europe Research Papers in Law, available at https://www.coleurope.eu/research-paper/importance-international-developments-case-law-european-court-justice-kadi-and.

[149] While the law of treaties admits informal treaty amendments under certain conditions, such possibility seems to be excluded by the ECJ with respect to EU Treaties. See Robert Schütze, 'EC Law and International Agreements of the Member States. An Ambivalent Relationship?', in Catherine Barnard (ed) *Cambridge Yearbook of European Legal Studies 2006-2007* (vol. 9, Hart 2007) 387, 439. *Contra* Trevor Hartley, 'International Law and the Law of the European Union – a Reassessment' (2001) 72 *British Yearbook of International Law* 1, 20.

obligations pursuant to the UN Charter, and any other act of secondary legislation: they both need to be fully compliant with the law-making norms and procedures provided within the EU Treaties, including the fundamental principles of the Union referred to as general parameters of legitimacy. In sum, should Member States consider it appropriate to address their obligations under the UN Charter by means of an action within the EU legal framework (and should the EU Treaties explicitly provide a legal basis for such action), the act of secondary legislation adopted to perform said obligations needs to be 'doubly compliant': on the one hand, in order to fully perform Member States' obligations pursuant to the Charter, it would need to comply with relevant UN law; on the other hand, in order to be validly adopted as an act of the EU, it would either need to comply with EU primary law (including the fundamental principles of the Union itself).

It comes from the above that the jurisdiction of the Court of Justice of the EU could not encounter any particular limit, neither could the Court adopt different legal standards, in order to review EU legislation, when it is passed to implement UN measures, such as Security Council resolutions. In this regard, the argument of both the GCEU and the ECJ in *Kadi I* were altogether not convincing. As of the General Court, its stance on jurisdiction is closely related to its (monist) idea of the relationship between the UN and the EU legal systems (widely addressed and criticised above). In particular, since the Court argued in favour of a general obligation – placed onto the EU by Member States – to comply with the UN Charter, it considered its jurisdiction to be necessarily curtailed by that very same obligation and be limited to a 'procedural' review, with regard to EU secondary legislation, adopted to implement UN Security Council resolutions. In fact, according to the General Court, EU institutions could exert limited or no control over the merits of these acts, whose content was almost entirely decided at the

UN level and simply 'translated' into EU law by the competent bodies of the Union. Otherwise, in the opinion of the General Court, a full judicial review of the EU measures at stake would imply for the Union's judiciary (either indirectly) to breach the primacy of UN law by assessing its legitimacy *vis-à-vis* the EU Treaties. The position of the General Court as regards jurisdiction ends up reaffirming a relationship of absolute hierarchy between the UN and EU legal systems, which implies for EU law to be directly outranked (repealed and/or derogated) by UN law. As I clearly demonstrated above, however, such position can be upheld neither from the standpoint of international law, nor based on the EU Treaties; therefore, any limitation of the jurisdiction of the Court of Justice of the EU cannot be maintained on this basis.

Contrary to the General Court, in *Kadi I*, the ECJ ended up asserting its full jurisdiction over any act of the EU, including secondary legislation adopted to implement Security Council resolutions. As the ECJ clearly stated (and I properly showed above) substantive judicial review of European secondary legislation, adopted to implement UN Security Council resolutions, being 'naturally' limited to its internal lawfulness within the EU legal order, 'would not entail any challenge to the primacy of that resolution in international law',[150] neither it would jeopardise the principles presiding over the international legal order or howsoever compromise the absolute immunity granted to UN bodies and their acts. In fact, no judicial review would be exerted over UN Security Council resolutions on the basis of EU law, but only over EU secondary legislation adopted to implement such resolutions. However, if the conclusions reached by the ECJ in the case at stake appear coherent with the above analysis of the relationship between the

[150] *Kadi I*, Appeals (n 96), para 285.

UN and EU legal systems, still some important steps of its argumentative path cannot be agreed upon. The ECJ, in particular, seemed to describe the EU legal system not only as an autonomous and self-standing one, but rather as a 'constitutional order' *stricto sensu*, characterised by a set of hard-core constitutional rules that should admit no derogation by means of Member States' international obligations under the UN Charter. According to the Court, respect for fundamental human rights forms a crucial part of the constitutional traditions common to Member States, which found the Union's 'constitutional identity' and should necessarily be upheld by the EU judiciary. In addition, the ECJ took a further step towards its definition as a constitutional court proper, by affirming its power to decide whether to assert, limit or decline its jurisdiction, on the basis of the level of protection for fundamental rights, afforded within a legal system other than the EU, whose measures European secondary legislation is to implement: should this level be at least equivalent to the one provided by the EU legal framework, the Court could decide – as the master of its own jurisdiction – to perform limited or no review in that regard; otherwise its jurisdiction should encounter no limits.

Such 'constitutional drift' of the ECJ, although not unprecedented, still risks to bear effects that go beyond (or against) the same EU Treaties as they were intended by Member States at the time of their drafting.[151] What is more, for the purpose of identifying a proper relationship within the UN and EU legal systems in this particular field, thinking of the EU legal framework as a constitutional order

[151] After the failure of the Treaty establishing a Constitution for Europe, the Treaty of Lisbon was drafted in such a manner as to guarantee a reinforcement of the European integration process, eliminating any reference to the constitutionalisation of the European legal system. As regard the ECJ, in particular, while its jurisdiction was considerably extended, still it remained a statutory regional court, whose tasks and limits are clearly identified by the EU Treaties themselves.

stricto sensu would not take any further benefit to the Court's argument, if not the contrary. To affirm the absolute inviolability of the Union's fundamental principles – which include protection for human rights – the ECJ made reference to constitutional traditions common to Member States and described them as a hard-core set of values that could not possibly be derogated or set aside. To justify the inviolability of these principles, the Court evoked the well-known 'counter-limits' doctrine, first developed by the Italian Constitutional Court. According to this doctrine, those values that lie at the basis of a state's constitutional identity should always prevail in case of conflict with international (or supranational) obligations. Said prevalence, in the case at stake, would imply the necessity for the ECJ to uphold EU constitutional values against the conflicting obligations imposed on EU Member States by the UN Charter, with the consequence of a full judicial review of EU secondary legislation to be always performed *vis-à- vis* fundamental human rights. This argument, however, does not seem to be entirely consistent with the Court's previous reasoning and – in any case – appears unnecessary to reach the conclusions that the ECJ wished to achieve. First of all, the counter-limits doctrine was developed by the Italian Constitutional Court to address the relationship between the national legal system (properly a constitutional order) and a supranational legal order such as the one established by the EU Treaties. On the one hand, while the EU legal system is widely regarded as constitutional *lato sensu*, still it cannot be considered as a constitutional order within the meaning generally accepted by constitutional law (i.e. a legal order comparable to the domestic ones of EU Member States).[152] On the other hand, the application of the counter-limits

[152] First of all, the EU is neither based on a 'constituent power', nor it enjoys a comprehensive (universal or state-like) constituted power. It only relies on a number of attributions that Member

doctrine (as proposed by the ECJ) would imply for the obligations imposed on Member States by the UN Charter to be inherently binding within the EU legal framework, in order to be 'counter-limited' by European constitutional principles. As I seek to demonstrate above, on the basis of both international and EU law, and as the same ECJ maintained, such an assumption is highly questionable. In any case, the Court would not have needed to indulge on a debatable constitutional rhetoric to affirm the necessity for any act of the EU to comply with the fundamental principles enshrined in the EU Treaties, including respect for human rights as derived from constitutional traditions common to Member States. As I argued above, for any act of the Union to be lawful within the EU legal order, it should necessarily be consistent with the law-making norms and procedures provided within the EU Treaties; said norms plainly includes the necessity to safeguard human rights as they stem from common constitutional traditions, that Member States established as a general parameter of legitimacy. In fact, the reference made by the EU Treaties to shared constitutional traditions, could more cautiously (and still effectively) be deemed as a further conventional parameter (similarly to the ECHR) to be interpreted in the light of evolving national constitutional case-law.

States voluntarily transferred to it, hence accepting to limit their own sovereignty (*rectius* jointly exercise certain sovereign powers), by means of a completely reversible process (see Article 50 TFEU). First and foremost, the Union is a regional (or supranational) organisation based on the agreement of sovereign Member States, without which – differently from an autonomous constitutional order – it could not survive. It can be defined as a 'pluralist entity […] neither a federal state, nor a confederacy'. In this regard, see the contribution of Matej Avbelj, 'Pluralism and Systemic Defiance in the European Union', in András Jakab, Dimitry Kochenov (eds) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford 2017) 44. For an interesting critical view on the EU as 'militant democracy' on the basis of the *Kadi* case-law see Giuseppe Martinico, Anna Margherita Russo, 'Is the European Union a Militant Democracy? The Perspective of the Court of Justice in Zambrano and Kadi' (2015) 21 European Public Law 659.

As regards the ECJ alleged power to decide whether to assert, limit or decline its jurisdiction, once again the Court resorted to a doctrine proper of national constitutional law, and in particular the so-called *Solange* doctrine, developed by the German Constitutional Court in the eighties. Therefore, according to the ECJ, its review of EU legislation adopted to implement UN measures have to be full and substantial unless the UN legal system would ensure a protection for fundamental human rights that is comparable to that offered by the EU legal order. Criticism to this rather unnecessary choice of the Court could be based on quite similar arguments as for the counter-limits doctrine. Even the *Solange* case-law was developed in order to address the relationship between the German national legal system and Community (now EU) law; furthermore, while it often resort to legal arguments that are proper of constitutional case-law and – to some extent – behaves as the EU constitutional court *lato sensu*, still the ECJ is not the equivalent of national constitutional courts at the EU level.[153] The ECJ remains, at any effect, a 'statutory court', whose powers, attributions and duties are conventional in nature and entirely derives from the EU Treaties.[154] For the purpose of this analysis, in particular, Article 263 TFEU[155] (former Article 230 EC), clearly provides that '[t]he Court of Justice of the European Union shall review the legality' of the acts of EU institutions

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[153] On this particular topic, see Christian Joerges, 'The *Rechtsstaat* and Social Europe: how a Classical Tension Resurfaces in the European Integration Process', in Leonardo Morlino, Gianluigi Palombella (eds), *Rule of Law and Democracy. Inquiries into Internal and External Issues* (Brill, 2010) 163, 173; partially *contra* Oreste Pollicino, Vincenzo Sciarabba, 'La Corte europea dei diritti dell'uomo e la Corte di giustizia nella prospettiva della giustizia costituzionale' in Luca Mezzetti (ed) *Sistemi e modelli di giustizia costituzionale* (vol. 2, CEDAM 2011) 1. See also Giuseppe Franco Ferrari (n 106). On the role of the Court of Justice in the field of CFSP see also Maja Brkan, 'The Role of the European Court of Justice in the Field of Common Foreign and Security Policy after the Treaty of Lisbon: New Challenges for the Future' in Paul James Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (Springer 2012) 97, 104

[154] Mariani (n 99), 45-47.

[155] Former Article 231 EC.

‘intended to produce legal effects vis-à-vis third parties’ and ‘shall for this purpose have jurisdiction […] on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers’. In addition, Article 264 TFEU, peremptorily states that ‘[i]f the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void’. The relevant norms within the EU Treaties seem to leave no room for the Court to decide whether or not (and to what extent) perform a judicial review when it is requested to do so. In fact, if a claim is brought before the ECJ, based on the infringement of the EU Treaties (i.e. even on the violation of the fundamental rights that the same EU Treaties protect) the Court has no authority to limit its jurisdiction; it ‘shall’, by contrast, perform a full judicial review on every ground set forth by Article 263 TFEU and declare the challenged act to be void, ‘if the action is well founded’.

In conclusion, the study proposed above tried to provide an answer to the key-questions I had outlined from the very beginning, based on the critical analysis of the arguments resorted to by the General Court and the ECJ in *Kadi I*. I became persuaded that, while EU Member States are bound to ensure the primacy of the UN Charter (either from the standpoint of international law, and from a European perspective), the EU as such is not subject to UN law in general terms, either directly or by means of a ‘voluntary’ obligation allegedly placed onto the Union by the same Member States. Irrespective of its alleged constitutional nature, the EU remains a self-standing legal order, generally characterised by entirety and closure, whose relationships with the UN legal system and international law at large cannot be addressed by means of a monistic approach; in fact, no relationship of direct hierarchy can be established between UN law and

EU law, in 'absolute' terms, such as to entitle an act adopted pursuant to UN law, by a UN body, to repeal or derogate an act adopted pursuant to EU law, within the EU legal system. What is more, based on the EU Treaties, one cannot maintain that Member States have an obligation to perform their duties under the UN Charter by means of common measures within the EU, if the measures to be adopted are incompatible with EU law. Indeed, as I widely discussed, Article 347 TFEU does not imply any obligation aimed at ensuring a joint performance of UN-derived obligations (but only obliges Member States to consult in order to safeguard the functioning of the internal market); also, while Article 215 TFEU certainly provides a legal basis for common measures to be (voluntarily) taken by Member States in the field at stake, it plainly does not provide for such actions to be necessary. As a consequence, Member States could either decide to implement Security Council resolutions by means of EU legal instruments (according to Article 215 TFEU) or rather to provide such implementation on their own.[156] Where they consider it appropriate to take action together within the European legal order, the EU secondary legislation adopted to implement UN Security Council resolution should comply with both UN law and EU law (double compliance), making no exception with regard to any other act of the Union, and the ECJ should enjoy jurisdiction to exert a full and substantial judicial review, as set forth by the Treaties with no reservation. By contrast, where Member States consider it preferable to perform their obligations outside the EU legal framework, their capacity to do so wouldn't encounter any limit by reason of the EU Treaties, whose provisions should yield to the primacy of UN law and remain unapplied in

[156] See Aurel Sari, 'The relationship between Community law and international law after *Kadi*: did the ECJ slam the door on effective multilateralism?', in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2012) 303.

case of conflict (pursuant to the first paragraph of Article 351 TFEU), with the sole obligation to 'consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected' by the measures taken.

In fact, as I reminded above, the wording of Article 351.1 TFEU[157] (in conjunction with Article 103 UNC) is unequivocally referred to the Treaties as a whole, including those norms that attribute or delegate exclusive competence to the EU in certain subject matters, such as the common commercial policy and the single market at large. Being themselves part of the Treaties, provision related to the competence of the EU make no exception in relation to the application of Article 351.1 TFEU, which is applicable to the whole set of EU primary norms. In line with this view, Article 347 TFEU pairs with Article 351.1 and Article 351.2 TFEU as it obliges Member States to 'consult each other' to adopt the actions needed to prevent the single market from being affected by national measures, adopted by Member States to comply with UN-derived obligations.[158]

Ultimately, my reasoning shows how – as long as Member States decide to take joint measures within the EU legal framework – such measures should be adopted in full compliance with the norms of the Treaties, including the necessary respect for fundamental human rights; should said compliance be unlikely, still Member States remain bound to perform their obligations under the UN Charter outside the European system and able to do so without any limitation on the basis of the EU Treaties. Hence, at a closer look, the problem of system interaction

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[157] 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, [with third countries], shall not be affected by the provisions of the Treaties'.

[158] In this regard, the scope and the implications of Articles 351.2 and 351.3 will be analised and contextualised in the following chapters.

between UN and EU law could be addressed – in the case at stake – in terms of preventive conflict avoidance, where Member States could choose a European solution (and be fully bound by EU law) or rather 'opt out', and perform their international obligations otherwise.

However, as long as they 'opt out', Member States are bound (pursuant Article 351.2 TFEU) to adopt every appropriate action at the international level – even by means of a 'common attitude' – in order to achieve a full consistency between the performance of their obligations under UN law and the principles of EU law. Eventually, the proposed solution allows Member States to comply with their duties under the UN Charter even if these duties are incompatible with the fundamental principles enshrined in the EU Treaties (by invoking the clause provided by Article 351.1 TFEU); meanwhile, it prompts Member States to take all the steps that are needed to eliminate existing conflicts between UN measures and EU law, so that resort to Article 351.1 TFEU is limited in time and the entirety of the European legal system is safeguarded.

CHAPTER 2

ARTICLE 103 OF THE UN CHARTER: THE PRIMACY CLAUSE

I. Introduction – II. Genesis of the Primacy Clause – III. Scope of Article 103 of the UN Charter: a Hierarchy Rule? – IV. Article 103 of the UN Charter as a Rule of Interpretation: European Consequences

I. INTRODUCTION

The first chapter of this work focused on analysing the judgments delivered by the General Court and the Court of Justice of the European Union in the *Kadi I* case as paramount examples of the monist and dualist approaches to the problem of regime interaction between the UN and the EU legal systems. While they reached almost diametrically opposite outcomes on the merits of the case, it is undeniable that both courts decided to rely for the most part on European law in order to ground their judgments, rather than focusing on international law. In the case of the ECJ, this choice seems altogether coherent with the dualist approach adopted by the Court, committed to stressing the independence and distinct nature of the European legal system, *vis-à-vis* UN law, with the aim of reaffirming the necessary enforcement (performed by the Court itself) of the fundamental 'constitutional' principles of EU law, against any conflicting norm, regardless for its source. By contrast, in the case of the General Court, EU law was interpreted in order to show how the European legal system (and the EU Treaties in particular) somehow 'incorporated' UN law and recognised its primacy, making it necessary for the Union to perform the duties provided by the

UN Charter *in lieu* of the Member States, as long as they transferred the necessary powers to the European level of government.

Within the first chapter I also had the chance to outline the main shortcomings of both approaches and the many points they left open to providing a viable long-term solution to the problem. Furthermore, I tried to develop a new and more nuanced approach to the interaction between the UN and the EU legal systems, in an effort of balancing the specificity of the EU (as an international organisation with its own legal environment) with the need to preserve the stability and the unity of the international legal order as a whole, including and the prominent role of the UN. In view of my analysis, I maintained that, differently from its Member States, the EU as such is not subject to UN law in general terms, either directly or by means of a 'voluntary' obligation allegedly placed onto the Union by the same Member States. No proper hierarchy can be established between UN law and EU law in 'absolute' terms, such as to entitle an act adopted pursuant to UN law, by a UN body, to repeal or derogate an act adopted pursuant to EU law, within the EU legal system. What is more, based on the EU Treaties, one cannot generally maintain that Member States have a proper obligation to perform their duties under the UN Charter by means of actions taken together within the EU.[159] As I observed, Member States could either decide to implement Security Council resolutions by means of a common measures within the EU or rather to provide for such implementation on their own. However, if they wish to take action within the European legal framework, the EU secondary legislation

[159] As I observed above, the necessity or the opportunity to perform Member States' duties under the UN Charter by means of an action within the EU may, nonetheless, appear preferable or even necessary, taking into account the exclusive competence of the EU in a number of fields. This is without prejudice – however – for Article 351 TFEU, whose provisions allow Member States to individually perform their obligations under the UN Charter, even in case such performance is in contrast with EU law.

adopted to implement UN Security Council resolution should comply with both UN law and EU law (a condition I referred to as 'double compliance') and the ECJ should enjoy jurisdiction to exert a full and substantial judicial review. By contrast, in case Member States decide to perform their obligations outside the EU legal framework, their capacity to do so would not encounter any limit by reason of the EU Treaties, whose provisions should yield to the primacy of UN law and remain plainly unapplied in case of conflict. The solution I proposed can be summarised as a preventive conflict avoidance rule: when it comes to performing their international duties, including obligations under the UN Charter, Member States can choose a European solution if available, therefore being fully bound by EU law, or rather 'opt out', and comply with said obligations otherwise, this latter choice being necessary in case the mentioned 'double compliance' cannot be achieved.

By analysing the provisions of the EU Treaties that deal with the UN and international law, I came to show that the proposed approach can be compatible with EU law and preserve its peculiar role for Member States, while not impairing the international legal order. One of the purposes of the approach I proposed, however, is to abandon the EU-based point of view, shown by the General Court and the ECJ, to adopt a more comprehensive standpoint that is soundly based, both in terms of EU law and in terms of general international law. Therefore, the following sections of this chapter will focus on Article 103 of the UN Charter, which represents the key provision to be studied, to better understand the reasoning that lies behind different approaches to the interaction between the UN and EU legal regimes. In particular, those who are in favour of a monist approach to the UN-EU relationship, generally consider Article 103 UNC something more than a conflict avoidance clause. In this respect, the provision is regarded as a

fundamental (or perhaps a 'constitutional') principle of the international legal order, capable of establishing a proper hierarchy between UN law and other sources of international law. The 'constitutionalisation' of the international legal order that derives from this assumption would imply for UN law to necessarily override EU law in case of a conflict. By contrast, those who reject the classical monist approach, tend to minimise the special character of Article 103 UNC, regarded as a conflict avoidance clause proper (i.e. as a source of interpretation). After a brief historical introduction aimed at describing the genesis of Article 103 UNC, this chapter will analyse the two different standpoints sketched above and their effects on the relationship between the UN and EU legal systems. The chapter will eventually maintain (as I briefly explained within the last section the of the previous chapter) that Article 103 UNC shouldn't be interpreted as a hierarchy norm, capable of curtailing member states' sovereign power, but rather as a stronger species of conflict avoidance clause, aimed at ensuring the primacy of UN law, just in case conflicts occur. My analysis will confirm that a more nuanced (and pragmatic) approach to the problem is capable of preserving both the special character of the UN Charter and the independence of the EU legal system.

II. GENESIS OF THE PRIMACY CLAUSE

It should initially be noted that Article 103 UNC does not represent the first example in the history of a conventional provision aimed at ensuring the primacy of a treaty over the others. Article 20 of the Covenant of the League of Nations (CLN) embodies the historical predecessor and more interesting term of comparison for the current Article 103 UNC, for at least two reasons: first of all, because the League of Nations (established during the Conference of Paris, right in the aftermath of the First World War) undoubtedly presents a number of

relevant affinities with the United Nations, being considered a forerunner of the modern organisation of the UN; secondly, because the wordings and structures of Article 20 of the Covenant and Article 103 UNC are notably different, even if they pursue a similar aim.[160] The analysis of its historical predecessor is a fundamental step in order to better understand the genesis of current Article 103 UNC and its logical premises, as well as to identify its underlying purpose and its effect. [161]

a. Article 20 of the Covenant of the League of Nations

Article 20 CLN reads: '1. The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof. 2. In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this

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[160] For a systematic comparison between the Covenant of the League of Nations and the UN Charter: Russel Sobel, 'The League of Nations covenant and the United Nations charter: An analysis of two international constitutions' (1994) 5 Constitutional Political Economy 173; Rai Neetij, 'A Comparitive Analysis Between the League Covenant and U.N. Charter' (2010). Available at SSRN: https://ssrn.com/abstract=1695358.

[161] A number of relevant contributions exist with regard to Article 20 of the Covenant. In this respect, the works of Hans Kelsen offer a complete perspective. Hans Kelsen 'Contributions a l'étude de la révision juridico-technique du Statut de la Société des Nations' (1938) 45 Revue générale du droit international public 161, 197; Hans Kelsen, *Legal Technique in International Law: A Textual Critique of the League Covenant* (Geneva Research Centre 1939) 148. Among the first contributions to the study of Article 20 CLN, one may mention: Frederick Pollock, *The League of Nations* (Stevens 1922), 163, and Geoffrey G. Butler, *A Handbook of the League of Nations* (Longmans 1925) 80, as well as; Hersch Lauterpacht, 'The Covenant as the Higher Law' (1936) 17 British Yearbook of International Law 54. More recently, general analyses are offered by Arnold McNair, *The Law of Treaties* (Oxford 1961) 213; Elena Sciso, *Gli Accordi Internazionali Confliggenti* (Cacucci 1986) 561; Felipe Paolillo, 'Article 30' in Olivier Corten, Pierre Klein, *Les Conventions de Vienne sur le Droit des Traités: Commentaire Article par Article* (Bruylant 2006) 1247, 1248; Andreas Paulus, Johann Leiss, 'Article 103' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus (eds), *The Charter of the United Nations. A Commentary* (3rd edn, Oxford 2012) 2110, 2114; Robert Kolb, *L'Article 103 de la Charte des Nations Unies* (ADI-POCHE 2014) 36.

Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations'[162].

