



## UvA-DARE (Digital Academic Repository)

### Reconciling different legal spheres in theory and practice: pluralism and constitutionalism in the cases of Al Jedda, Ahmed and Nada

Eckes, C.; Hollenberg, S.

**Publication date**

2013

**Document Version**

Final published version

**Published in**

Maastricht Journal of European and Comparative Law

[Link to publication](#)

**Citation for published version (APA):**

Eckes, C., & Hollenberg, S. (2013). Reconciling different legal spheres in theory and practice: pluralism and constitutionalism in the cases of Al Jedda, Ahmed and Nada. *Maastricht Journal of European and Comparative Law*, 20(2), 220-243.  
[http://www.maastrichtjournal.eu/pdf\\_file/ITS/MJ\\_20\\_02\\_0220.pdf](http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_02_0220.pdf)

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

# RECONCILING DIFFERENT LEGAL SPHERES IN THEORY AND PRACTICE: PLURALISM AND CONSTITUTIONALISM IN THE CASES OF *AL-JEDDA*, *AHMED* AND *NADA*

CHRISTINA ECKES\* and STEPHAN HOLLENBERG\*\*

## ABSTRACT

*A detailed analysis of four judicial responses to extreme pluri-contextual settings, the House of Lords' and the European Court of Human Rights (ECtHR)'s rulings in Al-Jedda, the UK Supreme Court's judgment in Ahmed, and the ECtHR's recent ruling in Nada, demonstrates that all three courts relied on elements of pluralist and constitutionalist logic. Elements of institutional hierarchy in international law are balanced against considerations that can be understood as substantive constitutional concerns. Sometimes their effects are counteracted by blunt pluralist claims. Radical pluralism and state-like constitutionalism are the two extreme poles on one scale. Both are ideal types and cannot exist in their pure form. The analysis further confirms the increased power of the judiciary, which, when determining the applicable normative framework, ultimately makes a choice between competing authorities representing competing values. 'Communicative' pluralism may contribute to the emergence of a shared frame of reference and ultimately to a shared understanding of the importance of certain substantive values.*

**Keywords:** *Ahmed*; *Al-Jedda*; constitutionalism; *Nada*; pluralism

---

\* Amsterdam Centre for European Law and Governance (<http://jur.uva.nl/acelg>), University of Amsterdam. 2012/2013 Emile Noël Fellow-in-residence, New York University.

\*\* Amsterdam Center for International Law (ACIL), University of Amsterdam.  
We would like to thank the research group 'The Architecture of Postnational Rulemaking' ([www.uva.nl/architecture](http://www.uva.nl/architecture)) and in particular Andre Nollkaemper for their comments on an earlier draft. Any remaining errors are of course entirely our own.

## §1. INTRODUCTION

In a pluri-contextual<sup>1</sup> setting several players claim the authority to control a given legal situation. One development that has contributed to a multiplication of authoritative voices is the Security Council's engagement with new forms of global governance after the end of the Cold War. The Security Council has used its Chapter VII competences to endorse numerous international peacekeeping missions<sup>2</sup> and adopt counter-terrorist measures of unprecedented detail.<sup>3</sup> National troops that participate in peacekeeping missions operate under very difficult circumstances outside the territory of their own state. This necessarily raises questions as to what legal norms govern the actions of these troops. Are they bound by the human rights standards applicable in their country of origin? Are they bound by obligations under the UN Charter or under the European Convention on Human Rights (ECHR)? A similar question arises when the Security Council requires UN member states to freeze the assets of terrorist suspects in a way and manner that the latter cannot comply without violating the core of the right to judicial protection, as it is guaranteed both under Article 14 ICCPR and Article 6 ECHR. In both cases, the core issue is how the different international regimes must be reconciled – or, ultimately, whether the Security Council can exempt UN member states from their (international) human rights obligations (ECHR) when the latter act to restore or maintain international peace and security. When adversely affected individuals bring these instances before domestic and regional courts these courts are confronted with a complicated mixture of potentially applicable normative contexts.

While much has been written in the abstract about pluri-contextual settings and the interactions between legal spheres, the actual judicial strategies to coordinate different legal contexts, but also those to establish distance between them, are underexplored. This article analyses the judicial responses in four rulings: the House of Lords' decision in the case of *Al-Jedda* (*Al-Jedda*, *HL*), the European Court of Human Rights (ECtHR)'s ruling in the case of *Al-Jedda* (*Al-Jedda*, *ECtHR*), the UK Supreme Court's judgment in the case of *Ahmed*, and the ECtHR's ruling in the case of *Nada*.<sup>4</sup> All discussed

<sup>1</sup> Throughout the text the term legal 'context' is chosen rather than 'level', since the different contexts are not layered. They do not relate to each other in any widely accepted hierarchical manner. Further, PIL is not organized to a degree that would justify calling it an order. The term 'pluri-contextual' is used purely descriptively.

<sup>2</sup> See [www.un.org/en/peacekeeping/operations](http://www.un.org/en/peacekeeping/operations) (last visited 3 June 2013). At present (February 2013), the UN runs 14 peacekeeping missions and one special political mission.

<sup>3</sup> See Security Council Resolutions UNSC Res 1267, 15 October 1999, UN Doc S/Res/1267 and UNSC Res 1373, 28 September 2001, UN Doc S/Res/1373.

<sup>4</sup> House of Lords, *R. (Al-Jedda) v. Secretary of State for Defence (Justice and another intervening)* [2007] UKHL 58, [2008] 1 A.C. 332; ECtHR, *Al-Jedda v. UK*, Judgment of 7 July 2011, App.No. 27021/08; UK Supreme Court, *HM Treasury v. Mohammed Jabar Ahmed and others* [2010] UKSC 2 & UKSC 5, on appeal from: [2008] EWCA Civ 1187; ECtHR, *Nada v. Switzerland*, Judgment of 12 September 2012, App.No. 10593/08.

cases are pluri-contextual in the extreme – for at least three reasons. Firstly, norms stemming from up to four different legal spheres claim to govern the factual situation in question (national law, European Union (EU) law (only *Ahmed*), the ECHR, and the UN Charter). Secondly, all concern Chapter VII resolutions of the Security Council, which enjoy a special status under international law and consequently make a claim of exceptional authority. Thirdly, in all four the very core of the protection of human rights is threatened.

This article first introduces the theoretical debate between constitutionalism and pluralism (Section 2). It then offers a detailed legal analysis of the four cases in the light of this theoretical debate (Section 3). The final section (Section 4) will summarize and draw conclusions. The principal argument in this article is that pluralism and constitutionalism should not be seen as antithetical,<sup>5</sup> but as complementary. The two theoretical doctrines in their pure form could be perceived as the two extreme ends on a scale of increasing structural order. The in-between consists of different combinations of pluralist and constitutionalist elements. Indeed, this article demonstrates that the courts relied both on pluralist and constitutionalist logic and that the different legal contexts equally contain elements of both. Further, the discussion confirms the increasing power of the judiciary, which, when determining the applicable normative framework, ultimately makes a choice between competing authorities representing competing values.

## §2. THEORETICAL FRAMEWORK

How courts should deal with conflicts resulting from pluri-contextual settings can be explored through the viewpoint of two ‘structural visions’<sup>6</sup> or ‘normative theories of power’,<sup>7</sup> which both aim to capture the changing nature of legal authority in a globalized world: constitutionalism and pluralism. The discourse on constitutionalism and pluralism is characterized by a great number of disagreements and misunderstandings. This modest attempt to sketch a theoretical framework will necessarily oversimplify and remain incomplete.

<sup>5</sup> N. Krisch chooses an antithetical approach in his book *Beyond Constitutionalism – The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford 2011), p. 23. However, many authors assume this only implicitly. N. MacCormick’s notion of constitutional pluralism is a form of pluralism rather than a combination of the two, see e.g.: N. MacCormick, ‘Juridical Pluralism and the Risk of Constitutional Conflict’, in N. MacCormick, *Questioning Sovereignty* (Oxford University Press, Oxford 1999), Chapter 7. Others have explicitly combined the two concepts: N. Walker, ‘The Idea of Constitutional Pluralism’, 65 *Modern Law Review* 3 (2002), p. 317–359. Disagreeing with the antithetical view: A. Stone Sweet, ‘Constitutionalism, Legal Pluralism, and International Regimes’, 16 *Indiana Journal of Global Legal Studies* 2 (2009), p. 621–645.

<sup>6</sup> N. Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law*, p. 5.

<sup>7</sup> M.P. Maduro, ‘The Importance of being called a Constitution: Constitutional authority and the Authority of Constitutionalism’, 3 *International Journal of Constitutional Law* 2–3 (2004), p. 332–356.

