The 'Equivalent Protection Test'

From European Union to United Nations, from *Solange II* to *Solange I*

(with reference to the *Al-Dulimi and Montana Management inc.* v. *Switzerland* Judgment of the European Court of Human Rights)

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Human rights – European Convention on Human Rights – European Union – United Nations – Smart sanctions – Constitutional law – French law – German law – Conflicts between legal systems – Equivalent protection – *Solange*

Introduction

In its recent and important decision *Al-Dulimi and Montana Management inc.* v. *Switzerland*,[1] the European Court of Human Rights (ECtHR) stated, for the first time, that the level of protection of human rights within the United Nations 'smart sanctions' system was insufficient.

The so-called 'smart sanctions' are measures that the United Nations Security Council orders the states to take against individuals and organisations suspected of being involved, whether directly or indirectly, in activities that threaten world peace, especially terrorist activities. These measures mainly include the freezing of funds and other economic resources of the designated persons, travel bans and arms embargo. In essence, the ECtHR considered in *Al-Dulimi* that individuals and organisations mentioned in the United Nations 'blacklists' do not benefit from any real judicial protection since they are not granted the possibility to request, at United Nations level, a judicial review of their inscription in the said lists. The existing complaints procedure does not, according to the ECtHR, match the

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[1] ECtHR 26 Nov. 2013, Case No. 5809/08, *Al-Dulimi and Montana Management inc.* v. *Switzerland* (NB: this case was referred to the Grand Chamber of the ECtHR on 14 April 2014, after this text was written).

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minimum requirements under the European Convention on Human Rights (ECHR). This quite important judgment will be presented in the first part of this paper.

This judgment, which strongly echoes the famous *Kadi* judgment of the European Court of Justice (ECJ),[2] is of paramount importance, even though its conclusion is not surprising. It was quite clear, as expressed by the ECJ in the *Kadi* decision and also by the Parliamentary Assembly of the Council of Europe,[3] that there was a problem with the smart sanctions system. People designated by the United Nations 'Sanctions Committee' may file a petition to be removed from the list or request their state of nationality or residence to ask the Council to remove them from the list. However, this does not lead to a proper judicial procedure. The decision of the Sanctions Committee is taken by consensus (therefore granting a right of veto to any Council member), the Committee is under no obligation to give any reasons for rejecting a de-listing request and the decision is taken *in camera*. This is what the ECJ summed up in its *Kadi* judgment by saying that 'the procedure before that Committee is still in essence diplomatic and intergovernmental' (para. 323).

What makes the *Al-Dulimi* judgment important is that it is the first time that the Strasbourg Court has clearly and explicitly extended to the United Nations a test that it first developed regarding the European Union, notably in the famous *Bosphorus* judgment,[4] that we will call here the 'equivalent protection test'.[5] This test may be defined as the *legal reasoning which allows a court to review the level of protection of certain fundamental principles (which it has a duty to uphold), and especially human rights, in another legal system and which can result in judicial immunity for measures adopted by this other legal system, in varying degrees and under a variety of different circumstances, if the court considers that the said principles are protected in an equivalent manner in the other system.*

The ECtHR was neither the first nor the only court to use this 'equivalent protection test'. It follows a clear '*Solange*-like reasoning', after the famous *Solange* ('as long as', in German) cases issued by the German Constitutional Court.[6] Oth-

[2] ECJ 3 Sept. 2008, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *EU Council and EC Commission*.

[3] See for example Resolution 1597 (2008) of the Parliamentary Assembly of the Council of Europe, 23 Jan. 2008, *United Nations Security Council and European Union blacklists*.

[4] ECtHR 30 June 2005, Case No. 45036/98, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* v. *Ireland*.

[5] The expression 'equivalent protection' is used in the *M & Co* decision (European Commission of Human Rights, 9 Feb. 1990, Case No. 13258/87, *M. & Co.* v. *the Federal Republic of Germany*), and again in the *Bosphorus* judgment (*supra* n. 4, para. 156).

[6] *Bundesverfassungsgericht*, 29 May 1974, BVerfGE 37, 271, called *Solange I*; *Bundesverfassungsgericht*, 22 Oct. 1986, BVerfGE 73, 339, called *Solange II* and *Bundesverfassungsgericht*, 7 June 2000, BVerfGE 102, 147, called *Solange III*. The *Solange I* judgment did not use the expression 'equivalent protection' but something very similar ('effective protection of fundamental

er national courts have followed a similar reasoning, especially very recently the French courts, as we will see in the second part of this paper.

This is an interesting case of converging solutions from various courts confronted with similar problems, i.e., the conflict between European Union law and the fundamental principles they have a duty to uphold. Even if there are differences between the methods used by those different courts, there seems to be a similar reasoning that I describe in the third part of this paper.

As a result of this converging use of the 'equivalent protection test' by the Strasbourg Court and several national courts, a situation of relative 'peace' has emerged between European Union law and the ECHR, on the one hand, and between European Union law and the constitutions of the states the courts of which use the test, on the other hand. In both cases, this peace benefits the state the most, which does not have to choose between two norms situated at a high level of the legal hierarchy. And this 'peace' will remain *as long as* the fundamental principles that the ECtHR and national courts have the duty to uphold are sufficiently protected at the European Union level. If we keep in mind the German Constitutional case-law, this is typically a '*Solange II*'-type of situation.

The question was therefore whether this test could be extended to other systems than the European Union. The case of the United Nations was particularly interesting, considering the human rights issues raised by the 'smart sanctions' technique. Unlike the case of the European Union, there is no significant convergence of courts applying the equivalent protection test to the United Nations, and the ECtHR itself has in fact been very reluctant to apply this test to the United Nations. There may be a practical explanation for this. In the case of the European Union, since there is an adequate level of human rights protection in this organisation, the equivalent protection test leads to a relative immunity of European secondary legislation and is therefore useful in avoiding potential clashes between competing legal systems. When it comes to the United Nations, since the lack of human rights protection there is much too prominent, the 'equivalent protection test' can only lead to a '*Solange I*'-type of situation there, as expressed in the *Al-Dulimi* judgment. This judgment can easily be expressed using a '*Solange I*' terminology. *As long as* the judicial protection of designated individuals and organisations is insufficient, the ECtHR will continue to review whether the national measures implementing United Nations smart sanctions are compatible with human rights. This question will be dealt with in the fourth part of this paper.

I will conclude this paper by suggesting a few possible consequences of this judgment [if confirmed by the Grand Chamber, see note *supra* in n. 1].

rights must be upheld in the same way as the protection of fundamental rights under the Basic Law').

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The *Al-Dulimi* judgment

After Iraq invaded Kuwait on 2 August 1990, the United Nations Security Council took several measures against Iraq.

First, it adopted Resolution 661 (1990) of 6 August 1990 and Resolution 670 (1990) of 25 September 1990, calling upon United Nations member states and non-member states to impose a general embargo on Iraq and on any Kuwaiti resources confiscated by the occupier, together with an embargo on air transport. On 7 August 1990 the Swiss Federal Council adopted an ordinance providing for economic measures against the Republic of Iraq (the 'Iraq Ordinance'), even though Switzerland was not a member of the United Nations at the time. Mr Al-Dulimi, former managing director of a company called Montana Management Inc., and the company Montana Management Inc. itself both alleged that since that date, their assets in Switzerland had remained frozen.

A few years later, on 22 May 2003 the United Nations Security Council adopted Resolution 1483 (2003), superseding Resolution 661 (1990), amongst others. This Resolution ordered all member states to freeze 'funds or other financial assets or economic resources of the previous government of Iraq or its state bodies, corporations, or agencies, located outside Iraq' and 'funds or other financial assets or economic resources that have been removed from Iraq, or acquired, by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction' (paragraph 23). The task of listing those entities was given to the Sanctions Committee created by Security Council Resolution 1518 (2003) (also called the '1518 Committee'). On 26 April 2004 the 1518 Committee added to the list of individuals and entities, respectively, Montana Management Inc., which had its registered office in Geneva, and Mr Al-Dulimi.

Shortly after Switzerland became a member of the United Nations on 10 September 2002, the Iraq Ordinance of 7 August 1990 underwent numerous amendments, in particular on 30 October 2002, to take into account the entry into force of the Federal Law of 22 March 2002 on the application of international sanctions (the Embargo Act, in force since 1 January 2003), and on 28 May 2003, to take account of Resolution 1483 (2003). On 12 May 2004 the names of Mr Al-Dulimi and of Montana Management Inc. were added to the list of individuals, legal entities, groups and organisations concerned by the national measures under Article 2 of the Iraq Ordinance.

Mr Al-Dulimi and Montana Management tried to challenge those measures, both at the national level and at the United Nations level.

At the United Nations level, Mr Al-Dulimi tried to apply directly to the 1518 Committee for the removal of his name from the list. The Swiss Government, in

a letter of 5 November 2004 to the Chair of the Sanctions Committee, supported that application. The Chair of the Sanctions Committee informed the applicants that the committee had examined their application and that it was under consideration. He asked them to send supporting documents and any additional information that might substantiate the application. Mr Al-Dulimi replied that he wished to give oral evidence to the Sanctions Committee, but he got no answer to this request and no further information on the progress of his application.

Later on, on 19 December 2006, the Security Council, being committed to ensuring that fair and clear procedures existed for placing individuals and entities on sanctions lists, including those of the 1518 Committee, and for removing their names, as well as for granting humanitarian exemptions, adopted Resolution 1730 (2006), which created a delisting procedure. The applicants lodged a delisting application in accordance with this procedure but their application was rejected on 6 January 2009. They were only authorised, on several occasions, to make use of the assets frozen in Switzerland for the payment of legal fees.

As for the national level, both the Swiss administration and the Swiss courts considered that Switzerland was bound by the UN Resolution and, therefore, had no other choice than to abide by it. The Federal Department for Economic Affairs ordered the confiscation of the assets. The applicants then lodged three administrative-law appeals before the Federal Court, but in three almost identical judgments, the Federal Court dismissed the appeals on the merits. The applicants then brought an application against Switzerland at the ECtHR, alleging a violation of Article 6(1) of the Convention.