First of all, it is immediately clear that Article 20 of the Covenant can be ideally divided into three separate provisions, two of which are set forth by the first paragraph, and the third that literally corresponds to the third paragraph of the Article. The first provision can be identified in a 'general abrogative norm', by means of which Members of the League mutually agreed to abrogate obligations that were inconsistent with the Covenant. While the expression 'obligations or understandings' is not further specified by the Article, the meaning of the words seems to refer only to conventional sources of international law. Furthermore, the Article clearly states that obligations subject to abrogation were only those that existed *inter se*, that is to say between two or more Members of the League, explicitly safeguarding any other agreement that involved third parties (including those agreements entered into by one or more Members of the League and third parties). In other words, the first provision that is contained in Article 20 CLN was intended to abrogate any conventional norm, established between one or more Members of the League before the Covenant was signed, whose content was inconsistent with the Covenant itself. At a closer look, the provision did nothing more than codifying (or specifying) one of the basic customary principles that is applied to resolve antinomies between conventional norms: the chronological one.[163] As long as the Covenant was regarded as *lex posterior*, it was generally

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[162] Hans Kelsen criticises the broad and rather unclear wording of Article 20 CLN, as it generally refers to 'understanding' or 'engagements', without properly referring to legal categories such as 'treaties' or 'agreements'. Hans Kelsen, *The Law of the United Nations: a Critical Analysis of its Fundamental Problems* (Stevens 1950) 111.

[163] Kelsen, *Legal Technique in International Law* (n 161), 149. In this particular regard, Olof Hoijer clarifies that the effect of Article 20 CLN was to be limited to the abrogation of conflicting norms within pre-existing agreements, to the extent that these were separable from the context of the agreement itself. Olof Hoijer, *Le Pacte de la Société des Nations. Commentaire théorique et*

accepted that it would abrogate any previous conflicting norm that was entered into by the same contracting parties (such a rule is nowadays generally established by Article 30, paragraphs 3 and 4 VCLT). However – and this is probably the 'innovative' part of the rule itself – the abrogative force of the Covenant is affirmed by its Article 20 in general terms, so that even 'special provisions' established by previous agreements between the parties were intended to succumb, in case they were inconsistent with the Covenant.[164]

The second provision contained in Article 20 CLN, particularly in the last sentence of the first paragraph, was set to introduce an obligation, upon Members of the League of Nations, not to enter into future agreements (or undertake to perform any further obligations) that were inconsistent with the content of the Covenant. While the first provision was addressed to resolve conflicts between the Covenant and previous 'obligations or understandings', the purpose of this particular stand-still clause was to prevent conflicts between the Covenant and other conventional instruments of international law that Members of the League may wish to enter into in the future.[165] In this second case, however, the wording adopted by Article 20 CLN seems to be less clear, both as regards the scope of such provision, and in terms of the effect that a violation of this undertaking may entail for the defaulting state. As of the scope of this provision, the absence of the locution *inter se* suggests that Members of the League should refrain from entering into future obligations, either with other Members or with third parties,

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pratique (Spes 1926), 347. According to Lauterpacht (n 161), 58, the abrogative effect of the Covenant was to be extended to merely potential or 'latent' inconsistencies.

[164] See in this regard Jean Ray, *Commentaire du Pacte de la Société des Nations selon la Politique et la Jurisprudence des Organes de la Société* (Sirey 1930), 568.

[165] According to David Miller, 'States were no longer to be free to make treaties as they saw fit. They must at least conform the new Covenant'. David Miller, *The Drafting of the Covenant* (Putnam 1928) 199.

indifferently. In effect, if the abrogative force of the Covenant should necessary be limited in scope to previous obligations existing between two or more Members of the League, the obligation not to enter into future undertakings could well be extended to any agreement whatsoever (i.e. even between a Member of the League and one or more third parties), whose conclusion ultimately rested on the sole contractual will of the Member involved. It seems reasonable to affirm, as a consequence, that the obligation not to 'enter in any engagement inconsistent with' the Covenant, should be referred both to any future engagements, irrespective of the parties involved. As regards the effect that a violation may bring along, however, one can envisage at least two possible interpretations of the rule. A 'stronger' reading of the provision (definitely closer to a monistic point of view) could suggest it to have some kind of real effect, either curtailing the international legal capacity of Member states, in order to prevent them from entering into obligations that were inconsistent with the Covenant, or simply having the effect to void any future engagement that happened to be in contrast with the same Covenant.[166] A 'weaker' reading of the provision, more compatible with a dualistic point of view, could imply it to have merely obligatory effects, so that any undertakings that were inconsistent with the Covenants could validly be entered into by Members of the League of Nations, with the only (albeit serious) effect to entail the international responsibility of the defaulting state towards the community of the other Members, for acting in violation of the Covenant.[167] Indeed, the wording of the provision, with particular reference to the locution 'solemnly undertake', suggest the latter choice to be more in line with the

[166] This idea is developed by Lauterpacht (n 161), 65.
[167] Emmanuelle Wyatt, 'Article 20' in Robert Kolb (ed), *Commentaire du Pacte de la Société des Nations* (Bruylant 2013) 787, 796; Kolb, *L'Article 103 de la Charte des Nations Unies* (n 161), 43.

intentions of the contracting parties: on the one hand, the Covenant was probably the first attempt, for a multilateral treaty, to establish a supra-national forum of nation states, aimed at taking decision together in order to promote international peace and the welfare of peoples. Hence it was modelled as a classical instrument of international law that generally relies on the international responsibility of states in order to achieve their compliance (since obligations are generally lacking real or immediately justiciable effects). On the other hand, membership of the League of Nations at the date of its foundation was far from being universal: in this regard, a provision that could have the effect to limit the international legal capacity of Member states would carry strong uncertainty in reaching any agreement with third states, which could legitimately consider the Covenant as *pacta tertiis*. In effect, a partially different conclusion could be reached with regard to agreements entered into after the signature of the Covenant, by two or more Members of the League, with no third parties. Could one affirm that – in such a case – Members had reciprocally renounced their capacity to undertake new obligations that are inconsistent with the Covenant itself? The answer is not as straightforward as it may seem. In such a case, one may legitimately argue that the parties of the new agreement had voluntarily and mutually accepted not to enter in any future engagement that could be inconsistent with the Covenant, hence – *de facto* – curtailing their international capacity; however, this kind of extensive interpretation is not altogether convincing. On the one hand, the wording of Article 20 CLN unambiguously refer to a 'solemn' undertaking to refrain from entering into agreements in contrast with the Covenant, rather than suggesting any renounce in terms of legal capacity, and this is true irrespective of the parties of the 'new' agreement; on the other hand, nothing in Article 20 CLN can lead to maintain that the Covenant was (in

the intention of the contracting states) provided with a particular status or a special rank in the hierarchy of sources of international law, such as to supersede any contrasting future engagements entered into by Member states, or to impede said engagements to be undertaken. Eventually, it seems far more advisable and prudent to hold that, whatever the states involved, the second provision contained in the first paragraph of Article 20 CLN should be considered as a general prohibition to enter into future agreements that appeared to contrast with the Covenant, whose violation couldn't bear any consequence in terms of real effects, but to affirm the international responsibility of the defaulting states towards the other Members of the League.[168]

The third provision contained in Article 20 CLN – that is represented by its second paragraph – can be regarded as a norm of closure, aimed at completing the legal framework established by the first paragraph, in order to ensure general respect of the Covenant by Members of the League and to remove any obstacle to the full performance of the obligations it established. In fact, while the first part of the first paragraph had the effect to abrogate previous obligations entered into between two or more Members of the League, in case they contrasted with the Covenant, this latter provision was in turn targeted at prior engagements that were inconsistent with the Covenant, whose parties were one or more Members of the League and one or more third states. In this case, as I argued before, Article 20 CLN could not have – alone – the effect to provoke abrogation of the contrasting norms, since *(i)* the contracting parties of the previous agreements were not the same of the Covenant and *(ii)* the Covenant itself could not be intended as outranking said previous agreements in terms of hierarchy. As a

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[168] Kolb, *L'Article 103 de la Charte des Nations Unies* (n 161), 44.

consequence, the provision imposed a duty onto Members of the League to take the necessary steps in order to free themselves from prior undertakings that may have the effect to impede a full performance of their obligations under the Covenant. In this case, the obligatory nature of Article 20 CLN is particularly clear: while this norm compelled Members of the League to act in order to be released from previous contrasting obligations, such duty could not be actually enforced in case of default and (once again) simply relied on the international responsibility of the violating state towards the others.[169]

My analysis showed that – by means of different provisions – Article 20 of the Covenant was, in fact, addressed both at actual conflict between the Covenant and pre-existing undertakings (either involving Members of the League only, or Members of the League and third parties), and at possible conflicts between the Covenant and future agreements. At a closer look, however, the general aim of Article 20 CLN could not be identified in establishing the primacy of the Covenant over any other source of conventional international law, neither in establishing a conflict avoidance rule, capable of solving any contrast in favour of the Covenant. It rather seems that – in drafting Article 20 of the Covenant – Members of the League aimed at preventing any possible conflict between the Covenant and other conventional sources of international law, with the aim of removing them from the international legal system, instead of outranking or superseding them by means of a higher source. And this conclusion is particularly relevant if one considers that, under Article 20 of the Covenant, conflicting

[169] Charles Rousseau, 'De la Compatibilité des Normes Juridiques Contradictoires dans l'Ordre International' (1932) 39 Revue générale du droit international public 133, 160. Ray (n 164), 570, stresses the absence of any independent review, other than the individual standpoint of the involved states, to assess whether an agreement was compatible or not compatible with the Covenant of the League of Nations.

obligations might well continue to exist (and be applied) if *(i)* in case of subsequent agreements, one or more Members of the League violated their undertaking not to enter into them and *(ii)* in case of previous agreements between Members of the Leagues and third parties, one or more Members of the League did not take action in order to provoke their release from the obligations said agreements impose. In both cases the only consequence could be the international responsibility of defaulting states towards the others.

Furthermore, having regard for the scope of Article 20 of the Covenant, it is certainly arguable that it could be applied to secondary sources of international law, established or approved within the League of Nations. First of all, it should be excluded that the abrogative effect provided by the first part of Article 20.1 CLN could be extended to (forthcoming) secondary sources of international law, established by or within the League, without any specific indication to this effect. Arguing to the contrary, would lead to a general 'precarisation' of any agreement or engagement between two or more Members of the League, entered into either before or after the signature of the Covenant. While it is quite clear that such 'uncertainty of law' would not have been accepted by many states, it is equally clear that the abrogative norm contained in Article 20.1 of the Covenant exhausted its effect with the entry into force of the said instrument, in relation to the sole agreements that might exist between two or more Members of the League at that particular time, and be incompatible with the Covenant itself.

Similar considerations can be made with respect to the undertaking not to enter into any new treaties that were incompatible with the Covenant, and with the obligation placed onto Members of the League to take action in order to provoke their release from prior agreements, should they have been in contrast with the same Covenant. In both cases, the wording of Article 20 CLN suggests

the sole ‘parameter of compatibility’ to be the norms provided by the Covenant itself and not any kind of secondary legislation, adopted by or within the League: in fact – differently from Article 103 UNC (as will be seen hereinafter) – Article 20 of the Covenant did not refer to the ‘obligations’ derived from the instrument, but rather and more specifically to the ‘terms’ of said instrument, thus limiting the scope of the provision. Indeed, within the context of the League of Nations (and having regard for the state of international law at the time), it would be very difficult for Member states to imagine that secondary or derived legislation could amend or broaden the scope of conventional obligations as to influence their freedom to act on the international stage. To argue in favour of the opposite solution would have implied such freedom (which stems directly from sovereignty) to vary from time to time, following the adoption of secondary legislation. As a consequence a treaty that was compatible with the Covenant at the time of its signature could subsequently ‘become’ incompatible with secondary legislation adopted within the League, thus obliging a contracting state to denounce the treaty that become incompatible with its obligations under the Covenant or – in any case – to act in order to be released from the same treaty. It is clear that similar consequences would have seriously impaired the capacity of Members of the League to enter into new international agreement with third states, given that said international agreements could – at an indefinite time in the future – have contrasted with the obligations that stemmed from the Covenant and have necessarily been re-negotiated (or worse).

It follows from the above that – while it presented some similarities with current Article 103 UNC and tried to address similar issues – Article 20 of the Covenant of the League of Nations could not be regarded as a primacy clause proper, but rather as a conflict prevention clause, whose aim was neither to

guarantee the primacy of the Covenant (and the legal framework it established) over any other treaty, undertaking or agreement, nor to set forth a new hierarchy of sources in international law, but to prevent the conflicts that might have occurred between the Covenant and other previous of future sources of international law. To do so, *on the one hand*, Article 20 CLN explicitly abrogated any incompatible undertaking previously entered into between two or more Members of the League, *on the other* it relied on the international responsibility of Members of the League in order to *(i)* avoid new agreements that might be incompatible with the Covenant to be entered into and *(ii)* oblige Members to act in order to be released from previous agreement with third parties whose obligations contrasted with the same Covenant.[170]

Having understood the structure and effects of Article 20 of the Covenant of the League of Nations, I may now directly address the current Article 103 UNC, in order to identify its underlying purpose and its legal force.

If one briefly recalls the text of Article 103 UNC ('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') a number of differences with Article 20 of the Covenant of the League of Nations appear quite clearly and said differences represent, in my opinion, a very good 'study tool' for the purpose of my analysis. First of all, Article 103 UNC is certainly simpler than its predecessor, as it abstains from making any distinction *ratione temporis* between agreements

[170] For a comparison between Article 20 of the Covenant and Article 103 UNC, under different points of view, see Sobel (n 160); Wyatt (n 167), 788; Kolb, *L'Article 103 de la Charte des Nations Unies* (n 161), 51; Kelsen (n 162), 111, 112; Hans Aufricht, 'Supersession of Treaties in International Law' (1952) 37 Cornell Law Quarterly 655, 683; Charles Rousseau, *Droit International Public* (Sirey 1970) 159.

prior or subsequent to the Charter, as well as any distinction *ratione personae* between agreements concluded by member states only, or by Members and non-Members of the UN, and generally refers to other international agreements, irrespective for their positioning over time and their parties.[171] To this extent, Article 103 UNC seems to adopt a clearer and stronger stance with regard to the primacy of the Charter, with the purpose of upholding such primacy in any case and without exception.[172] This does not mean, however, that Article 103 UNC can be regarded as a stronger norm in terms of effects: in fact, differently from the provisions of Article 20 CLN, it neither set forth the necessary abrogation of previous undertakings, that might be in contrast with the Charter, nor imposes any sort of constraint to the international capacity of UN members, in terms of 'treaty-making power'; it simply provides for obligations under the Charter to prevail over UN members obligations 'under any other international agreement'.[173] Moreover, while Article 20 of the Covenant generally referred to 'obligations or understandings', without further specification as of the particular source of international law they might stem from, Article 103 UNC is more specific as it makes reference to 'other international agreement[s]' as the sole sources subject to the primacy clause (to this extent, a literal interpretation of Article 103 UNC might suggest its scope to be strictly limited to conventional international law, but different interpretations have prevailed over the years as will be

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[171] Joseph Sulkowski, 'The Competence of the International Labor Organization Under the United Nations System' (1951) 45 AJIL 286, 298

[172] Lazare Kopelmanas, *L'Organisation des Nations Unies* (Sirey 1947) 166; Rousseau (n 170), 160; Thierry Flory, 'Article 103' in Jean Pierre Cot, Alain Pellet (eds), *La Charte des Nations Unies* (Economica 1985) 1373; James Crawford, 'Multilateral Rights and Obligations in International Law' in *Collected Courses of the Hague Academy of International Law* (vol. 319, Brill-Nijhoff 2006) 370.

[173] Aufricht (n 170), 683; Kelsen, *The Law of the United Nations* (n 162), 111, 112; Norman Bentwich, Andrew Martin, *A Commentary on the Charter of the United Nations* (Kraus 1951) 180; Paul Guggenheim, *Traité de Droit International Publique* (t 1, Georg 1967) 273.

explained hereinafter). Hence, while the 'chronological dimension' and subjective scope of Article 103 UNC would suggest to consider this norm as an evolution of Article 20 of the Covenant of the League of Nations towards a stronger and more comprehensive model, its effects and objective scope appear to be more conservative and realistic (or probably less ambitious).

At a closer look, the real difference between Article 20 of the Covenant and Article 103 UNC can be better explained in terms of approach: the drafters of Article 20 CLN considered it appropriate to provide a specific settlement for each situation of potential conflict between the Covenant and other 'obligations or understandings' of international law, by means of the three separate provisions that I analysed above. In order to do so, they resorted to general principles of international law – such as *lex posterior derogat priori* – and solely relied on the international responsibility of member states in order to ensure compliance with the 'solemn undertaking' not to enter into future agreements that contrasted with the Covenant, as well as with the codified 'duty […] to take immediate steps' in order to release themselves from previous obligations that the Covenant might conflict with. This approach – in general terms – makes the Covenant much akin an instrument of general international law, which is no surprise if one considers the historical context in which it was drafted. By contrast, Article 103 UNC does not introduce a set of specific provisions to deal with different cases of (actual or) potential conflict between the Charter and other international agreements that UN members are part of, it simply postulate the necessary prevalence of the former over the latter, without any further specification with regard *both* to the actual scope and effects of such prevalence *and* (consequently) to the legal category

which it can be traced back.[174] In sum, Article 103 UNC *(i)* does not explicitly provide the Charter with a special force, capable of abrogating or nullifying previous agreements and *(ii)* does not set forth special obligations for UN members to comply with, in order to ensure actual prevalence to the Charter, it rather bind member states to ensure the prevalence of the UN Charter, without any specific reference in terms of legal instruments or procedures to be adopted. To sum up, while Article 20 of the Covenant of the League of Nations proposed a detailed and 'technical' norm, whose provisions clearly identified a specific legal procedure to confront each case of conflict, Article 103 UNC only focused on the result to be achieved by UN members (the prevalence of the Charter over any other international agreement), irrespective of the legal path that may lead to the result itself. The former represents an example of procedural norm (a classical choice when it comes to deal with conflicts of laws), the latter is more a substantive or a principle norm (it tells member states 'what the reality should be', but not 'how to realise it'). To this extent, Article 103 UNC seems to completely disregard the wide number of interpretative problems that may be brought along by a preconceived and aprioristic postulation of primacy for the Charter over any international agreement, *erga omnes*. The UN Charter and the obligations it imposes onto member states need to prevail, whatever the legal argument to achieve such prevalence may be and irrespective of the procedure to be followed by the interpreter. This kind of differences between Article 20 of the Covenant and Article 103 UNC reflect the different standpoints adopted by the drafters of the Covenant and the Charter of the United Nations in terms of general approach

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[174] Leland Goodrich, Edvard Hambro, Anne Simons, *Charter of the United Nations, Commentary and Documents* (Columbia University Press 1969) 10; Kolb, *L'Article 103 de la Charte des Nations Unies* (n 161), 53.

to be given to the treaty, and probably they also reflects the particular historical context of the time.[175] In the case of the Covenant, it was drafted as a classical instrument of conventional international law and it aimed at respecting the legal environment of the time, without any revolutionary reach. In the case of the Charter of the United Nations – as will be better clarified hereinafter – it was intended as a purpose-oriented treaty, that may overcome the shortcomings of the League of Nations by means of a more political/less legalist approach and ensure a stronger position for the international organisation it was set to establish. If the Covenant of the League of Nations pledged to comply with international law, the Charter of the United Nations aimed at changing it from the foundation.[176]

The evolutionary path of the primacy clause from the Article 20 CLN-model to the actual text of Article 103 UNC is particularly clear having regard to the *travaux préparatoires*[177] of the latter provision, that I will briefly analyse, in order to understand the reasons underlying the change of perspective I have previously pointed out and set the basis for the interpretation of Article 103 UNC I aim at providing.

b. *From Article 20 of the Covenant of the League of Nations to Article 103 of the UN Charter: the need for a primacy clause*

The need to provide the future UN Charter with a norm ensuring its primacy over any other treaty was very clear since the Dumbarton Oaks conference in 1944. On that occasion, a first draft of the future Article 103 UNC appeared to be very

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[175] Kolb, *L'Article 103 de la Charte des Nations Unies* (n 161), 52, 53; Goodrich, Hambro and Simons (n 174), 10, 11.
[176] Ibid.
[177] Goodrich, Hambro and Simons (n 174), 615; Paulus and Leiss (n 161), 2115; Ruth Russell, *A History of the United Nations Charter, The Role of the United States 1940-1945* (Brookings 1958) 921; Evan Luard, *A History of the United Nations, The Year of Western Domination, 1945-1955* (Palgrave 1972) 17.

similar – *both* with regard to its structure, *and* with regard to its scope – to the provisions contained in Article 20 of the Covenant of the League of Nations. To this extent, the proposals submitted at the Dumbarton Oaks conference generally showed a tripartite structure, providing *(a)* an abrogative clause, with respect to previous treaties concluded by member states *inter se*; *(b)* a provision aimed at preventing member states from entering into new agreements that could be in contrast with the Charter and *(c)* a final undertaking, for member states, to procure their release from previous agreements, entered into with third parties. Furthermore, some States also proposed to crystallise the general principle of international law according to which member states could invoke no provision of their domestic law, in order to refuse compliance with the Charter.[178] Such formal and procedural approach, directly derived from the experience of the Covenant, represented the starting point for further discussions that took place in 1945, at the San Francisco Conference, within the Committee 2 of the IV Commission (titled Technical Committee on Legal Problems). In this context, some of the proposals aimed at reinforcing the effects of the abrogative clause, extending its reach to 'present and future' agreements, concluded *inter se* by member states; some others, by contrast, tried to adopt a more cautious approach, introducing a specific obligation to revise incompatible agreements*,* instead of providing their abrogation *tout court*. In addition, some proposals limited their reach to previous agreements only, while others aimed at curtailing member states treaty-making capacity for the future and avoided to codify the effects of the Charter on prior treaties.[179]

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[178] *United Nations Conference on International Organization* (*UNCIO*, vol 4) 277, 274, 482, 483, 517, 518, 644, 736, 763, 783, 790.
[179] *UNCIO* (vol 13) 594, 595, 725, 726.