Constitutionalism assumes the existence (descriptive dimension), or aspires to establish (normative dimension), structuring principles that purport to be of general application. It assumes that all legal contexts can be placed within an overarching (systematical) framework consisting of (hierarchical) structures and (predictable) legal principles.<sup>8</sup> It is based on some form of continuity from the state structure.<sup>9</sup> This can be the transfer of certain constitutional elements to the international sphere or the linking back of international law to the state. Similar to constitutionalization ('constitution-hardening process'),<sup>10</sup> constitutionalism (ideology behind constitutionalization) emphasizes process: the emerging of constitutional elements, often through legal reasoning that discovers constitutional elements within the existing law.

Institutional and substantive constitutionalism can be distinguished as different strands or groups with the same general idea but emphasizing different aspects of it.<sup>11</sup> Both believe in 'rules about rules' that are binding on all legal subjects and that enhance a normative ordering across levels of governance. Yet, the former focuses on the hierarchical relationship between institutions, accepting that specific bodies can have the power to enact rules that are of a relatively higher normative standing.<sup>12</sup> It implies a levelled approach where the hierarchically lower levels of norms (often produced by the geographically smaller polities) have to comply with the norms set by the hierarchically higher levels (often produced by more inclusive polities).

Adherers of substantive constitutionalism by contrast hold that '[l]ess attention should be paid to the formal sources of law and more to its substance. The ranking of the norms at stake should be assessed in a more subtle manner, according to their substantive weight and significance'.<sup>13</sup> This could mean 'a shift away from considerations of form,

<sup>8</sup> Strong purporters of constitutionalism are: I. Pernice, 'The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation', in P.M. Dupuy, M.N. Shaw and K.-P. Sommermann (eds.), *Völkerrecht als Wertordnung. Common Values in International Law, Festschrift für/ Essays in Honour of Christian Tomuschat, Kehl-Strasbourg-Arlington* (N.P. Engel Verlag, Kehl 2006), p. 975–976, 'I submit that constitutionalism is the correct and only possible answer to the present challenges of globalisation...'

<sup>9</sup> N. Walker, 'EU Constitutionalism in the State Constitutional Tradition', *EUI Working Paper Law* No. 21 (2006), <http://cadmus.eui.eu/bitstream/handle/1814/6248/LAW-2006-21.pdf?sequence=1> (last visited 12 April 2012); P. Dobner and M. Loughlin, *The Twilight of Constitutionalism* (Oxford University Press, Oxford 2010), Part One, analysing the dependency between constitutionalism and statehood. See also: N. Walker, 'Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms', 3 *Transnational Legal Theory* 1 (2012), p. 61–85.

<sup>10</sup> N. Tsagourias, *Transnational Constitutionalism – International and European Perspectives* (Cambridge University Press, Cambridge 2007).

<sup>11</sup> N. Walker, 65 *Modern Law Review* 3 (2002), p. 317–359.

<sup>12</sup> B. Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbian Journal of Transnational Law* 3 (1998), p. 531; C. Tomuschat, 'International Law as the Constitution of Mankind', in United Nations (ed.), *International Law on the Eve of the Twenty-first Century. Views from the International Law Commission* (United Nations Publications, New York 1997), p. 38.

<sup>13</sup> A. Peters, 'The Globalization of State Constitutions', in J. Nijman and P. Nollkaemper (eds.), *New Perspectives on the Divide between National and International Law* (Oxford University Press, Oxford 2007), p. 306.

away from legal-sources-thinking toward Hersch Lauterpacht's 'reason of the thing'.<sup>14</sup> Under international law, it advances a focus on meta-norms, *ius cogens* and *erga omnes* norms, that develop to some extent independently from the will of individual states.<sup>15</sup> In addition, through means of consistent interpretation or presumption of compliance, substantive constitutionalism may mitigate the outcome imposed by institutional hierarchy. However, even purporters of constitutionalism voice doubts about the workability of a global scale for the desired organizing framework, a 'world constitution', and call for the global context to be supplemented by regional integration.<sup>16</sup>

Pluralism rejects this hierarchy and implies a diametrically opposed approach to power: polities offer checks and balances of the rules of other, including bigger and more inclusive, polities. Pluralism further embraces diversity and rejects any generally imposed structural rules or principles that do not inherently flow from the 'own' legal order. It equally has a descriptive ('we live in a pluralist world') and a normative dimension (the principled decision of how legal orders relate *should* be left open). Nico Krisch, who is an adherent of pluralism also as a normative concept,<sup>17</sup> explains that a pluralist world is 'governed by the potentially competing rules of the various sub-orders, each with its own ultimate point of reference and supremacy claim, the relationships between them are left to be ultimately determined through political, not rule-based processes',<sup>18</sup> and that this gives the best expression to 'public autonomy'.<sup>19</sup> Pluralism is hence seen as giving priority to the *political*, including in the realm of the judiciary. It leads to a competition of the applicable norms on a case-by-case basis without establishing more broadly applicable structural rules or principles. Krisch for instance argues that court decisions that avoid 'statements of principle' on a 'quest for reconciliation' constitute a 'judicial voice in a new, pluralist context'.<sup>20</sup> Indeed, pluralism does not appear to aspire to develop guidelines of how to reconcile different legal spheres or how to develop interface norms.<sup>21</sup>

<sup>14</sup> G. de Búrca and O. Gerstenberg, 'The Denationalization of Constitutional Law', 47 *Harvard International Law Journal* 1 (2005), p. 243, 254.

<sup>15</sup> J. Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System', in E. de Wet and J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press, Oxford 2012), p. 40–51; E. de Wet, 'The International Constitutional Order', 55 *ICLQ* 1 (2005), p. 51–76; E. Petersmann, 'Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice', 10 *Journal of International Economic Law* 3 (2007), p. 529–551.

<sup>16</sup> See e.g. D.M. Johnston, 'World Constitutionalism in the Theory of International Law', in R.S.J. Macdonald and D.M. Johnston (eds.), *Towards World Constitutionalism, Issues in the Legal Ordering of the World Community* (Martinus Nijhoff Publishers, Leiden 2005), p. 27.

<sup>17</sup> N. Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law*, Chapters 8 and 9.

<sup>18</sup> *Ibid.*, p. 23.

<sup>19</sup> N. Krisch, 'The Case for Pluralism in Postnational Law', in G. de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism* (Cambridge University Press, Cambridge 2012), p. 249 et seq.

<sup>20</sup> N. Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law*, p. 165.

<sup>21</sup> *Ibid.*

The most extreme form of pluralism is ‘radical’<sup>22</sup> or ‘systemic’<sup>23</sup> pluralism. It is truly polycentric and fully accepts the fact that irreconcilable, but internally plausible claims to authority can stand next to each other.<sup>24</sup> This makes radical pluralism the most interesting challenge to the constitutionalist narrative. Neil MacCormick originally defended a radical form of legal pluralism but has explicitly softened his approach over time.<sup>25</sup> Nico Krisch distinguishes radical/systemic and softer types of pluralism in kind, rather than as a matter of degree. He speaks of the difference between ‘systemic’ and ‘institutional’ pluralism,<sup>26</sup> and explains that the latter refers to a setting in which ‘different parts of one order operate on a basis of coordination, in the framework of common rules but without a clearly defined hierarchy’.<sup>27</sup> This takes ‘the edge out of’ the systemic or radical pluralism,<sup>28</sup> which denies any form of communality, be it in the form of coordinating principles or a value framework.

Krisch seems to understand his own concept of pluralism as systemic (and hence radical).<sup>29</sup> However, he also softens his pluralist position when explaining that ‘polities and institutions gain respect from others only if they reflect a vision of how self-legislating equals might order the post-national political’;<sup>30</sup> that pluralism opens up a ‘space for contestation’;<sup>31</sup> and ‘a pluralist order can contribute to the transformation of a regime over time’.<sup>32</sup> All three points emphasize a form of communality between the different legal contexts. Respect for public autonomy requires an agreement on the fundamental value of public autonomy.<sup>33</sup> Contestation can only take place within a (to

<sup>22</sup> N. MacCormick, in N. MacCormick, *Questioning Sovereignty*.

<sup>23</sup> N. Krisch, in G. de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism*.

<sup>24</sup> N. MacCormick, in N. MacCormick, *Questioning Sovereignty*, p. 199, ‘The problem is not logically embarrassing, because strictly the answers are from the point of view of different systems. But it is practically embarrassing to the extent that the same human beings or corporations are said to have and not have a certain right. How shall they act?’.

<sup>25</sup> N. Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law*, Chapter 3 I.