The first question that the Court had to address was the 'coexistence of Convention guarantees and obligations imposed on states by Security Council resolutions' – in short, whether or not the *Bosphorus* precedent[7] could apply in the case. According to the *Bosphorus* judgment, the Convention does not prohibit Contracting Parties from transferring sovereign power to an international organisation in order to pursue cooperation in certain fields of activity. States nevertheless remain responsible under the Convention for all acts and omissions of their organs stemming from domestic law or from the necessity to comply with international legal obligations. State action taken in compliance with such obligations is, however, justified where the relevant organisation protects fundamental rights in a manner which can be considered at least equivalent to that provided in the Convention. In other words, if such equivalent protection is considered to be provided by the organisation, the presumption will be that a state has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

[7] *Supra* n. 4.

In the *Al-Dulimi* case, the Court considers that the relevant Security Council resolutions, especially paragraph 23 of Resolution 1483 (2003), do not confer on the states concerned any discretion in the implementation of the obligations arising thereunder. Therefore, the question was whether or not the United Nations provided sufficient protection of human rights compared to the standards of the ECtHR. The answer of the Court here is firmly negative. The respondent government itself admitted that the system in place, even in its improved form since Resolution 1730 (2006), enabling the applicants to apply to a 'Focal Point' to have their names removed from the Security Council lists, did not provide a level of protection that is equivalent to that required by the Convention (para. 106 of the judgment). Furthermore, in his report of 26 September 2012,[8] the United Nations Special Rapporteur on the 'Promotion and protection of human rights and fundamental freedoms while countering terrorism' clearly expressed the opinion that in spite of the significant due process improvements brought about by Security Council Resolutions 1904 (2009) and 1989 (2011), which had created an 'Office of the Ombudsperson', the Al-Qaida sanctions regime established by Resolution 1267 (1999) continued to fall short of international minimum standards in such matters. Since no supervisory mechanism comparable to the Office of the Ombudsperson had been introduced in the context of the sanctions regime against the former Iraqi Government under Resolution 1483 (2003), it follows, all the more so, that the protection afforded at the international level in this context was not equivalent to that required by the Convention.

This lack of judicial protection at UN level could have been compensated had there been adequate remedies at national level. This was not the case, since the Federal Court refused to examine the merits of the impugned measures.

The presumption of equivalent protection was therefore rebutted in the present case, and the Court accordingly had to rule on the merits of the complaint concerning the right of access to a court.

From then on, there was not much doubt on the outcome. The Swiss courts have developed a case-law according to which, because of the primacy of the UN Charter, every application against national implementation measures of Security Council resolutions shall be dismissed. The right of access to a court was therefore clearly restricted. The Court accepted the respondent government's argument that the refusal by the domestic courts to examine on the merits the applicants' complaints about the confiscation of their assets could be explained by their concern to ensure effective domestic implementation of the obligations arising from that resolution. The key issue was therefore whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realized. The Court insisted on the fact that, in the present case, with the adoption of

[8] A/67/396.

Resolution 1483 (2003), it was not a question of responding to an imminent threat of terrorism, since the invasion of Kuwait took place more than twenty years ago, but of re-establishing the autonomy and sovereignty of the Iraqi Government and of securing the right of the Iraqi people to freely determine their own political future and control their own natural resources. Furthermore, the Court considered that the applicants have been deprived of their property for a very long time. The words used by the Court on this point are very harsh, especially in the French version.[9] The Court therefore considered that there had been a violation of Article 6(1).

The *Al-Dulimi* judgment is therefore an important judgment. The fact that it was issued by the second section of the Court does not diminish its importance [nor does the fact that the case has been referred to the Grand Chamber, see note *supra* in n. 1]. As a matter of fact, the Chamber wanted to relinquish this case, raising novel and important issues, to the Grand Chamber, but the Swiss Government vetoed this decision,[10] as criticized by Judge Lorenzen in his dissenting opinion.

Because of the lack of an equivalent protection of human rights in the United Nations system, a member state is condemned merely for having complied with the obligations stemming from its membership to the United Nations. As a result, the United Nations measures may be paralyzed if the states decide (as it is likely to be the case) to abide by their obligations under the Convention rather than their obligations as United Nations members. It does not seem necessary here to highlight the importance of this outcome. It is however important to look back to the origin of the equivalent protection test, which was first developed specifically for the European Union.

The development of the equivalent protection test applied to the European Union by German, Strasbourg and French courts

As was mentioned in the introduction, the first 'equivalent protection test' was introduced by the German Constitutional Court in the famous *Solange I* judgment.[11] At this time, the Court found human rights protection in the European Communities wanting, and said that as long as (*Solange*, in German) the integration process had not progressed so far that Community law received a catalogue of fundamental rights decided on by a parliament and of settled validity, which

[9] Para. 131. In the English version, the Court states that '[the applicants'] inability to challenge the confiscation measure for several years is difficult to accept in a democratic society'. In the French version, the Court uses the expression 'à peine concevable dans une société démocratique', which translates better as 'barely conceivable in a democratic society'.

[10] See para. 9 of the judgment.

[11] *Supra* n. 6.

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would be adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, the Court would declare admissible any reference in judicial review proceedings by a German court concerning a conflict between a rule of Community law and one of the fundamental rights in the Basic Law. After the ECJ's reaction of developing a strong case-law on human rights protection,[12] the Court applied the test again, in the *Solange II* decision of 22 October 1986,[13] and came to a completely different conclusion, even though there was still not, strictly speaking, a catalogue of human rights at European Communities level. The Court held that as long as (*Solange*) European Communities law and especially the ECJ, ensures that the European Union upholds fundamental rights generally in the same way as fundamental rights are protected under German law, the German Federal Constitutional Court will no longer examine whether European secondary law complies with German fundamental rights. Applications made to the German Constitutional Court on the basis of Article 100(1) of the Basic Law regarding European secondary legislation are therefore inadmissible.[14] The German Constitutional Court will only intervene if fundamental rights are not protected in accordance with the level set in the *Solange II* case. In its *Solange III* judgment of 7 June 2000,[15] the German Constitutional Court confirmed and even reinforced this position by stating that constitutional complaints and submissions by courts are inadmissible from the outset if their grounds do not state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has resulted in a decline below the required standard of fundamental rights after the '*Solange II*' decision. Therefore, the grounds for a submission by a national court or of a constitutional complaint regarding an infringement by secondary European Community law of the fundamental rights guaranteed in the Basic Law must state in detail that the protection of fundamental rights required unconditionally by the Basic Law is not generally assured in the respective case.

The equivalent protection test has then been used by the ECtHR, even though in this case, one could say, in a way, that *Solange III* came before *Solange II*. In the *M & Co* decision of 9 February 1990,[16] the European Commission of Human Rights considered that 'the transfer of powers to an international organisation [i.e., in this case, European Community] is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection'. The Commission acknowledged that fundamental rights were

[12] See notably ECJ 17 Dec. 1970, Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*; ECJ 11 Jan. 1977, Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung* v. *EC Commission*.

[13] *Supra* n. 6.

[14] *Solange II*, 22 Oct. 1986, *supra* n. 5.

[15] *Supra* n. 6.

[16] *Supra* n. 5.

generally protected by European Economic Community law and that in the present case the ECJ had examined the situation with respect to the right to a fair trial and had concluded that this right had not been infringed. The Commission concluded that 'it would be contrary to the very idea of transferring powers to an international organisation to hold the member states responsible for examining, in each individual case before issuing a writ of execution for a judgment of the ECJ, whether Article 6 of the Convention was respected in the underlying proceedings'. This decision could be interpreted very broadly as establishing a presumption that fundamental rights will receive an equivalent protection both under European Communities law and the ECHR.

However, on 30 June 2005, the Court, in the *Bosphorus* case,[17] restricted this immunity from review granted to European Communities law by setting conditions whereby this immunity could be set aside. The ECtHR held that 'any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection'.[18] Furthermore, the presumption that a state complies with the requirements of the Convention when it does no more than fulfil its legal obligations arising from its membership of an organisation which provides fundamental rights protection equivalent to that of the Convention 'can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient'.[19]

The equivalent protection test has also been used by other national courts. In France, for example, the issue of equivalent protection has arisen in case-law from the Constitutional Council (*Conseil constitutionnel*, the French Constitutional Court) and the Council of State (*Conseil d'Etat*, the French Supreme Administrative Court), even though, so far, both of these courts have only applied the test to directives.

Under Articles 61 and 61-1 of the French Constitution, the Constitutional Council is entitled to review the constitutionality of all Acts of Parliament. Under Article 61, Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty members of the National Assembly or sixty senators. Under Article 61-1, introduced in 2008, if, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'État* or by the *Cour de Cassation* (the other French Supreme Court dealing with civil, labour, commercial and criminal matters) to the Constitutional Council. In a famous case known as *Econ-*

[17] *Supra* n. 4.
[18] *Supra* n. 4, para. 156.
[19] *Supra* n. 4.

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omie numérique,[20] several members of the National Assembly and senators brought an application before the Constitutional Council under Article 61 against an Act of Parliament implementing the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). The applicants considered that this Act of Parliament infringed several constitutional principles, notably the freedom of communication and the due process of law. The question was whether the Constitutional Council could review the Act without indirectly reviewing the Directive itself. Such a result would infringe the primacy of European Union law, the state's obligation to implement the Directive and the monopoly of the ECJ to review European Union secondary legislation. In order to avoid this, the Constitutional Council came up with a solution based on Article 88-1 of the Constitution.

The provision in question was introduced in 1992 when the French Constitution was amended to allow the ratification of the Maastricht Treaty and reads as follows in its current version:

> The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.