In general terms the Committee debated and analysed a number of problematic legal issues – *both* in terms of legal reach of the future primacy clause, *and* in terms of its actual enforcement – that closely recalls some of the problems faced above, in relation to Article 20 of the Covenant. As regards the effects of future Article 103 UNC on previous agreements, in particular, different stances were maintained in relation to the appropriateness of providing an automatic abrogative clause (that could cause a number of problems in terms of legal certainty), instead of a milder obligation to amend only the parts of previous agreements that were judged incompatible with the Charter, in order to ensure their compliance with the principles of the United Nations. Furthermore, no general consensus was reached on the effects that the Charter should have with respect to previous agreements that involved third parties. To this extent, *on the one hand*, the Committee recognised that the functioning and the effectiveness of the new international organisation couldn't be curtailed by the existence of previous treaties between members and non-members; *on the other hand*, however, a legal procedure capable of overcoming the 'sacred' principle of '*pacta tertiis nec nocent nec prosunt*', without subverting the very structure of international law was probably impossible to find. In relation to future agreements, moreover, the positions within the Committee seemed to be more nuanced: some proposals appeared to consider the idea of limiting (or at least influencing) UN members in their treaty-making capacity; others proposed to introduce an obligation not to enter into future agreements that contrasted with the Charter and its principles, others preferred to stick to the Article 20 CLN-model, supporting the idea of a 'solemn undertaking' (without further specification). Probably the most critical and unresolved point – however – was represented by the actual assessment of the conflict between the Charter and other agreements and the

possibility to enforce the primacy clause to come. To this extent, while some of the contracting parties considered it appropriate to vest the General Assembly with all appropriate powers, in order to declare a treaty to be incompatible with the Charter, other refused to abandon the principle, well grounded in general international law, that it was only for states to interpret and assess the compatibility of different treaties they entered into.[180] Such differences within the Committee and the stalemate they created clearly showed that the contracting parties were not able to reach the necessary consensus on a procedural norm, modelled on Article 20 of the Covenant of the League of Nations, capable of addressing with a specific provision any conflict that could be envisaged between the Charter and other international agreements, as well as the power to ascertain the very existence of such conflict and the consequence of a positive assessment on the conflicting treaty. States could not agree on a detailed legal framework to codify the primacy of the Charter and its legal consequences by means of applying the categories of classical international law. Moreover, some states had clearly expressed their opinion to be *tout court* against the idea of a primacy clause as part of the Charter (if modelled on Article 20 of the Covenant of the League of Nations), especially with regard to previous treaties concluded by UN members with third parties, which could not have been called into question by means of *pacta tertiis*.[181] This particular position was countered by those states that feared a Charter without an explicit primacy clause would have been interpreted – *a contrario* – as to exclude its own primacy, with all the negative

[180] Ibid, 600, 604, 605.
[181] Ibid, 658.

consequences that such an approach could have brought along on the capabilities and effectiveness of the new international organisation.[182]

The debate having reached a dead end, the need for a radical change of approach emerged clearly within the Committee. In particular, as long as it was not possible to reach a general consensus on a primacy clause, to be structured as a strictly legal and procedural norm on the model of Article 20 of the Covenant, an alternative approach emerged, with a view to establish a simpler norm.[183] In the intention of the Committee, the reach of this norm should be limited to affirming the primacy of the Charter over any other agreement, without any further specification. In so doing, the Charter would have simply affirmed its right to prevail, focusing on the desired ('political') effect and disregarding all technical difficulties – widely outlined above – related to the legal means and procedures necessary to achieve such effect. These problems should have been addressed on a case by case basis, overcoming the needs to explicitly provide for the effects of the Charter of previous agreement, either concluded *inter se* by UN members or involving third parties, to discipline the influence that the Charter could exert on UN members treaty-making capacity and to establish a legal procedure in order to evaluate *(i)* whether a treaty actually conflicted with the Charter and *(ii)* what legal consequences the primacy of the Charter should have for the conflicting treaty. Furthermore, the Committee felt it appropriate to clarify that the proposed primacy clause would not have necessarily implied for UN members to renegotiate previous agreement, since the prevalence of the Charter could have been ensured – when necessary – for example by means of the mere derogation

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[182] Ibid, 803; Kolb, *L'Article 103 de la Charte des Nations Unies* (n 161), 63.
[183] *UNCIO* (vol 13) 675.

or disapplication of conflicting provisions. In conclusion, following the report[184] adopted by the Committee, the rule set forth by Article 103 UNC was intended to establish – as a general principle and a 'material result' to be pursued – the prevalence of the obligations placed onto UN members by the Charter over any other obligation of conventional international law, irrespective of the procedures or legal arguments that may lead to such result and without establishing any rule of explicit hierarchy between different sources of international law. It was a matter of '*obligations v. obligations*', to be dealt with each time an actual conflict arose (indeed, one can imagine *either* obligations that are intrinsically conflicting with the principles of the Charter of the United Nations, *or* obligations that may occasionally collide with the same Charter. The latter scenario may be verified *both* in case a provision of general international law is applied in a way that conflicts with the Charter, *and* in case a supervening obligation under the Charter is such to contrast with previous obligations under a different instrument of international law, as will be explained hereafter). Moreover, with regard to potential conflicts between the Charter itself and subsequent international agreements, the Committee considered that an explicit limit to the international legal capacity of UN members was not altogether necessary given that, *on the one hand*, the prevalence of the Charter was affirmed with regard to any other international agreement (without necessarily implying a limitation of member states treaty-making power) and, *on the other hand*, the 'good faith clause', provided by Article 2.2 UNC, should have compelled UN members not to enter into obligations that might have impaired their own compliance with the Charter. These considerations led to the final text of Article 103 UNC, adopted by the IV

[184] Ibid, 716-718.

Commission of the San Francisco Conference on June 15, 1945 and subsequently approved by the contracting parties, with minor aesthetic changes.[185]

The analysis of the path that led from Article 20 of the Covenant of the League of Nations to Article 103 UNC (through the *travaux préparatoires* of the latter) helped me to point out a number of key elements that need to be properly taken into account for the purpose of this work, with particular regard to the actual meaning of Article 103 UNC and its rationale. The transition between the clause of the Covenant and the corresponding clause in the Charter shows an ideological and theoretical change of approach that cannot be ignored when it comes to understanding the scope of Article 103 UNC and its proper interpretation *vis-à-vis* other instruments of international law. As I outlined above, Article 20 of the Covenant was construed to be both a conflict avoidance clause and a conflict resolution clause. It was structured as a norm of general international law and aimed at establishing detailed framework in order to deal with each case of (actual or potential) conflict between the Covenant and different understandings. As a consequence, it provided different disciplines, procedures and effects, depending on the subjects of conflicting obligations (members of the League of Nations *inter se* or members and third parties) and on the time such conflicting obligations were entered into (before or after the League of Nations was established). Particularly, by means of Article 20 CLN, the parties of the Covenant explicitly abrogated any prior obligation or understanding *inter se*, that conflicted with the Covenant and undertook not to enter into any future agreement in contrast with the same Covenant. Moreover, they committed themselves to

[185] Ibid, 123.

take all the appropriate steps in order to procure their release from any prior obligation, entered into with third parties, that could impede them to perform their obligations under the Covenant. Notably, the norm made general reference to ‘obligations’ and ‘undertakings’, to include a wider set of sources of international law, not limited to treaties. As I argued above, Article 20 of the Covenant of the League of Nations was intended to set forth substantive legal provisions, with very limited needs for further interpretation, in coherence with the international law framework it was construed to comply with. Nonetheless, the wide number of problematic issues that Article 20 CLN had left unsolved (think about the obligation to renegotiate previous agreements with third parties, the unassigned power to assess which obligations actually conflicted with the Covenant and the difference between intrinsic conflict and occasional conflict) emerged in full within the preparatory works of the UN Charter and led the contracting parties to adopt a very different approach. Instead of providing a specific discipline for each scenario of potential conflict, Article 103 UNC simply provides for the Charter to prevail over any other agreement (here the word ‘agreement’ is preferred to the way vaguer ‘understanding’); it focuses on the purpose that should be achieved and leaves to the interpreter, on a case-by-case basis, the task of identifying the correct or at least acceptable legal path in order to achieve such result. The concept of prevalence as a ‘political’ principle managed to overcome en bloc the criticalities brought along by Article 20 of the Covenant of the League of Nations, bypassing the problem of ‘general and abstract’ legal categories in favour of a result-oriented provision, aimed at preventing any sort of conflict, regardless for the legal argument or procedure one could follow to achieve such result and for the effects on international obligations the Charter was set to prevail over.

III. **SCOPE OF ARTICLE 103** of the UN Charter: a Hierarchy Rule?

While it provided substantial help in reaching an (otherwise difficult) agreement on a primacy clause to be included in the Charter, the 'political' wording of Article 103 UNC and the case-by-case approach it adopts left the interpreters substantial leeway as regards the legal effects to be attributed to the norm and its proper application. Indeed, as I argued above, the drafters of Article 103 UNC decided to focus on the effects they desired to achieve, without properly specifying the legal scope of the norm they were about to set up. Far from being a merely stylistic choice (in favour of synthesis or clarity), the wording of Article 103 UNC reflects profound theoretical differences and does not find its grounds on a common standpoint. The brief analysis of Article 20 of the Covenant of the League of Nations and the *travaux préparatoires* of Article 103 UNC clearly outlined that Committee 2 of the IV Commission at the San Francisco Conference could not eventually find a common position in order to implement a strictly legal procedure, capable of ensuring the primacy of the Charter without opening a wide doctrinal discussion on its possible shortcomings, its potential contrast with 'classical' principles of international law and the impossibility of regulating in advance any situations of conflict that the Charter might be confronted with. Differently from what usually happens, the *travaux préparatoires* of Article 103 UNC could not help in identifying the intention of the drafters as of the rationale and the scope of the norm, they rather tell where the discussion started and the model drafters looked at (Article 20 of the Covenant of the League of Nations), the criticalities they outlined with regard to such a model (*a)* the immediate abrogative effect of the norm; *b)* the limitation of the treaty-making power of states and *c)* the position of states that were third parties to the Charter) and the effect they desired to achieve irrespective of said criticalities (the prevalence of the

Charter over any other treaty). They eventually tell that the above-mentioned problems were not solved at the time and it is – therefore – for the interpreter to find the appropriate solution, on a case-by-case basis. Such choice, however, is not devoid of meaning (at least in political terms) when it comes to identify what kind of norm Article 103 UNC actually is.

a. *Arguments for constitutionalising international law*

A number of challenging scholarly debates have arisen around the scope of Article 103 UNC since its adoption in 1945, its effect towards third states probably being the most complicated issue to solve. For the purpose of my analysis, however, the systematic reading of the primacy clause has a special relevance, since it exerts a decisive influence on interactions between UN law and other legal regimes (within international law), therefore – ultimately – on the interaction and potential conflicts between UN law and EU law. In fact, to the extent of my analysis, I merely assumed that Article 103 UNC did not establish a hierarchy between UN law and other legal orders (within international law), placing the Charter at the top of said hierarchy. I maintained, by contrast, that Article 103 UNC should be interpreted as a conflict avoidance clause (although one of a particular kind), whose application is limited to material cases of contrast between obligations that stem from the Charter and any other obligation of conventional international law. At a closer look, regarding Article 103 UNC as a hierarchy rule implies adhering to the monist choice with regard to interaction between UN law and different legal orders, where the latter are somehow 'subordinate' to the former and the Charter acts, *lato sensu*, as the constitution of the international

community.[186] Differently, those who consider Article 103 UNC as a conflict avoidance norm, generally adopt a more nuanced approach to the problem of regime interaction, without going so far as to theorising (either implicitly, or explicitly) the existence of an 'international constitutional norm', that being the Charter.[187] Starting from the genesis of Article 103 UNC (and its predecessor), the lines that follows will briefly represent the arguments in favour of the hierarchy rule and those in favour of the conflict avoidance clause, in order to conclude that – although the existence of a constitution for the international community would be an evocative idea – there is actually no legal ground in the Charter to underpin such theory. Conversely, reading Article 103 UNC as a conflict avoidance clause is more advisable, since it does not require to extend the meaning of the norm by means of interpretation, it is more respectful of the purpose the drafters aimed to pursue and, ultimately, it better suit the current needs of international law.

Legal theories that look at the Charter as a constitutional norm are nothing new: indeed, their first appearance dates back to the fifties.[188] However, in those circumstances, the idea of categorising the Charter as the international constitution was the outcome of a political interpretation rather than a strictly legal one. *On the one hand*, cloaking the Charter with a 'constitutional dress' was

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[186] An extremely clear example of this position (that will be discussed hereinafter) is provided by the work of Bardo Fassbender. Fassbender relies on the reasoning of Hans Kelsen in order to qualify the UNC as a constitution proper, based on its alleged global binding force, irrespective of UN membership. Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leyde 2009) 112, 114 (for a brief analysis of the subject matter, *vis-à-vis* Article 2.6 UNC, see *infra* p. 111.

[187] For an example of this stance see Alix Toublanc, 'L'Article 103 et la Valeur Juridique de la Charte des Nations Unies (2004) 108 Revue générale du droit International public 439 and Milanovic (n 136) that points out the many ideological preconceptions, which lie behind the idea of constitutionalising international law.

[188] Kopelmanas (n 172), 203; Georges Kaeckenbeeck, 'La Carte de San Francisco dans ses Rapports avec le Droit International' in *Recueil des Cours de 1923 à 1972 professés a l'Académie de droit international de La Haye* (tome 70, 1947) 109, 297; Charles Cadoux, 'La Superiorité du droit des Nations Unies sur le droit des États Membres (1959) 63 Revue générale de droit international public 649, 651-655.

functional to reinforce the strong symbolic effect that the contracting parties desired to convey; *on the other hand*, the idea of an international constitution could be very helpful in order to stress its innovative effects with regard to classical international law. To this extent, referring to the Charter of the United Nations as a constitutional treaty was not intended to qualify the Charter as a constitution proper, but to outline its significance (either symbolic, political and ideological) within the context of international law, with particular regard to conventional international law. In this sense – at least initially – no one paid great attention to the revolutionary legal effects that vesting the Charter with a constitutional force would necessarily have implied, the first and most evident being the establishment of a hierarchy of the legal sources of international law, which was previously unknown. More recently, however, the theory that looks at the Charter as a constitutional treaty has been developing in a more substantial way, trying to identify within the Charter itself the (fundamental or) constitutional principles of the international community (i.e. the community of states) and to outline in the international legal order those characters that identify a constitutional order proper.[189]

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[189] According to Krzysztof Skubiszewski, looking at the UN Charter as a constitution favours the adoption of a teleological interpretative path, which ends up reinforcing the scope of the UN, by means of an implied-powers theory. Furthermore, subsequent practice and agreements would serve as 'authentic' means of interpretation of the UN Charter, thus underlining the idea of a 'living instrument' of law. Krzysztof Skubiszewski, 'Remarks on the Interpretation of the United Nations Charter' in Rudolf Bernhard and others (eds), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte – Festschrift für Hermann Mosler* (Springer 1983) 891, 893, 898; Eric Suy stresses the constitutional nature of the UN Charter as a comprehensive document that pursues the organization of powers in order to achieve a common goal, rather than balancing concurring goals, as it happens with other treaties. Eric Suy, 'The Constitutional Character of Constituent Treaties of International Organizations and the Hierarchy of Norms', in Ulrich Beyerlin and others (eds), *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt* (Springer 1995) 267, 277; James Crawford points out that, being the UN Charter the constituent treaty of the United Nations, establishing its structure, attributing powers to different bodies and setting out its fundamental values, the almost universal membership of the UN allows to look at it as the potential constitution of the international community. James Crawford, 'The Charter of the United Nations as a Constitution', in Hazel Fox (ed), *The Changing Constitution of the United Nations* (British Institute of International and Comparative Law 1997) 3. Bardo Fassbender tends

First of all, the Charter is undoubtedly a 'constituent one', both from a substantial and from an institutional point of view. Although states have probably never toyed with the idea of establishing some sort of international constitution or global governance, nonetheless the process they undertook with the Charter led to the development of a common framework of values and principles that aimed at being the foundations of a peaceful coexistence and fruitful global cooperation. As it often happened with national constitutions, the Charter has codified some pre-existing principles and peremptory norms, generally accepted by the community of states as a whole (i.e. sovereign equality and certain rules of *jus cogens*), and recognised the consensus that the international community had reached on other ones (i.e. the prohibition of the use of force; the principle of self-determination of peoples; the promotion of respect for human rights and fundamental freedoms), formulated in the broad manner which is typical of a

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to stress the almost global membership of the UN and the acceptance of the principles of the UN Charter as well as of the decision adopted by UN bodies by non-members as indicators of the constitutional value that the Charter acquired. Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 Columbia Journal of Transnational Law 529, and also Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (n 186). Fassbender further argues that 'the Charter is the supporting frame of all international law and the highest layer in a hierarchy of norms of international law, leaving no room for a category of 'general international law' existing independently beside the Charter'. Bardo Fassbender, 'The Meaning of International Constitutional Law', in Ronald St. John Macdonald and Douglas Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijoff 2005) 837, 848. Ronald St. John Macdonald observes how the UN Charter and the law generated by the UN has provided some constitutional guidance in the normative evaluation of conflicts over different interests and values. Ultimately, he maintains that supranational constitutionalism, in terms of values, does not collide with but instead reinforces national constitutional traditions. Ronald St. John Macdonald, 'The Charter of the United Nations as a World Constitution', in Michael Schmitt (ed) *Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday* (2000) 263, 264, 293. Thomas Frank focuses on the differences between the UN Charter and other treaties, in terms of primacy (with reference to Article 103 UNC), duration in time and resistance to amendments. In species, the UN Charter cannot be revoked, no provision exists for a state to resign from the UN and a reinforced majority is provided for any amendment to be approved. Thomas Franck, 'Is the UN Charter a constitution?', in Jochen Frowein and others (eds), *Verhandeln für den frieden* (Springer 2003) 95, 96. Michael W. Doyle focuses on the institutional dimension of the UN Charter as an instrument of global governance. Michael W. Doyle, 'Dialectics of a Global Constitution? The Struggle over the UN Charter' (2012) 18 European Journal of International Relations 601.

Grundnorm.[190] From an institutional point of view, the Charter created a new organisation, the United Nations, which represents the gathering of the international community. It also defined the institutional structure of the organisation, the powers and attributions of its different bodies along with the duties and rights of member states. In fewer words, *on the one hand*, the Charter set forth the binding values and purposes of the community of states, while, *on the other hand*, it provides a general legal framework to regulate relations between states, either on a bilateral basis and as a community. This does not mean, obviously, that one can expect the whole set of principles and rules that govern the life of the international community to be codified within the Charter. As it happens with nation states, in spite of general attempts to organise the constitution within one or few comprehensive documents, the constitutional order further grows and develops even beyond what is written, with the effect of reinforcing – rather than weakening – the fundamental norm.

Another argument that is often spent in favour of the constitutional nature of the Charter is definitely its inclusive character: to date, membership of the United Nations is almost universal and – with some exceptions – the fundamental principles enshrined in the Charter have been voluntarily accepted and shared even by the few non-members of the organisation. Such global acceptance of its values and basic norms would make it reasonable to look at the UN Charter as the constitution of the international legal order.[191] In fact, national constitutions

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[190] Luigi Condorelli, 'La Charte, source des principes fondamentaux du droit international', in Régis Chemain, Alain Pellet (eds), *La Charte des Nations Unies* (Economica 1985) 162.
[191] Fassbender 'The United Nations Charter as Constitution of the International Community' (n 189), 567; Stefan Kadelbach, Thomas Kleinlein, 'International Law – a Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles (2007) 50 German Yearbook of International Law 303, 318; Christine EJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff 2011), 31.

usually represent the heritage of values and principles generally shared by a community of people and, to this extent, the parallelism with the Charter could be maintained.

By contrast, one may easily argue that non-member states would hardly be bound by the institutional framework of the United Nations, that is to say the decisions of UN bodies (particularly the enforcement system provided by Chapter VII of the same Charter). However, those who support the idea of the Charter as an international constitution tend to stress the fact that non-member States have in most cases proven willing to abide by the decision adopted by UN bodies – namely Security Council resolutions – even if they were not formally bound by such decisions [192] (for example, this is the case of Switzerland before its accession to the United Nations as a full member, in 2002). This circumstance would serve, in their view, to show how the value of the Charter as the fundamental norm of the international community is recognised by states regardless of their actual membership of the United Nations.

A third argument, which is often resorted to in favour of the constitutional dimension of the Charter is its dynamism and its proven capability to evolve in a way that is consistent with changes that emerge in the international community. To this extent, the success of many modern national constitutions comes from their capability to be flexible instruments, in order to meet (through interpretation) the evolving needs of the community they are expected to govern, still being rigid enough to preserve their fundamental principles and values. Indeed, since 1945, the Charter has faced a number of similar challenges, experiencing radical social

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[192] See, for example, Bardo Fassbender, *UN Security Council Reform and the Right of Veto. A Constitutional Perspective* (Martinus Nijoff 1998), 109. But *contra*, Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart 2004), 97.

and political changes (the Cold War before, the War on Terror), seemingly without losing its capability to represent the ultimate normative framework of the international community. According to some scholars the interpretative processes that allowed the Charter to preserve its central role within an evolving social and political framework are much close to the ones that characterises domestic constitutional law.[193]

Fourthly, some stressed the parallelism between the Charter and national constitutions as it would realise an institutional structure based on the separation of powers.[194] Since the origins of the tripartite system, in Montesquieu's The Spirit of The Laws, this principle has continuously evolved to represent one of the founding elements of democracy *per se*. Within modern constitutions, the existence of a separation of powers is a necessary prerequisite for the proper functioning of an institutional system based on democracy as concentration of power in the hands of a sole institution radically excludes any checks and balances. In this regard, these scholars envisage in the institutional structure of the Organisation and the different attributions that the Charter grants to UN bodies a clue of the constitutional nature of the same Charter and the legal framework it established.

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[193] See Francis Paul Walters, *A History of the League of Nations* (Oxford 1960) 1. Such interpretation seems to be recalled by the Convention on the Law of Treaties of 1969, which considers the object and purpose of a treaty as a main source of interpretation and introduces specific safeguards for 'constituent instruments of international organisations', whose purposes and rules should remain unaffected. In this regard, either the International Court of Justice has developed a method of interpretation which focuses on the purpose of each Charter provision, in the context of the principles set forth by the Charter as a whole, thus closely recalling the concept of 'implied powers', nowadays widespread in constitutional (and European) law. In this respect, the practice of different UN bodies has gradually become a source of interpretation *per se*, as it has commonly happened with constitutional bodies within domestic legal systems.

[194] Blaine Sloan, 'The United Nations Charter as a Constitution' (1988) 1 Pace Y.B. Int'l L. 61, 77.

In the light of these four main arguments, those who support the constitutional nature of the Charter draw a few extremely relevant normative conclusions.[195] The entry into force of the Charter would have established a brand-new international legal order, characterised by the existence of an international system of governance, where the UN bodies represent constituted powers, and a proper hierarchy of legal sources. More importantly, the legal system established by the Charter would be a universal one, addressed also to non-members, since the natural scope of a constitution is to bind each and any member of the community it governs (in this case, the international community of states). Furthermore, according to the constitutional interpretation, the Charter would also apply to non-state entities, such as other international organisations, but also individuals, companies and other legal persons. To this extent, Article 103 UNC is interpreted as a structural provision, since (i) it would establish a proper hierarchy of norms within international law, with the Charter being placed 'on the tip of the pyramid', (ii) the hierarchy it establish would be binding for the whole international community, including non-members, (iii) any norm that is contrary to the Charter would be 'unconstitutional' and – as a consequence – null and void.

b. *A constituent treaty, not a constitution*

This theory is not altogether convincing. First and foremost, it apparently suffers from a clear logical defect. Authors that support the constitutional interpretation of the Charter start from the 'observation' of the Charter itself (i.e. its role within the international community, its structure and its interpretation) and maintain it presents some of the fundamental characters of domestic constitutions. To

[195] See Kolb, *L'Article 103 de la Charte des Nations Unies* (n 161), 312-316.

summarise: (a) it is a constituent instrument, since it found a new organisation with its own legal system; (b) it set forth the fundamental values and purposes of community of member states; (c) it provides a general legal framework to regulate relations between member-states, either on a bilateral basis and as a community; (d) it was accepted by (virtually) any state in the world, given that membership of the United Nations is – to date – almost universal and non-members have, in a number of cases, voluntarily abided by the Charter; (e) it can be regarded as a flexible and 'living' instrument, capable of being interpreted in order to meet the evolving needs of the international community. At the same time, it is rigid enough to preserve the fundamental values that lie at its core; (f) it established an institutional system characterised by a separation of powers between UN bodies (in terms of 'legislative' and 'executive' powers) that recalls the one provided by domestic constitutions. Given these similarities with domestic constitutions, authors who support the constitutional nature of the Charter maintain[196] that it should necessarily enjoy the same force and the same scope of a national constitution, namely: it should be considered the higher-ranking norm within a proper hierarchy in the international legal order, it should apply to the whole international community (and not only to member states) and it should be capable of nullifying any conflicting norm (to be considered lower in rank), according to the principle *lex superior derogat legi inferiori*. By contrast, these consequences are neither necessary, nor can they be drawn from positive law. The logical scheme followed by constitutionalists can be summarised by two consequential arguments. First: (1) all constitutions have the 'X' character; (2) the Charter has the 'X' character; so (3) the Charter is a constitution. Second: (4) all constitutions

[196] As discussed in para. III.a, above.

have the 'Y' power and the 'Z' scope; (3) the Charter is a constitution; so (5) the Charter have the 'Y' power and the 'Z' scope. The first argument, however, is not a proper syllogism and, as a consequence, the proposition (3), that grounds the whole logical structure, is not necessarily true. In fact, maintaining that 'all constitutions have the 'X' character' does not imply that all legal instruments that have the 'X' character are, themselves, a constitution. Indeed, the constitutional theory tries to draw normative consequences *a priori*, from the simple observation of structural similarities between the UN Charter and modern national constitutions. These arguments tend to represent the Charter for what it should be in the idea of the constitutional doctrine, rather than for what it actually is, based on positive law and its general application by member (and non-member) states; ultimately it presents a conceptualist political/philosophical interpretation of the Charter, rather than one based on positive legal arguments, be them literal or teleological.[197] Although the idea of a global constitution may somehow be suggestive, as I observed above, the *travaux préparatoires* clearly suggest that founding states were neither trying to establish a new global governance, nor to set forth a new rigid hierarchy of the sources of international law as they drafted Article 103 UNC. In fact, the text of Article 103 UNC adopted at the San Francisco Conference reflected the necessary compromise between different theoretical stances that could hardly be reconciled. As I remembered above, the main unsolved problems that emerged during the preparatory works were – in particular – the legal effects of the Charter with regard to previous understandings that might conflict with the Charter itself (should it enjoy a stronger nullifying effect, an abrogative or a derogative one?) and the legal effects of the Charter

[197] See Milanovic (n 136), 77, Liivoja (n 136), 584, 612.

with regard to previous understanding that were entered into by UN members and non-members (i.e. its effects towards third states). Some of the founding states proposed a 'stronger' text of Article 103 UNC, establishing a hierarchical relationship between the Charter and any other instrument of international law, including those agreements entered into by member states and third parties. By contrast, others adopted a more problematic and nuanced approach to these problems, refusing to broaden the scope of Article 103 UNC to such extent, and no common position was eventually reached. Taking a closer look, the problems I just described above represent two key-issues when it comes to qualifying the Charter as a constitution in strictly legal terms: describing the Charter as a constitution proper means adhering to the first and stronger thesis that wanted the UN Charter to be hierarchically superordinate to any other instrument of international law, and applied universally. This thesis found no unanimous support within the San Francisco Conference. The current text of Article 103 UNC, by contrast, reflects the choice of the contracting parties to introduce a 'variable geometry', purpose-oriented norm, that focused on the effect to be achieved (ensuring the prevalence of the Charter), without prescribing the means member states should adopt in order to pursue that same effect. This conclusion implies that the legal reasoning to be followed, to ensure the primacy of the Charter, may be determined on a case-by-case basis, depending on the circumstances and on the subjects involved. Something very different from what happens with national constitutions. With particular regard for the effect of the UN Charter, moreover, one may add that – in order for the same Charter to prevail over other instruments of international law – it is often neither necessary, nor desirable that the latter be nullified or abrogated. In relation to temporary measures adopted by the Security Council, for example, the simple derogation

or interim suspension of conflicting obligations might be a sufficient and appropriate means in order to ensure the prevalence of the Charter and UN law at large.