<sup>26</sup> N. Krisch, in G. de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism*, p. 220. An example of ‘systemic pluralism’ is: A. Fischer-Lescano and G. Teubner, *Regime-Kollisionen: Zur Fragmentierung des Globalen Rechts* (Suhrkamp, Frankfurt am Main 2006); for an English version see: A. Fischer-Lescano and G. Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, 25 *Michigan Journal of International Law* 4 (2004), p. 999–1046. An example of ‘institutional pluralism’ is: M. Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’, in J.L. Dunoff and J.P. Trachtman (eds.), *Constitutionalism, International Law and Global Government* (Cambridge University Press, Cambridge 2009), p. 258–324.

<sup>27</sup> N. Krisch, in G. de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism*, p. 222.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid., p. 220–238.

<sup>30</sup> Ibid., p. 260.

<sup>31</sup> Ibid., p. 260.

<sup>32</sup> N. Krisch, *Beyond Constitutionalism*, p. 152.

<sup>33</sup> Krisch argues that even in a pluralist order some polities deserve more respect and tolerance than others, based on their public autonomy credentials [N. Krisch, in G. de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism*, p. 252]. This is brought to the point by J.H.H. Weiler, ‘Dialogical Epilogue’, in G. de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism*, p. 302.

some extent) shared frame of reference. Similarly, if pluralism works towards change in the other legal contexts this entails an approximation, a step towards shared values and principles. Hence, even if 'there is no ultimate decision-maker, no umpire to appeal to',<sup>34</sup> agreed terms of interaction are in itself a constitutionalist nuance.

This characterization depends of course on the definition of constitutional elements. Together with many scholars,<sup>35</sup> we consider ordering principles, engagement rules, identification of shared values and approximation of rules and principles as constitutional elements. Not only strictly hierarchical ordering qualifies as constitutional. This also finds a parallel within national constitutions and transnational constitutionalization processes, both of which are also crucially about managing the exercise of power by several players.

Elements of the pluralism and constitutionalism have also been explicitly combined. An example is *constitutional pluralism*, as suggested by Neil Walker.<sup>36</sup> It addresses the challenges of a heterarchical reality by constructing constitutionalism as a matter of nuances and gradation rather than a black-and-white decision between different legal orders. It perceives constitutionalism 'as a medium through which [plural orders] interconnect – as a structural characteristic of the relationship between certain types of political authority or claims to authority situated at different sites or in different processes'.<sup>37</sup> The distinction between a constitutionalist and a constitutional pluralist might be the former's emphasis on hierarchy while the latter (only) accepts the existence and need for ordering and connection. This is also reflected in the latter's emphasis on the process rather than the outcome.

We argue that constitutionalism and pluralism are different views of the existing (descriptive) and necessary (normative) degree of coordination between different legal contexts. Constitutionalists recognize that the international (or European) legal context will not reach the level of constitutional ordering of the 'ideal type' of state, nor does any pluralist defend that legal contexts 'should pass by each other like ships at night'.<sup>38</sup> Hence, while it is possible to argue in favour of the normative value of more pluralism

<sup>34</sup> N. Krisch, in G. de Búrca and J.H.H. Weiler, *The Worlds of European Constitutionalism*, p. 303.

<sup>35</sup> N. Tsagourias, *Transnational Constitutionalism – International and European Perspectives*, Introduction; U.K. Preuss, 'The Political Meaning of Constitutionalism', in R. Bellamy (ed.), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Ashgate, Avebury 1996), p. 12; T.C. Grey, 'Constitutionalism: An Analytical Framework', in J.R. Pennock and J.W. Chapman, *Constitutionalism* (New York University Press, New York 1979), p. 190; N. Walker, 'European Constitutionalism and European Integration', *Public Law* (1996), p. 268–75; P. Craig, 'Constitutions, Constitutionalism, and the European Union', *7 European Law Journal* 2 (2001), p. 126–128; C. Moellers, 'Pouvoir Constituant- Constitution-Constitutionalisation', in A. von Bogdandy and J. Bast, *Principles of European Constitutional Law* (Hart Publishing, Oxford 2006), p. 183.

<sup>36</sup> N. Walker, *65 Modern Law Review* 3 (2002), p. 317.

<sup>37</sup> *Ibid.*, p. 340.

<sup>38</sup> This expression is taken from Advocate General Maduro's Opinion in Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-06351.



(rejection of a hierarchical order; no binding overarching rules), in practice *radical* pluralism is as utopian as global constitutionalism is an ideal type. Even in the most pluralist scenario, interaction and overlapping of legal contexts requires (in a particular case before a specific court) to define the relationship between these contexts in one way or another. This will necessarily result in a practice of interaction and at least implicitly in a meta-debate on the rules of this interaction. Constitutionalist and pluralist elements are dots that can be placed on the same colour chart. This is confirmed by the fact that all four court decisions that will be discussed in the remainder of this article contain such constitutionalist and pluralist elements.

### §3. THEORY AND PRACTICE: CHOOSING THE APPLICABLE LEGAL PARAMETERS

In all three cases, *Al Jedda*, *Ahmed* and *Nada*, individual rights had to be balanced against the public interests of security. The four concerned legal contexts are: national law, the ECHR, the UN Charter, and EU law, and all protect both individual rights and security. This creates the need to relate these different legal contexts, which draw their authority and legitimacy from different sources. The following subsections will consider constitutional and pluralist elements in the courts' approaches to pluri-contextual legal problems, such as endorsing institutional hierarchy; reconciling substantive concerns, as far as possible; employing a presumption of compliance or consistent interpretation; and taking a pluralist approach that separates the different legal contexts.

#### A. INSTITUTIONAL HIERARCHY: CAN THE SECURITY COUNCIL DISPLACE THE EUROPEAN CONVENTION?

The UN Charter confers on the Security Council a hierarchically privileged position. Pursuant to Articles 25 and 103 UN Charter, obligations under the Charter prevail over obligations under any other international agreement. Article 25 establishes that member states are bound to carry out Security Council decisions in accordance with the Charter, while Article 103 is a conflict rule setting out that 'in the event of a conflict between the obligations of the Members of the United Nations under the UN Charter and their obligations under any other international agreement the former shall prevail'. While a consensus appears to have emerged in doctrine that the Security Council does not have absolute powers, but that it is subject to certain restraints,<sup>39</sup> the basis for these restraints

<sup>39</sup> R. Bernardt, 'Article 103', in B. Simma et al. (eds.), *The Charter of the United Nations – Volume II* (2<sup>nd</sup> edition, Oxford University Press, Oxford 2002), p. 1292–1302.

remains disputed. Some find limits in the legal framework of the UN Charter,<sup>40</sup> others argue on the basis of general legal principles,<sup>41</sup> such as good faith<sup>42</sup> and proportionality.<sup>43</sup> Yet others focus on *jus cogens*.<sup>44</sup> The limits of the Security Council's powers were at the centre of the legal discussion in the cases of *Nada*, *Al-Jedda*, and *Ahmed*. These cases are illustrative examples of the legal consequences of a pluri-contextual setting, where competing claims of authority result in conflicts of norms.<sup>45</sup> Indeed, they represent the two most prominent forms of global governance exercised by the Security Council: peacekeeping missions and sanctions, including counter-terrorist sanctions.

In *Nada*, the Swiss Federal Court largely followed the General Court's earlier ruling in the case of *Kadi I*.<sup>46</sup> Both cases concerned individuals that were directly targeted by Security Council counter-terrorist sanctions. For the imposition of such targeted sanctions a Sanctions Committee directly designates particular individuals. States have no scope of discretion in regard to the sanctions' implementation, but are legally obliged to implement the prescribed measures against the designated individuals. The measures include the freezing of assets and the imposition of a travel ban. Therewith,

<sup>40</sup> E.g. UN Charter Article 24(2) jointly with Article 1(1): G. Watson, 'Constitutionalism, Judicial Review, and the World Order', 34 *Harvard International Law Journal* 1 (1993), p. 1–45; UN Charter Article 24(2) jointly with Article 1(3): E. de Wet and A. Nollkaemper, 'Review of Security Council Decisions by National Courts', 45 *German Yearbook of International Law* (2002), p. 166 et seq.

<sup>41</sup> Problems persist in that particularly the open legal concepts would require judicial interpretation to be able to play a meaningful power-limiting role in practice, and that some of the identified limits set a standard that is too low to provide a yardstick for effective protection.

<sup>42</sup> E. de Wet and A. Nollkaemper, 45 *German Yearbook of International Law* (2002), p. 166.

<sup>43</sup> M. Bothe, 'Les limites des pouvoirs du Conseil de Sécurité', in R.-J. Dupuy (ed.), *Le développement du rôle du Conseil de Sécurité* (Martin Nijhoff Publishers, Leiden 1993), p. 67 et seq., 78; doubtful that the principle of proportionality amounts to a general principle of public international law: R. Higgins, *Problems & Process. International Law and how we use it* (Clarendon Press, Oxford 1994), p. 236 et seq.