It seems to be a purely declarative provision. However, in *Economie numérique*, the Constitutional Council deduced from this provision a constitutional requirement to transpose directives[21] into national law 'with which non-compliance is only possible by reason of an express contrary provision of the Constitution'. As a result, when there is no 'express contrary provision', the ECJ, upon an application for a preliminary ruling, is the only court competent to ensure that the directive respects both the powers set forth in the treaties and the fundamental rights guaranteed by Article 6 of the Treaty on the European Union. The Constitutional Council therefore stated that it could not review legislative provisions that merely implemented unconditional and precise provisions of the Directive, except if there was an 'express contrary provision of the Constitution'.

This notion of 'express contrary provision of the Constitution' was far from clear, even though its meaning was of paramount importance since the presence

[20] *Conseil constitutionnel* 2004-496 DC, 10 June 2004, *Loi pour la confiance dans l'économie numérique*.

[21] There is no explanation, either in the case-law of the Constitutional Council or in the case-law of the Council of State, as to why a provision as general in its wording as Art. 88-1 should imply such restrictive requirement that applies only to directives and not a general requirement to comply with European Union law.

of such a provision would allow the Constitutional Council to review legislative provisions that merely implement unconditional and precise provisions of a directive and therefore, indirectly, to review the provisions of the directive themselves. The Constitutional Council started to clarify this notion in its *Bioéthique* decision of 29 July 2004.[22] In this case, an application was brought against an Act of Parliament implementing unconditional and precise provisions of the Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions. This Act of Parliament was challenged on the grounds of the constitutional freedom of expression. The Constitutional Council applied its recent *Economie numérique* case-law but, oddly enough, it stated that

> article 11 of the [French Declaration of Human and Civic Rights] of 1789 provides: 'The free communication of ideas and opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law'; this liberty is also protected as a general principle of Community Law by Article 10 of the European Convention on Human Rights and Fundamental Freedoms.

The Constitutional Council then considered that it was not therefore required to examine the question of whether or not such provisions constituted a violation of the Constitution. By stating that the constitutional freedom had an equivalent in European Community law, the Constitutional Council seemed to consider that it would only agree to review a legislative provision that would merely implement unconditional and precise provisions of a directive if there was no equivalent of the relevant French constitutional principles in European Union law.

This did not fit with the notion of 'express contrary provision of the Constitution'. Therefore, the Constitutional Council abandoned this expression in a later decision known as the *Droits d'auteurs* judgment of 27 July 2006[23] and replaced it with the expression 'rule or principle inherent in the constitutional identity of France'. The exact meaning to be attributed to this expression is hardly less enigmatic than the one of the previous 'express contrary provision of the Constitution', but the adjective 'inherent' seems to refer to constitutional rules or principles for which there is no equivalent in European Union law.

This interpretation that 'inherent in the constitutional identity of France' may mean 'without any equivalent' was confirmed by the French Council of State in

[22] *Conseil constitutionnel* 2004-498 DC, 29 July 2004, *Loi relative à la bioéthique*.

[23] *Conseil constitutionnel* 2006-540 DC, 27 July 2006, *Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*.

the *Arcelor* case of 8 February 2007.[24] In this case, the company Arcelor brought an application before the Council of State against a Government decree implementing the Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC. Amongst other arguments, Arcelor alleged that this decree infringed several constitutional principles, notably the right to property, the freedom to pursue commercial activities and the principle of equal treatment.

The problem raised by these arguments was the same as in the *Economie numérique* case before the Constitutional Council. Normally, French administrative courts have the power to review administrative decisions and, where necessary, to declare them void if they have broken the law, including of course if they are contrary to a constitutional provision or principle. But in a situation like the *Arcelor* case, such a review would be tantamount to reviewing the constitutionality of the Directive itself. To avoid that, the Council of State came up with a solution that was strongly influenced by the *Economie numérique* case-law, as is confirmed by the opinion[25] of the Government Commissioner,[26] Mattias Guyomar. The Supreme Administrative court based its reasoning on the constitutional requirement to transpose directives stemming from Article 88-1 of the Constitution, thus following the interpretation of the Constitutional Council. It held that 'whether or not an administrative decision implementing a directive complies with the constitution should be examined with particular care where precise and unconditional provisions [of the directive] are implemented'. More especially, the Administrative court should 'examine whether there is a general rule or principle under European law, the nature and scope of which, as interpreted by the European court, effectively matches the said constitutional provision or principle'. If the administrative court finds that this is not so, then it may examine the constitutionality of the administrative decision. However, if there is such an equivalent to this constitutional principle in European Union law, the administrative court should consider that the issue is not the constitutionality of this administrative decision implementing the directive but the validity of the implemented directive itself. In other words, where there is an equivalent principle, the constitutional issue (administrative decision versus constitutional principle) becomes a purely European Union issue (directive versus European Union principle). Therefore,

[24] *Conseil d'Etat*, Assemblée, 8 Feb. 2007, *Société Arcelor Atlantique et Lorraine e. a.*, with the opinion by M. Guyomar, Lebon, p. 55.

[25] M. Guyomar, 'Conclusions sur l'affaire Arcelor', 2 *Revue trimestrielle de droit européen* (2007) p. 378.

[26] French equivalent of the ECJ's advocate general before the French administrative courts, now called the 'public reporter'.

according to the ECJ *Foto-Frost* case-law,[27] the administrative courts may in this situation either consider that the grounds put forward before them by the parties in support of invalidity of the directive are unfounded and reject them, concluding that the directive is completely valid, or refer the matter to the ECJ for a preliminary ruling on the validity of the said directive. In the *Arcelor* case, the Council of State considered that the relevant constitutional principles all had equivalents in European Union law. The Supreme Administrative Court rejected the arguments based on the right to property and the freedom to pursue commercial activities, but referred the matter of the compliance of the Directive with the principle of equal treatment to the ECJ. The ECJ ruled[28] that consideration of Directive 2003/87 from the point of view of the principle of equal treatment had disclosed nothing to affect its validity. Consequently, the Council of State ruled that the government decree did not infringe the French Constitution.[29]

These cases clearly all follow a similar pattern. It is to be noted that this equivalent protection test is not always necessary to a court when faced with a (potential) conflict between laws from different systems. This test is only useful as a way of 'smoothing' relationships between systems where they may degenerate not only into a conflict of laws – since such conflicts of laws are generally a 'normal' occurrence for which there is a legal solution[30] – but into *unresolvable* conflicts of laws for which there is no rule, recognised by both systems, to help resolve the conflict. For example, conflicts between French Acts of Parliament and international law have ceased to be a problem since French national courts now consent to set aside Acts of Parliament which do not comply with a convention,[31] in accordance with the primacy of international law and of European law[32] as held by the ECJ. However there is still a problem when a conflict arises between the French *Constitution* and European or international law. On the one hand, a French court will claim that the Constitution is supreme in national law.[33] On the other hand, international law prohibits a state from refusing to comply with its international

[27] ECJ 22 Oct. 1987, Case 314/85, *Foto-Frost* v. *Hauptzollamt Lübeck-Ost*.

[28] ECJ 16 Dec. 2008, Case C-127/07, *Société Arcelor Atlantique et Lorraine and Others* v. *Premier ministre and others*.

[29] CE, 3 June 2009, *Arcelor II*, Lebon, p. 214.

[30] See N. Bobbio, *Teoria generale del diritto* (Giappichelli 1993), p. 218-222.

[31] *Cour de Cassation* (*ch. mixte*) 24 May 1975, *Société des cafés Jacques Vabre*, Bull. civ., I, n° 4; *Conseil d'Etat*, Assembly, 20 Oct. 1989, *Nicolo*, Lebon, p. 190.

[32] ECJ 9 March 1978, Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA*.

[33] *Conseil d'Etat*, 30 Oct. 1998, *Sarran e. a,* Lebon, p. 368; *Cour de cassation* (*Ass. Plén.*), 2 June 2000, *Mlle Fraisse,* Bull. Ass. Plén., n° 4; *Conseil d'Etat*, 3 Dec. 2001, *Syndicat national des industries pharmaceutiques (SNIP),* Lebon, p. 624.

obligations on the grounds that its Constitution does not allow it.[34] As for the ECJ, it requires a national court to overturn any national law, constitutional or otherwise, which does not comply with European Union law.[35] It is in these kinds of situations that the equivalent protection test can prove useful.

The components of the equivalent protection test

The key element of the test, which determines whether immunity may be granted to laws of the other system, is whether there is an equivalent protection of fundamental principles in both systems – the legal system of the court that is required to examine this issue and the legal system from which the law under examination originates. The first point to analyse is therefore how this equivalence is established. If the court considers that there is equivalence, the result of this finding is that the laws from the other legal system therefore obtain immunity from judgment. However, the issue remains of the extent of this immunity.

Establishing equivalence

The types of equivalence

A court may require two different types of equivalence: procedural and substantial. In checking procedural equivalence, a court will examine whether there are sufficient means of protection or judicial remedies in the other system. Substantial equivalence refers to the existence of substantially equivalent principles in both legal systems.

A court may decide to examine whether there is both procedural and substantial equivalence, as in the *Bosphorus* case.[36] In this case, the ECtHR explicitly mentioned the fact that fundamental rights granted by the ECHR also existed in European Union law (substantial equivalence) and that effective remedies, compliant with the standards of the Convention, existed before the ECJ for those whose rights had been violated (procedural equivalence).

Procedural equivalence is of paramount importance in post-*Bosphorus* case-law, as shown in the *Michaud* v. *France* case.[37] In this case, the applicant appealed to the French Council of State against a decision of the National Bar Council adopting regulations on internal procedures for implementing Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering

[34] Permanent Court of International Justice, 25 May 1926, *Certain German Interests in Polish Upper Silesia*, A07.

[35] *Internationale Handelsgesellschaft*, *supra* n. 12; *Simmenthal*, *supra* n. 32.

[36] *Supra* n. 4.