Similar logical flaws can be identified with regard to the 'global membership' argument and the 'voluntary obedience' argument as well. In relation to the almost-global membership of the UN, one may raise at least two objections, the first one is somehow a 'definitory' one and the second is one of a strictly formal nature: (i) while it is certainly true that a constitution is a fundamental norm that is accepted by and binding for the entire community it is set to govern, not every norm that is accepted by and binding for an entire community (be that of people or of states) is necessarily a constitution;[198] (ii) even if one could affirm that every norm that is accepted by and binding for an entire community is a constitution (which is not), membership of the United Nations does not represent the entire community of existing nation states all over the world, since an almost-global membership is not sufficient to postulate the global acceptance of the Charter as the international constitution. In addition, voluntary obedience of non-members to the principles enshrined in the Charter and to the decisions adopted by the Security Council by virtue of its statutory powers does not necessarily vest the Charter with a constitutional power. In fact, the voluntary nature of such compliance radically excludes – *per se* – one of the characters of

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[198] To this extent, one may recall the similar debate on the constitutional nature of EU Treaties (that I dealt with in Chapter 1, above): if EU Treaties are commonly regarded (given their constituent nature) as 'constitutional treaties', since they established a common set of rules and values that govern the European community of states, nonetheless they cannot be considered as a European constitution *stricto sensu*. The reason for not ratifying and abandoning the Treaty establishing a Constitution for Europe, signed in Rome in 2004, lied mostly in its constitutional tone and in its ambition to establish a proper constitutional framework for the EU. The greater part of the innovations brought by the 2004 constitutional treaty was somehow recovered by the Treaty of Lisbon that struggled to repeal, however, any direct reference to a constitutional charter and continued to rely on the 'contract-like' model, proper of conventional instruments of international law.

a constitutional norm, that is to say its imperative power: obedience to a constitutional norm is always necessary for any members of the community and never voluntary.

It is useful, in this regard, to briefly consider Article 2.6 UNC, according to which '[t]he Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security'. Principles referred to in Article 2 UNC are, namely, sovereign equality and the general ban on the threat or use of force in order to settle disputes between states. This obligation, imposed onto UN institutions by the Charter of the United Nations, is sometimes interpreted to maintain that the UN Charter enjoys binding force for non-members as well.

It was argued[199] that the principle of sovereign equality, which represents one of the very foundations of the international legal order, could not be effective before Article 2.4 UNC[200] introduced a general ban on the threat or use of force. To this extent, since non-members are both protected by[201] and expected to comply with the principles set forth in Article 2 UNC (i.e. a violation of the general ban on the threat of use of force may be sanctioned by the Security Council, under Chapter VII UNC, irrespectively of the member or non-member status of the 'perpetrator' and of the 'victim') it may be maintained that non-member states are duty bound to comply with the UN Charter.

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[199] Fassbender, *The United Nations Charter as the Constitution of the International Community* (n 189), 112-114.
[200] 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.
[201] Since Article 2.4 UNC refers to 'any state'.

This view is supported by making reference to the opinion of Hans Kelsen,[202] whose substantial reasoning rely on the fact that, if the UN Charter attaches sanctions to non-member states when they adopt certain behaviours, then an obligation exists for non-member states to adopt contrary behaviours.

I respectfully dissent.[203] First of all, compliance with the general ban on the use or threat of force by non-members, based on the actual risk of sanctions adopted by the UN Security Council against them, is not sufficient to maintain that non-members are legally bound to comply with the UN Charter. The logical equation: (A) all subjects that are bound by law X must obey law X; (B) subject N complies with law X; so (C) subject N is bound by law X; is not a valid syllogism.

Non-member states may be compelled to comply with the UN Charter and refrain from the use of threat of force due to the potential impact that sanctions adopted at the UN level (and applied by the vast majority of the community of states) may have against them. This does not necessarily mean – however – that they perceive compliance with the UN Charter as a legal obligation, but rather as a necessity, in order to avoid greater damages. In sum, the effectiveness of the

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[202] Kelsen, *The Law of the United Nations* (n 162), 117

[203] Opinions contrary to an over-extensive interpretation of Article 2.6 UNC are proposed, among others, by Jeremy Matam Farral, *United Nations Sanctions and the Rule of Law* (Cambridge 2007), 66; Christina Eckes, *EU Counter Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford 2009), 231, 232; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart 2016), 98. In a quite old essay, Georg Schwarzenberger, reasoning on the concept of sovereignty and starting from classical concepts in international law (such as the idea of consent and the principle *pacta tertiis*), firmly opposes any chances for the UN Charter to impose obligations upon non-members. Georg Schwarzenberger, 'The Forms of Sovereignty: An Essay in Comparative Jurisprudence' (1957) 10 Current Legal Problems 264, 280. While he recalls the ideas of Hans Kelsen (n 162), 117, in his comment to Article 2 UNC, Wolfgang Graf Vitzthum, does not go this far to conclude that this provision renders the UN Charter binding for non-members as well. Wolfgang Graf Vitzthum, 'Article 2', in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford 2002) 22. Interestingly, Kamil Mielus talks about the introduction of a 'quasi-duty' upon non-members. Kamil Mielus, 'Legal Implications of Palestine's Enhanced Status in the UN General Assembly' (2014) 3 Polish Review of International and European Law 51, 63. The thesis of Rain Liivoja, according to which the provision of Aricle 2.6 UNC is not aimed at binding non-members, but rather the organisation (to take action against non-members) is the one I feel to share. Rain Liivoja (n 136), 595.

international legal order, based on sovereign equality, as established by the UN Charter, comes from the quasi-universal adherence of states to the UN legal system and their inherent force as a community. This circumstance, however, is not sufficient to maintain that the UN Charter has universal binding force, *in abstracto*.

Even if one considers compliance by non-member states as the recognition of an international obligation, still this fact wouldn't imply for the Charter to be necessarily considered as a constitution proper. By contrast, the only conclusion that one may legitimately draw is that some provisions of the UN Charter are considered by the concerned states as customary international law (and this is probably the case).

Moreover, from an institutional point of view, the different functions the Charter assigns to various UN bodies could hardly be regarded as a separation of powers in the sense of what happens at the domestic level, to wit, the provision of a system of law-making, administration and adjudication, whose relationships are governed by a correct system of checks and balances. First of all, as many commentators have argued, no proper separation of powers could exist within an organisation that – by its very nature – does not exert the power and functions of a nation state, but a set of limited statutory attributions, provided by in the Charter itself. In fact, UN political and institutional bodies could not be compared with constitutional organs, usually established by national fundamental laws: in particular, the UN General Assembly could hardly be regarded as a legislature, since its powers are not properly legislative ones and it does not exert any control over the Security Council; indeed, no institutional relationship of trust actually exists between the two bodies. In addition, as regards the Security Council, it would be very difficult (if not impossible) to classify its resolutions as legislative

or executive acts, which makes a clear distinction between the executive and legislative powers within the UN somehow blurry. The Security Council itself could not be compared to a 'world government', since its attributions are generally 'limited by subject' and, more importantly, no proper enforcement mechanism exists to compel member states to abide its binding decisions. Last but not least, while a number of Courts – either permanent or temporary – do exist within the Organisation of the United Nations, the most important being the International Court of Justice, none of them can possibly be regarded as the representative of the UN judiciary power. In fact, the UN Charter did not provide the Organisation with any independent judicial body, in order to review the legitimacy of the acts adopted by UN institutions and agencies, as well as member states, *vis-à-vis* the Charter itself.[204]

It is not for this chapter to further indulge on the analysis of the many distinctions that make the Charter something very far from a national constitution. However, a few more words could be spent in order to clarify to what extent the adjective 'constitutional' may correctly be referred to the Charter and what conclusions one could not draw from such an adjective. The UN Charter can certainly be regarded a constitutional (better a constituent) treaty, since it

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[204] It must be pointed out that the idea of 'constitution' may acquire different meanings in legal literature, depending on the concept it is set to convey. A quite relevant number of scholars (among those who support the 'constitutional theory' in international law) adopt relatively thin definitions of 'constitution', which can easily be satisfied by constituent treaties, such as the UN Charter or EU Treaties (see, for example, the ideas of Doyle, Suy and Fassbender, especially in 'The Meaning of International Constitutional Law', at n 189). Said definitions are rooted on a broader conceptual approach, which tend to identify in some key elements (such as the establishment a kind of international governance) the 'indicators of constitutionalism'. Earlier constitutional positions (see the ideas of Kopelmanas and Kaeckenbeeck at n 188) were widely based on the presence of a common set of fundamental values. I do not disregard these semantic differences, but I hold that – in order for a legal instrument to be granted the hierarchical status and the overwhelming force of a constitution – broad conceptual similarities are not enough. In this respect, Christian Walter offers a quite different perspective on the concept of global constitutionalism, describing it as a process *in fieri*. Christian Walter, 'International Law in a Process of Constitutionalization' in André Nollkaemper, Janne Elisabeth Nijman (eds), *New Perspectives on the Divide Between National and International Law* (Oxford 2007) 191.

established *ex novo* a new international organisation, namely the United Nations. It surely shows some of the characters of a constitution, since it lays down the fundamental principles of the organisation it established and codify the shared values all member states are called to respect. Furthermore, alike a constitution, it set forth the institutional structure of the new organisation and the distribution of powers within such organisation. In order to properly address the Charter as a constitutional treaty, however one cannot expect it to be the exact projection of national constitution at the international level. What should be outlined – with respect to the Charter – is the existence of a constitutional structure, made up of fundamental principles and an institutional framework, that does not imply for the Charter to enjoy the same power and broad scope of a constitution proper. In conclusion, the idea of a constitutional Charter can be acceptable as long as it serves to outline its many affinities with national basic laws; however, one should always keep in mind that such comparison can only be based on theoretical parallelisms, rather than identities on the merits. In fact, what should be rejected is a theory that tries to draw from these structural affinities a number of legal consequences that can find no basis in positive norms, neither from a literal, nor from a teleological point of view. In other words, while it can be assumed that the Charter has a constitutional structure and – *lato sensu* – a constitutional function for the United Nations, it is certainly not intended to serve as a constitution under a normative point of view, for the international community of states.[205]

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[205] Nonetheless, the great majority of scholars today rely on a hierarchical idea of international law, even if differently nuanced. See, for instance, Paulus and Leiss (n 161), 2112; Fassbender, 'The United Natrions Charter as Constitution of the International Community' (n 189); Clarence Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401, 436; Aufricht (n 170), 682; Theodor Meron, 'On Hierarchy of International Human Rights' (1986) 80 AJIL 1, 3; David Schweigman, *The authority of the Security Council under chapter VII of the UN Charter* (Kluwer 2001) 194; José Alvarez, 'International Organizations: Then and Now' (2006) 1900 AJIL 324, 327; Oliver Diggelman, Tilman Altwicker, 'Is There Something Like a Constitution of International Law?' (2008) 68 ZaöRV 623, 637, 634; Riccardo Monaco, Carlo Curti

IV. ARTICLE 103 OF THE UN CHARTER AS A SOURCE OF INTERPRETATION: CONSEQUENCES FOR THE EU

My conclusion leads to abandon the idea of Article 103 UNC as a hierarchy rule that was set forth in order to preserve the constitutional role of the Charter, in order to address its function as a conflict avoidance clause, even if one of a particular species. Indeed, those legal theories that consider Article 103 UNC from a hierarchical point of view, tend to describe this provision as something very far from general international law (be that conventional or customary), that is traditionally grounded on a substantial equality between different sources of law, both in terms of rank, and in terms of (reciprocal) effect. In this regard, the 'constitutionally-oriented' reading of Article 103 UNC tend to verticalise the relationship between the Charter and other sources of international law, within a legal environment that is still mostly characterised by horizontal interactions. Reading and interpreting Article 103 UNC as a conflict avoidance clause appears to be more coherent with both the textual structure of the provision itself, and the *ratio legis* that inspired its drafting at the San Francisco Conference in 1945 (keeping in mind the lack of a common position and the relevant number of criticalities that flamed the debate around the late Article 20 of the Covenant of the League of Nations, whose Article 103 UNC should serve as successor).[206]

Gialdino, *Manuale di Diritto Internazionale Pubblico*. *Parte Generale* (Utet 2009) 324; Santiago Villalpando 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21 EJIL 387, 404; Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (Brill 2011) 836. For a general overview, see Erika de Wet, Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (Oxford 2012).

[206] Dominique Carreau, *Droit International* (Pedone 2001) 73; Alix Toublanc, 'L'Article 103 et la Valeur Juridique de la Charte des Nations Unies' (n 187); Milanovic (n 136), 77; Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester 2005) 14; Elena Sciso, 'Fundamental Rights and Article 103 of the UN Charter before the Court of first instance of the European Communities' (2006) 15 *Italian Yearbook of International Law* 135, 149; Karl Zemanke,

As I broadly discussed above, at a closer look, the text of Article 103 UNC does neither provide, nor suggest for the Charter to be hierarchically super-ordinated to other sources of international law. In fact, under a conceptual point of view it does not refer – either directly or indirectly – to the idea of hierarchy, but to the broader notion of prevalence, where it is generally accepted that rules of prevalence do exist between sources of the same rank. Furthermore – and this is a relevant interpretative argument as well – Article 103 UNC does not wish to regulate the interaction between the Charter and other sources of international law, but rather between the 'obligations [imposed onto UN members by the] Charter and their obligations under any other international agreement'. This particular wording unambiguously suggests that Article 103 UNC was not intended to establish a hierarchy between the Charter and other sources of international law *in abstracto*, but to resolve the conflicts that may occur in terms of concrete application of such norms and simultaneous performance of the obligations they set forth. It was not intended as a strictly legal or procedural norm but was rather drafted as a pragmatic political norm (a metanorm), taking a less legalistic and more principled approach. As I observed above, the wording of Article 103 UNC, gave rise to a number of broad interpretations, which tended to identify in the primacy clause a constitutional or hierarchical rule. By contrast, as my arguments should have shown, the purpose of Article 103 UNC is not

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'The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?', in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford 2010) 381, 399; Antonios Tzanakopulos, *Disobeying the Security Council, Countermeasures against Wrongful Sanctions* (Oxford 2011) 74; Antonios Tzanakopulos, 'Collective Security and Human Rights' in Erika de Wet, Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford 2012) 42, 44; Nigel D. White, 'The Security Council, the Security Imperative and International Law', in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2012) 4, 11. For a parallel reasoning on jus cogens see also Robert Kolb, *Peremptory International Law – Jus Cogens. A General Inventory* (Hart 2015) 104.

establishing the hierarchical pre-eminence of the Charter, but simply ensuring its prevalence in case of conflict. It is up to member states – on a case by case basis – to identify the appropriate legal means in order to pursue the result that Article 103 UNC clearly represents. Indeed, even those international courts that adopted a strictly monist approach with respect to international legal conflicts involving UN law (e.g. the General Court of the EU in *Kadi I*) made no explicit reference to a relationship of hierarchy between the UN Charter and other sources of international law, which could represent a dangerous precedent to be established.

As I briefly outlined before, the existence of a rule of prevalence does not necessarily imply the existence of a corresponding relationship of hierarchy between different sources of law. In fact, one may certainly affirm the primacy of a norm over another norm, being the two norms placed on a plan of hierarchical equality. One would never hold a conventional rule, established between two or more states, to be super-ordinate to a general rule of customary law in terms of hierarchy: the former could prevail over the latter based on a relationship of specialty, still being absolutely equal as for their rank. Furthermore, a conventional rule, established between two or more states, can certainly be derogated by a subsequent conventional rule having the same object, established between said states, without being outranked by the supervening norm. These two examples show how the prevalence or primacy of a norm can be achieved – in these cases, by means of the classical interpretative principles of *lex specialis* and *lex posterior* – without resorting to any kind of hierarchy rule. The issue of prevalence of a norm over another may well be addressed *in concreto*, as long as a conflict occurs, without having any influence on the hierarchy of the sources of international law and – more importantly – without any

permanent effect on the legal status (i.e. nullity or annulment) of the recessive norm.

In conclusion, if one considers Article 103 UNC far from any ideological constitutionally-oriented preconception, one can hold that the rule it set forth does not establish a fixed hierarchy between different sources of international law, with the Charter and UN law on the top of the pyramid, but introduces a particular conflict avoidance clause, aimed at ensuring the primacy of the obligations imposed onto UN member states by the Charter over any other obligations of conventional international law, in case a concrete conflict is verified. Article 103 UNC does not provide for a fixed legal procedure in order for UN law to prevail; it rather allows the interpreter to follow the path that better suits each particular case.

As a consequence, the norm that happens to conflict with the Charter may be derogated, suspended or simply left unapplied, depending on the particular circumstances at stake.

Ultimately, under a functional point of view, one may adhere to the legal theory that considers Article 103 UNC as a particular species of the rule *lex specialis derogat legi generali*, where the UN Charter (and UN law at large) should always be regarded as the 'special rule', in contrast with other norms of conventional international law. Furthermore, this specialty rule is itself a conventional rule and not one derived from general international law. One eventually understands the maxim *Carta pro lege speciali habetur, quae derogate legi generali*, where the *lex specialis* is obviously the whole set of UN law, and the *legi generali* is embodied by other international agreements.

This focused overview on Article 103 UNC led me to show how – in fact – no proper relationship of hierarchy can be established between the UN Charter

and EU Treaties. Article 103 UNC, often invoked[207] to maintain the constitutional dimension of the Charter in terms of legal effects, should be, by contrast, properly interpreted as a particular species of conflict avoidance clause (i.e. as a rule of interpretation). Such rule is capable of ensuring the primacy of UN-derived obligations in case a conflict actually occurs with other conventional obligations of international law, such as those deriving from EU Treaties, without altering the formal and substantial equality of the legal sources. The standpoint I maintained above represents – in my view – a strong argument in favour of the nuanced (or 'case by case') approach that I proposed in Chapter 1, when it comes to deal with the interaction between UN law and EU law in the delicate field of human rights.

Being clear that Article 103 UNC does not curtail the international 'treaty-making' capacity of Member States, neither it imposes to repeal conventional norms that might (potentially) conflict with the UN Charter, Member States will be called to carefully evaluate – on a case by case basis – the actual compatibility between the full performance of their obligations under the UN Charter and their obligations under the EU Treaties, to understand whether a joint performance is feasible, or whether UN law should prevail over EU-derived obligations. Having ultimately rejected the idea of the UN Charter as an international constitution, that naturally permeates the autonomous legal systems of European law, I can now clearly reaffirm that the EU – in its international legal capacity – is not a subject of UN law as its Member States are. Furthermore, neither the drafters of the UN Charter imagined making other international organisations directly subject to UN law, nor Member States decided to exclusively perform their obligations under the Charter within the framework of EU law (or worse, to make the EU voluntarily

[207] See, for example, Fassbender 'The United Nations Charter as Constitution of the International Community' (n 189), 573, Skubiszewski (n 189), 891.

subject to UN law). As no proper hierarchy can be established between UN law and EU law, an act adopted pursuant to UN law, by a UN body, has in general no authority to repeal or derogate an act adopted pursuant to EU law, within the EU legal system.[208] As I observed, Member States could either decide to implement Security Council resolutions by means of a common action within the EU or rather to provide such implementation on their own, depending on the compatibility of UN measures with the EU Treaties. If said compatibility can be maintained, Member States will be able to take action together within the EU legal framework in order to implement UN Security Council Resolutions. In this case EU secondary legislation should comply with both UN law and EU law and the ECJ should enjoy jurisdiction to exert a full and substantial judicial review. By contrast, in case Member States considers UN measures to be incompatible with EU law, pursuant to Article 103 UNC, they should perform their obligations outside the EU legal framework, whose norms should yield to the primacy of UN law and remain plainly unapplied[209] in case of conflict.

[208] For the sake of clarity, this does not mean that UN law can never have a direct effect within the EU legal system. As my dissertation has shown, UN law can be 'incorporated' within the EU legal system as and to the extent EU law so provides, within the limits of the Treaties and of the EU Charter of Fundamental Rights.

[209] Since the conflict between UN law and the EU Treaties is usually limited to one or more specific provisions of UN secondary law, one cannot envisage the temporary suspension of the conflicting norms in the Treaties, that would be greatly disproportioned in relation to the particular case and would bring along more damages than advantages. With regard to derogation, looking at general principles of international law, it may properly apply in case the two conflicting treaties involve the same contracting parties.

CHAPTER 3

UN BLACKLISTS AS A CASE STUDY: CURRENT CHALLENGES AND FUTURE PERSPECTIVES

I. Introduction – II. Before Kadi I: a decade of one-way monism – III. After Kadi I: learning from the EU lesson? – IV. Chances for a multilateral approach

I. INTRODUCTION

As I reach the third and last stage of this research, I have been passing through an extensive analysis of some debated issues, brought forward by the interaction between the UN and the EU legal systems in the field of human rights. I first tried to address these problems from a European perspective – and from the ECJ's point of view in particular – following the judicial path of the well-known *Kadi I* case, from the General Court to the Court of Justice of the European Union. Within both judgments, which lied on diametrically opposed theoretical backgrounds (being the monist theory for the General Court and the dualist theory for the ECJ), I identified a number of shortcomings and open questions that brought me to consider the need to overcome such classical dichotomies, in favour of a more nuanced approach to the problem, capable of taking into account *both* the specificity of the European Union as an international organisation *and* the pressing need not to subvert the international legal order. In my opinion, a long-term approach could not be properly developed by relying alternatively onto European law or UN law (*rectius*, struggling to establish a rule of hierarchy between the two legal orders), but should take into account the reciprocal position of the two within the 'broader picture' of international law. It is – ultimately – a matter of maintaining some kind of coherence within the international legal system, which unilateral (or ideological) points of view risk fatally undermining.

On the one hand, the unique dimension of the EU as an international organisation, with its own 'autonomous' legal system, cannot be ignored. Over the years, the efforts spent by the majority of Member States towards a 'more perfect union', paired with the judicial activism of the ECJ, led to an apparently irreversible cross-contamination between national legislations and EU law, where the former represented the sources of common constitutional values (*rectius,* the 'constitutional traditions common to the Member States', in the words of the ECJ) and the latter provided an overwhelming source of harmonisation and standardisation in terms of primary legislation (even though the widespread popular belief that set the percentage of EU-derived sources of law within domestic legal systems at 80% is devoid of any serious statistical basis). In this regard, the increasing number of acts adopted by means of regulations – that are directly applicable within the territory of each Member State – after the Treaty of Lisbon provided a remarkable contribution. It is quite obvious, as a consequence, that the so-called EU core values, i.e. those principles and values that are common to the constitutional traditions of Member States, passed through the evolutionary interpretation of the ECJ, are nowadays a primary source of constitutional interpretation, adopted by many constitutional courts across Europe, when it comes to deal with fundamental rights and civil liberties. *On the other hand*, however, the original nature of EU law as part of the international legal system cannot be entirely forgotten or set aside by reason of the constitutional cloak EU institutions, and the ECJ in particular, have vested themselves with over the years.