<sup>44</sup> Case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* [2005] ECR II-03649; set aside by: Case C-402/05 P and C-415/05 P *Kadi and Al Barakat v. Council and Commission*. See also Swiss Supreme Court, *Youssef Mustapha Nada v. Staatssekretariat für Wirtschaft* [2007] 1A.45/2007, para. 7.

<sup>45</sup> There are different understandings of the notion 'norm conflict'. Many authors distinguish narrow and broad definitions. The narrow definition norm conflict is generally understood to describe 'those situations in which giving effect to one international obligation unavoidably leads to the breach of another'. Views differ on the broad definition of norm conflict. Pauwelyn and Milanović understand a broad definition to mean 'not only cases of incompatibility of two obligations, but also conflicts between obligations and permissive norms'. De Wet and Vidmar use a broad definition to refer 'to situations where compliance with an obligation under international law does not necessarily lead to a breach of another norm – which can give rise to either a right or an obligation – but rather to its limitation, or even a limitation of all the rights and/or obligations at stake'. The latter notion of a broad conflict includes what others would call apparent (as opposed to genuine) conflicts. See J. Pauwelyn, *Conflict of norms in public international law: How WTO law relates to other rules of international law* (Cambridge University Press, Cambridge 2003), p. 184–188; E. de Wet and J. Vidmar, 'Introduction', in E. de Wet and J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights*, p. 2–3; and M. Milanović, 'Norm Conflict in International Law: Whither Human Rights?', 20 *Duke Journal of Comparative & International Law* 1 (2009), p. 73.

<sup>46</sup> Case T-315/01 *Kadi v. Council and Commission*.

they interfere (at least) with the right to property and freedom of movement. For Mr. Nada the imposition of a travel ban had particularly harsh consequences, since he lived in a 1.6 km<sup>2</sup> Italian enclave in Switzerland. In that situation, the measure almost amounted to house arrest. Moreover, since there is no possibility in the UN context for individuals to obtain judicial review of their designation, obligatory implementation of the UN terrorist lists by states also interferes with the most basic fundamental rights, such as the rights to an effective remedy and access to court.

The General Court in *Kadi I* effectively endorsed an institutional hierarchy by allowing Article 103 of the UN Charter to put a limitation on its jurisdiction. It refused to engage in a review of the implementation of counter-terrorist sanctions because the underlying Security Council Resolution left states no scope of discretion. Such review, it argued, would result in an indirect review of the underlying Security Council Resolution. Similarly, the Swiss Federal Court in *Nada* found that it was not competent to review the lawfulness of the domestic measures implementing the UN Security Council sanctions.<sup>47</sup> In effect, both courts accepted the primacy of Security Council Resolutions to permeate the domestic legal order.

In *Al-Jedda*, the House of Lords was also confronted with the question of whether a UN Security Council Resolution could displace or qualify the appellant's rights under the European Convention.<sup>48</sup> In this case, UK forces were acting on the basis of a UN Security Council Resolution, which authorized them to intern persons where this was necessary for imperative reasons of security in Iraq.<sup>49</sup> Yet, such internments are contrary to Article 5(1) ECHR.<sup>50</sup> This Convention right mentions six grounds on the basis of which a person may lawfully be detained. Being a threat to the security of a country is not one of them. Therefore, only a valid derogation<sup>51</sup> could bring the internment in compliance under Article 5(1) ECHR.<sup>52</sup> As a consequence, the House of Lords had to consider the relationship, *id est*, hierarchy, between the two obligations: Articles 25 and 103 UN

<sup>47</sup> Swiss Supreme Court, *Nada v. Staatssekretariat für Wirtschaft*, para. 8.

<sup>48</sup> House of Lords, *Al-Jedda v. Secretary of State for Defence*, para. 26 et seq. (Lord Bingham), para. 114 et seq. (Lord Rodger), para. 125 et seq. (Baroness Hale), para. 131 et seq. (Lord Carswell), and para. 150 et seq. (Lord Brown).

<sup>49</sup> The Resolution itself decides that the multinational forces 'shall have the authority to take all necessary measures to contribute to the maintenance of security and stability of Iraq in accordance with the letters annexed to this resolution' [10]. The annexed letter of US Secretary of State Colin Powell refers to 'internment where this is necessary for imperative reasons of security'. Security Council Resolution, UNSC Res 1546, 8 June 2004, UN Doc S/Res/1546.

<sup>50</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November, entered into force 3 September 1953) 213 UNTS 222 (ECHR).

<sup>51</sup> See ECHR Article 15.

<sup>52</sup> The House of Lords considered that: '[I]t is difficult to see how any exercise of the power to detain [...] could do otherwise than breach the detainee's rights under article 5 (1) [of the Convention]'. House of Lords, *Al-Jedda v. Secretary of State for Defence*, para. 37. See also C. Ovey and R. White, *Jacobs & White: The European Convention on Human Rights* (4<sup>th</sup> edition, Oxford University Press, Oxford 2006), p. 127.

Charter on the one hand<sup>53</sup> and Article 5(1) ECHR on the other.<sup>54</sup> The majority of the House of Lords sided with Articles 25 and 103 UN Charter to the extent that this was *absolutely necessary*. In an oft-quoted passage Lord Bingham argued that ‘the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by [the Security Council], but must ensure that the detainee’s rights under Article 5 are not infringed to any greater extent than is inherent in such detention’.<sup>55</sup>

What the House of Lords in fact seems to have done is add another ground for lawful detention to the already existing six: internment ordered by a Security Council Resolution.<sup>56</sup> This is an acceptance of a hierarchy under international law: the Security Council has the power to (at least) qualify a state’s obligations under the ECHR. It is logically based on a constitutionalist view of the relationship between the Convention and the Charter. The House of Lords supported its considerations of hierarchy both with reference to the institutional position of the Security Council (a limitation is imposed because the Security Council says so) and with reference to a substantive hierarchy (human rights are limited because peace and security rank higher). The latter element will be discussed further in Subsection 3.2 below.

After the House of Lords decision in *Al-Jedda* and the Court of Justice’s (CJEU) appeal decision in *Kadi I*,<sup>57</sup> the UK Supreme Court was similarly called to reconcile norms originating from different legal contexts in the case of *Ahmed*. Just like Mr. Nada and Mr. Kadi, some of the individuals in *Ahmed* were directly affected by the implementation of Security Council sanctions. In *Kadi I*, the CJEU had on appeal taken a position diametrically opposed to the above discussed ruling of its General Court. The CJEU held that international obligations, including those under the UN Charter, could not prejudice the constitutional principles of EU law: all EU acts must respect fundamental

<sup>53</sup> Article 25 UN Charter creates the obligation for Member States to carry out the decisions of the Security Council. Article 103 UN Charter is a conflict rule which states that the obligations under the Charter will prevail over all other international obligations. J. Alvarez, ‘The Security Council’s War on Terrorism: Problems and Policy Options’, in E. de Wet and A. Nollkaemper (eds.), *Review of the Security Council by Member States* (Intersentia, Antwerp 2003).

<sup>54</sup> House of Lords, *Al-Jedda v. Secretary of State for Defence*, para. 3; see below a critique of the lack of precision with which the Lords, excluding Baroness Hale, used the terms ‘displacing’ and ‘qualifying’.

<sup>55</sup> *Ibid.*, para. 39.

<sup>56</sup> Similarly, Messineo argues that ‘a virtual further letter “g” was added in Article 5(1) to the list of allowed cases of deprivation of liberty: that of internment for imperative reasons of security in time of military occupation’. F. Messineo, ‘The House of Lords in *Al-Jedda* and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights’, 56 *Netherlands International Law Review* 1 (2009), p. 57.

<sup>57</sup> Case C-402/05 P & C-415/05 P *Kadi and Al Barakat v. Council and Commission*, recently confirmed in Case C-584/10 P & C-595/10 P, *Commission, Council and UK v. Kadi*, Judgment of 18 July 2013, not yet reported.

rights.<sup>58</sup> The CJEU had thus reviewed the domestic implementing measures in the light of general principles of EU law.<sup>59</sup>

This led one of the applicants in the subsequent case of *Ahmed* to suggest that the UK Supreme Court should reconsider the House of Lords' decision in *Al-Jedda*, in light of the CJEU's *Kadi I* ruling.<sup>60</sup> The applicant did not argue that *Kadi I* should, through the workings of EU law, have direct effect in the national legal order;<sup>61</sup> he rather argued that the Strasbourg Court, where *Al-Jedda* was pending at that moment, might be influenced by the CJEU's decision in *Kadi I* and might therefore choose not to vest UN Security Council Resolutions with all-prevailing force.<sup>62</sup> However, for reasons discussed below,<sup>63</sup> the Supreme Court did not follow *Kadi I*, but held that it could not predict what the ECtHR would decide in *Al-Jedda* and that therefore it had to follow the decision of the House of Lords.<sup>64</sup> It hence confirmed the institutional hierarchy under international law.