[37] ECtHR 6 Dec. 2012, Case No. 12323/11, *Michaud* v. *France*.

and terrorist financing. This Directive repealed and reproduced, with added content, the Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, as amended by the Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001. These texts place lawyers under an obligation to report suspicions of criminal offence by their clients. The legal profession in France sees its obligation as a threat to legal privilege and the confidentiality of exchanges between lawyers and their clients and have constantly criticised it. Before the Council of State, the applicant alleged that the decision of the National Bar Council infringed Article 8 ECHR. Since this argument was in fact directed against the Directive itself, the applicant also asked the Council of State to refer the matter to the Court of Justice of the European Communities for a preliminary ruling on the compatibility of the obligation to report suspicions of criminal offence laid down in the Directive with Article 6 TEU and Article 8 of the Convention. The Council of State refused to refer this question for a preliminary ruling, even though the Court of Justice had never ruled on this particular matter previously,[38] and rejected the argument of the applicant based on Article 8, along with his application.[39] This can be considered a violation, by the Council of State, of its duty to refer to the ECJ for a preliminary ruling on the validity of a piece of secondary legislation. As there was no previous established case-law from the Court of Justice on the matter, there was clearly *doubt* on whether or not this aspect of the Directive was compliant with Article 8 of the Convention. According to the *Foto-Frost* case-law,[40] such a doubt is enough to create an obligation for every national court to refer the matter to the ECJ for a preliminary ruling. Therefore, the Council of State should have done so.

The applicant then brought an application against France before the ECtHR. Since the decision of the National Bar Council was merely an implementation of the Directive, France could have been granted immunity in accordance with the *Bosphorus* case-law. However, the Court considered that

> because of the decision of the *Conseil d'Etat* not to refer the question before it to the Court of Justice for a preliminary ruling, even though that court had never examined the Convention rights in issue, the *Conseil d'Etat* ruled without the full potential of

[38] It is true that, in 2005, in the context of an application lodged by various Belgian Bar associations to have certain legal provisions transposing Directive 2001/97/EC annulled, the Belgian Constitutional Court referred the question of the validity of this Directive to the Court of Justice of the European Union for a preliminary ruling. But in this case, the ECJ only ruled on the conformity of the Directive with Art. 6 ECHR, and not Art. 8: ECJ 26 June 2007, Case C-305/05, *Ordre des barreaux francophones et germanophone and Others* v. *Conseil des ministres*.

[39] *Conseil d'Etat*, 10 April 2008, *Michaud*, Case No. 296845.

[40] *Supra* n. 27.

> the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed. In the light of that choice and the importance of what was at stake, the presumption of equivalent protection does not apply.[41]

It is to be noted, however, that in this case the lack of procedural protection was not structural, and was not even attributable to the European Union, but to France.

Sometimes, the court will only explicitly examine whether there is substantial equivalence. This is what the French Constitutional Council generally does but is also what the French Council of State did in the *Arcelor* case. When applying the equivalent protection test, those two courts do not explicitly check whether there are satisfactory European judicial remedies against the directives. However in both cases we can say with confidence that the judicial protection provided by the ECJ played an important (though not explicit) role in the outcome of these decisions. So, it was more or less presupposed that there was an efficient procedural equivalence.

The Constitutional Council, for example, refers expressly to the role of the ECJ in the *Economie numérique* judgment

> Where there is no express contrary provision in the Constitution, the ECJ, upon an application for a preliminary ruling, is the only court competent to ensure that the directive respects both the powers set forth in the treaties and the fundamental rights guaranteed by Article 6 of the Treaty on the European Union.[42]

There is no such reference to European judicial protection of fundamental principles in the French Council of State's decision, but since the *Arcelor* decision specifically mentions the possibility of referring the matter to the ECJ as a possible outcome of the test, one can argue that the procedural protection of fundamental principles by the ECJ was taken into account when reaching this solution.

The German Federal Constitutional Court also takes into consideration the role of the ECJ when examining whether fundamental rights are protected, whether as regards European secondary legislation (*Solange II*) or national legislation implementing European secondary legislation (*Solange III*). The Constitutional Court in this case did not elaborate on whether the judicial protection within the European Union was sufficient. However, in the general framework of *Solange* case-law, the German Constitutional Court did ensure to a certain extent that at least as regards the right to access the Court of Justice, this European judicial

[41] *Michaud* judgment, para. 115.
[42] *Economie numérique*, *supra* n. 20, para. 7.

protection is sufficient. In the *Teilzeitarbeit* case of 9 January 2001,[43] the German Constitutional Court held that the German courts had a *constitutional* obligation, under the right to a legal court (Article 101(1), second sentence of the Basic Law), to refer to the ECJ any matter where a piece of Secondary legislation may be incompatible with a fundamental right. In this case, the Court held that this obligation was the *necessary corollary* of its waiving its right to review whether the secondary legislation complied with the constitution in accordance with the *Solange II* and *III* cases. Therefore, it can be argued that there is a link, in the German Federal Constitutional Court's case-law, between the effectiveness of European Union judicial protection through the preliminary ruling procedure and the judicial immunity granted to European Union secondary legislation.

In addition to deciding what type of equivalence is required, the court that chooses to apply the equivalent protection test may also decide how equivalence shall be proven.

The burden of proof

In the case of the European Union, since the level of protection of human rights is globally sufficient, there may be a presumption of equivalence, such as in the *Solange II* case[44] as well as in the *M & Co* decision.[45] However, such a presumption is never final or conclusive. The *Bosphorus* case illustrates exactly how such a presumption may be rebutted.[46]

Rebutting the presumption and proving the lack of *general* equivalence is, of course, very difficult. In the *Bosphorus* case, in addition to admitting that the presumption of equivalent protection could *generally* be rebutted by a general lack of sufficient protection of fundamental rights in the European Union legal system, the ECtHR also stated that the presumption could be rebutted by evidence that there was a lack of adequate protection in the *specific* case, like in the *Michaud* case.[47] Such inadequacy must however be 'blatant'.

There is as well, to a certain extent, a presumption of general equivalence that can be rebutted in a specific case in the *Economie numérique* case-law of the French Constitutional Council.[48] According to this case-law, the French Constitutional Council will waive its power to review Acts of Parliament that merely implements

[43] *Bundesverfassungsgericht*, 9 Jan. 2001, 1 BvR 1036/99, *Neue Juristische Wochenschrift* (2001), p. 1267; *Europäische Zeitschrift für Wirtschaftsrecht* (2001), p. 255.

[44] *Supra* n. 6.

[45] *Supra* n. 5.

[46] *Bosphorus* case, *supra* n. 4, para. 155: 'However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.'

[47] *Supra* n. 37.

[48] *Supra* n. 20.

unconditional and precise provisions of a directive (principle) *unless* there is a rule or principle inherent in the constitutional identity of France (exception). Hence, if 'inherent' means 'without equivalent',[49] we can say that, in the case-law of the Constitutional Council, there is a presumption of equivalence that can be rebutted if there is no equivalent principle to the constitutional principles that have been allegedly infringed by the Act of Parliament, and, indirectly, by the directive itself.

There is no such possibility of rebutting the presumption of equivalence in a specific case under the German case-law, since the German constitutional Court stated in *Solange II* and *III* that all applications regarding European secondary legislation shall be inadmissible unless the protection of human rights in the European Union has *generally* fallen under the standards required by German Basic Law. However, it cannot be ruled out that an application against European secondary legislation based on the lack of protection of a *specific* right at European Union level may be declared admissible on the basis of a constitutional identity claim,[50] if the right in question is considered to be a part of this identity. Such an admission could, however, raise the question of the consistency between the *Solange* case-law and the constitutional identity case-law.

Finally, there may be situations where there is absolutely no presumption of equivalence. The French Council of State in particular, in the *Arcelor* case,[51] seemed to suggest that it would only waive its right to review if there was sufficient evidence that the protection offered to the principle is equivalent in European Union law. As stated in *Arcelor* decision, 'it is for the administrative court, when there is an alleged violation of a constitutional principle or provision, to examine whether there is a general rule or principle under European law, the nature and scope of which, as interpreted by the European Court, effectively upholds the said constitutional provision or principle'. The first consequence of this statement is that there is no presumption of equivalence in the *Arcelor* case-law. The second consequence is that the equivalence that must be proven is a *special* equivalence, because the Council of State requires that a principle equivalent to the specific constitutional principle which has been allegedly infringed must be found in European Union law.

The degree of equivalence

Equivalent protection does not necessarily imply identical protection. It may even be argued that the equivalent protection test only helps smooth relationships between the systems precisely because the equivalence only needs to be 'approxi-

[49] *Supra*.
[50] See notably *Bundesverfassungsgericht*, 30 June 2009, BVerfGE 123, 267 (Lisbon Treaty).
[51] *Supra* n. 24 .

mate'. In the *Bosphorus* case, the ECtHR clearly stated that a *comparable* protection was enough to ensure indirect immunity of European Union secondary legislation: 'By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued.'[52]

The equivalence sought by the French courts is also only an approximate equivalence, but in varying degrees. In the *Bioéthique* case,[53] the Constitutional Council stated that the constitutional principle of freedom of expression had an equivalent in European Union law, but it did not establish that the principle had the same meaning and scope in European Union law. However, in *Arcelor*,[54] the Council of State seemed to require a very close similarity between French constitutional principles and European principles, but this largely depends on the facts and the arguments raised in each case. The constitutional principle and the European Union principle do not have to be *generally* identical as long as their results, in the case brought before the administrative court, are similar. For example, in *Arcelor*, the claimant based its argument on the constitutional principle of equality. The principle of equality in French law is slightly different from the principle of equality in European Union law since, in French law, unlike European Union law[55] and the case-law of the ECtHR,[56] it does not create an *obligation* to treat differently people who are in different situations.[57] Such different treatment is only an *option* for public bodies. Yet, in *Arcelor*, the applicant claimed that the Government Decree infringed *both* aspects of the principle of equal treatment. The Council of State rejected the first argument raised by *Arcelor* based on equality – the violation of the obligation to treat differently people in different situations – since this obligation is not a part of the French constitutional principle of equality. However, the Council of State did consider that the argument raised by *Arcelor* based on the principle that people in similar situations must not be treated differently – a principle that exists both in French and European Union law – was admissible. Therefore, in that respect, French and European principles of equality were equivalent *as regards this precise argument*, even though they are not absolutely similar *in general*. Furthermore the French administrative courts only examine whether there is a *minimum* equivalent level of protection, since the European protection may be greater than the national constitutional protection. This was confirmed by the opinion of the government commissioner in the *Arce-*