On the UN side, at least two key elements should be taken into account. First of all, as I had the chance to argue within the second Chapter, the constitutional dimension of the UN Charter should not be over-emphasised. While

it does present the characteristics of a constituent legal instrument, it nonetheless cannot be regarded as an international constitution, establishing a fixed hierarchy of norms within the international legal order. Apart from over-enthusiastic and philosophically-oriented interpretations, the Charter cannot be interpreted but coherently with the intentions of its drafters (i.e. the founding members of the UN) and with its original rationale, which were very far from any attempt of constitutionalising the international legal order and limiting UN member states' legitimate sovereignty and treaty-making powers. As discussed above, Article 103 UNC – invoked by a number of scholars as a pivotal hierarchy rule – should, conversely, be read as a conflict-avoidance clause (even if provided with a particularly binding force, according to Article 30 VCLT) that establishes the rules of precedence between different sources of international law. Secondly, one should take into due account that the UN itself is grounded on a set of shared principles, outlined within Chapter I of the Charter, which include (Article 1.3 UNC) 'promoting and encouraging respect for human rights and for fundamental freedoms for all'. To this extent, each and any act of UN bodies should be regarded and interpreted in such a manner as to be consistent with fundamental human rights, including Security Council Resolutions adopted pursuant to Chapter VII UNC. This element can be a crucial one along the path of my reasoning, if one considers 'internal coherence' the cornerstone of any legal system, or at least one of them.

Indeed, the legislator of the UN Charter (i.e. UN member states) certainly expected the Security Council to act consistently with the basic principles and purposes of the Organisation, set forth by Articles 1 and 2 UNC, as consistency with such principles was set as implicit condition of legitimacy for UN secondary

legislation.[210] However – as the ECJ correctly pointed out in *Kadi I* – the UN legal system provides no judicial and independent review of secondary UN law (such as Security Council Resolutions), in order to assess its consistency with the Charter.[211] The legitimate answer to this 'lack' of judicial review, though, cannot come from the activism of supranational or regional courts (such as the ECJ itself), but should be sought within the UN system, looking at the international legal order as a whole and preserving its coherence, while enhancing the positive interactions between its different components.

In this respect (to summarise some of the key points of the previous Chapters), *(a)* the EU is not under a direct and immediate obligation to perform UN Security Council Resolutions, nor Article 103 UNC has the similar effect of establishing a proper hierarchy between UN and EU law; *(b)* nonetheless, EU Member States may consider it appropriate (given the competences they chose to transfer to the EU) to perform UN-derived obligations by means of EU secondary legislation. In any case, however, *(i)* EU legislation adopted in order to implement UN Security Council Resolutions has to comply with the EU Treaties (including constitutional traditions common to Member States) and the EU Charter of Fundamental Rights, as interpreted by the ECJ, *(ii)* if such compliance is not feasible, pursuant to Article 351 TFEU, Member States remain at any effect capable of fully implementing UN measures by means of domestic law (and duty bound to do so, under the UN Charter); *(c)* the ECJ maintains full jurisdiction (and

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[210] Article 24.2 UNC explicitly provides that, while discharging its duties, the UN Security Council 'shall act in accordance with the Purposes and Principles of the United Nations', which include the promotion of human rights.

[211] The absence of an independent judicial review of secondary legislation within the UN legal system is not surprising, if one considers the rationale behind and the origins of the Organisation, mainly grounded on diplomatic and inter- governmental relationships between Member States. Given the very structure of the Security Council – in particular – and its initial focus, the need for a third-party assessment on the legitimacy of its decision was simply not perceived (and probably not wanted at all) by the drafters of the UN Charter.

not only a procedural one) to assess the legitimacy of EU secondary legislation, even if it is adopted to implement UN Security Council Resolutions, that should be struck down if they violates fundamental human rights.

Given all these assumptions, one further step is still missing in order to close the circle of my reasoning. As I observed above, Article 1.3 UNC set the promotion and respect for human rights and fundamental freedom as one of the crucial purposes of the Organisation. The open wording of this clause allows it to be interpreted consistently with the evolution of the international legal doctrine on human rights and fundamental freedoms, from the Universal Declaration of Human Rights onwards. In fact, international practice clearly shows how the idea of human rights and fundamental freedom has constantly evolved over the years towards a more inclusive and protective stance, thanks to the actions of a number of players, which include several UN bodies and agencies, supranational courts (such as the European Court of Human Rights), regional courts, such as the ECJ, and constitutional courts. The cross-contamination between different legal orders, both horizontally and vertically, led a number of scholars to talk about an emerging ‘multilevel system of protection’ for human rights and fundamental freedoms that tend towards a real globalisation. In this context, the EU (and the ECJ in particular) and EU Member States (with their long-established constitutional courts) has emerged as forerunners in terms of reliability and accountability, often ‘raising the bar of protection’ and leading the way of legal interpretation.

As regards the UN Security Council, its relationship with human rights has certainly changed since its establishment, along with the evolution in the scope of its action. In particular, the role of the UN Security Council has evolved over the years in order to include protection of human rights, at large, within the

concept of 'maintaining international peace and security'.[212] The subject is definitely wide and it is not for this work to deal with it extensively; some brief remarks, though, can add a few important elements to my analysis.

Interestingly, over the years, protection of human rights has become one of the policy areas which the UN Security Council has devoted itself the most, being eager to intervene in international crises, including by resorting to measures adopted under Chapter VII of the UN Charter.[213] However, while important steps have been taken by the Security Council to set higher standards of protection for human rights at the international level and to confront violations perpetrated by state and non-state actors, less attention was paid at the UN level to the protection of such rights 'within' UN Security Council measures.

At first, it would be legitimate to maintain that analogous standards should by applied by the UN Security Council both in relation to third-party actions, and in relation to its own policies. Despite that, especially with regard to the second side of this problem (i.e. protecting Human Rights within UN Security Council policies) a clear identification of these standards is far from being easy.

Looking at the UN Charter, the reference contained in Article 1.3 UNC (in conjunction with Article 24.2 UNC[214]) can be read as a flexible clause, capable of

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[212] Vera Gowlland-Debbas, 'Remarks by Vera Gowlland-Debbas', in (2009) 103 Proceedings of the Annual Meeting (American Society of International Law) 199. This view is shared by Jared Genser and Bruno Stagno Ugarte, 'Evolution of the Security Council Engagement on Human Rights', in Jared Genser, Bruno Stagno Ugarte (eds), *The United Nations Security Council in the Age of Human Rights* (Cambridge 2014) 3, 7-24, and Daphna Shraga, 'The Security Council and Human Rights-From Discretion to Promote to Obligation to Protect', in Bardo Fassbender (ed), *Securing Human Rights? Achievements and Challenges of the UN Security Council* (Oxford 2011) 8, 11. These last two works, in particular, provide interesting insight on how the practice of the UN Security Council have evolved since the sixties, from considering respect for human rights and fundamental freedoms as a matter of 'domestic jurisdiction' (and therefore excluded by the jurisdiction of the UN Security Council, under Article 2.7 UNC), to one of the Council's most important area of intervention.

[213] See Genser and Stagno Ugarte (n 212), 14-24.

[214] Article 24.2 UNC reads as follows: '[i]n discharging [its] duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted

adapting to the evolutions that the concept of human rights have encountered in international law.[215] From a procedural point of view, however, it remains unclear what possible consequences might be drawn in case the UN Security Council allegedly acted ultra vires and illegitimately sacrificed human rights.[216] The idea that such acts could be considered as voidable would imply the existence of a body, vested with the authority to declare them void. Plainly, this is not the case.[217]

In addition, international case-law offers no particular support in relation to this issue. When it was confronted with the problem, the European Court of Human rights variously avoided it by resorting either to a peculiar presumption of compliance of UN Security Council acts with human rights[218] or by maintaining the existence of a 'margin of appreciation' recognised to UN member states in implementing UN Security Council resolutions, in order to avoid violations of human rights.[219]

The somewhat 'extreme' idea to consider those acts null and void,[220] would endanger international security as a whole, encouraging states to 'cherry

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to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII'.

[215] In this sense, see the judgment of the European Court of Human Rights in *Al Jedda v United Kingdom* (2011) 53 EHRR 23, paras. 100-102. *Contra*, and in favour of a limited reference to the standard of protection that existed at the time the UN Charter was drafted, Orakhelashvili (n 84).

[216] A further problem is brought along by the fact that respect for human rights is not always an absolute clause: as states are entitled by a number of instruments of international law to adopt derogatory measures in case of public emergency, so should be the UN Security Council. See, in this respect, Dapo Akande, 'The Security Council and Human Rights: What is the role of Art. 103 of the Charter?' EJIL:Talk!, 30 March 2009, available at https://www.ejiltalk.org/the-security-council-and-human-rights-what-is-the-role-of-art-103-of-the-charter/.

[217] See Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran, James Sloan, *Oppenheim's International Law. United Nations* (vol. 1, Oxford 2017), 421, 422 especially at n 70.

[218] This is the position adopted in *Al Jedda* (n 215).

[219] This is the general argument of the Court in *Nada v Switzerland* (2013) 56 EHRR 18, para. 185.

[220] A theory supported by Dapo Akande, 'International Organisations', in Malcolm D. Evans (ed), *International Law* (Oxford 2014) 248, 262 and, to some extent, by Von Bodgandy (n 84). This is also the separate opinion of Judge Morelli in *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, 222.

pick' resolutions that they are willing to comply with, and discard others on the basis of alleged human rights violations.

From a European perspective, one may legitimately wonder why 'human rights and fundamental freedoms' referred to in Article 1.3 UNC should ever be considered as something different from (or less than) 'human rights and fundamental freedoms' as protected by the EU Treaties, the EU Charter of Fundamental Rights and common constitutional traditions of Member States. *On the one hand*, it may be observed that EU Member States are also members of the United Nations, and some of them gave an invaluable contribution to the establishment and development of both Organisations. This shared membership should lead EU Member States to act within the UN in a way that is coherent with their commitments under the EU Treaties and with their own constitutions. *On the other hand*, Article 351.2 TFEU prompts Member States to assist each other and act jointly ('adopt a common attitude') to eliminate the incompatibilities between the EU Treaties and other international agreements, which they are a party of. Such provision of the EU Treaties could probably be a substantial part of the answer to the problem of the interaction (and conflict) between the UN and EU legal regimes in the field of human rights and fundamental freedoms.[221] While the action of the ECJ cannot legitimately go beyond the 'border' of the EU legal

[221] This provision can be easily paired with Article 34 TEU, according to which 'Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the Union's positions in such forums. The High Representative of the Union for Foreign Affairs and Security Policy shall organise this coordination […]. Member States which are also members of the United Nations Security Council will concert and keep the other Member States and the High Representative fully informed. Member States which are members of the Security Council will, in the execution of their functions, defend the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter'.

system, conversely, Member States are bound to engage within the UN[222] in order to influence and shape the policies of the Organisation and render them coherent with the level of protection of human rights and fundamental freedoms, enshrined in the EU Treaties, as interpreted by the ECJ, which include common constitutional traditions.[223]

This solution is ultimately a political and diplomatic one, very far from the judicial model of protection for human rights and fundamental freedoms embodied by the ECJ, the European Court of Human Rights and national constitutional courts. Nonetheless, it seems today to be the only viable path to ensure the coherence of the international legal system at large, enabling EU Member States to comply with their obligations under the UN Charter, *on the one side*, and favouring global adherence to the higher standards of protection for human rights and fundamental freedoms, applied within the EU, *on the other*.

As a consequence, the following paragraphs will revert to the case of individual sanctions imposed by the UN Security Council, in the fight against international terrorism, analysing – in parallel – the evolution of UN secondary legislation (namely Security Council Resolution) and the corresponding acts adopted at the EU level, in order to implement such measures. My analysis will focus on the main 'shortcomings' of UN measures, *vis-à-vis* the principles established by the ECJ in *Kadi I*, and the indirect effect this judgment had on UN legislation adopted afterwards, with the aim of understanding to what extent EU Member States played a positive role in re-shaping UN positions and how they

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[222] As Vera Gowland-Debbas maintained, a viable settlement of the unsolved problem of human rights standards to be respected by the UN Security Council must be pursued within the UN legal system. See Gowland-Debbas (n 212), 202.
[223] See Machiko Kanetake, 'The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions' (2012) 1 INTERFACES Research Paper, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188915, 27, 34.

could better achieve the result of eliminating incompatibilities between the EU Treaties and UN law. In this respect, Paragraph II will analyse the pre-*Kadi I* scenario, characterised by an evident predominance of the UN 'securitarian' stance, plainly and uncritically followed by EU institutions, and introduce the EU's own model of individual sanctions. Paragraph III will outline some relevant precedents to *Kadi I*, with a particular focus on the crucial role played by the ECJ in fine-tuning the EU blacklists system, in order to ensure its compatibility with the protection of human rights and fundamental freedoms enshrined in the EU Treaties. Subsequently, it will address the post-*Kadi I* evolution of UN policies, towards a stronger protection of the individual, both from a procedural and from a substantial point of view. Taking stock of said positive evolution, my analysis will try to understand the influence of European stances within the UN, with the purpose of understanding – in Paragraph IV – whether the 'political solution' that I sketched above could ultimately lead to multilateral approach to the protection of human rights, settling conflicts between the UN and EU legal systems.

II. BEFORE *KADI I*: A DECADE OF ONE-WAY MONISM

Differently from what one may imagine, the commitment of the UN towards the prevention and suppression of terrorism financing dates back to 1999, well before the 9/11 attacks on the World Trade Center. Security Council Resolution 1267[224] can legitimately be considered the 'mother' of a well-developed series of Resolutions, aimed – *inter alia* – at addressing the growing amount of financial resources available to (and flowing towards) terrorist organisations and so enhancing their operational capabilities. Upon request of the United States of

[224] United Nations Security Council Resolution 1267 of 15 October 1999.

America (that hold a permanent seat in the Security Council), Res. 1267 was set to provide adequate countermeasures to two terrorist attacks that took place in Nairobi (Kenya) and Dar el Salaam (Tanzania) in 1998, against US diplomatic missions. While no certain evidence was provided – at the time – in order to identify those responsible of these two attacks, nonetheless Res. 1267 shows how the international community, and particularly the States seating in the Security Council,[225] considered Usama bin-Laden and his Al-Qaeda network, sheltered by the Taliban regime in Afghanistan, a serious threat to international peace and security (in relation to the Taliban regime, early Resolution 1214[226] had already expressed serious concerns, due to the 'deteriorating political, military and humanitarian situation in Afghanistan').

At this point, it must be briefly pointed out that the power to impose sanctions – vested in the Security Council by Article 41 UNC – and the mechanism of 'international security' established by Chapter VII UNC, as a whole were intended by the drafters of the Charter (at the San Francisco Conference) to deal with primary actors in international law: i.e. States. The political-diplomatic system set up within the Charter, in order to confront actual or potential threats to international peace and security (once again widely based on the principle of unanimity and characterised by strong veto powers), the very nature, the membership and the functioning of the Security Council itself, clearly reflect the rationale that lies behind this set of provisions.[227] Nonetheless, since its early days, the Security Council seemed to interpret the wording of Article 39 UNC

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[225] The Security Council was at the time composed as follows: China, France, Russia, United Kingdom and the United States as permanent members; Argentina, Bahrain, Brazil, Canada, Gabon, Gambia, Malaysia, Namibia, The Netherlands and Slovenia as Non-permanent members.
[226] United Nations Security Council Resolution 1214 of 8 December 1998.
[227] See Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge 2007) 60-78.

('The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall […] decide what measures shall be taken […] to maintain or restore international peace and security) and Article 41.1 UNC ('The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions […]') so as to include non-State actors within the group of potential targets.[228] While almost any resolution adopted under Chapter VII UNC, be it addressed to States or non-State entities, indirectly affected individuals, further innovation was brought along with Res. 1267 and especially with Resolution 1333.[229] *On the one side*, these Resolutions directly targeted (among others) Usama bin-Laden, both in its capacity as the leader of Al-Qaeda and as a natural person; *on the other side*, Resolutions 1267 and 1333 were not solely intended to compel a State or non-State entity to comply with Security Council's requests or recommendations – so removing or reducing the threat to international peace and security – but were rather maily structured as a set of potentially permanent measures, aimed at disrupting the targeted State or non-State entity (so directly removing the threat to international peace and security) in spite of their widely expected non-compliance. It is not for this work to indulge on the procedural and substantial limits that the Security Council should encounter to its sanctioning power.

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[228] See Noah Birkhauser, 'Sanctions of the Security Council against Individuals – Some Human Rights Problems', *European Society of International Law*, available at http://www.esil-sedi.org/english/pdf/Birkhauser.PDF, 2; Thomas Biersteker, Sue Eckert, 'Strengthening Targeted Sanctions through Fair and Clear Procedures', *Watson Institute Publications*, 2006, available at https://reliefweb.int/report/world/strengthening-targeted-sanctions-through-fair-and-clear-procedures, 7; Scott Vesel 'Combating the financing of terrorism while protecting human rights: a dilemma?', in Mark Pieth, Daniel Thelesklaf, Radha Ivory (eds) *Countering Terrorist Financing. The Practicioner's Point of View* (Peter Lang 2009) 205, 212. For a problematic approach to the general issue, see Davorin Lapas, 'Sanctioning Non-state Entities' (2010) 81 Revue Internationale de Droit Pénal 99, and also Maria-Lydia Bolani 'Security Council Sanctions on Non-State Entities and Individuals' (2003) 56 Revue Hellénique de Droit International 401.

[229] United Nations Security Council Resolution 1333 of 19 December 2000, analised hereafter.

However, these particular features are of significant importance for the sake of my research and need to be kept in mind, since *(a)* they characterise (with slightly different accents, over the years) any resolution adopted, to date, by the Security Council in this field and *(b)* they represent the ultimate reason for some of the criticalities and inconsistencies that will be encountered in a while.

a. Origins of blacklisting: Resolution 1267 and the first European reaction

Turning to the substance of Res. 1267, it identified two areas of intervention and seek to establish dedicate measures for the both of them. First of all, it intended to limit logistic capabilities of the Taliban (and in general their possibility to move from or towards the Afghan territories under their control). To this extent, it imposed onto UN member states an obligation to '[d]eny permission for any aircraft to take off from or land in their territory if it is owned, leased or operated by or on behalf of the Taliban',[230] in order to paralise the ability of high-ranking members of the Taliban regime abroad to return to Afghanistan and – in parallel – to curtail their range of action outside the Afghan territory. Second, it intended to strike down, as far as possible, the economic and financial resources of the Taliban regime and to impair its commercial activities, be they legal or illegal. In this regard, it provided for 'funds and other financial resources, including funds derived from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban' to be promptly frozen within any UN Member State.[231] From a procedural point of view, the Resolution established a Committee within the Security Council (the 'Sanctions Committee'), which included all of its members, tasked with the power of listing the aircrafts to

[230] Res. 1267, para 4(a).
[231] Res. 1267, para 4(b).

be banned from take-off and landing as long as the funds and properties to be 'frozen'. The same Sanctions Committee was also vested with the power to examine, on a case-by-case basis, any request for exemption in relation to the adopted measures, that might be filed for humanitarian reasons only, and to perform periodical reviews in order to assess *(i)* the impact of the imposed sanctions and *(ii)* the level of compliance with the same sanctions.[232]

In the aftermath of the adoption of Res. 1267, the EU responded on 15 November 1999 with Common Position 1999/727/CFSP. [233] The Common Position in question, lapidarily stating that '[a]ction by the Community is needed to implement' sanctions imposed by the Security Council[234] (and without much digression on the legal basis that required such action by the Community), simply committed Member States to adopt legislation in order to ban '[f]lights to and from the European Community carried out by aircraft owned, leased or operated by or on behalf of the Taliban under the conditions set out in [UN Security Council Res. 1267]'[235] and to freeze '[f]unds and other financial resources held abroad by the Taliban under the conditions set out in' the same Resolution.[236] Having regard to Common Position 1999/727/CFSP, on a proposal from the Commission, on 14 February 2000 the Council adopted Regulation (EC) 337/2000,[237] with a view to provide the maximum legal certainty, as well as uniform implementation of Res. 1267 within Member States. In terms of legal basis, the Council resorted to Article 301 EC, according to which '[w]here it is provided, in a common position or in a

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[232] Res. 1267, para 6.
[233] Council Common Position 1999/727/CFSP of 15 November 1999 concerning restrictive measures against the Taliban [1999] OJ L294/1.
[234] Common Position 1999/727/CFSP, Whereas 2.
[235] Common Position 1999/727/CFSP, Article 1.
[236] Common Position 1999/727/CFSP, Article 2.
[237] Council Regulation (EC) No 337/2000 of 14 February 2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2000] OJ L43/1.

joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures'. In this case, the necessity for the Community to intervene *in lieu* of Member States was justified by the need to preserve a fair and uniform competition within the Internal Market. As regards the merits, the Regulation looked merely reproductive of the Resolution it was set to implement, written in the broad and often vague register proper of the Security Council, without any noteworthy addition. It provided for aircrafts that were listed by the Sanctions Committee to be banned from taking-off and landing within the territory of the Community[238] and for any funds and other financial resources identified by the same Sanctions Committee to be immediately frozen.[239] The lists of aircrafts targeted by the flight ban and the funds and financial resources to be frozen were transcribed into two annexes, which the Commission was tasked with updating by means of a delegated regulation, based on the decisions of the Sanctions Committee, 'for reasons of expediency'. [240] As regards exemptions, the Regulation further clarified that the only body empowered to grant *ad hoc* exemptions from established sanctions was the Sanctions Committee itself, under the conditions set forth by Res. 1267, with no discretion for European institutions to exert any kind of review. Notably, the Regulation specified that requests for exemptions should have been addressed (by any affected individual) not to the Sanctions Committee, but to 'the competent authorities of Member

[238] Regulation (EC) 337/2000, Article 5.
[239] Regulation (EC) 337/2000, Article 3.
[240] Regulation (EC) 337/2000, Whereas 7 and Article 7.

States', a list of which was also attached.[241] The latter point is particularly relevant for the sake of my analysis, since it underlines the rigid procedural stance adopted both by the Security Council and by the Council. Indeed, as I noticed above, the Security Council was (in the idea of the San Francisco Conference) established to deal with States at a political and diplomatic level. It was, as a consequence, particularly uncomfortable and unfit to deal with non-State entities and individuals in a direct (not politically mediated) relationship, administering complex complaint procedures. Therefore, a choice was made to let Member States deal with individual procedures aimed at evaluating any request for exemption, in order to submit it to the Committee. The effects of this choice on the actual chance to obtain an exemption need no further explanation.

The measures in question – as adopted by the Security Council and then implemented by the Council – raised significant concerns in terms of protection of individuals' rights and freedoms, both from a substantial and from a procedural point of view.[242] First of all, the flight ban imposed on certain aircrafts owned and/or operated by the Taliban directly affected freedom of movement. While a right to 'free movement' beyond States' borders is generally not recognised at the international level, still preventing a wide number of aircrafts (both civilian and military ones) from taking from and landing in UN member states could indirectly impair the right to life and health (if one thinks about the need to fly from a country to another in order to receive appropriate medical care) of innocent individuals and their right to personal and family life, since a number of civilians could have

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[241] Regulation (EC) 337/2000, Article 6.

[242] For a clear synopsis of such concerns – at the time – see August Reinisch 'The Action of the European Union to Combat International Terrorism', in Andrea Bianchi (ed) *Enforcing International Law Norms Against Terrorism* (Hart 2004) 119, 132. See also, in general, Imelda Tappeiner, 'The Fight Against Terrorism; The Lists and the Gaps', in Antoine M. Hol. John A.E. Vervaele (eds), *Security and Civil Liberties: The Case of Terrorism* (Intersentia 2005) 93, 102.

encountered unjust hardships in reuniting with their families, both in Afghanistan and abroad. Second, the administrative freezing of funds and other economic resources (such as immovable properties) obviously limited the right to property and may have brought along a number of problems as for the guarantee of everyday essential needs for individuals. From a procedural point of view, it is not clear – and it was not ever disclosed – on what basis the Sanction Committee should have selected the aircrafts to be prevented from flying as well as the funds and other economic resources to be frozen. Individuals and entities affected by the sanctions were neither noticed in advance that evidence existed in order to justify the adoption of restrictive measures against them, nor allowed to directly contest such evidence. Indeed, no evidentiary rule was provided at all. The right to a due process of law, when it comes to measures that limits individual rights, was further restricted by the absence of any form of recourse, judicial or administrative review, in order to have sanctions lifted, in whole or in part. As I outlined above, if a limited number of exemptions did exist on humanitarian grounds, still the procedure to request such exemptions was devoid of any proper guarantee and let to the discretion of any UN Member State to receive individual demands, assess their grounds and worthwhileness, and decide to submit them (or not) to the Sanctions Committee.