When *Al-Jedda* was subsequently decided by the ECtHR, the Strasbourg Court did not explicitly reject the possibility of an institutional hierarchy. It determined merely that in the case at hand there was no conflict between the two international obligations of the UK<sup>65</sup> and that '[i]n these circumstances, [...] the provisions of Article 5 §1 were not displaced...'.<sup>66</sup> It did not therefore exclude the possibility that an obligation stemming from a UN Security Council Resolution under those circumstances could displace human rights under the Convention. In its subsequent decision in *Nada*, by contrast, the ECtHR found such conflict to exist. Yet, the Court did not consider it necessary in that particular instance to decide upon this conflict.<sup>67</sup> It regarded it sufficient to rule that Switzerland had acted in violation of the right to freedom of movement by not doing all

<sup>58</sup> Ibid., para. 285.

<sup>59</sup> For a discussion see: C. Eckes, 'International Sanctions against Individuals: A Test Case for the Resilience of the European Union's Constitutional Foundations', 15 *European Public Law* 3 (2009), p. 351–378.

<sup>60</sup> House of Lords, *Al-Jedda v. Secretary of State for Defence*, para. 66.

<sup>61</sup> UKSC, *HM Treasury v. Ahmed*, para. 105.

<sup>62</sup> Ibid., para. 105 and 106. For the protection of human rights in the UK see: *R (Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, para. 33–34: The Human Rights Act (HRA) was intended to 'bring rights home' by providing 'a remedial structure in domestic law for the rights guaranteed by the Convention'. This led the House of Lords to conclude that the territorial scope of the HRA was 'intended to be coextensive with the territorial scope of the obligations of the UK and the rights of victims under the Convention'. See also: Article 21(1) Human Rights Act 1998, s 15(1)(b) defining the European Convention 'as it has effect for the time being in relation to the United Kingdom'. See also *R (Al-Skeini and others) v. Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26, [2007] 3 WLR 33. See in particular: para. 56–59 (per Lord Rodger), para. 88 (per Baroness Hale), para. 138–140 (per Lord Brown). Lord Carswell agreed with Lord Rodger, at para. 96.

<sup>63</sup> See Section 3.D below.

<sup>64</sup> UKSC, *HM Treasury v. Ahmed*, para. 74 and 106.

<sup>65</sup> ECtHR, *Al-Jedda v. UK*, para. 109.

<sup>66</sup> Ibid., para. 110.

<sup>67</sup> Ibid., para. 197.

it could to adapt the implementation of the sanction, as far as possible, to the specific circumstances of Mr. Nada.

## B. INSTITUTIONAL HIERARCHY AND SUBSTANTIVE VALUES

Both the UN Charter and the European Convention aim to promote universal and undeniable interests.<sup>68</sup> Both can be said to benefit ultimately the individual: the Convention by providing a legal remedy for human rights violations and the Charter by providing a framework for international cooperation on a wide range of issues, including human rights protection as well as the maintenance of international peace.<sup>69</sup> The objectives of the two legal regimes are hence in principle reconcilable.<sup>70</sup> However, in *Nada, Al-Jedda* and *Ahmed* the interest of maintaining international peace and security (UN Charter) was in conflict with individual rights (ECHR). Courts had to decide how these two legal contexts should be reconciled and ultimately whether they stand in a hierarchal relation. *Prima facie*, courts were giving greater importance to one and not the other, by accepting an institutional hierarchy, under which was an organ of one legal context, most likely with the Security Council at its peak; also by weighing the substantive values protected by these legal instruments; or by interpreting one obligation consistently with the other. The latter two options will be discussed in the present section.

Beyond an institutional hierarchy, Article 103 UN Charter could also be understood to impose a substantive hierarchy,<sup>71</sup> in that it privileges the obligation to do what is necessary to maintain international peace and security. This seems to have been part of the rationale of Lord Bingham's broad construction of the meaning of this provision in *Al-Jedda*. In contrast to individuals who are directly designated by the UN Sanctions Committee under the 1267 sanctions regime (*Ahmed* and *Nada*), Mr. Al-Jedda was not specifically mentioned in a UN Security Council Resolution. The UN Security Council did not oblige the UK forces to detain Mr. Al-Jedda in particular.

The lack of such a specific obligation may put into question the applicability of Article 103 UN Charter,<sup>72</sup> which speaks of the prevalence of 'obligations' under the

<sup>68</sup> This is why they both have 'constitutional' characteristics in that they create largely autonomous legal orders, which assume effect *erga omnes partes* (Convention) and supremacy (Charter).

<sup>69</sup> In the last decade provisions of the UN Charter have also been (mis-)used against private individuals, see: T. Meerpohl, *Individualsanktionen des Sicherheitsrates der Vereinten Nationen: Das Sanktionsregime gegen die Taliban und Al-Qaida vor dem Hintergrund des Rechts der VN und der Menschenrechte* (Herbert Utz Verlag, München 2008); from a European perspective: C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, Oxford 2009).

<sup>70</sup> See however the discussion of the political context in ECtHR, *Behrami v. France and Saramati v. France, Germany and Norway*, Judgment of 2 May 2007, App.No. 71412/01 and 78166/01.

<sup>71</sup> See D. Shelton, 'International Law and Relative Normativity', in M. Evans, *International Law* (Oxford University Press, Oxford 2009), p. 178. See also J. Vidmar, in E. de Wet and J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights*, p. 34.

<sup>72</sup> See for a similar and successfully brought argument to this end: *H. N. v. The Netherlands* in which a Dutch court held that Article 25 was not applicable since the contribution of troops did not constitute

UN Charter. However, Lord Bingham, writing the majority Opinion, argued that the UK had an obligation, under the authorization by the UN Security Council, to detain persons that posed a (potential) threat to security.<sup>73</sup> At least in part he arrived at this broad interpretation by emphasizing the importance of maintaining international peace and security.<sup>74</sup> This interpretation resulted in a conflict with other important substantive values that the UN Charter seeks to promote: human rights. In this regard, Lord Bingham contemplated whether the European Convention could be considered of a ‘special character’ and whether it could therefore constitute an ‘excepted category’ under Article 103 UN Charter.<sup>75</sup> However, he concluded that this is not the case, stating that it might endanger the support of UN missions by its member states and that it would also impose limits on UN Security Council solutions that are not set out in the resolutions themselves.<sup>76</sup> Accordingly, the House of Lords confirmed an *institutional* hierarchy underpinned by the *substantive* value of maintaining international peace and security.

Lord Bingham made an exception from the supreme character of Article 103 for the special category of *ius cogens*. He found that the case law of the International Court of Justice (ICJ) gives no warrant for making an exception, except for *ius cogens*.<sup>77</sup> This is similar to the decisions of the Swiss Federal Court in *Nada* and the General Court in *Kadi I*. Both courts had refused to engage in full judicial review but reviewed in light of *ius cogens*. Hence, *ius cogens* was considered to protect interests of such importance to justify a deviation from what these courts thought was prescribed by the institutional hierarchy. However, upholding norms of *ius cogens* would not necessarily protect individuals targeted by Security Council sanctions, since human rights do not generally enjoy this status.<sup>78</sup>

Beyond the *ius cogens* review, the House of Lords showed in other considerations reluctance to surrender readily to the remaining consequences prescribed by the found institutional hierarchy. Indeed, it sought to confine its implications, as far as possible, by holding that Mr Al-Jedda’s rights may not be infringed to any greater extent than is inherent in his detention and is *necessary* for imperative reasons of security. This is an important limitation of the measures that states can take under the mandate given to them by the Security Council, compliance with which is reviewed by domestic courts.

---

an obligation. *H. N. v. The Netherlands* [2008] LJN: BF0181; ZA 06–1671 [4.12.1].

<sup>73</sup> House of Lords, *Al-Jedda v. Secretary of State for Defence*, para. 30–34.

<sup>74</sup> *Ibid.*, para. 34. See J. Vidmar, in E. de Wet and J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights*, p. 34; see also R. Kolb, ‘Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorizations Adopted by the Security Council?’, 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1 (2004), p. 21.

<sup>75</sup> House of Lords, *Al-Jedda v. Secretary of State for Defence*, para. 35.

<sup>76</sup> *Ibid.*, para. 21, referring to ECtHR, *Behrami and Saramati v. France, Germany and Norway*, para. 149.

<sup>77</sup> House of Lords, *Al-Jedda v. Secretary of State for Defence*, para. 35.