[52] *Bosphorus* judgment, *supra* n. 4, para. 155.
[53] *Supra* n. 22.
[54] *Supra* n. 24.
[55] See for example ECJ 2 Oct. 2005, Case C-148/02, *Garcia Avello* v. *Belgium*, para. 31 s.
[56] ECtHR 6 March 2000, Case No. 34369/97, *Thlimmenos v. Greece*, para. 44.
[57] *Conseil constitutionnel* 87-232 DC, 7 Jan. 1988, *Loi relative à la mutualisation de la Caisse nationale de Crédit agricole*, point 10; *Conseil d'Etat*, 28 March 1997, *Société Baxter*, Lebon, p. 114.

lor case who considered that, as regards the principle of equality, there was an equivalence in the *specific* case brought before the Council of State and in view of the arguments raised, and that 'European law, on this point [principle of equality] goes further than national law'.[58] The outcome of the equivalent protection test may therefore still be positive even though the principles are not strictly and generally identical.

We can therefore see that the courts are not tied down. If a court chooses to apply the equivalent protection test, it is free to determine the type of equivalence, how such equivalence may be evidenced and even the level of equivalence required. However, once it is established that there is equivalence, the result is the same. The law issued by the other system, over which the court has indirect jurisdiction, is immune from judgment. The scope of this immunity may vary, however.

The scope of immunity

The object of immunity

As for the object of immunity, it can be a *direct* immunity such as in the *Solange II* case[59] where the Court of Karlsruhe refused to examine whether European Communities secondary legislation *itself* complied with the German Constitution. But in most cases, immunity is granted *indirectly*, for example when a court is requested to rule on laws or actions over which it has jurisdiction but which merely implement European Community or European Union law. In such a case, the court is required indirectly to review European Community or European Union law even though it has no jurisdiction to do so. For example in the *Bosphorus* case[60] the ECtHR dismissed the claim brought against Ireland for having impounded an aircraft on the basis of a European regulation. This is what we will call here 'implementation' immunity, meaning that a legal measure or an action of public authorities is granted judicial immunity because it results from the implementation of another piece of legislation adopted in another legal system.

For implementation immunity to be granted the authority that implements the legislation from the other system must not have any margin of discretion in implementing this legislation. It is only where there is no margin of discretion that the actions taken in implementing such a requirement may be considered to be 'transparent'.

The German Constitutional Court, for example, considered in the *InvZulg* order of 4 October 2011[61] that, due to the *Solange II* and *Solange III* decisions,

[58] M. Guyomar, *supra* n. 25, at p. 400.

[59] *Supra* n. 6.

[60] *Supra* n. 4.

[61] *Bundesverfassungsgericht*, 4 Oct. 2011, *Investitionszulagengesetz (InvZulG)*, 1 BvL 3/08. There is no English version of this order, but a press release (press release no. 65/2011 of 26 Oct.

a domestic legal provision which transposes a directive or a decision into German law shall not be examined for its compatibility with the fundamental rights of the Basic Law if the European Union law fails to leave to the German legislature any latitude in such transposition. A court has to clarify prior to submitting the statute to the Federal Constitutional Court whether the German legislature was left any latitude in transposing European Union law. In order to do so, if there is a lack of clarity regarding the implications of European Union law, it must initiate preliminary ruling proceedings before the ECJ, regardless of whether it is a court of final instance or not. This obligation, which derives from German constitutional law and the need to ascertain the power to review of the Federal Constitutional Court, goes beyond the obligation to submit to the ECJ under European Union law,[62] which applies exclusively for courts of final instance against whose decisions there is no judicial remedy under national law.

The French Constitutional Court and the French Council of State will only grant immunity for legal or regulatory provisions which merely implement *unconditional and precise* provisions of a directive. For example in the *Communications électroniques et services de communication audiovisuelle* decision of 1 July 2004,[63] the French Constitutional Council based its decision to review the legal provisions implementing a directive on the issue of determining whether or not they were merely implementing unconditional and precise provisions of the directive. Similarly in the *Bosphorus* case,[64] the ECtHR expressly acknowledged the fact that 'the impugned interference was not the result of an exercise of discretion by the Irish authorities' (para. 148). It may be noted here that, in the *Michaud* judgment,[65] the ECtHR considered that, since directives 'are binding on the member states as regards the result to be achieved but leave it to them to choose the means and manner of achieving it', 'the question whether France, in complying with its obligations resulting from its membership of the European Union, had a margin of manoeuvre capable of obstructing the application of the presumption of equivalent protection is not without relevance' (para. 113). It would seem that there may be a certain presumption that, when implementing a directive, the states have a margin of discretion. It is likely though that this presumption could be rebutted if the relevant provisions of the directive do not in fact allow the states any margin of discretion, for example if these provisions are clear, precise and unconditional.

2011) is available in English on the website of the Court: <www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-065en.html>.

[62] See Art. 267 TFEU.

[63] *Conseil constitutionnel* 2004-497 DC, 1 July 2004, *Loi relative aux communications électroniques et aux services de communication audiovisuelle*.

[64] *Supra* n. 4.

[65] See n. 37.

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Implementation immunity may apply only to legislation that may be subject to judicial review in its own legal system. This is a direct consequence of the condition of procedural equivalence. Without such a possibility of judicial review, the court will not waive its jurisdiction, even if there is a substantial equivalence, since there will not be a proper judicial protection of the fundamental principles in the other system. This is evidenced in case-law of the ECtHR. Thus in the *Bosphorus* case, the court spent a considerable amount of time examining the procedural equivalence, explaining that European Union regulations can be reviewed before the ECJ in order to check if they comply with fundamental rights. On the other hand, in the *Matthews* decision,[66] the Court fully examined the implementation by the United Kingdom of the 1976 Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage, specifying that 'the 1976 Act cannot be challenged before the ECJ for the very reason that it is not a 'normal' act of the Community, but is a treaty within the Community legal order'.[67] As a consequence, as far as European Union law is concerned, only secondary legislation can benefit from implementation immunity, as opposed to European Union primary legislation. But the question remains of what is the full extent of 'secondary legislation'? Does it include, for example, ECJ decisions? The answer is probably yes. First of all, an appeal is possible against decisions of the General Court and of the Civil Service Tribunal. Secondly, as for the decisions of the Court of Justice itself, the main criterion for immunity is that there is a court capable of examining the issue. Since immunity is based on judicial protection, court decisions should themselves indeed be exempt from review. In the *M & Co* decision,[68] the exequatur of an ECJ decision was granted judicial immunity.

The extent of immunity

As regards the extent of immunity, there are three points to note.

First of all, certain authors[69] consider that 'implementation' immunity, if granted, should not extend to the rules of competence and procedure which apply in the system in which the immunity is granted. For example, a French administrative court may annul an administrative order or regulation which merely implements the unconditional and precise provisions of a directive, on the grounds that the proper procedure has not been followed in applying this administrative measure. In such a case, the problem is 'exclusively internal',[70] so that such a review

[66] ECtHR 18 Feb. 1999, Case No. 24833/94, *Matthews* v. *The United Kingdom*.

[67] Para. 33.

[68] *Supra* n. 5.

[69] X. Magnon, 'Le chemin communautaire du Conseil constitutionnel: entre ombre et lumière, principe et conséquence de la spécificité constitutionnelle du droit communautaire', 8 *Europe* (2004) Study No. 9.

[70] See Magnon, *supra* n. 69.

would not result in an indirect review of the 'reflected' requirement, i.e. the directive itself. Mattias Guyomar, in his opinion on the *Arcelor* case took the view that the French Constitutional Council in the *Droits d'auteur* decision had 'unreservedly' reviewed the legality of the proceedings of the Act of Parliament implementing the directive, thus confirming this distinction on the scope of immunity for substantial rules and for rules of competence and procedure.[71] The Government Commissioner also considered that the same applied to the Council of State. The immunity that results from equivalence is related exclusively to the directive itself and does not extend to any irregularity of procedure surrounding the implementation of the directive. For example, the Council of State in the *Arcelor* case,[72] expressly provided that it could 'review the rules of competence and procedure' in accordance with its previous case-law and examine 'external legality' arguments (incompetence and irregularity of procedure) made against provisions implementing international[73] or European[74] legislation.

Secondly, and paradoxically, immunity does not necessarily imply that there will not be any court review at all. In the *Arcelor* case, the fact that there was equivalence allowed the Council of State, in accordance with the ECJ *Foto-Frost* case, to reject some of the arguments and to refer the matter for a preliminary ruling for the remaining arguments. There was therefore a court review, but one which was carried out on the grounds of European Union law and, partly, by the European Court. The constitutionality argument was 'transformed' into an argument as regards the legality of the directive. Where there is equivalence, the implementing measure, and indirectly the directive, benefits from *constitutional* immunity but not *absolute* immunity.

Thirdly, it must be noted that, in some cases, and even when there is equivalent protection, immunity may not prevent judicial review on every ground.

In the *Bosphorus* case, for example, the ECtHR based its reasoning on the clause which allows the states to interfere in the use of private property on grounds of public interest.[75] The general interest argument was, in this case, the necessary 'compliance with legal obligations flowing from the Irish State's membership of the European Community', such that the Court accepted that 'compliance with

[71] Guyomar, *supra* n. 25, at p. 383.