Although these issues were particularly clear, by Regulation (EC) 337/2000 the Council chose not to address any and opted for a straightforward transposition of UN measures within Community law, so embracing a particularly orthodox monist position, in relation to the relationship between UN and European law. In fact, while in February 2000 the EU Charter of Fundamental Right had yet to come, still UN measures overtly conflicted with established principles of Community and EU law (one may refer to the Article F TEU – in its

post-Amsterdam version – according to which '1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'). Nevertheless, these problems remained confined to a scholarly debate and very less perceived as material conflicts between UN and Community law, at least until the advent of the 'war on terror', in late 2001.[243] In fact, some scholar disputed the very power of the Council to adopt sanctions against non-State entities (including individuals), pursuant to Article 301 EC, that allowed the Council to 'interrupt or to reduce, in part or completely, economic relations with one or more third countries'. In particular, a literal argument and one based on *ratio legis* were spent to contest the over-extension of the Council's foreign policy attributions, resorting to the so-called theory of implied powers.[244] Even this formal and procedural argument, however well founded, had little grip on Community policies.

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[243] For an historical background of UN-EU relationships in terms of sanctions before and at the beginning of the war on terror see Daniel Bethelem, 'The European Union' in Vera Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions* (Martinus Nijhoff 2004) 123. For an early focus on counter-terrorism sanctions see also Pieter-Jan Kuijper, 'Implementation of Binding Security Council Resolutions by the EU/EC', in Erika de Wet, André Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia 2003) 39.

[244] Andrés Delgado Casteleiro, 'The Implementation of Targeted Sanctions in the European Union' in Andrés Delgado Casteleiro, Martina Spernbauer (eds), *Security Aspects in EU External Policies. EUI Working Paper LAW 2009/01*, available at http://cadmus.eui.eu/bitstream/handle/1814/10288/LAW_2009_01.pdf?sequence=3, 39; Mielle Bultermann, 'Fundamental Rights and the United Nations Financial Sanctions Regime: The Kadi and Yusuf Judgements of the Court of First Instance of the European Communities' (2006) 19 Leiden Journal of International Law 753, 763; Nikolaus Graf Vitzthum, 'Les competénces législatives et juridictionelles de la Communauté européenne dans la lutte contre le terrorisme-l'affaire Kadi' (2008) 11 Zeitschrift für europarechtliche Studien 375, 390.

b. *Resolution 1333: targeting Usama bin-Laden*

The adoption and subsequent implementation of Res. 1267, described above, did not actually prevent other serious attacks to be performed against US targets and urged the Security Council to widen the scope of its action, aiming not only at the Taliban regime, but also at Usama bin-Laden and his Al-Qaeda network.

On 19 December 2000, right after the suicide bombing of the American destroyer USS Cole in the Aden Harbour, the Security Council took further steps to reinforce the sanctions adopted by means of Res. 1267. Res. 1333, *inter alia*, (a) imposed a general embargo on the transfer or sale of arms and other military equipment to the territory of Afghanistan under Taliban control (as designated by the Sanctions Committee), including technical advice, assistance, training and similar services;[245] (b) urged a general reduction (in terms of number and level of staff) of diplomatic relations with the Taliban regime;[246] (c) imposed the closure of any Taliban office in the territory of UN member states, including any office of the Afghan airline company;[247] (d) extended the freezing of funds and any financial asset, already provided by Res. 1267, including 'Usama bin Laden and individual and entities associated with him as designated by the' Sanctions Committee, members of Al-Qaida as well as any other individual or entity associated with bin-Laden or the Al-Qaeda network, and provided for the Sanctions Committee to maintain an updated list of such individuals and entities 'based on information provided by States and regional organisations';[248] (e) extended the flight ban contained in Res. 1267 to any aircraft taking off from or

[245] Res. 1333, para 5.
[246] Res. 1333, para 6.
[247] Res. 1333, paras 8(a) and 8(b).
[248] Res. 1333, para 8(c).

headed to land in the territory of Afghanistan under Taliban control (including the prohibition to overfly the territory of UN member states) and imposed a general travel ban for any senior officials of the Taliban.[249] The Security Council also decided to instruct the UN Secretary General and the Sanctions Committee to periodically review and report the humanitarian implications of the measures imposed by Resolutions 1267 and 1333.[250]

The reaction of EU was timely: Common Position 2001/154/CFSP,[251] adopted on 26 February 2001 (partially amended Common Position 96/746/CFSP, adopted in 1996 to impose a first embargo on the transfer and sale of arms to Afghanistan, and) committed Member States to implement any of the new measures established by the Security Council. Council Regulation (EC) 467/2001[252] was further adopted on 6 March 2001 to turn Res. 1333 into Community law. The last Regulation repealed previous Regulation (EC) 337/2000 and integrated into a single regulatory text both the provisions of Resolution 1267, as amended by Resolution 1333, and further measures introduced by the latter. Just like it had done before, the Council did not introduce any substantial specification to the measures adopted by the UN Security Council – in order to overcome some of the criticalities outlined above – nor it provided for any change in terms of the exemption procedure, that remained substantially the same. Even in this case, the Commission was empowered to amend and update (by means of its own regulations) the list of individuals and entities whose

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[249] Res. 1333, para 11.
[250] Res. 1333, para 15(d).
[251] Council Common Position 2001/154/CFSP of 26 February 2001 concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP [2001] OJ L57/1.
[252] 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 L67/1.

funds and financial resources were to be frozen, on the basis of the periodical updates performed by the Sanctions Committee.

Regulation (EC) 467/2001 marked no change in the monist attitude of the European Council towards UN law and its implementation, notwithstanding the number of critical issues that the initial set of measures against the Taliban had raised. Indeed, this second round of measures tightened the sanctions regime under at least two points of view: first, the scope of the flight ban was substantially broadened, switching from a prohibition of take-off and landing imposed onto certain planes owned or operated by the Taliban, to a general prohibition for any plane taking-off from or heading towards the territory of Afghanistan under Taliban control, to take-off, land or fly-over in the territory of the Community, with a view to disrupting airline connections between Member States and Afghanistan; second, the freezing of funds and economic resources (that was initially targeted to the Taliban and to individual or entities linked to the Taliban regime) was substantially extended to the person of Usama bin-Laden and to any individual or entity associated with the same bin-Laden and with the Al-Qaeda network. It should be noted, in addition, that Res. 1333 called upon UN member states (and regional organisations) to cooperate with the Sanctions Committee in order to review and update the list of individuals and entities whose assets should be frozen, *id est* inviting UN member states to play an active role in gathering information on potential affiliates or supporting entities of bin-Laden and the Al-Qaeda network and providing it to the Sanctions Committee.[253] Such provision offered Member States a viable alternative to criminal prosecution – very far from the constraints of evidentiary rules – that brought out the role of intelligence

[253] Res. 1333, paras 17 and 19.

agencies in collecting secret evidence against individual, with few or no chances to be challenged in a court of law. It is quite clear how this form of administrative and concealed procedure (without any chance of actual participation, even *ex post facto*, of concerned individuals), alternative to ordinary prosecution in a due process of law, introduced a further element of conflict between Member States duties under the UN Charter and their obligations under the EU Treaties. In fact, not only were the Member States obliged to implement measures adopted by the Security Council and the Sanctions Committee, they were also directly involved in establishing the factual assumptions (or presumptions) for such measures to be taken, *de facto* introducing a permanent derogation to the presumption of innocence. To this latter extent, in particular, a key element of the Resolutions adopted by the Security Council is their duration. As a matter of fact, provisional security measures that may temporarily restrict individual rights and freedoms, adopted at the administrative level, are legitimate – under certain conditions – according to EU law and constitutional principles common to Member States. Resolutions 1267 and 1333, by contrast, introduced measures that were, at least in theory, potentially permanent, since their termination was conditioned to compliance by the Taliban with a number of requests of the UN and the United States in particular (i.e. surrendering Usama bin-Laden and ceasing to host the Al-Qaeda network).[254]

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[254] See Imelda Tappeiner (n 242), 101; Ove Bring, Per Cramér, Göran Lysén, 'Sweden' in Vera Gowland-Debbas (ed), *National Implementation of United Nations Sanctions* (Martinus Nijhoff, 2004) 473, 505; Per Cramér, 'Recent Swedish Experiences with Targeted UN Sanctions: The Erosion of Trust in the Security Council', in Erika de Wet, André Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia 2003) 85, 88; Daniel S. Meyers, 'The Transatlantic Divide Over the Implementation and Enforcement of Security Council Resolutions' (2008) 38 California Western International Law Journal 255, 263.

This line of action by the UN Security Council is even more noteworthy, if one considers that the 1999 UN Convention for the Suppression of the Financing of Terrorism, clearly moved towards a criminal-law approach to the phenomenon of terrorism financing (to be treated as an offence) that at least partially contrasted, even on the application level, with the stance of the Security Council.

c. The aftermath of 9/11: Resolution 1373 and the EU's own blacklists

As it is sadly known, the efforts spent by the UN Security Council in contrasting operational and financial capabilities of Usama bin-Laden, the Al-Qaeda network and the Taliban regime did not prevent the barbaric 9/11 attacks against the United States of America. The day after the attacks, the UN Security Council adopted Resolution 1368,[255] which condemned the attacks, and declared them 'a threat to international peace and security'. On 28 September 2001, the Security Council took further steps towards the reinforcement of its counter-terrorism system of sanctions, by means of Resolution 1373.[256] This Resolution represents a milestone [257] in the evolution of the Security Council approach to the phenomenon of terrorism for at least a couple of main reasons, first the Resolution switched from a subjective approach to the problem (i.e. targeting the Taliban, Usama bin-Laden and the Al-Qaeda network) to a global approach, aimed at confronting any form of terrorism; second, the Resolution (following the provisions of the UN Convention for the Suppression of the Financing of

[255] United Nations Security Council Resolution 1368 of 12 September 2001.
[256] United Nations Security Council Resolution 1373 of 28 September 2001.
[257] On Res. 1373 and its importance in the context of the UN counter-terrorism policy, see Eckes (n 203), 41; Cian C. Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart 2012) 120; Myriam Feinberg, *Sovereignty in the Age of Global Terrorism. The Role of International Organisation* (Brill Nijhoff 2016) 125; Lisa Ginsborg, 'UN sanctions and counter-terrorism strategies: moving towards thematic sanctions against individuals?', in Larissa van den Herik (ed), *Research Handbook on UN Sanctions and International Law* (Elgar, 2017) 73, 86.

Terrorism and other international instruments aimed at combating terrorism in general), provided obligations onto Member States to introduce criminal sanctions against terrorists and those who provided funds to terrorists, thus opening the door to a sort of 'second track' in the fight against terrorism, which is not alternative but additional to the sanctions regime. In particular (and among other provisions), Resolution 1373 imposed onto UN member states (a) a duty to freeze 'all funds and other financial assets or economic resources of person who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons or entities acting on behalf of, or at the direction of such persons and entities', including funds that may derive from properties;[258] (b) a duty to criminalise the 'wilful provision or collection, by any means, directly or indirectly, of funds […], with the intention that […] or in the knowledge that they are to be used in order to carry out terrorist acts';[259] and (c) a duty to prohibit any person or entity to make any funds, financial assets or economic resources available to the same individuals or entities whose funds were due to be frozen.[260] In addition, the same Resolution established a new Committee within the Security Council, consisting of all its members, in order to review the implementation of the new measures (the 'Antiterrorism Committee')[261] and further pushed on the importance of exchange of information (i.e. of intelligence information) [262] between UN member states in order to effectively prevent the perpetration of

[258] Res. 1373, para 1(c).
[259] Res. 1373, para 1(b).
[260] Res. 1373, para 1(d).
[261] Res. 1373, para 6. On the Committee and its work, see Eric Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee and the Fight Against Terrorism (2003) 97 AJIL 333.
[262] Res. 1373, para 3.

terrorist acts.[263] It should be carefully noted that Res. 1373 neither replaced, nor repealed, the sanctions regime established by the Security Council through Resolutions 1267 and 1333, which continued to be in full force, along with the Sanctions Committee. Furthermore, Resolution 1373 did not provide itself a proper definition of 'terrorist acts' – leaving the notion open to interpretation – and neither established a system of lists in order to identify those individuals and entities whose funds should have been promptly frozen by UN member states, nor provided for any pre-determined exemptions (including any procedure to request or grant such exemptions).

The broader scope of Res. 1373, together with its partially different (one could argue, less self-executing) approach, left the European Community a wider leeway in order to give effect to UN measures within the territory of Member States. Particularly, the provision of an open clause with regard to the activities and conducts to be targeted and the absence of any pre-compiled blacklist of individuals and entities, allowed the European Community to develop its own system of measures for preventing and countering terrorism financing. In fact, on 27 December 2001, the Council adopted Common Position 2001/931/CFSP[264]

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[263] See Szasz (n 3), 902, Jane E. Stromseth, 'An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390 (2003) 97 American Society of International Law Proceedings 41, 43, and Emilio J. Càrdenas, 'The United Nations Security Council's Quest for Effectiveness' (2004) 25 Michigan Journal of International Law 1341, 1342, who stress the innovative step taken by the UN Security Council in imposing onto UN member states general and abstract obligations, without any proper limitation of space/time, in a fashion that echoes the ambition of introducing some sort of global legislation. On the emergence of a global counter-terrorism law see Victor V. Ramraj, 'The impossibility of global anti-terrorism law?' in Victor V. Ramraj, Michael Hor, Kent Roach, George Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge 2012) 44; Mirko Sossai, 'UN SC Res.1373 (2001) and International Law-making: A transformation in the Nature of the Legal Obligations for the Fight Against Terrorism', working paper available at http://www.esil-sedi.eu/sites/default/files/Sossai_0.PDF.

[264] Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism [2001] OJ L344/93.

and Regulation (EC) 2580/2001,[265] which established a complete European system of financial sanctions. Community legislation in question – first of all – introduced the very first European definitions of 'terrorist act'[266] and 'terrorist group';[267] while the former definition was still quite ample and purpose-oriented (including a list of behaviours and offence that would have been classified as 'terrorist acts' if committed in order to reach a terrorist purpose), still it represented a substantial step forward taken by the European Community in relation to the UN practice, and not the only one. First of all, inclusion of individual or entities in the European blacklist could be ordered only 'on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the [individual or entity] concerned' and such decision be based on 'credible evidence or clues';[268] while said decision should not necessarily be a final one, the definition of 'competent authority' was limited to judicial authorities, with the only exception of cases where judicial authorities were not competent to adopt a decision according to national law.[269] Second, the Council provided for specific safeguards in order to avoid cases of mistaken identity, by demanding each name included in the European blacklist to be 'appended' with sufficient particulars to 'permit effective identification of specific human beings, legal persons, entities or bodies'.[270] Third, a periodical assessment was established, to take place at least every six months, in order to

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[265] Council Regulation (EC) 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism [2001] OJ L344/70.
[266] Common Position 2001/931/CFSP, Article 1.3. This definition will be further recalled within Framework Decision 2002/457/JHA of 13 June 2002 on combating terrorism, which is not part of this analysis.
[267] Common Position 2001/931/CFSP, Article 1.3, last paragraph.
[268] Common Position 2001/931/CFSP, Article 1.4.
[269] Common Position 2001/931/CFSP, Article 1.4, last paragraph.
[270] Common Position 2001/931/CFSP, Article 1.5.

ensure that solid grounds existed for maintaining any name on the list.[271] On the one hand, the establishment of a European framework for financial sanctions introduced some improvements in terms of protection for individual rights that must be taken into account: the effort to provide a definition of terrorist act, to rely preferably on judicial decisions in order to insert a name on the list, and the further provision of a regular review (at least every six months) of the list itself are some examples. On the other hand, still the set of provisions presented some major flaws: first of all, it was established that the names of individual and entities listed by the Sanctions Committee (pursuant to Resolutions 1267 and 1333) as affiliated to the Taliban regime, Usama bin-Laden and Al-Qaeda could also appear on the European blacklist, hence realising a risky overlap between the sanctions directly 'administered' by the UN and those proper of the European Council; second, Regulation (EC) 2580/2001 established a number of cases that may lead 'the competent authorities of the Member States' to grant exemptions in order to spend frozen funds for 'essential human needs',[272] for the 'payment of taxes' or other public services, or for the 'payment of charges due to a financial institution in the Community'.[273] However, the procedure established for granting such exemptions widely relied on discretionary choices made by competent authorities[274] in Member States, did not provide for effective participation of those affected and did not grant any form of judicial or independent recourse.

It should be made very clear that Res.1373 and the European provisions that followed, differently from what had happened before, addressed the terrorist

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[271] Common Position 2001/931/CFSP, Article 1.6.
[272] Regulation (EC) 2580/2001, Article 5.2.1.
[273] Regulation (EC) 2580/2001, Article 5.2.2.
[274] That involved a cumbersome information and consultation procedure with competent authorities in other Member States, the Council and the Commission.

phenomenon in general, with no distinction whatsoever, based on the ideological background or the international dimension of the threat. As a consequence, the measures introduced with the provisions at stake (generally still in force nowadays) were plainly resorted to Member States in order to target (and list) any kind of individual or organisation suspected of or convicted for having committed terrorist acts (including national and local terrorist groups, such as the ETA and the IRA), in a clear example of heterogenesis of the ends. In fact, it is at least debatable that Res. 1373, adopted under Chapter VII in order to respond to a serious threat to international peace and security, could ever be interpreted as to include terrorist acts that were, for their very nature, matter for national criminal investigations. From the point of view of the relationship between UN law and EU (or Community) law, this is a quite clear example of how a formal and monistic stance by Member States within the European Council could perhaps hide some kind of opportunistic attitude in exploiting UN-derived measures in order to bypass European and constitutional constraints in such a sensitive matter.

The normative parenthesis represented by Resolution 1373 – however – did not interrupt the flow of Resolutions aimed at directly targeting the Taliban, bin-Laden and the Al-Qaeda network. On 16 January 2002, the UN Security Council adopted Resolution 1390,[275] aimed at strengthening measures contained in Resolutions 1267 and 1333. Particularly, the latter Resolution confirmed and renewed all such measures for a further term of twelve months and provided – in addition – (a) a complete ban for the individuals listed by the Sanctions Committee (as associated with the Taliban, Usama bin-Laden and Al-Qaeda)

[275] United Nations Security Council Resolution 1390 of 16 January 2002.

from entering in or transiting through the territory of UN member states, with the exceptions of entries or transits to be authorised, on a case-by-case basis, by the Committee itself,[276] and (b) extended the embargo on 'arms and related materiel of all types' as well as related services, to any individual or entity listed by the same Sanctions Committee.[277] The Resolution further provided for the Sanctions Committee to review its list periodically, based on the information received by States and regional organisations, in order to keep it up to date, and to prepare periodic reports on the state of implementation of the measures so established.[278]

The European Council responded to the renewed sanctions regime on 27 May 2002, through Common Position 2002/402/CFSP[279] and Regulation (EC) 881/2002,[280] which repealed any previous acts on the same matter (without prejudice for the 'autonomous' sanctions regime established pursuant to Res. 1373, by Common Position 2001/931/CFSP and Regulation (EC) 2580/2001) and plainly recalled the text of the new Resolution. For the purpose of my analysis, three elements deserve some comments: first of all, the Resolution (and European implementing legislation) introduced a stronger limit to the freedom of movement of listed individuals – and consequently, as I briefly explained above, to their right to life and health, as well as to their right to personal and family life

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[276] Res. 1390, para 2(b).
[277] Res. 1390, para 2(c).
[278] Measurer related to the closure of Taliban offices within the territory of UN member states were discontinued, due to their apparent full accomplishment. In relation to Res. 1390 and its content see Birkhäuser (n 228), 5; Meyers (n 254); Stromseth (n 263).
[279] Council Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP [2002] OJ L139/4.
[280] Council Regulation (EC) 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 L139/9.

– pairing the flight ban with a much more invasive prohibition on entering in and transiting through the territory of UN member states. In this respect, such a strong and long-lasting restriction could potentially be in conflict with the free movement of persons within the Community, provided (in 2002) by Article 39.1 EC,[281] to the extent that the affected individual was a citizen of a Member State. In addition, one may just notice that the prohibition on entering the territory of a UN Member State could overtly clash with the principle of non-refoulment, that many scholars considers to have acquired the status of jus cogens; second, an unprecedented 'embargo' against individuals, groups and non-State entities was introduced, that was even more restrictive in terms of safeguarding the right to private property of any concerned individual; third – from a procedural point of view – the legal basis of Regulation (EC) 2580/2001 was extended from Article 301 EC to Article 308 EC, in so implicitly recognising the lack of an explicit power vested in the European Community to adopt restrictive measures, such as the one considered here, against non-State entities and individuals.

d. The first evolution of the UN framework

The first hints of some kind of European 'return influence' on the UN Security Council can be found in subsequent Resolution 1452,[282] adopted on 20 December 2002. In particular, taking into account the growing number of individuals listed by the Sanctions Committee (on the request of UN member states), the Security Council introduced a set of exception to be applied to asset

[281] Taking into due account the narrow interpretation of the 'public policy, public security, or public health' exception to this rule, provided by the ECJ, and the fact that the 'listing' of an individual derived from a concealed political and diplomatic procedure, without any room for a transparent judicial or howsoever independent review of the measure.
[282] United Nations Security Council Resolution 1452 of 20 December 2002.

freezing, in order to exempt funds and financial resources to be spent for 'basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums and public utility charges', legal fees, or 'charges for routine holding or maintenance of frozen funds', provided that the concerned State had notified the Committee of the intention to apply an exemption and such exemption was not denied within forty-eight hours.[283] The Committee, upon request of any State, could also grant extraordinary exemptions.[284] The Resolution further provided that interest earned on frozen accounts could be added to such account and payments due under contracts or obligations that arose prior to the 'date of freezing' could be added to the same accounts (and frozen, in turn).[285] The Council welcomed these new measures as part of Community law by Common Position 2003/140/CFSP[286] of 27 February 2003 and Regulation (EC) 561/2003 [287] of 27 March 2003, that amended Common Position 2002/402/CFSP and Regulation (EC) 881/2002 accordingly.[288]

A number of four subsequent Resolutions, from January 2004 to December 2006 (while reiterating the whole sanctions regime), introduced further refinements to the sanctioning system, in order to provide some elementary safeguards for the rights and freedoms of the individuals and entities concerned

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[283] Res. 1452, para 1(a).
[284] Res. 1452, para 1(b).
[285] Res. 1452, para 2.
[286] Council Common Position 2003/140/CFSP of 27 February 2003 concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP [2003] OJ L53/62.
[287] Council Regulation (EC) No 561/2003 of 27 March 2003 amending, as regards exceptions to the freezing of funds and economic resources, 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 [2003] OJ L82/1.
[288] See 'Document no. 6', in Kirsten E. Boob, Aziz Huq, Douglas C. Lovelace JR., *Terrorism. Commentary on Security Documents* (vol. 122, Oxford 2012) 93; Cathleen Powell, 'The United Nations Security Council, terrorism and the rule of law', in Victor V. Ramraj, Michael Hor, Kent Roach, George Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge 2012) 19, 33; Ali Ahmed Shaglah, 'Security Council Response to Human Rights Violation in Term of Combating Terrorism: Retrospect and Prospect' (2016) 7 Beijing Law Review 114, 117.

and to better establish procedures to be followed for listing and de-listing. Said amendments prelude to the significant changes that the whole system have encountered from December 2009 on, and anticipate the gradual overcoming of the 'one way' monist and hierarchy-based approach, adopted by both the UN and the then-Community since 1999. In particular, the actions taken by the Security Council (that did not require amendments to the relevant European provisions) apparently show how the European model of individual sanctions had started to exert growing influence on the members of the Security Council, foreseeing the structural changes that the ECJ judgment in *Kadi I* would have brought along. First of all, Resolution 1526[289] of 30 January 2004 – *inter alia*[290]– provided for States that submitted names of individuals or entities to the Sanctions Committee, to include identifying information and background information, 'to the greatest extent possible' in order to demonstrate their actual association with the Taliban, Usama bin-Laden or Al-Qaeda and to avoid spreading cases of mistaken identity;[291] it further provide for the same States to inform 'to the extent possible, individuals and entities included in the Committee's list of the measures imposed on them'.[292] This notification obligation – in particular – was set in order to avoid for concerned individual and entities to be informed of the measures adopted against them only as a consequence of the detrimental effects such measures exerted on their rights and freedoms. Secondly, Resolution 1617[293] of 29 July 2005, introduced a seemingly non-exhaustive list of conducts that could indicate that an individual, group or entity was associated with the Taliban, Usama bin-

[289] United Nations Security Council Resolution 1526 of 30 January 2004.
[290] Res. 1526, paras 16 and 18.
[291] Res. 1526, para 17.
[292] Res. 1526, para 18.
[293] United Nations Security Council Resolution 1617 of 29 July 2005.