<sup>78</sup> See for a controversial understanding of the concept of *ius cogens* by the General Court, Case T-315/01 *Kadi v. Council and Commission*, para. 242 and 286.

Baroness Hale appears to have had such limitations of necessity in mind, when she held that the appellant's 'right is qualified only to the extent required or authorised by the resolution. What remains of it thereafter must be observed'.<sup>79</sup> She continued by explaining that even if the Security Council resolution had given the UK the power 'to intern anyone where this is thought "necessary for imperative reasons of security"', it would not be immediately obvious why the prolonged detention of Mr Al-Jedda was indeed necessary.<sup>80</sup> Any problem he would present to the security of Iraq could be solved by repatriating him to the UK.<sup>81</sup> Further proceedings (before domestic courts) were needed in order to determine what was precisely required by the Security Council Resolution; whether it applied on the facts of the case; whether the internment of the appellant had been necessary; and whether sufficient safeguards had been in place.<sup>82</sup>

The Court of Appeal adhered to this perspective in a subsequent decision concerning Mr Al-Jedda's claim for damages in relation to his alleged unlawful imprisonment under Iraqi law.<sup>83</sup> It considered that the House of Lords 'did not hold that the protection guaranteed to Mr Al-Jedda by the Convention was completely displaced' and that it 'did not go on to consider the precise scope of the authorisation given by the UN'.<sup>84</sup> The Court of Appeal itself did not directly address this issue either, since it was concerned with the application of Iraqi law and not with 'the residual protection afforded by the Convention'.<sup>85</sup> Nonetheless, Lord Justice Elias addressed the scope of the obligation under the Security Council Resolution and particularly the provision of judicial safeguards.<sup>86</sup> He assessed the possibility for a *habeas corpus* review within the requirements posed by the Security Council Resolution. Moreover, he regarded the Court competent, in response to the plea of act of state, to 'satisfy itself that detention is proportionate to the risks at stake, and [to] ensure at least elementary principles of fairness in the detention process,' and held that 'whilst the state in pursuance of its treaty obligations may have the power to detain as an exercise of prerogative power, nonetheless the court can question the way in which that power is exercised'.<sup>87</sup>

<sup>79</sup> ECtHR, *Al-Jedda v. UK*, para. 126.

<sup>80</sup> Ibid., para. 128.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid., para. 129. Further support for this conclusion can be found in the text of Security Council Resolution 1546 itself: UNSC Res 1546 (2004), read both the preamble and para. 7(b); see also: M. 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, 58<sup>th</sup> Session of the International Law Commission, A/CN.4/L.682*, 4 April 2006, Section C. Conflicts Between Special and General Law.

<sup>83</sup> *Al-Jedda v. Secretary of The State for Defence* [2010] EWCA Civ 758. See similarly *A, K, M, Q, & G v. HM Treasury* [2008] EWCA Civ 1187, para. 118–119.

<sup>84</sup> *Al-Jedda v. Secretary of The State for Defence*, para. 17.

<sup>85</sup> Ibid.

<sup>86</sup> Despite an earlier negation thereof by Lady Justice Arden. Ibid.

<sup>87</sup> Ibid., para. 218. In contrast, Lady Justice Arden did find the defence of act of state to apply, because of the overriding force of the Security Council Resolution in question. She held that '[i]f courts hold states liable in damages when they comply with resolutions of the UN designed to secure international peace



By contrast with the House of Lords' balanced approach in *Al-Jedda*, the Supreme Court in *Ahmed* merely concluded, without an explicit in-depth analysis, that '[f]or the time being we must proceed on the basis that article 103 leaves no room for any exception, and that the Convention rights fall into the category of obligations under an international agreement over which obligations under the Charter must prevail'.<sup>88</sup> It entertained a rather narrow interpretation of *Al-Jedda* and its finding lacked the subtlety of the House of Lords' approach, which, at least, emphasized the importance of maintaining, as far as possible, the individuals' enjoyment of international human rights.<sup>89</sup> Lord Bingham's important restriction pronounced in *Al-Jedda* that the UK 'must ensure that the detainee's rights under article 5 [ECHR] were not infringed to any greater extent than was inherent in such detention', was mentioned twice in *Ahmed*, merely in passing.<sup>90</sup> Nor did the UK Supreme Court attempt to contain the effects of the result prescribed by the domestic institutional hierarchy (sovereignty of parliament)<sup>91</sup> by referring to the importance of other substantive norms.

When *Al-Jedda* subsequently reached the ECtHR, the Strasbourg Court first pointed out (with regard to a different issue) that 'the Court is mindful of the fact that it is not its role to seek to define authoritatively the meaning of provisions of the United Nations Charter and other international instruments'.<sup>92</sup> At the same time, it went quite far by establishing 'a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights'.<sup>93</sup> This presumption flows, according to the ECtHR, from the fact that Article 24(2) UN Charter 'requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to act in accordance with the Purposes and Principles of the United Nations'.<sup>94</sup> From this latter point, the Court construed the presumption that 'the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights'.<sup>95</sup>

Finally following the argument of the applicant,<sup>96</sup> the ECtHR held that 'it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations

---

and security, the likelihood is that states will be less ready to assist the UN achieve its role in this regard, and this would be detrimental to the long-term interests of the states'. *Ibid.*, para. 108.

<sup>88</sup> UKSC, *HM Treasury v. Ahmed*, para. 74.

<sup>89</sup> Compare to *A, K, M, Q, & G v. HM Treasury*, para. 116–118.

<sup>90</sup> UKSC, *HM Treasury v. Ahmed*, para. 72 and 238.

<sup>91</sup> See Section 3.D below.

<sup>92</sup> ECtHR, *Al-Jedda v. UK*, para. 76.

<sup>93</sup> *Ibid.*, para. 102.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*, para. 93.

under international human rights law'.<sup>97</sup> It transposed the substantive importance of human rights into formal linguistic requirements of derogation. The Court's decision can be interpreted to state *a contrario* that obligations under a Security Council Resolution can prevail over the ECHR, if the Security Council uses clear and explicit language to express this intention. Whether this is actually what the Court had in mind remains, for the moment, a product of scholarly interpretation.<sup>98</sup>

In the subsequent *Nada* case, in which the ECtHR found a rebuttal of the compliance presumption,<sup>99</sup> the Court did not consider the effect of that rebuttal. It first concluded on the basis of the allegedly clear and explicit language applied by the Security Council when imposing the travel ban that the Security Council indeed intended to oblige states to take measures that were capable of breaching targeted individuals' human rights.<sup>100</sup> Yet, thereafter, the Court simply continued by examining whether this obligation left sufficient scope for Switzerland to comply with the ECHR.<sup>101</sup> The Court then evaluated what Switzerland had done to reconcile as far as possible its obligations under the UN Charter and the ECHR. It concluded that Switzerland had not sufficiently taken into account the realities of the particular case when it applied the travel ban to Mr. Nada.<sup>102</sup> In its review, the ECHR essentially assessed requirements introduced by the Swiss Court. The latter court, after rejecting competence to engage in a judicial review, added that Switzerland was under an obligation to employ every possibility allowed for by the Security Council to mitigate the application of sanctions to Mr Nada.<sup>103</sup> Moreover, it found that UN member states were under an obligation to instigate criminal proceedings against the targeted individuals, and in case of an acquittal, inform the Sanctions Committee thereof.<sup>104</sup>

Switzerland's failure to comply with these 'residual' obligations rendered it unnecessary, in the eyes of the ECtHR, to further explore the hierarchy between an obligation created by the Security Council and an obligation under the Convention.<sup>105</sup> Hence, it remains unclear what the Court actually considers to be the effect of a rebuttal of the compliance presumption. What is clear however is that the seemingly high threshold posed in *Al-Jedda* was not as stringently applied in *Nada*. The Court did not invoke particularly strong evidence of the Security Council's intention to override international human rights. Indeed, the Security Council did not explicitly consider how the measures should relate to states' obligations under international human rights law.<sup>106</sup> It merely imposed a

<sup>97</sup> Ibid., para. 102 et seq.

<sup>98</sup> See, for example, M. Milanović, 'Al-Skeini and Al-Jedda in Strasbourg', 23 *European Journal of International Law* 1 (2012), p. 138.

<sup>99</sup> ECtHR, *Nada v. Switzerland*, para. 172.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid., para. 176–180.

<sup>102</sup> Ibid., para. 195–196.

<sup>103</sup> Swiss Supreme Court, *Nada v. Staatssekretariat für Wirtschaft*, para. 10.2.

<sup>104</sup> Ibid., para. 9.2.

<sup>105</sup> ECtHR, *Nada v. Switzerland*, para. 197.