[72] *Supra* n. 24.

[73] *Conseil d'Etat* (Sect.), 7 July 1978, *Jonquières d'Oriola*, Lebon, p. 300.

[74] For example *Conseil d'Etat* (Sect.), 27 Oct. 2006, *Sté Techna*, Lebon, p. 451.

[75] Art. 1 Protocol No. 1 ECHR: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*' [emphasis added].

Community Law by a Contracting Party constitutes a legitimate general-interest objective within the meaning of Article 1 of Protocol No. 1' (para. 150). The general interest argument is conducive to a generalisation of the equivalent protection test for the majority of rights in the ECHR, since most of the material provisions of the Convention contain an exception as regards the general interest. But one must not forget that not all the rights protected by the Convention are subject to exceptions based on general interest. Some rights are considered to be absolute, such as the right to life (Article 2), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3) and the prohibition of slavery and forced labour (Article 4). Therefore, the presumption of equivalent protection should not prevent the ECtHR from reviewing whether a state has violated one of these rights, even when this state was merely and strictly implementing European Union law.

However, the exact status of the equivalent protection test in the reasoning of the Court remains unclear. In the *Bosphorus* case, as well as in other cases like *Michaud* v. *France*,[76] the Court firstly assessed whether or not there was an interference with the exercise of a right granted by the Convention and, as this was the case, whether or not the interference was in accordance with the law. The equivalent protection test was then only applied when the Court assessed whether or not the interference had a legitimate aim and was necessary. However, in the *M.S.S.* v. *Belgium and Greece*,[77] the Court dismissed the presumption of equivalent protection for Belgium (due to a margin of discretion left to the state in complying with its obligations under European Union law) in a paragraph called 'The responsibility of Belgium under the Convention', after it had dismissed the arguments of the Governments on the inadmissibility of the application and *before* it ruled on the merits. This seems to make the equivalent protection test a quasi-admissibility test. Similarly, and even more clearly, in the *Al-Dulimi* case, the Court addressed the question of equivalent protection *in limine litis* as a 'preliminary question'. After addressing this 'preliminary question', the Court concluded that '[it] must accordingly rule on the merits of the complaint concerning the right of access to a court'. This seems to indicate that the equivalent protection test is no longer based on limitation clauses, but is now a condition for the Court to rule on the merits of the case. The first consequence of such a change would be that, when there is an equivalent protection, the Court will not even rule on whether or not there was an interference. The Court, when the presumption of equivalent protection applies, will not rule at all on the merits. The second consequence is that this immunity could apply to all the provisions of the Convention, even the provisions which do not allow for any kind of limitation. However, the case-law

[76] *Supra* n. 37.
[77] ECtHR 21 Jan. 2011, Case No. 30696/09, *M.S.S* v. *Belgium and Greece.*

of the Court is too unstable to affirm without doubt that the equivalent protection test has truly become a preliminary test.

In German law, it is perhaps possible to bypass the inadmissibility resulting from the *Solange II* and *Solange III* judgments by claiming that a piece of European secondary legislation is, in fact, *ultra vires*[78] or breaches the German constitutional identity.[79] However, in the *Honeywell* judgment[80] the German Constitutional Court strongly limited its power to review an *ultra vires* claim, since an *ultra vires* review by the Federal Constitutional Court can only be considered if a breach of competences by the institutions and bodies of the European Union is sufficiently qualified. Furthermore, prior to the acceptance of an *ultra vires* act, the Court of Justice must be given the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the acts in question, in preliminary ruling proceedings according to Article 267 TFEU, insofar as it has not yet clarified the questions which have arisen.

In conclusion, it appears that the equivalent protection test, as applied to the European Union, consistently appears as reasoning in several court decisions, both European and national. It allows a court to grant judicial immunity to norms belonging to another legal system if it appears that this system protects fundamental principles in a way that is equivalent to the protection granted by the court. This mechanism is quite flexible. Every court that has to deal with situations involving other legal systems is free to choose whether or not to use this test and, if they do so, it is at their discretion to determine how they want to use it, what constitutes equivalence and the extent of immunity they consider should apply.

There is no reason for not applying this test to other international organisations than the European Union. The ECtHR said so itself in the *Al-Dulimi* judgment.[81] In the *Boivin* decision,[82] the Court had already mentioned the possibility of applying this test to the European Organisation for the Safety of Air Navigation ('Eurocontrol'). In this case, the applicant's appointments to a post of head accountant at the Institute of Air Navigation Services (a body which is part of Eurocontrol) had been cancelled twice following complaints by another official of the organisation. Unsatisfied with the proceedings, the applicant brought the matter before the ECtHR. But as Eurocontrol is not a party to the ECHR, he lodged his application against France and Belgium, and later against all the 32

[78] *Bundesverfassungsgericht*, 12 Oct. 1993, BVerfGE 89, 155 (Maastricht Treaty).

[79] See the Lisbon judgment, *supra* n. 50.

[80] *Bundesverfassungsgericht*, 6 July 2010, BVerfGE 126, 286.

[81] Para. 116: 'The Court observes, however, that it has never ruled out the application of the equivalent protection criterion to a situation concerning the compatibility with the Convention of acts of international organisations other than the European Union.'

[82] ECtHR 9 Sept. 2008, Case No. 73250/01, *Boivin* v. *34 State Members of the Council of Europe*.

member states of the Council of Europe which were also members of Eurocontrol. The applicant's complaints, in so far as they were brought against those 32 other states, were declared inadmissible because he failed to comply with the six-month rule provided for in Article 35(1). As for the complaints against France and Belgium, the Court referred explicitly to the *Bosphorus* case, but only to observe, in the aforementioned decision,

> that it has not been established, or even alleged, that the protection of fundamental rights generally afforded by Eurocontrol is not 'equivalent', within the meaning given to that term in the Bosphorus judgment, to that of the Convention system. Thus the Court need not examine whether Eurocontrol's internal mechanism for the settlement of labour disputes is 'manifestly deficient' in that connection; such an examination would only be meaningful if the Court were to consider that there was a presumption of an 'equivalent' protection of Convention rights and then to ascertain whether or not that presumption had been rebutted in the circumstances of the case.

There is no sign here of an absolute refusal, from the Court, to apply the equivalent protection test to Eurocontrol.

However, both European and national case-law seem to show that, before the *Al-Dulimi* judgment, the equivalent protection test had not really been applied to other systems than the European Union. In applying the equivalent protection test to the United Nations in *Al-Dulimi*, the ECtHR was both reluctant and alone.

The application of the equivalent protection test to United Nations smart sanctions by the European Court of Human Rights

The isolation of the European Court of Human Rights

The positions of the national courts, when confronted with United Nations resolutions, have already been analysed by legal writers,[83] and do not need to be analysed again in this paper. We will only emphasize for the moment the fact that these positions do not, so far, include a clear application of an equivalent protection test.

It is true that some aspects of the equivalent protection test appear in national case-law, when national courts are confronted with national measures implementing United Nations resolutions. It has been noted,[84] for example, that national courts pay attention to how much margin of discretion is left to the national authorities by the United Nations resolutions. When there is enough room for ma-

[83] See, for example, A. Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions', in A. Reinisch (ed.), *Challenging Acts of International Organizations before National Courts* (Oxford University Press 2010), p. 54.

[84] See Tzanakopoulos, *supra* n. 83.

noeuvre, national courts do review the exercise of this discretion 'normally', i.e., the same way they would review any other national measure.[85] It is only when there is no such margin of appreciation, and therefore when reviewing the national measure is substantially akin to reviewing the resolution itself, that the position of the national courts may differ. This focus on the margin of discretion and the connection between the implementing measure that is reviewed and the implemented measure that is beyond the normal reach of the court also exists, as we have seen, in the equivalent protection test. However, the similarity stops there. As Tzanakopoulos[86] notices, there is a variety of positions that a national court may adopt when reviewing a national measure implementing a United Nations resolution without a margin of discretion, such as abstention from reviewing, low-intensity review, consistent or harmonizing interpretation or complete disregard for the 'United Nations origin' of the domestic measure, leading sometimes to the quashing or annulment of the said measure. None of those positions can be considered to be the application of an equivalent protection test.

This disregard for the real origin of the human rights violation is also the position that has been adopted by the United Nations Human Rights Committee, in the *Sayadi and Vinck* v. *Belgium* case of 22 October 2008.[87] The circumstances of the case were similar to those in the ECJ *Kadi* case. The claimants argued that their rights under the United Nations Covenant on Civil and Political Rights had been infringed because the foundation that they managed had been placed by a Security Council resolution and a European regulation on the list of persons or bodies associated with Al-Qaida. The claim was lodged against Belgium, for having implemented the resolution and the related European regulation. However, the Committee totally neglected these aspects and only addressed the matter of the decisions carried out by the state. Furthermore, under Article 46 of the Covenant which states that nothing in the Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations, the Committee stated

> that there is nothing in this case that involves interpreting a provision of the Covenant as impairing the provisions of the Charter of the United Nations. The case concerns the compatibility with the Covenant of national measures taken by the State party in implementation of a Security Council resolution. Consequently, the Committee finds that article 46 is not relevant in this case.

[85] See, for example, UK Supreme Court, *Her Majesty's Treasury* v. *Mohammed Jabar Ahmed and others; Mohammed al-Ghabra; Hani El Sayed Sabaei Youssef* [2010] UKSC 2 & [2010] UKSC, 27 Jan. 2010, para. 148.

[86] See Tzanakopoulos, *supra* n. 83.

[87] UN Doc CCPR/C/94/D/1472/2006.