Laden or Al-Qaeda. It also provided, for the State requesting entities or individuals to be listed, to submit a detailed statement of case describing the basis of its proposal. Furthermore, with regard to notification (introduced by Res. 1526), it specified such notification to be made in writing and to include 'listing and delisting procedures' to be administered by the State in question.[294] In relation to the latter Resolution, the effort to clarify some kind of listing-criterion is a remarkable step forward if compared with the initial stance of the Security Council in Res. 1267.[295]

Third, Resolutions 1730[296] and 1735[297], adopted on 19-22 December 2006 respectively, opened the door to a direct and unusual 'dialogue' between UN bodies and those individuals and entities that were affected by the sanctions.[298] Res. 1730, in particular, established a dedicate office within the UN Secretariat (called focal point), tasked with receiving delisting requests by concerned individuals or entities and clarified the procedure to be followed in order to review such request.[299] If the procedure still appeared unreasonably long

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[294] Res. 1617, para 5.

[295] See Meyers (n 254), 265; Johannes Reich, 'Due Process and Sanctions Targeted Against Individuals Pursuant to U.N. Resolution 1267 (1999)' (2008) 33 Yale Journal of International Law 505, 509; Larissa Van Den Herik 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual' (2007) 20 Leiden Journal of International Law 797, 804; Maurizio Arcari, 'Sviluppi in tema di tutela dei diritti di individui iscritti nelle liste dei comitati delle sanzioni del Consiglio di sicurezza' (2007) 90 *Rivista di diritto internazionale* 657; Clemens A. Feinäugle, 'Legal Protection of the Individual Against UN Sanctions in a Multilevel System', in Andreas Follesdal, Ramses A. Wessel, *Multilevel Regulation and the EU: The Interplay Between Global European and National Normative Processes* (Martinus Nijhoff 2008) 231, 244; Eckes (n 263), 34; Pasquale De Sena, Maria Chiara Vitucci, 'The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values' (2009) 20 EJIL 193, 224; 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 2011) 98, 105; Alette Smeulers, Fred Grünfeld, *International Crimes and Other Gross Human Rights Violations* (Martinus Nijhoff 2011) 434.

[296] United Nations Security Council Resolution 1730 of 19 December 2006.

[297] United Nations Security Council Resolution 1735 of 22 December 2006.

[298] Paul Eden, 'United Nations Targeted Sanctions, Human Rights and the Office of the Ombudsperson' in Matthew Happold, Paul Eden (eds), *Economic Sanctions and International Law* (Hart 2016) 135, 146.

[299] The procedure established by Resolution 1730 is shared with a number of different sanctioning systems that were established by the Security Council over the year and were not part of this

and burdensome (it required the 'designating' State, as well as the State of citizenship and residence to be consulted and any delisting petition to be upheld by at least one member of the Sanctions Committee), it can however be regarded as a milestone in the history of the Security Council, which overcame a traditional limit and admitted non-State subjects to directly be involved in its proceedings. Res. 1735 (while further renewing the sanctions regime) insisted on the need, for any State proposing individuals and entities for listing, to submit specific information to support its proposal in light of the criteria established by the Security Council, the nature of such information and any supporting documents, specifying whether any part of the statement of case may be 'publicly released for the purposes of notifying the listed individual or entity'.[300] Although it was not mandatory to release any part of the statement of case for the benefit of the listed individual or entity, still this provision represented a first step in order to make those 'sanctioned' aware of the grounds for their inclusion on the lists and allow (even if at a very early stage) some kind of disclosure for the sake of defence.[301]

III. AFTER *KADI I*: LEARNING FROM THE EU LESSON?

The evolution of the European stance on UN-derived sanctions (and the slow but relevant change in the UN's own approach) was not altogether a consequence of

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analysis. Namely Resolution 1718 (2006) on North Korea, Resolution 1636 (2005) on Lebanon and the Middle East, Resolution 1591 (2005) related to Sudan, Resolution 1572 (2004) on Côte d'Ivoire, Resolution 1533 (2004) on Congo, Resolution 1521 (2003) on the situation in Liberia, Resolution 1518 (2003) related to Iraq and Kuwait, Resolution 1132 (1997) on Sierra Leone, Resolution 918 (1994) on Rwanda and Resolution 751 (1992) on Somalia.

[300] Res. 1735, para 6.

[301] For a very comprehensive review of the legal issues concerning UN Security Council's counterterrorism Measures until 2006, see Andrea Bianchi 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion' (2006) 17 EJIL 881.

the ECJ's judgment in *Kadi I*. Indeed, the same *Kadi* case-law did not come entirely out of the blue: both the General Court and the ECJ had the chance to review a number of complaints related to the EU 'autonomous' system of counter-terrorism financial sanctions, established by Common Position 2001/931/CFSP and Regulation (EC) 2580/2001, pursuant to Res. 1373. As I had the chance to point out, the EU blacklists system was *ab origine* characterised by a stronger level of protection for human rights and fundamental freedom, *both* from a substantial *and* from a procedural point of view (which was at least partially followed by subsequent UN resolutions).[302] However, what is crucial here for the purpose of my analysis, is the nature of European measures and their relationship with Res. 1373. Differently from what happened with other Security Council Resolutions, the latter did not establish an UN-administered listing procedure but provided for UN member states a number of specific goals to be achieved (i.e. curtailing terrorism financing in general), through a set of sanctioning and preventive measures, to be adopted within and pursuant to domestic legal systems. In particular, no preformed list of individuals and entities to be targeted was provided, leaving any UN Member State free to establish its own listing criteria and procedures, in line with the very broad and general wording of the Resolution.

As the European Community took her steps in order to provide a common European set of rules in response to Res. 1373, it was no more a simple 'executor' of UN measures (i.e. giving a binding force to UN Security Council Resolutions within the territories of Member States); instead, it acted as an implementer in the broadest possible meaning, *(a)* adopting an autonomous

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[302] Cf *Supra* para II.

definition of terrorism, with a view to identifying the scope of the measures, *(b)* introducing its own procedure and grounds for listing,[303] *(c)* introducing exceptions and derogations and *(d)* providing for a recurring review (to be performed every six months) in order to assess the permanence of the grounds that had led to listing. Such a different relationship of the European measure with UN law (that can be summarised in the absence of any 'mandatory' listing, as well as the provision of derogations and/or exceptions established at the European level), led the General Court and the Court of Justice to adopt – from the very beginning – a significantly different stance on judicial review. In particular, given the internal (European) nature of the rules established by Regulation (EC) 2580/2001, starting from the well-known *OMPI* case[304], both the General Court and the Court of Justice considered such measures to be fully reviewable on the merits, *vis-à-vis* the protection of Human Rights afforded by the EU Treaties, as well as by the case law of the ECJ and the European Court of Human Rights.

a. *Role and influence of the ECJ case-law*

The case-law of the ECJ[305] provided a series of interesting improvements to the measure, with specific regard to procedural guarantees to be afforded to

[303] Generally based on a decision taken by judicial authorities of Member States (that are expected to comply with all procedural guarantees provided by a due process of law), but with two relevant exceptions: *(a)* the case of judicial authorities not being competent to adopt such decisions in the relevant field (that could lead to listing based on non-judicial/administrative proceedings) and *(b)* the obligation to include in the EU list individuals and entities that are listed by the Sanctions Committee under the UN system.

[304] Case T-228/02 *People's Mojahedin Organization of Iran v. Council* [2006] ECR II-4665 ('*OMPI*'). See, in this respect, Giacinto della Cananea, 'Return to the Due Process of Law: The European Union and the Fight Against Terrorism (2008) 4 European Law Review 896.

[305] See Case T-229/02 *PKK and KNN v. Council* [2005] ECR II-539 (Order); Case C-229/05 P *PKK and KNK v. Council* [2007] ECR I-439 ('*PKK*'); Case T-229/02 *PKK and KNK v. Council* [2008] ECR II-45; Case T-327/03 *Stichting Al-Aqsa v. Council* [2007] ECR II-79; Case T-47/03 *Jose Maria Sison and Others v. Council* [2007] ECR II-73 ('*Sison*') and *OMPI* (n 304). See, in this respect, Christina Eckes, 'Sanctions Against Individuals: Fighting Terrorism within the European

individual and entities that were included in the European list. First of all, the ECJ reminded that strict respect for the rights of the defence is a long-established principle of law, to be ensured in any proceedings that may end up with a measure that adversely affect individuals or entities, even in the absence of rules governing the proceedings at stake. Such principle requires that the person against whom an adverse decision may be taken, should be ensured the right to make his view known on the evidence against him upon which the contested decision is based. As a consequence, according to the Court, any individuals or entities affected by the asset freezing measures adopted by the Council should be informed on the evidence on which the adoption of restrictive measures was grounded and be given the opportunity to confront that same evidence.[306] However, given the particular nature of the measures and the public interest they aimed at protecting, the Court recognised that the Council couldn't be obliged to communicate such evidence prior of including an individual or entity on the list, since a preventive notification would substantially affect the 'surprise effect' that was inherent to the effectiveness of the measures themselves. From a procedural point of view, as a consequence, listed individuals and entities should be informed of the grounds for their inclusion on the list after the measure has been adopted and have the possibility to make their views known to the Council and bring an action before the ECJ (*rectius* the General Court) to have the Council Decision reviewed.[307]

Legal Order (2008) 4 EuConst 205, 213; Eleanor Spaventa, 'Fundamental What? The Difficult Relationship between Foreign Policy and Fundamental Rights', in Marise Cremona, Bruno de Witte (eds), *'EU Foreign Relations Law: Constitutional Fundamentals* (Hart 2008) 233, 248; Tridimas and Gutierrez-Fons (n 98), 708.

[306] *OMPI*, (n 304), paras 139-151, 176; *Sison* (n 305), paras 139-142.

[307] Moreover, the 'surprise effect' was no more a justification for belated communication to the individuals or entities involved, in case of confirmation (within the periodical review of the list) of the grounds for listing, including all the new evidence provided to the Council in the meantime. In such cases, the Court insisted on the relevance of further hearings and notifications, before any

The Court further stressed that Article 253 EC (current Article 296 TFEU) should be fully and unconditionally applied to Council Decisions providing for the freezing of funds of an individual or entity, being a fundamental principle of European law: consequently, the Council should provide an adequate statement of reason for the measure to be adopted, disclosing in a clear and unequivocal fashion the whole reasoning followed in order to adopt the measure at stake, as to enable *both* those concerned *and* the competent court to understand the reasons of the affecting measure and review its lawfulness.[308] It must be noted, at this stage, that the Court insisted on the fact that the total absence of a statement of reasons could not be effectively remedied after an action was brought in court, since this would force the petitioner to defend himself without being aware of the grounds for listing.[309] In consequence, the Council should show to have correctly verified that a decision exists of a competent authority in a Member State (as regards first listing) and that its consequences are still in force (for the confirmation of previous listing).

The Court also considered that the rights afforded within the European proceedings – which include the right to bring action before the General Court and the Court of Justice – should always be balanced with the level of protection that was guaranteed within national proceedings. In particular, with regard to the

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subsequent decision to freeze funds is adopted. *Sison* (n 305), para 175; Case T-306/01 *Yusuf and Al Barakaat Foundation v. Council* [2005] ECR II-03533 ('*Yusuf*'), para 308. See also Case T-256/07 *People's Mojahedin Organization of Iran v. Council* [2008] ECR II-03019; Case T-284/08 *People's Mojahedin Organization of Iran v. Council* [2008] ECR II-03487; Case C-27/09 P *France v. People's Mojahedin Organization of Iran* [2011] ECR I-13427; Case T-348/07 *Stichting Al-Aqsa v. Council* [2010] ECR II-04575; Joined Cases C-539/10 P and C-550/10 P *Stichting Al-Aqsa v. Council and The Netherlands v. Stichting Al-Aqsa* ECLI:EU:C:2012:711 ('*Stichting Al-Aqsa*'). See Alicia Hinarejos, *Judicial Control in the European Union. Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford 2009) 146, 149.

[308] *Sison* (n 305), para 188; Stichting Al-Aqsa (n 307), para 138; Case T-256/07 *People's Mojahedin Organization of Iran* (n 307), para 139.

[309] *Sison* (n 305), para 186.

rights of defence and the right to a fair hearing, these have a narrower scope when the Council acted on the basis of decisions of national judicial authorities, whose own proceedings were conducted in accordance with the principles of a due process of law.[310] Conversely, in case the Council acted on different grounds (i.e. decisions adopted by the public prosecutor, or administrative decisions), proceedings at the European level should ensure higher standards of protection. While it admitted certain derogations to disclosure of evidence and information for limited reasons of public security and public interest (e.g. in order to protect sensitive information or avoid reprisals) the Court clearly provided that no exception could be granted to its own right to access any relevant evidence or information in order to review the legitimacy of Council Decisions.[311]

The influence of the mentioned case-law is clearly perceivable in Resolutions 1730 and 1735, which took the first steps towards the enhancement of procedural rights of affected individuals and entities within the UN blackists system, and also in Resolution 1822[312], that provided for a brief statement of reasons to be published on the Sanctions Committee website, alongside any listed name. The decision of the ECJ in *Kadi* could be read – in this regard – from two different perspective, both related to coherence: under a European point of view, the ECJ couldn't resist further tension between the rights and guarantees afforded to individuals and entities in relation to the EU autonomous blacklist system and the substantial absence of safeguards offered to individuals and entities included in the UN blacklists (not to consider the link between the two systems, created by Article 1.4 of Common Position 2001/931/CFSP, which

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[310] *Sison* (n 305), para 164-172; Case T-256/07 *People's Mojahedin Organization of Iran* (n 307), paras 131-134.
[311] *Sison* (n 305), para 202.
[312] United Nations Security Council Resolution 1822 of 30 June 2008.

authorised listing of individuals or entities on the basis of their inclusion in the UN list), if one except the respect of *jus cogens*. Under an international point of view, the Court intended to force Member States to adopt a firmer stance on the protection of human rights and fundamental freedoms at the UN level, in order to promote the application of (tendentially) uniform standards, preserve the legitimacy of European implementing legislation and safeguard the coherence of the international legal system as a whole.

This attitude of the Court of Justice is even clearer if one considers the so-called *Kadi II* case, where the GCEU[313] and the ECJ[314] were asked to rule (again) on the legitimacy of preventive freezing measures applied by the EU Commission to Yassin Abdullah Kadi, on the basis of UN Security Council Resolution 1822. In granting Mr Kadi's claims, both the CGEU and the ECJ made frequent reference to the Court previous case-law in *Kadi*,[315] OMPI[316] and *Stichting Al-Aqsa*,[317] in order to maintain that a full judicial review of EU measures implementing UN Security Council resolutions was still needed. In particular, while they recognised that (in the aftermath of the *Kadi I* case), stronger procedural guarantees were introduced at the UN level, still both Courts considered them inadequate, in order to ensure full respect of any individual's procedural rights.[318] In this respect, the GCEU and the ECJ stressed that the improvements set up by the UN Security Council did not allow for full and independent review of individual preventive

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[313] Case T-85/09 *Yassin Abdullah Kadi v. European Commission* [2010] ECR II-05177 (*Kadi II*).
[314] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and others v. Yassin Abdullah Kadi* [2013] ECLI:EU:C:2013:518. (*Kadi II Appeals*).
[315] *Kadi I Appeals*, n 96.
[316] *OMPI*, n 304, but also Case T-256/07 *People's Mojahedin Organization of Iran v. Council*; Case T-284/08 *People's Mojahedin Organization of Iran v. Council*; Case C-27/09 P *France v. People's Mojahedin Organization of Iran*, n 307.
[317] Case C-550/10 P *Stichting Al-Aqsa v. Council and The Netherlands v. Stichting Al-Aqsa*, n 307.
[318] *Kadi II*, n 313, paras. 127 and 128; *Kadi II Appeals*, n 314, para. 133.

measures and argued that any final decision to list or de-list an individual was ultimately based on consensus within the UN Security Council itself (hence, failing to comply with EU judicial/independent review standards).

Interestingly enough, the GCEU and the ECJ took quite different stances as regards procedural rights to be granted at the EU level, while implementing UN Security Council measures. In adopting an extensive interpretation of the ECJ ruling in *Kadi I*, the GCEU argued that – before implementing the disputed UN measures – the Commission should have granted the concerned individual some access to evidence that grounded his listing, in order to safeguard his right to refute such evidence and ultimately his right to defence. The Court criticised the Commission's sole reliance on the 'statement of reasons' provided to Mr Kadi, pursuant to Res. 1822, stigmatising the lack of balance between the claimant's interests and 'and the need to protect the confidential nature of the information in question'.[319] This stance by the GCEU seem to disregard, at least in part, the fact that – while implementing restrictive measures adopted at the UN level by the Security Council – EU institutions do not carry out any autonomous inquiry and are not necessarily aware of the pieces of evidence that were collected against the concerned individual. In fact, while it applied principles that were established in previous case-law of the ECJ (briefly described above), the CGEU did not take into account the intrinsic difference that exist between the EU's own blacklists (were EU institutions clearly bear full responsibility for the whole listing procedure, including the power to assess whether allegations brought against the prospect 'target' are well grounded) and UN-derived blacklists, where EU institutions may

[319] *Kadi II*, n 313, paras. 171 and 175.

lack a substantial knowledge of evidence that is needed to perform a substantial case-by-case evaluation.

The approach of the ECJ is more prudent and shows a balancing effort that deserves praise. According to the ECJ, 'the fact that the competent European Union authority does not make accessible to the person concerned and, subsequently, to the Courts of the European Union information or evidence which is in the sole possession of the Sanctions Committee or the Member of the UN concerned and which relates to the summary of reasons underpinning the decision at issue, cannot, as such, justify a finding that those rights have been infringed'.[320] In sum, the ECJ recognises that the EU Commission may not be in the condition of autonomously reviewing and disclosing to the concerned party 'information or evidence' that were evaluated by the UN Security Council in order to adopt restrictive measures against an individual. What needs to be evaluated by the EU Commission (and by the Courts, in turn) is whether the information that is contained in the 'statement of reasons', released by the UN Security Council, provides sufficient evidence to consider restrictive measures be well grounded and proportionate, 'taking into consideration any observations and exculpatory evidence'[321] that were filed by the concerned individual. This approach by the ECJ, once again, indirectly addresses UN institutions, calling for listing decisions to be adopted *ab origine* on the basis of solid evidence and that such evidence was made available to concerned individuals and the EU Commission, in order to avoid implementing measures being struck down by the Court of Justice.

b. *Reforming UN administrative procedures: a new role for individuals*

[320] *Kadi II Appeals*, n 314, para. 137.
[321] *Id.*

The message from the ECJ was probably heard across the Atlantic and the first 'response' to the European call was Resolution 1904, adopted by the Security Council on 17 December 2009.[322] *Inter alia*, this Resolution introduced a completely renewed delisting procedure, focused on the activity of an Ombudsperson – to be selected by the Secretary-General among 'eminent individual[s] of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions' and assisted by an independent Office (the Office of the Ombudsperson) – in order to receive delisting requests filed by individuals and entities, review them on the merits and subsequently prepare a comprehensive report to be analysed by the Sanctions Committee in order to adopt a decision. It was provided by the Resolution that the Ombudsperson 'shall perform [its] tasks in an independent and impartial manner and shall neither seek nor receive instructions from any government'. The procedure to be followed by the Office of the Ombudsperson (described in Annex II to the Resolution), provided a direct engagement with the petitioner (i.e. the individual or entity demanding delisting) in order to allow a better understanding of the grounds for listing and to ensure the petitioners' points of view on such grounds to be received and properly considered. While any form of independent judicial review continued to lack within the UN blacklists system, still Resolution 1904 represented a

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[322] United Nations Security Council Resolution 1904 of 17 December 2009. See Miša Zgonec-Rozej, 'Introductory Note on UN Security Council Resolution 1904 (2009) on Threats to International Peace and Security Caused by Terrorist Acts' (2010) 49 ILM 502; Adele J. Kirshner, 'Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al-Qaida and Taliban Sanctions Regime?' (2010) 70 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 585; Eden (n 298), 148; Eleanor Spaventa, 'Counter-terrorism and Fundamental Rights: Judicial Challenges and Legislative Changes after the Rulings in *Kadi* and *PMOI*' in Antonis Antoniadis, Robert Schütze, Eleanor Spaventa (eds), *The European Union and Global Emergencies* (Hart 2011) 105, 109; Jared Genser, Kate Barth, 'Targeted Sanctions and Due Process of Law', in Jared Genser, Bruno Stagno Ugarte (eds) *The United Nations Security Council in the Age of Human Rights* (Cambridge 2014) 195, 200.

substantial step in the direction that the ECJ had pointed in *Kadi* and its previous judgment. In particular, the appointment of a third and independent body (whose independence was explicitly guaranteed by the Security Council) was a completely unprecedented and relevant improvement with regard to the procedural rights guaranteed to individuals and entities targeted by the UN counter-terrorism financial sanctions. In particular – in a way that is coherent with the ECJ case-law – the Office of the Ombudsperson aimed at ensuring stronger protection for the rights of defense and the right to be heard (as well as for the right to be aware and understand the reasons for listing), with little prejudice for the effectiveness of the whole system in terms of security needs and protection for sensitive information.

Subsequent Resolutions 1988 and 1989 adopted on 17 June 2011[323] – taking into due account the changed situation in Afghanistan and the recent killing of Usama bin-Laden in May 2011 – split the UN sanctions systems against the Taliban and Al-Qaeda into two separate legal instruments, and re-established two separate Committees of the Security Council, one of which (under Res. 1988) should focus on the Taliban and the other (the former Sanctions Committee, under Res. 1989) should focus on Al-Qaeda and associated entities. While no major changes occurred to the overall shape of the blacklists system, a few differences should be noted in terms of procedure: first of all, the new Committee and the new lists established under Res. 1988 did not focus on terrorists or terrorist activities, but rather on threats to peace and security in Afghanistan, engaged in a difficult process of national reconciliation. To this respect, the grounds for asset freezing and other measures (limiting the freedom of

[323] United Nations Security Council Resolution 1988 of 17 June 2011 and United Nations Security Council Resolution 1989 of 17 June 2011.

movement) were amended accordingly, in order to target those members or affiliated of the Taliban group that represented a threat to the process of peace in Afghanistan. In line with this new perspective, the delisting procedure in relation to Res. 1988 was brought back within the scope of previous Res. 1706 (currently adopted for any other sanctioning system within the UN) and excluded the competence of the Office of the Ombudsperson, which remained unchanged for the Al-Qaeda blacklist. This particular choice helps understanding the perception of the (global) counter-terrorism sanctioning system as a matter of exception at the UN level. In species, the reinforcement of procedural safeguards and a stronger involvement of the interested individuals or entities is understood as necessary as long as the sanctioning system addresses a global issue, with no or few links with the situation in a particular State (in this regard, the Security Council felt to use its powers under Chapter VII UNC against individuals and entities, irrespective of an actual threat to peace and security in a particular State, and agreed to ensure further procedural rights); by contrast, as long as it steps back to a more 'classical' context, the need for stronger guarantees is considered as weaker and less central to the reasoning of the Security Council. This is probably because, differently from what happened with global counter-terrorism blacklists, in the case of the Taliban group (as in the cases of other sanctioning systems adopted by the Security Council with regard to the situations in a number of States)[324] the new democratic Afghan Government should remain the first counterpart of the Security Council from a political and diplomatic point of view, even with specific regard to the assessment of the grounds for listing and delisting those individuals or entities affiliated with or in any case supporting the Taliban

[324] Cfr. *supra* (n 299).

group. The EU responded to this amended framework with Common Position 2011/486/CFSP[325] and Regulation (EU) 753/2011, both adopted on 1 August 2011 (and still in force), that reflected the 'two tracks' system provided by Resolutions 1988 and 1989. Since it was adopted subsequently to the Lisbon Treaty, the legal basis of Regulation (EU) 753/2011[326] is found in the new Article 215.2 TFEU[327], which explicitly vested the Council with the power to 'adopt restrictive measures […] against natural or legal persons and groups or non-State entities', so filling the disputed legal gap that I briefly discussed above and ending widespread resort to the 'implied powers' doctrine, pursuant to current Article 352 TFEU,[328] which is now clearly excluded (by Article 352.4 TFEU) in the field of Common Foreign and Security Policy.[329] In addition, Recital 4 of the Regulation clarified that it was construed and should be applied as to respect fundamental rights and the principles recognised by the EU Charter of Fundamental Rights, and in particular the right to an effective remedy and to a fair trial. While this declaration may seem a mere formality, on the contrary its inclusion within the text of the Regulation marks the difference in the attitude of the Council towards

[325] Council Decision 2011/486/CFSP of 1 August 2011 concerning restrictive measures directed against certain individuals, groups, undertakings and entities in view of the situation in Afghanistan [2011] OJ L199/57.
[326] Council Regulation (EU) 753/2011 of 1 August 2011 concerning restrictive measures directed against certain individuals, groups, undertakings and entities in view of the situation in Afghanistan.
[327] Former Article 301 EC.
[328] Former Article 308 EC.
[329] It may be noted that Article 215 TFUE, that replaced Article 301 EC after the Treaty of Lisbon (and was therefore drafted in 2007), shows an early influence of the scholarly debate related to the protection of human rights while implementing UN measures. According to its third paragraph, restrictive measures adopted by the EU – such as asset freezing – 'shall include necessary provisions on legal safeguards'. Such brief provision is nonetheless sufficient to maintain that, as I argued within this work, any restrictive measure adopted by EU institution need to respect EU legal principles in relation to human rights protection. Interestingly enough, a similar provision was included, in 2004, in Article III-160 of the Treaty Establishing a Constitution for Europe, that was later abandoned.

the relationship between UN and EU law and, more importantly, a full awareness of the conditions of legitimacy that the ECJ set forth in *Kadi*.