<sup>106</sup> Ibid., para. 172.

clear obligation to implement sanctions.<sup>107</sup> The presumption was rebutted by implication only. The barriers put by the ECtHR to avoid the Convention from being set aside by the Security Council hence may not be as forceful as they might have originally appeared.<sup>108</sup>

### C. JUDICIAL REVIEW IN CONTEXT: CONSTITUTIONALIST TEMPTATION?

In *Nada* and *Al-Jedda*, the ECtHR agreed to review the substance of the applicant's claims against the Convention in light of the relevant UN Security Council Resolutions. The Court did not assume that a UN Security Council Resolution could set aside all Convention rights, as a matter of principle and the Court's willingness to carry out judicial review against the yardstick of the Convention is in itself a pluralist point of departure.<sup>109</sup> It adds a new perspective to the larger discussion – a perspective rooted in the constitutional setting of that court.

At the same time, the contextual interpretation of the Convention adds a constitutionalist dimension. In *Nada* and *Al-Jedda*, the ECtHR did not base the demarcation of the Resolutions' application on the Convention but on the UN Charter. It interpreted the reference to human rights in the UN Charter as including the same rights as the Convention.<sup>110</sup> Demarcating the powers of the executive on the basis of a founding document is the role of a constitutional court. Indeed, in *Al-Jedda* the ECtHR discussed whether Security Council Resolution 1546 'explicitly or implicitly *required*' the UK to intern an individual without charge.<sup>111</sup> In order to make that determination it took into consideration not only other UN Security Council Resolutions and documents referred to and annexed to them but also statements of the Secretary General and of the United Nations Assistance Mission for Iraq.<sup>112</sup> It further excluded that an agreement between the Iraqi government and the United States government, including on behalf of the UK government, could override the binding obligations under the Convention.<sup>113</sup>

On the basis of this contextual interpretation the ECtHR arrived at the conclusion that the Security Council did not explicitly or implicitly require the UK to keep Mr Al-Jedda in indefinite detention. Therefore there was no conflict between UK's obligations under the UN Charter and its obligations under the Convention. The ECtHR's contextual

<sup>107</sup> Security Council Resolution UNSC Res 1390, 28 January 2002, UN Doc S/Res/1390, para. 2(b).

<sup>108</sup> For a further critique of the Court's rather low threshold in rebutting the presumption of compliance see S.J. Hollenberg, *Challenges and Opportunities for Judicial Protection against Decisions of the United Nations Security Council*, dissertation defended at the University of Amsterdam on 11 June 2013.

<sup>109</sup> See Section 3.D below.

<sup>110</sup> ECtHR, *Al-Jedda v. UK*, para. 102, and ECtHR, *Nada v. Switzerland*, para. 171–172.

<sup>111</sup> ECtHR, *Al-Jedda v. UK*, para. 109 (emphasis added).

<sup>112</sup> *Ibid.*, para. 106.

<sup>113</sup> *Ibid.*, para. 108.

interpretation is not monist in the legal sense, but it reconciles the two different legal contexts of the UN Charter and the ECHR into one interpretative picture.

Furthermore, the ECtHR established (*Al-Jedda*) and confirmed (*Nada*) a general presumption about the intention of the Security Council. This introduces a principled rule of how Security Council Resolutions should be read and placed in relation to international human rights law. It contributes to a constitutionalist ordering of the different legal contexts.

#### D. JUDICIAL REVIEW BY DOMESTIC COURTS: A PLURALIST APPROACH?

In *Nada*, the ECtHR did not only evidence constitutionalist tendencies, it also appeared to endorse a form of pluralism. The Court did not extend the presumption of compliance it had applied in regard to Mr Nada's right to protection of his private and family life to his right to an effective remedy. The Court merely held that Mr Nada was not able to obtain such remedy within the national legal order,<sup>114</sup> and that therefore his right to an effective remedy was violated.<sup>115</sup> The Court did not take into account that this was an effect inherent in the application of the centrally imposed UN counter-terrorist sanctions. Providing such a remedy at the national level would however amount in practice to a violation of the obligations imposed by the Security Council Resolution, since the likely consequence of domestic judicial review is annulment of the domestic implementation measures, because the lack of information excludes review of the merits.<sup>116</sup> The right to an effective remedy would in effect prevail over the obligation created by the Security Council – even if a domestic remedy cannot offer relief from the listing within the UN context. The ECtHR's approach was inspired by the CJEU's decision in *Kadi I*<sup>117</sup> and would ultimately require national courts to take a pluralist approach.<sup>118</sup>

The Supreme Court in *Ahmed* by contrast concluded that it could not follow the Court of Justice's pluralist position in *Kadi I*, because the situation of the EU is different from that of the UK.<sup>119</sup> The UN Charter does not bind the EU because it is not a member of the UN. As a consequence, the CJEU was not faced with Article 103 UN Charter<sup>120</sup> and could argue that the implementation of UN Security Council resolutions within the

<sup>114</sup> ECtHR, *Nada v. Switzerland*, para. 211.

<sup>115</sup> *Ibid.*, para. 213–214.

<sup>116</sup> C. Eckes, *EU Counter-Terrorist Policies*, Chapter 5.

<sup>117</sup> The Court indeed referred to Court of Justice's decision in Case C-402/05 P and C-415/05 P *Kadi and Al Barakaat v. Council and Commission*. See ECtHR, *Nada v. Switzerland*, para. 212.

<sup>118</sup> See also T. Theniel, 'Nada v. Switzerland: The ECtHR Does Not Pull a Kadi (But Mandates It for Domestic Law)', *Invisible College Blog*, 12 September 2012, <http://invisiblecollege weblog.leidenuniv.nl/2012/09/12/nada-v-switzerland-the-ecthr-does-not-pu/> (last visited 4 June 2013).

<sup>119</sup> ECtHR, *Nada v. Switzerland*, para. 71. See also para. 104 and 203.

<sup>120</sup> *Ibid.*, para. 71.

EU cannot violate EU fundamental rights standards. Remarkably, while the Supreme Court distinguished *Kadi I*, it eventually took the same pluralistic approach by excluding the applicability of Article 103 UN Charter in respect to UK law.<sup>121</sup> It proceeded on the basis that under international law, UN Charter obligations prevail over human rights treaties,<sup>122</sup> but that this does not affect national law.<sup>123</sup>

An important contrast with the CJEU's ruling in *Kadi I* is that the CJEU rejected the implications of an institutional hierarchy on the basis of concerns about the protection of fundamental rights, while the Supreme Court ultimately annulled the domestic implementation not so much on the basis of protection of fundamental rights but on the basis of a flaw in the delegation of powers from parliament to government. It examined the sanction regime's compatibility with the principle of legality, which embraces the right to peaceful enjoyment of property and unimpeded access to court.<sup>124</sup> The principle of legality determines that if parliament chooses to legislate contrary to fundamental rights – which it is allowed to do on the basis of the principle of parliamentary sovereignty – it must squarely confront what it is doing and accept the political cost.<sup>125</sup> Fundamental rights may hence not be overridden by general words. 'This can only be done by express language or by necessary implication.'<sup>126</sup> In the absence of any sufficient judicial protection in the UN context, the Court found the national implementation to interfere with the individual's fundamental rights and concluded that the government would have needed explicit approval by parliament. Shortly after the judgment, parliament repaired the deficiency by enacting temporary legislation, which declared that the government's implementing orders were deemed to have been validly made under the UN Act 1946.<sup>127</sup> Presently, new implementing legislation has

<sup>121</sup> UKSC, *HM Treasury v. Ahmed*, para. 75. A hint at this similarity was also given by Lord Mance at para. 244.

<sup>122</sup> *Ibid.*, para. 74.

<sup>123</sup> *Ibid.*, para. 75.

<sup>124</sup> *Ibid.*

<sup>125</sup> This idea is specified in the Simms principle, which holds that: 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.' Fully quoted in UKSC, *HM Treasury v. Ahmed*, para. 111 (Lord Phillips), para. 193 (Lord Brown) and para. 240 (Lord Mance). Only Lord Brown disagreed on this point. He held, that '[t]he Simms principle is intended to ensure that human rights are not interfered with to a greater extent than Parliament has already unambiguously sanctioned. The loss of such rights is not to be allowed to "[pass] unnoticed in the democratic process". "Parliament must squarely confront what it is doing and accept the political cost." But in this case the Security Council by Resolution 1267 unambiguously stated what was required of the UK and the 1946 Act equally unambiguously provided that that measure could be implemented by Order in Council. There could surely be no political cost in doing what, unless we were flagrantly to violate our UN Charter obligations, the UK had no alternative but to do'; *Ibid.*, para. 204.

<sup>126</sup> UKSC, *HM Treasury v. Ahmed*, para. 75.