The Committee did not give this matter any special consideration, which shows that the involvement of other systems was not taken into account, not even the fact that, in this case, the alleged violation of the United Nations Covenant on Civil and Political rights originated from *another* United Nations 'system'. And *a fortiori*, there is no question here about any immunity that could be granted to the state when implementing measures issued within a system in which there is a satisfactory protection of human rights. For example, the Committee could have taken into account the fact that, due to the then-recent *Kadi* decision of the ECJ, the Luxembourg Court provided a satisfactory level of protection of human rights against European regulations, even when implementing United Nations resolutions. It chose not to do so, hence putting the states in an uncomfortable position of conflict between their various international and European obligations.

None of these positions, either national or international, can be considered to be an application of the equivalent protection test. The equivalent protection test is in essence a conditional immunity from judicial review, based on the level of protection of fundamental principles in another legal system. If there is no immunity, there is no equivalent protection test. However, if this immunity is absolute, unconditional, there is no equivalent protection test either, and if there is no review of the level of protection of fundamental principles in the other system, there is of course no equivalent protection test.

One case remains that could be interpreted as an application of the equivalent protection test to United Nations smart sanctions. In the *Kadi* judgment of 3 September 2008 of the ECJ,[88] European Communities regulations had been adopted in order to give effect to United Nations resolutions. Those resolutions provided that the states were required, *inter alia*, to freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him. Actions for annulment were brought against these European regulations. In an initial judgment, the Court of First Instance decided that, in principle, it could not review those regulations because, in doing so, it would indirectly review the United Nations resolutions themselves, which are not under its jurisdiction. The Court of First Instance stated that it had the power to review if the United Nations resolutions complied with *ius cogens* (peremptory norms of international law).[89] An appeal was brought against this decision before the ECJ, and the Court refused to grant 'general judicial immunity' to the European regulations, even though they were simply implementing United Nations resolutions, because there was no sufficient judicial protection in the United Nations system for the persons affected by those resolutions. Because of this lack of judicial protection in the

[88] *Supra* n. 2.

[89] CFI 21 Sept. 2005, Case No. T-315/01, *Yassin Abdullah Kadi* v. *EU Council and EC Commission*.

United Nations system, the Court examined and partially nullified the European legislation passed under these resolutions, even though in so doing it put the member states in a situation where they would be in breach of their international obligations.

In this respect the *Kadi* case seems to be similar to the first 'Act' of the *Solange* case-law, the *Solange I* decision, in which the German Constitutional Court considered that it could review European Communities law with respect to the protection of fundamental rights under the German Basic law since the protection of rights under European Communities law did not, at the time, provide a satisfactory level of protection that was equivalent to that under the Basic Law. Furthermore Mr Kadi, in his brief, explicitly used the '*Solange* formula' arguing that '*so long as* the Law of the United Nations offers no adequate protection for those whose (sic) claim that their fundamental rights have been infringed, there must be a review of the measures adopted by the Community in order to give effect to resolutions of the Security Council' [emphasis added].[90]

As Griller noted, 'this leaves the door open to reduce scrutiny as soon as an effective mechanism of judicial control at UN level would be established'.[91] Yet, we cannot definitively conclude that the Court, in this decision, endorsed and applied the equivalent protection test to United Nations smart sanctions.

Firstly, it is to be noted that the Court, in this decision, only evaluated what we have earlier called 'procedural equivalence'. The Court refused to grant immunity because of the lack of sufficient judicial protection in the United Nations system for persons affected by the resolutions. The ECJ did not address the point of 'substantial equivalence' in this case. But this may have been simply because the lack of procedural equivalence was enough to refuse immunity and so there was no need to address the question of substantial equivalence.

Secondly, and more importantly, as it has been noted by de Búrca, 'it is difficult to know whether the Court intended by these paragraphs to hint that certain Security Council Resolutions might enjoy immunity from review if they did provide sufficient guarantees of protection, because the Court chose not to address the question with any clarity'.[92] Without such a 'promise' of immunity, it is impossible to conclude with absolute certainty that the ECJ applied the equivalent protection test, as defined in this paper, to United Nations smart sanctions. The

[90] Point 256 of the judgment.

[91] S. Griller, 'International Law, Human Rights and the Community's Autonomous Legal Order', 3 *EuConst* (2008) p. 528 at p. 549.

[92] G. de Búrca, 'The ECJ and the International Legal Order: A Re-Evaluation', in G. de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism* (Cambridge 2012) p. 105 at p. 122.

Kadi II judgment,[93] which confirms and clarifies the *Kadi* precedent, does not give further information on this matter.

The ECtHR is therefore so far the only court which has *clearly* applied the 'equivalent protection test' to the United Nations. Furthermore, it must be noted that the Strasbourg Court has been extremely reluctant to do so.

The reluctance of the European Court of Human Rights

It is true that, when examining earlier Strasbourg case-law, one may see elements that could indicate an application of the equivalent protection test to the United Nations. In the *Al-Jedda* case,[94] the Court stated that 'there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights'. Such a presumption looks very much like the one arising from the *Bosphorus* case[95] concerning the European Union. Furthermore, in this case, and more recently in the *Nada* case,[96] the Court reviewed whether or not a state, when implementing a United Nations measure or when acting within a legal framework resulting from a United Nations measure, had a margin of discretion, again, just like in the *Bosphorus* solution.

Yet, it can be argued that the ECtHR was, in fact, very reluctant to perform the equivalent protection test to the United Nations before *Al-Dulimi*.

The Behrami *and* Saramati *case*

In the *Behrami* case,[97] the Court considered that the United Nations, and not the member states, was liable for the Kosovo FORce (KFOR) and the United Nations Interim Administration Mission in Kosovo (UNMIK). The issue, as raised by the applicants, was therefore whether the *Bosphorus* precedent[98] applied to this case. The Court held that it did not.

One might think that this refusal to apply *Bosphorus* was simply due to the facts of the case. The Court tried hard to distinguish the *Bosphorus* case from that of *Behrami and Saramati*:

> In its judgment in [the Bosphorus] case, the Court noted that the impugned act (seizure of the applicant's leased aircraft) had been carried out by the respondent

[93] ECJ 18 July 2013, Joined Cases Nos. C-584/10 P, C-593/10 P and C-595/10 P, *EU Commission and others* v. *Kadi*.

[94] ECtHR 7 July 2011, Case No. 27021/08, *Al-Jedda* v. *The United Kingdom*.

[95] *Supra* n. 4.

[96] ECtHR 12 Sept. 2012, Case No. 10593/08, *Nada* v. *Switzerland*.

[97] ECtHR decision of 2 May 2007, Cases Nos. 71412/01 and 78166/01, *Behrami and Behrami* v. *France and Saramati* v. *France, Germany and Norway*.

[98] *Supra* n. 4.

> State authorities, on its territory and following a decision by one of its Ministers (§ 137 of [the Bosphorus] judgment). The Court did not therefore consider that any question arose as to its competence, notably *ratione personae*, vis-à-vis the respondent State despite the fact that the source of the impugned seizure was an EC Council Regulation which, in turn, applied a UNSC Resolution. In the present cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent states and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. (para. 151)

This refusal to apply the *Bosphorus* precedent therefore seems to be because of two distinctions between this and the *Bosphorus* case. On the one hand, in the *Behrami and Saramati* case and contrary to the *Bosphorus* case, 'the defendant States did not have to pass national laws to enforce the UN decision, with or without margin of discretion; they only participated in effectively implementing a decision of the Security Council'.[99] On the other hand, territorial considerations seemed to have also played a role. In the *Bosphorus* case, the respondent state applied European Communities law in its national territory whereas in the *Behrami and Saramati* case, the impugned acts took place outside of the territory of the respondent state. Therefore there was no evidence linking the facts of the case to the 'jurisdiction' of the contracting state within the meaning of Article 1 of the Convention.

The *Behrami and Saramati* case may be considered to be simply a missed opportunity to transpose the *Bosphorus* precedent to the relationship between the Convention and United Nations law, because the conditions were not met in the present case. However, this impression is contradicted by the rest of the Court's argument, which shows that the principal motive behind the decision was to avoid interfering in the performance of an important United Nations peacekeeping mission. After having detailed the differences between the facts of *Bosphorus* and those of *Behrami and Saramati*, the Court added 'There exists, *in any event*, a fundamental distinction between the nature of the international organisation and of the international cooperation with which the Court was concerned there [in Bosphorus] and those in the present cases' [para. 151, emphasis added]. It added that the facts of the case 'were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective'. Such a distinction seems superfluous given that the court had already distinguished the *Bosphorus* case. It also echoes an earlier argument made by the Court in the same

[99] Ph. Lagrange, 'Responsabilité des Etats pour actes accomplis en application du Chapitre VII de la Charte des Nations Unies. Observations à propos de la décision de la Cour européenne des droits de l'homme (grande chambre) sur la recevabilité des requêtes Behrami et Behrami c. France et Saramati c. Allemagne, France et Norvège, 31 mai 2007', 1 *Revue générale de droit international public* (2008) p. 85 at p. 105.

decision on the lack of *ratione personae* jurisdiction, in which it emphasised the link between the Convention and the United Nations, the precedence of the Charter of the United Nations and the importance of the United Nations international peacekeeping mission and that therefore

> the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. (para. 149)

It is difficult, though, to determine how much of the Court's decision is attributable to the fact that the *Bosphorus* case did not apply and how much is attributable to the importance of United Nations objectives.

The Al-Jedda *case*

The *Al-Jedda* case[100] was about an applicant who had been held prisoner in Iraq, by British Forces, in a British Facility. The British Government argued that it was merely complying with the obligations created by United Nations Security Council Resolution 1546. The key question, as stated by the Court, was therefore 'whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment'. Subsequently, when the Court stated that 'there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights', it was not, as it was for the European Union in the *Bosphorus* case, an acknowledgement of the level of protection of human rights within the United Nations system, it was merely a *rule of interpretation* for United Nations resolutions, as stated in the next sentence: 'in the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations', and since (para. 105) 'the Court does not consider that the language used in this Resolution indicates unambiguously that the Security Council intended to place Member States within the Multi-National Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees', the Court can reach the conclusion that, when holding the applicant in internment, the state was not merely implementing the resolution. Therefore, it could not argue that its obligations under the United Nations Charter were in conflict with its obligations under the Convention. In other words,

[100] *Supra* n. 94.

the presumption here is not a presumption of equivalent protection leading to immunity; it is the assumption from which the Court deduces that the state was acting within its margin of discretion.