The following evolutions of the UN blacklists system did not add much, for the purpose of this analysis, to the main features I tried to outline within this paragraph and did not require any relevant intervention on the European side.[330] From the point of view of procedural rights, in particular, Resolution 2083, adopted on 17 December 2012, [331] provided for the focal point that was established by Res. 1730 to receive requests for exemption that should be previously addressed to competent authorities of UN member states, in so reinforcing the direct engagement of concerned individuals and entities in the proceedings of UN bodies (and finally overcoming the necessary interposition of States that had survived, for the purpose of demanding exemptions, until that moment). Eventually, Resolution 2161, adopted on 17 June 2014,[332] allowed individuals claiming to have been listed as a result of mistaken identity to refer the matter to the focal point.

IV. CHANCES FOR A MULTILATERAL APPROACH

As paragraphs above have shown, the UN blacklists system and its implementation at the European level represent an interesting case-study in order to test the relationship between UN and EU law in the field of human rights and fundamental freedoms. In the light of my assumptions – explained and discussed

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[330] This work does not address measures other than asset freezing (and related sanctions, such as travel bans and arms embargo) in the context of the fight against terrorism, which were – nonetheless – adopted by the Security Council over the years. Notably, from 2014 on, the Security Council have addressed the ISIL and Al Nusrah Front, as well as the phenomenon of the so-called foreign fighters, at large (the latter with Resolution 2178, adopted on 24 September 2014). Subsequently, asset freezing measures have been extended to ISIL and ANF (with individuals or entities related thereto), by Resolutions 2199 (2015); 2253 (2015) and 2368 (2017).
[331] United Nations Security Council Resolution 2083 of 17 December 2012.
[332] United Nations Security Council Resolution 2161 of 17 June 2014.

in Chapters 1 and 2 – my analysis tried to understand whether it is possible to set aside the contrasts arising from unilateral approaches (both on the UN and on the EU side) in order to focus on the advantages a multilateral approach can bring along, if one adopts the right paradigm, aimed at preserving the overall coherence of the international legal order.

My analysis demonstrated that the primacy of UN law can be preserved and reconciled with the specialty and autonomy of the EU legal order, through the positive action of Member States at a political and diplomatic level, and the keys of this reconciliation lie both in the UN Charter and in the EU Treaties. *On the one side*, Article 1.3 UNC includes among the primary purposes of the Organisation 'promoting and encouraging respect for human rights and for fundamental freedoms'; in so doing, it provides respect for human rights and fundamental freedoms as a condition of legitimacy for any act adopted under the UN Charter itself, including secondary UN law (and Security Council Resolutions). Notably, the clause drafted at the San Francisco Conference is an open one, capable of recognising and consolidate – from 1945 onwards – the long evolutionary path that characterised the doctrine of human rights and fundamental freedom, as well as the content of the rights and their scope. *On the other side*, since the advent of the European Communities, the European approach to the protection of human right and fundamental freedoms has proven to be an avant-garde one, combining the long-standing traditions of European Constitutional courts, with the influential contribution of the Council of Europe (and its European Court of Human Rights) and ultimately with a noteworthy evolution of the ECJ case-law that has increasingly re-shaped its role as a 'bastion' of human rights. If one should take into due account that EU Member States are also (first-line) members of the United Nations, a reason of consistency

imposes to hold that the developments achieved by EU Member States in the field of human rights and fundamental freedoms (also and above all within the EU itself) should also play a decisive role in interpreting Article 1.3 UNC and shaping the UN legal system as a whole. In other words, EU Member States could not behave within the UN legal system in a manner that is not coherent with their own constitutional traditions and the common principles enshrined in the EU Treaties.

This particular 'backwards' argument has its normative counterpart in Articles 34 and 351.2[333] TFEU: the first one places an obligation onto Member States to act co-ordinately in international fora in order to uphold the EU positions and – with specific regard to Member States that are members of the UN Security Council – to defend the 'positions and interests of the Union'; the second provision encourages Member States to cooperate in order to remove the incompatibilities between the EU Treaties and other international agreements that they participate in. Without prejudice for the primacy of UN law – pursuant to Article 103 UNC – it is undoubted that Member States have are duty bound to act within UN bodies, in a way that is coherent with their being a party of the EU Treaties and the EU legal system at large (and with their common constitutional traditions). Hence, the problem of conflicting obligations imposed onto Member States by UN and EU law should neither be solved resorting to a monist or formal approach, based on the alleged existence of a hierarchy of treaty norms within the international legal order, nor insisting on the specialty and autonomy of EU law, whose fundamental principles should act as counter-limits for contrasting international norms. *On the one hand*, for all the reasons explained above, Article

[333] The provisions of current Article 351 TFEU were formerly part of Article 307 EC (after the Treaty of Nice), of Article 234 EC (after the Treaty of Maastricht) and of Article 234 EEC.

103 UNC should not be intended as a hierarchy rule and provisions of UN law cannot be applied within the EU legal order if they conflict with fundamental principles of European law; *On the other hand*, membership of the EU does not release Member States from their duties under the UN Charter: under Article 351.1 TFEU, in conjunction with Article 103 UNC, they should leave the EU Treaties unapplied and implement UN measures (that are contrary to EU law) within their domestic legal systems.[334] The latter solution – however – is such to preserve the primacy of UN law and the specialty of EU law, while frustrating the unity and consistency of the international legal order.

What my analysis have shown is that a 'third way' to coherence is possible: based on both the provisions of the UN Charter and those of the EU Treaties, Member States have a duty to influence UN rulemaking in order to make it coherent with the level of protection of human rights enshrined in the EU Treaties. In the case of UN blacklists, the evolution of this phenomenon is clearly perceivable and follows the evolution of EU law and the role of the ECJ. In species, from 1999 to 2006, the influence of European stances on UN policies was less evident and characterised by a relatively slow pace. The introduction of the EU's own blacklists system (pursuant to Resolution 1373) served as a benchmark for the Security Council – whose initial Resolutions on the subject matter were adopted in a context of emergency – to introduce a number of specifications and improvements that gradually enhanced the level of procedural rights afforded to concerned individuals and entities. From 2006 to 2009, the role played by European 'doctrines' was increasingly clear: one of the reasons for this change can be found in the judgments of the ECJ on the EU autonomous

[334] Provided that this is coherent with the fundamental principles of their own constitutions.

blacklists system, which fixed a number of loopholes in the European provisions and established well-defined guidelines for EU institutions in order to comply with EU human rights standards. Finally, from 2009 to 2011 the return-influence of European principles on UN Security Council Resolutions was of the greatest importance: the *Kadi* judgment of the ECJ stressed the need for internal coherence within the EU legal system, recognising that the same principles established by the Court in relation to EU autonomous blacklists should also be applied to the implementation of UN-administered blacklists. Such firm stance by the ECJ had the effect of compelling Member States to act at the UN level in order to further enhance the level of protection for human rights and fundamental freedoms within UN blacklists system, with particular regard to procedural guarantees, in line with the requirements of the ECJ.

In sum, while it is not for the ECJ to review the legitimacy of UN measures, going beyond the 'border' of the EU legal system, its judgments certainly played a crucial role in recalling Member States to their obligations under the EU Treaties: for the sake of safeguarding (a) the primacy of UN law, (b) the principles of EU law and (c) the coherence of the international legal system, it is for States to engage within UN bodies, with a view to influencing the policies of the Organisation and ensuring their coherence with EU fundamental principles, to the extent that is possible in relation to the nature and structure of the UN. As I anticipated at the beginning of this Chapter, the proposed solution is a political and diplomatic one, as it tends to settle legal conflicts by amending one of the provisions at stake (i.e. the one that is less protective for human rights and fundamental freedoms). Nonetheless, it has the undoubted merit of being

realistic[335] and valorising the role of the European judiciary beyond the scope of its own jurisdiction, as both a fundamental tool of political influence and a stimulus for EU Member States to properly exert such influence. Far from being a perfect answer to any problem of contrast between UN and EU law, it seems in the field of human rights the more viable (and with no doubts the only currently available) route to allow Member Sates complying with their obligations under the UN Charter, while favouring global adherence to the European standards of protection for human rights and fundamental freedoms and preserving the overall coherence of the international legal system, at the same time.

[335] Foreseeing or invoking the establishment of a system of independent judicial review to assess the legitimacy of UN secondary law would probably be much more challenging from a theoretical point of view, but way less concrete.

CONCLUDING REMARKS

How to reconcile the seemingly conflicting obligations imposed onto EU Member States by UN law and EU law in the field of human rights, in the particular case of individual sanctions adopted by the UN Security Council to prevent and combat the financing of transnational terrorism? This is the fundamental question that has occupied me since the very beginning of this research and the one I tried to answer with my analysis. To do so, I combined both an empirical and a theoretical approach, paying attention to the exegesis of positive law, to the interpretation offered by the case-law of the ECJ and to the importance of political relationships in the solution of conflicts between different legal systems, in the field of public international law.

I started tackling the problem from a European point of view, proposing a reasoned analysis of a landmark case in the history of EU judiciary: the *Kadi I* case. My focused review of the judgments rendered by the General Court and the ECJ led me to conclude that the traditional (and competing) approaches to the interactions and conflicts between different legal systems – namely the monistic one (adopted by the General Court) and the dualistic one (adopted by the ECJ) – presented a number of weak points and needed to be overcome in favour of a more nuanced attitude to the problem. In this regard, the key question to be considered is: under what conditions is the EU entitled or even obliged to implement UN law – including Security Council Resolutions – in place of EU Member States? The answer to this question is less straightforward than it seems.

My reasoning clarified that the EU – being an international organisation with its own legal personality, autonomous from its Member States – is not directly and individually bound by the set of duties and obligations that derives from the UN Charter, separately from EU Member States. In fact, to date, the EU is neither a member of the UN, nor it legally succeeded Member States in their rights and obligations towards the UN. Furthermore, differently from what happened with other non-members of the UN, the EU is not a direct addressee of the resolutions of the Security Council. As a consequence, no rule of public international law obliges the EU to directly implement Security Council resolutions, including Article 103 of the UN Charter, whose scope is limited to the obligations of the 'Members of the United Nations' and cannot be plainly extended to the EU, by means of sole interpretation. Accepting this theoretical premise, however, cannot lead to infer that UN law should remain completely irrelevant for the EU. While it cannot be regarded as directly applicable to the EU, Article 103 UNC still imposes an obligation onto Member States to ensure that their duties under the UN Charter prevail over any other commitments under different instruments of international law, being such the EU Treaties and the ECHR. In this regard, UN law (including secondary law, such as resolutions adopted by the UN Security Council) should take precedence over any other obligation of international law in case of conflict. To this extent, EU Treaties contain a number of specific provisions, whose aim is that of recognising the primacy of UN law and avoiding potential conflicts of laws. Notably, Article 351.1 TFEU explicitly safeguards any international agreement entered into by Member States prior to their accession to the Community (such as the UN Charter) from being repealed, derogated or its fulfilment being prejudiced by Member States' obligations under EU law. Besides, Article 347 TEU establishes an *ad hoc* duty of consultation between

Member States, in order to comply with those international obligations that they 'accepted for the purpose of maintaining international peace and security' (this being an explicit reference to the purpose of the UN, and especially to Chapter VII UNC), without prejudice for the correct functioning of the common market.

While the conjunction of Article 103 UNC and Article 351.1 TFEU provide an obligation for EU Member States to disregard European law, whereas it may interfere with their obligations under UN law, maintaining a corresponding duty of Member States to perform their obligations under the UN Charter by means of an action of the EU is groundless. On the one hand – as my analysis has shown – references made by EU Treaties to UN law are not such to affirm that Member States implicitly agreed to make the EU bound by UN law and to autonomously implement Security Council resolutions, neither can such a duty be derived from the transfer from Member States to the EU of the powers required to comply with some duties under the UN Charter. On the other hand, the duty of consultation established by Article 347 TEU cannot be interpreted as a delegation of powers and duties from Member States to the EU, in order to implement Security Council resolutions (and other obligations aimed at maintaining international peace and security) by resorting to the EU legal framework; it simply requires EU Member States to 'consult' in order to avoid that implementation of UN measures affect the functioning of the common market.

This does not mean, however, that Member States cannot consider it appropriate to abide by their obligations under the UN Charter by means of acts adopted at the EU level, provided that such acts are adopted in compliance with the EU Treaties, both from a procedural and from a substantial point of view.

As I had the chance to point out, the EU was established by its founding Treaties (and by their subsequent amendments, over the years) as a complex

international organisation, based on an autonomous supranational legal system, with its own fundamental principles, its law-making procedures, its rules on the allocation of powers and its own jurisdiction, having the authority of adjudicating the legitimacy of EU secondary legislation, both from a substantial and from a procedural point of view. While it cannot be considered a constitutional order *per se* – as I argued above – still the EU legal order shall be regarded as a conventionally-established and self-standing legal system, whose three main characteristics are entirety, separateness and closure. As a consequence, the EU legal order does not admit any external interference or any integration with extraneous legal systems, unless it is explicitly provided by the EU Treaties. In this respect, for any secondary legislation adopted by EU institutions to be valid and lawful, it should necessarily be consistent with the law-making norms and procedures provided by the EU Treaties, as well as with the fundamental principles enshrined in the EU Treaties themselves and in particular: *(i)* the EU should enjoy the power and/or be competent to adopt that particular act in the field in question (necessity of a legal basis); *(ii)* the act should be adopted by the competent institutions within the EU; *(iii)* the act should be adopted following the proper law- making procedures; *(iv)* the act should comply with the fundamental principles, which Member States conventionally established within the EU Treaties as general parameters of legitimacy for any act of the EU. These four conditions admit no exceptions whatsoever. In this respect, the ECJ shall always enjoy full jurisdiction to assess the legitimacy of EU secondary legislation – including the merits of such legislation – be it adopted to comply with Member States obligations under the UN Charter or not.

Adhering to these conclusions does not risk – as some have argued – to compromise the primacy of UN law (and Security Council resolutions) within the

international legal order, since the scrutiny of the ECJ shall be focused only on EU secondary legislation and not on UN legal instruments: Member Stats could either decide to implement Security Council Resolution by means of an action within the EU legal framework (according to Article 215 TFEU) or rather to provide for such implementation on their own. In the former case, EU legislation adopted to implement UN Security Council resolutions should comply with both UN law and EU law (I referred to this condition as 'double compliance'), making no sort of exception with regard to any other act of EU, and the ECJ should enjoy a full jurisdiction to exert a substantial judicial review, as set forth by the EU Treaties, with no reservation. In the latter case, Member State will have full legal capacity to implement Security Council resolutions on their own, encountering no limits by reason of the EU Treaties, whose provisions should yield to the primacy of UN law and remain unapplied in case of conflict, pursuant to Article 351.1 TFEU. In this case, no violation of the EU Treaties could be invoked by European institutions, which should refrain from interfering with Member States performance of their duties under UN law; Member States – in turn – would be obliged to 'consult', in order to avoid the functioning of the single market being compromised. Obviously, such duty of consultation could be aimed at finding a common attitude towards the implementation of UN-derived obligations (in the effort of overcoming possible contrasts between UN law and EU law, as encouraged by Article 351.2 TFEU), but still entails no further and implicit obligations, as some tried to suggest.

Conclusions reached in Chapter 1 (and retraced above) rely on the main assumption – further developed in Chapter 2 – that Article 103 UNC should not be regarded as a hierarchy rule, but rather as a conflict avoidance clause, even if one of a particular species. As I have shown, over the years, a number of

international scholars has over-emphasised the role of the UN Charter within the international legal order, trying to identify it as the very constitution of the community of States. This idea was strongly based on the interpretation of the primacy clause – contained in Article 103 UNC – as establishing a hierarchy in the international legal order, where the UN Charter was superior in rank to any other instrument of international law. My analysis led me to conclude that the idea of Article 103 UNC as a hierarchy rule, while it entails interesting consequences, is nonetheless fallacious and ill-grounded. First of all, the text of Article 103 UNC does neither provide, nor suggest for the Charter to represent the constitutional instrument of the community of States or to be super-ordinated to other sources of international law. From a conceptual point of view, Article 103 UNC does not refer to the idea of hierarchy, but rather to the notion of prevalence, and it is well understood that a relationship of prevalence may exist between sources of the same rank (one may simply think to the variety of methods known by legal theory for resolving antinomies, among which the hierarchy rule is only one of many). Second, the *ratio legis* of Article 103 UNC, as it emerges from the analysis of the *travaux préparatoires* at the San Francisco Conference in 1945, suggests that the founding members of the United Nations never intended to establish a rule of hierarchy in order to grant the UN Charter a position superior to any other treaty or rule of international law, neither they considered it appropriate to renounce (in part) their treaty-making capacity in order to ensure the hierarchical superiority of the new Charter. Indeed, the idea of a primacy clause for the UN Charter fostered debate among the drafters, which struggled to reach a compromise on the current wording, to be substantially weaker than former Article 20 of the Covenant of the League of Nations. Third – and this may appear as a consequence of what I outlined before – Article 103 UNC does not wish to regulate interactions between

the Charter and other sources of international law, but rather between obligations imposed onto UN member states by the Charter and obligations under any other international agreement: this choice suggests the will to resolve conflicts that may arise from the concrete application of the Charter and other agreements, in terms of simultaneous performance of conflicting obligations, rather than establishing any kind of hierarchy *in abstracto*. In sum, Article 103 UNC can be regarded as a purpose-oriented norm, rather than a strictly procedural one, whose aim was and still is nowadays that of ensuring the prevalence of obligations derived from UN law over any other international obligations member states may be subject to.

As I widely observed in Chapter 2, the idea of 'constitution' may acquire a number of different meanings in legal literature, depending on the concept that it is set to convey. In the case of the UN Charter, it can be certainly considered as a 'constitutional' or 'constituent' treaty, since it established a new organisation – the United Nations – laying down its fundamental principles and the shared values all members are bound to respect. Also, it provided for the institutional structure of the organisation and the allocation of powers within different bodies. However, while the Charter may have – at least in part – a constitutional structure, this does not imply it should be read as a constitution proper. It would be utterly erroneous, both from a logical and from a legal point of view, to stress structural affinities between the UN Charter and national basic laws, in order to draw a number of legal consequences that find no basis in positive norms (namely Article 103 UNC), neither from a literal, nor from a teleological point of view. Hence, if one can talk about the constitutional function of the UN Charter for the functioning of the United Nations, the community of states did certainly not intend to establish a constitutional hierarchy for the international legal order.

It comes from the above that – within the EU legal order – no provision of the EU Treaties can be set aside or howsoever derogated by UN legislation, neither UN Security Council resolutions can be implemented by means of an act of EU institutions if such implementation conflicts with the fundamental principles that are enshrined in the EU Treaties.

On the other side, no provision of EU law and no EU institution (including the ECJ) can interfere with Member States' duties under the UN Charter, whose mandatory performance cannot be refused, suspended or delayed on the basis of European principles, including those related to the protection of human rights and fundamental freedoms, without violating Member States obligations towards the UN and its members.

My analysis came to show that a long-term approach to the problem of the interaction between legal systems, in the particular field of human rights and fundamental freedoms, cannot be properly developed by relying alternatively on European law or UN law, in the struggle of establishing which system should prevail over the other. By contrast, the reciprocal position of both the EU and the UN legal systems within the broader international legal order should be taken into account. On the one hand, it should be recalled that the UN Charter is grounded on a set of shared principles, which include 'promoting and encouraging respect for human rights and for fundamental freedoms for all', as provided by Article 1.3 UNC. As a consequence, each act of UN institutions – including Security Council resolution under Chapter VII UNC – should be regarded and interpreted in such a manner as to be consistent with the aforementioned principle. As a matter of internal coherence of the UN legal system, the legislator of the UN Charter surely expected Security Council (a crucial institution for the safeguard of global peace and security) to act consistently with the basic principles and purposes of the

Organisation. In sum, respect for human rights and fundamental freedom may be well regarded as a condition of legitimacy for UN secondary legislation. While the UN legal system is devoid of any form of independent review, it is not for courts belonging to different legal systems (such as the ECJ) to artificially fill this gap.

Indeed, the open and quite simple wording of Article 1.3 UNC allows it to be interpreted in accordance with the evolution of the international legal doctrine on human rights and fundamental freedom: a process that involves a number of different players, including UN bodies and agencies, supranational courts such as the European Court of Human Rights and the Inter-American Court of Human Rights, regional courts such as the ECJ and domestic constitutional courts. In this regard, the EU and its Member States provided a very strong contribution to the development of transnational (or global) principles in the field of human rights law, inspired by a stronger protection of individual liberties. Such contribution very much derives from the cross-contamination between the constitutional traditions of Member States, which led to develop a set of fundamental principles regarded by the EU as common constitutional values. As I argued, there is no reason to regard the 'human rights and fundamental freedoms' addressed by Article 1.3 UNC as something different from 'human rights and fundamental freedoms' that are protected by EU law (within the EU Treaties and the EU Charter of Fundamental Rights), so that the condition of legitimacy established by the UN Charter for UN secondary legislation – including Security Council resolutions – is theoretically comparable to that established by the EU Treaties for EU secondary legislation. Differently from what many European scholars may wish, however, the way to go from theory to practice cannot rely on the sole judicial activism of the ECJ but should focus on Member States double membership of the EU and the UN as well as on Article 351.2 TFEU. Being both a party of the UN Charter

and of the EU Treaties, Member States should act within the UN in a way that is coherent with the fundamental principles of EU law and common constitutional traditions. What is more, according to Article 351.2 TFEU, Member States should 'adopt a common attitude' to prevent or overcome any conflict between the EU Treaties and the UN Charter. In fact, as I argued in Chapter 3, Member States are bound to engage within the UN in order to influence and shape the policies of the Organisation and render them coherent with the level of protection of human rights and fundamental freedoms, enshrined in the EU Treaties, as interpreted by the ECJ, which include common constitutional traditions.

My analysis of the interaction between UN and EU law in the specific field of measures aimed at preventing the financing of international terrorism, provided in Chapter 3, clearly showed how European principles – including those that were developed by the ECJ – have gradually influenced UN rulemaking (especially over the last ten years), compelling Member States to act at the UN level in order to achieve a level of protection of human rights and fundamental freedoms that is in line with the requirements of the ECJ, with particular regards to procedural guarantees afforded to concerned individual and entities.

As I argued at the end of Chapter 3, the ultimate solution to the problem of conflicting interactions between UN and EU law in the field of human rights can be more political than strictly legal. It necessary relies on the diplomatic action exerted by Member States at the UN level and ultimately on their own commitment. Nevertheless it seems, nowadays, the only realistic and viable option in order to foster the role of the EU (and its Court of Justice) on the international stage, as a relevant player, compelling Member States to favour global adherence to European standards for human rights protection and – a the same time – allowing Member States to comply with their obligations under UN

Charter, in the struggle of preserving the overall coherence of the international legal system.

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