<sup>127</sup> Terrorist Asset-Freezing (Temporary Provisions) Act 2010.

been adopted.<sup>128</sup> For the implementation of the 1267 regime, the government relies now on the existing EU law.<sup>129</sup>

While the UK Supreme Court accepted the institutional hierarchy under international law, it rejected a monist approach that places the Security Council at the pinnacle of *one* legal construction that includes the national legal order.<sup>130</sup> The Court quashed the domestic implementing measure because it found it to be *ultra vires* on the basis of a violation of a domestic constitutional prescription. The Supreme Court hence neither accepted a hierarchy of substantive norms, nor did it subject the internal domestic legal order to the institutional hierarchy in international law.

Furthermore, the UK Supreme Court implicitly rejected in *Ahmed* the supremacy of EU law and hence a hierarchically superior position of the EU lawmaker. Indeed, traditionally there have been no legal limits on the sovereignty of the UK parliament and 'the only exceptions are those entailed by membership of the EU'.<sup>131</sup> The UK Supreme Court rejected these limits by disregarding not only the CJEU's ruling in *Kadi I* but also the existing EU legislation governing the legal situations of the applicants. The EU implements the UN Security Council Resolutions on sanctions in directly applicable regulations. EU Member States are not therefore required to give effect to the UN Security Council Resolution at the national level. EU law even prohibits them to do so.<sup>132</sup> The UK Supreme Court's acceptance of the UK government's initial choice to rely on national implementation contributed to a situation, which ultimately results in a greater number of authoritative claims and potentially applicable norms.

#### §4. CONCLUSION

Two conclusions can be drawn from the above analysis. Firstly, none of the discussed rulings can be placed in one particular spot on the sliding scale of constitutionalism and pluralism. Facing extreme situations of multiplying claims to authority, all three courts relied on elements of both pluralist and constitutionalist logic. Indeed, the discussed rulings are kaleidoscopes of pluralist and constitutionalist claims. Elements of institutional hierarchy in international law are balanced against considerations that

<sup>128</sup> With regard to the TO see Terrorist Asset-Freezing Act 2010, which received Royal Assent on 16 December 2010.

<sup>129</sup> Essentially, the AQO is still largely in place. The UK Supreme Court only partially quashed it. Thereupon, government decided to rely on European regulations implementing the same Security Council sanctions regime to fill the gap in legislation. See B. Smith, 'Report on Terrorist Asset Freezing (Temporary Provisions) Bill', *House of Commons Library*, 5 February 2010, SN/IA/5325, p. 11. The implementation of European Regulations is facilitated by: The Al-Qaida and Taliban (Asset-Freezing) Regulations 2010 No. 1197; and the Al-Qaida (Asset-Freezing) Regulations 2011 No. 2742.

<sup>130</sup> This is what the Court of First Instance did in Case T-315/01 *Kadi v. Council and Commission*.

<sup>131</sup> F. Jacobs, *The Sovereignty of Law – The European Way, The Hamlyn Lectures 2006* (Cambridge University Press, Cambridge 2007), p. 7.

<sup>132</sup> Case 50/76 *Amsterdam Bulb BV v. Produktschap voor Siergewassen* [1977] ECR-00137, para. 5 and 7.

can be understood as substantive constitutional concerns. Sometimes their effects are counteracted by blunt pluralist claims. Secondly, the judiciary plays an ever more important role in a pluri-contextual world. Courts have the choice to either opt for a constitutional or a pluralist approach, and to choose between or reconcile norms stemming from different legal regimes that are not directly hierarchically related but govern the same case.

Just as dualism and monism are valuable concepts to describe elements of how domestic constitutions deal with legal norms originating outside of their legal order, constitutionalism and pluralism can help to understand the different approaches towards overlapping legal contexts. Yet, none of these concepts exists in its pure form. They both offer abstract structural visions of how the different legal parameters *are* or *should be* related to each other. They can guide the decision in the individual case, either as a way of understanding the world or as a way of normatively influencing it. Eventually however, courts will have to decide the case at hand. By doing so, it may or may not choose to lay down a principled rule, but it must decide what legal parameters it will apply to the issues at hand.

Neil Walker observes that ‘the proliferation of local metaconstitutional claims, with their myopic imperviousness to universal constitutional possibilities, has been an aggravating factor in the deep fracturing and fragmentation of our contemporary constitutional discourse (...)’.<sup>133</sup> At the same time, non-engagement can equally be accused of leading to greater fragmentation. This would be an inward looking form of pluralism, which concerns the application of norms from one legal order without providing any information on the application of international law relevant for others beyond that legal order. In that situation a court, for example, simply rejects the application of a UN Security Council Resolution, on the basis of purely domestic prescriptions. This does not provide a point of departure for further discussion. It does not contribute to the predictability and integrity of law.

Instead courts should engage in a form of ‘communicative’ pluralism. Courts by definition start from their own constitutional context. They apply the domestic framework and often a domestic norm or standard to the case at hand. At the same time, in a pluri-contextual setting they inevitably transmit a message to other judicial but also political institutions dealing with the same issues. This could be especially fruitful if domestic courts apply a (human rights) norm or a standard of review, which has a counterpart in international law and in other domestic legal contexts.<sup>134</sup> The normative foundation of such a judicial discourse may be found in courts’ obligation to decide cases

<sup>133</sup> N. Walker, 65 *Modern Law Review* 3 (2002), p. 356.

<sup>134</sup> Some authors refer to such occurrence as a consubstantial application of international legal norms. A. Tzanakopoulos, ‘Domestic Courts in International Law: The International Judicial Function of National Courts’, 34 *Loyola of Los Angeles International and Comparative Law Review* 1 (2011), p. 143. See also S. Hollenberg, *Challenges and Opportunities for Judicial Protection against Decisions of the United Nations Security Council*.

by clear legal reasoning,<sup>135</sup> and standards, such as necessity and proportionality, may provide a useful framework for discussion.

The specificities in a domestic court's application of a widely used norm or standard of review may have exemplary value beyond the domestic legal context. Eventually, communicative pluralism may contribute to the emergence of a certain shared understanding of substantive hierarchy of norms, potentially with a layer of human rights at the peak. That does not mean that human rights should always prevail. Nor does it mean that one uniform interpretation prevails. Rather, the lawfulness of decisions affecting individuals should be assessed in a human rights framework. It should not be possible to set it aside by norms that prevail on the basis of an institutional hierarchy. Framing the discourse in the language of international law creates a common linguistic ground, a common terminology that speaks to all involved judiciaries and functions as a sort of 'co-ordination tool'.<sup>136</sup> This observation speaks in favour of a nuanced form of pluralism similar to Neil Walker's approach of constitutional pluralism.<sup>137</sup> It also resonates with Nico Krisch's acknowledgement of 'a distinct need for processes by which the guiding values of [different legal contexts] can communicate with each other'.<sup>138</sup>

Law and courts, by interpreting it, create a legal reality that is to a certain extent removed from the factual reality by determining whether or not facts are legally relevant. This makes law to some degree resistant towards factual change. It also allows law to shape the factual reality. The same is applicable for the relationships between different claims of authority and ultimately different legal contexts. The choices taken by the judiciary in a pluri-contextual setting have far-reaching implications for these relationships. Ultimately, this vests them with the power to choose between claims of authority, within the framework of their own constitutional setting. Judicial reality, separate from factual reality, is also a way of ensuring the independence of the judiciary from the executive, which is the central actor in creating international and European norms. The engagement of courts with norms originating outside their own constitutional setting, even if that might lead to an extension of their power, is inevitable. Non-engagement would result in an ever-shrinking scope of judicial review curtailed by a growing number of 'post-national norms'.

<sup>135</sup> R. Dworkin, *Taking Rights Seriously* (revised edition, Harvard University Press, Cambridge 1978), p. 283, but also at p. 340–342 and p. 360; R. Dworkin, "Natural" Law Revisited', 34 *University of Florida Law Review* 2 (1982), p. 165. See also R. Dworkin, *Law's Empire* (Harvard University Press, Cambridge 1986). Note the importance of adequate argumentation, also from the perspective of Article 6 ECHR. See, for example textbook A. Nollkaemper, *Kern van het Internationaal Publiekrecht* (5<sup>th</sup> edition, Boom Juridische Uitgevers, The Hague 2011), p. 280. See also J. Lathouwers and K. Rimanque, 'Artikel 6 – Recht op een eerlijk proces (§1)', in J. Vande Lanotte and Y. Haeck (eds.), *Handboek EVRM Volume 2 (I)* (Intersentia, Antwerpen 2004), p. 461–463.

<sup>136</sup> E. Benvenisti and G. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', 20 *European Journal of International Law* 1 (2009), p. 66.

<sup>137</sup> See above Section 2.

<sup>138</sup> N. Krisch, *Beyond Constitutionalism – The Pluralist Structure of Postnational Law*, p. 185.