This conclusion does not incite much criticism. It was clear in this case that United Nations institutions not only did not require indefinite internments without judicial oversight but also objected to them (see para. 106). But the use of the margin of discretion in the *Nada* case shows much more clearly the attitude of the Court towards the United Nations before *Al-Dulimi*, and this attitude was nothing less than ambivalent.

The Nada *case*

In this case,[101] the applicant lived in Campione d'Italia, which is an Italian enclave of about 1.6 sq. km in the Province of Como (Lombardy), surrounded by the Swiss Canton of Ticino and separated from the rest of Italy by Lake Lugano. In 2001, as he was suspected of being involved in terrorist activities, his name was added to the United Nations Sanctions Committee's list. On 16 January 2002, the Security Council adopted Resolution 1390 (2002) introducing an entry and transit ban in respect of individuals, groups, undertakings and entities referred to in this list. Consequently, Switzerland applied an entry and transit ban to all individuals named in the list, including the applicant. The Canton of Ticino then revoked the applicant's special border-crossing permit. As a result, the applicant was *de facto* a prisoner in the Italian enclave where he lived. The ECtHR considered that there was indeed an interference with the applicant's right to private and family life. The question was therefore, as in the *Al-Jedda* case, whether it could be considered that this interference could be the direct consequence of an obligation imposed by United Nations law on Switzerland. The Court considered that this was not the case, and that the United Nations resolutions left a margin of discretion to Switzerland. Switzerland could not therefore argue that the interference was the direct consequence of its obligations under United Nations Charter.

This reasoning seems to be consistent with the equivalent protection test.[102] However, the conclusion of the Court – that the interference was not the direct consequence of United Nations resolutions – is far from convincing. The main issue was the entry and transit ban applied by Switzerland to the applicant. This ban was the direct consequence of the Resolution 1390 (2002). In their joint concurring opinion, Judges Bratza, Nicolaou and Yudkivska stated that they 'entertain[ed] considerable doubts about the conclusion that Switzerland 'enjoyed

[101] *Supra* n. 96.

[102] See, for another case in which the margin of discretion led to a non-application of the presumption of equivalent protection, the *M.S.S.* v. *Belgium and Greece* case, *supra* n. 77.

some latitude which was admittedly limited but nevertheless real in implementing the relevant binding resolutions of the UN Security Council' (para. 180). This conclusion is not in [their] view borne out by the terms of the resolutions themselves or by the provisions of the United Nations Charter under which they were issued'. In his concurring opinion, Judge Malinverni expressed the same doubts, with strong and detailed arguments.

It seems that the Court only concluded that Switzerland had some 'latitude' in order to avoid performing the equivalent protection test on the United Nations system. Had the Court decided to apply such a test, it would have necessarily concluded that the protection of human rights was clearly wanting in the United Nations 'smart sanctions' system, especially as the persons referred to in the Sanctions Committee's list are not granted an effective remedy. As Judge Malinverni states (point 23 of his opinion), 'the system in place in the United Nations at the material time was thus far from offering an equivalent protection to that guaranteed by the Convention, with the result that it does not seem possible to rely here on a presumption of Convention compliance on the part of the Security Council. The *Bosphorus* case-law is not yet applicable to the law of the United Nations'.

By acknowledging that there was no equivalent protection of human rights in the United Nations system, the Court should have had to carry out an indirect review of United Nations resolutions, just like the ECJ did in *Kadi*, and in so doing, would have had to address the problem of a conflict between the United Nations Charter and the ECHR. This problem is especially sensitive since Article 103 of the United Nations Charter states that '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'.

The Court's position was somewhat ambiguous. On the one hand, the Court *did* review the national implementation of the United Nations resolutions. Human rights were therefore protected. But on the other hand, the Court avoids – or in fact *pretends to avoid* – the question of the conflict between various international obligations, and refuses to assess the level of human rights protection in the United Nations system. This could be perceived as a kind of *implicit equivalent protection test for 'diplomatic' reasons*, in that as long as the protection of human rights is not sufficient in the United Nations system, the Court will review the national implementation of United Nations measures *but*, by using the fiction of the 'latitude', it will not say that the violations of Human Rights that could occur are the direct consequences of those United Nations measures.

This was clearly too much innuendo. This is why the *Al-Dulimi* decision can be considered to be a better decision than *Nada* because it makes things clear. It stated that the human rights protection, and especially the right to a judge, *is*

insufficient at United Nations level, and therefore, national implementing measures *cannot* be granted any immunity.

One could then wonder why, so shortly after the *Nada* decision, the Court decided to openly apply the equivalent protection test to United Nations smart sanctions system. The answer perhaps lies in the fact that the United Nations system itself has begun to admit its own flaws. On 26 September 2012, the Secretary-General of the United Nations transmitted to the General Assembly the report[103] of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, submitted in accordance with General Assembly Resolution 66/171 and Human Rights Council Resolution 15/15. This report, intensively quoted by the Court in the French version of the *Al-Dulimi* judgment (but not in the English version, in which the whole 'relevant international and domestic law' part of the judgment is missing), points out very explicitly the deficiencies of the United Nations system in terms of judicial protection. It said, for example, that the smart sanctions regime is 'inconsistent with any reasonable conception of due process, and gives the appearance that the Council is acting above and beyond the law' (para. 16). It is also said that even if 'Council resolutions should be read subject to a presumption that it was not the Council's intention to violate fundamental rights' (in reference, notably, to the forementioned *Al-Jedda* case of the ECtHR), 'in the case of the Al-Qaida sanctions regime, however, the language of the relevant resolutions does not allow for this approach'.

Interestingly enough, the report mentions the *Nada* case as one of the most recent illustrations of 'a series of successful legal challenges [that] has highlighted the problem by quashing implementing legislation, or declaring it unlawful, for precisely this reason' (i.e., 'compatibility with fundamental norms of due process' – see para. 20 of the report). The report does not mention, however, that in the *Nada* judgment the violation of human rights was considered to be a consequence of Switzerland exercising a margin of discretion allegedly allowed by the United Nations resolutions. This may be because the Special Rapporteur, unlike the Court, is entitled to assess the level of human rights protection in the United Nations system and, therefore, does not have to diplomatically 'hide' the real origin of the human rights violation. The report therefore says that 'the Nada judgment thus echoes the approach of the European Court of Justice and the General Court in the Kadi litigation' (para. 21), which is quite questionable[104] since the ECJ, in its *Kadi* judgment, chose to disregard the origin of the European regulation in ques-

[103] S*upra* n. 8.

[104] The Special Rapporteur seems to consider that the ECJ and the General Court took the same approach in the *Kadi* case, which could not be more wrong as we have already seen.

tion and did not elaborate on the margin of discretion available to the European Community.

Conclusion

The first potential prospect [should the Grand Chamber confirm the judgment, see note *supra* in n. 1] is that other courts may now apply or extend the equivalent protection test to United Nations smart sanctions system. In theory there is no real obstacle to such a generalisation. The ECJ, as we have seen earlier, was already very close to such an approach in its *Kadi* judgment. The main issue is a technical one, the legal basis of such reasoning. As we have seen, the ECtHR apparently bases the '*Bosphorus* reasoning' on the general interest provision that exists in the majority of the articles of the Convention. The general interest in question is 'international cooperation' (*Bosphorus*, para. 150), which is vague enough to apply both to the European Union and to the United Nations. It is true that there is some doubt about whether the Strasbourg Court still bases its *Bosphorus* reasoning on the general interest clauses. As we have seen earlier in this paper, the equivalent protection test may, in the case-law of the ECtHR, have become a kind of admissibility test. Even so, the legal basis of the equivalent protection test in the *Bosphorus* line of cases still proved general enough to be extended to United Nations. Some national courts, on the other hand, based their reasoning on provisions concerning specifically the European Union. In France for example, the Council of State and the Constitutional Council rely on Article 88-1 of the Constitution, which proclaims France's membership of the European Union. It would therefore seem difficult under French law to transpose the equivalent protection test to systems other than the European Union, for example to measures taken by the French Government or legislation introduced in parliament implementing a resolution of the Security Council directly and without any discretion.

The second perspective is the potential consequence of the application of the equivalent protection test to the United Nations smart sanctions system. We have said earlier that, when the equivalent protection test leads to a 'positive' conclusion (i.e., that there is indeed, in the other system, an 'equivalent protection' of the fundamental principles), it helps ease the relationship between legal systems. Of course, when there is no equivalent protection, and therefore no immunity, this 'smoothing' effect does not work. When it comes to the United Nations smart sanctions system, it means that member states of the Council of Europe may find themselves in the position of choosing between being in breach of their obligation to implement United Nations resolutions and breaching their obligations under the ECHR. What is then the point of the equivalent protection test? The answer may lie in the other aspect of the equivalent protection test. When the test is

negative, it is then an incentive for the legal system that does not sufficiently protect fundamental principles. By applying the equivalent protection test to the United Nations, the ECtHR sends the message that if the United Nations increases its standards of human rights protection – and especially if it would give a judicial protection to the persons and organisations on the 'blacklists' – the ECtHR could consider not reviewing the national measures that implement the 'smart sanctions'. By so doing, the United Nations would ensure a more effective global fight against terrorism whilst respecting individual rights.

Let us not forget that the *Solange I* judgment and the defiant position of the German Constitutional Court have been a strong incentive for a better protection of human rights at European Union level. We can only hope now that the *Al-Dulimi* judgment (as well as, maybe, judgments of other courts that may adopt a similar position in the future) will have such a '*Solange I*' effect on the United Nations regarding the protection of human rights.

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