



LICENSE TO PRESUME: THE COMPATIBILITY BETWEEN THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND SECURITY COUNCIL RESOLUTIONS IN *AL-DULIMI AND MONTANA MANAGEMENT INC V. SWITZERLAND*

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ABSTRACT: The judgment of the Grand Chamber in *Al-Dulimi and Montana Management Inc. v. Switzerland* can be praised as an effort to avoid contradictions between the UN Charter and the European Convention of Human Rights. It is also a reminder that UN Sanctions Committees still fail to meet fair trial standards. However, the reasoning of the Grand Chamber is not beyond controversy. In justifying the lack of contradiction between the SC Resolution 1483 (2003) and the ECHR, the Grand Chamber relies on a presumption of harmony between two legal orders (the UN Charter and the Convention) that is open to discussion. Moreover, the application made *in casu* of such presumption is unconvincing, since it does not appear to be supported by other elements of interpretation.

KEYWORDS: UN Security Council – primacy – *a contrario* interpretation – equivalence – presumption of harmony – autonomy.

I. INTRODUCTION

The judgment of the Grand Chamber of the European Court of Human Rights (the Grand Chamber) in *Al-Dulimi and Montana Management Inc. v. Switzerland* is a new development on the responsibility of States for acts carried out in the implementation of UN Security Council (SC) Resolutions,¹ an issue that has been widely discussed in rela-

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¹ European Court of Human Rights, judgment of 21 June 2016, no. 5809/08, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC].

tion to the restrictive measures against individuals adopted by the so-called Al-Qaeda/Taliban Sanctions Committee.²

The judgment revisits the interplay between the UN Charter and the European Convention on Human Rights (ECHR or the Convention). For that purpose, it relies on a particular conception of the relation between the two instruments, namely one of subordination of the Convention to the UN Charter on the basis of the rule of primacy enshrined in Art. 103 of the latter.³ From this point of view, the decision is to be welcomed, both as an act of deference toward the United Nations and as an effort to avoid contradictions between legal orders. Moreover, the judgment's references to the rule of law are a reminder that UN Sanctions Committees still fail to meet fair trial standards.⁴

At the same time, the decision is not without flaws. In justifying the lack of contradiction between the SC Resolution at stake and the ECHR, the Grand Chamber relies on a presumption of harmony between two legal orders (the UN Charter and the Convention) that is open to discussion.

In this *Insight*, these shortcomings will be carefully assessed with a view to arguing⁵ that the Grand Chamber has failed to identify the existence of a conflict between the relevant Resolution and the Convention. In this regard, I explain that the said presumption of harmony is not a reliable instrument of treaty interpretation. Moreover, I contend that the use made *in casu* of this methodology is unconvincing, since it does not appear to be supported by other elements of interpretation.

The analysis is structured in three parts. In the first, I will highlight the main passages of the judgment of the Grand Chamber. In the second, I will discuss the presumption of harmony between the Charter and the ECHR in the context of the case law of the Eu-

² See *inter alia* J.E. ÁLVAREZ, *Hegemonic International Law Revisited*, in *American Journal of International Law*, 2003, p. 876 *et seq.*; G. DE BÚRCA, *The European Courts and the Security Council: Three Replies*, in *European Journal of International Law*, 2009, p. 853 *et seq.*; A. GARRIDO-MUÑOZ, *Garantías judiciales y sanciones anti-terroristas del Consejo de Seguridad de Naciones Unidas. De la técnica jurídica a los valores*, Valencia: Tirant lo Blanch, 2013; L.M. HINOJOSA, *Bad Law for Good Reasons: the Contradictions of the Kadi Judgment*, in *International Organizations Law Review*, 2008, p. 339 *et seq.*

³ According to this provision, “[i]n 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”.

⁴ See in particular Human Rights Council, Report of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 26 September 2012, Un Doc. A/67/396, paras 16-35.

⁵ I will not assess here other relevant aspects of the judgment. This is the case, in particular, of the test of “arbitrariness” set by the Court in order to delimit the obligation to respect fair trial rights in the particular case (see *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], cit., para. 146). For more details on these and other aspects of the decision, see L. GASBARRI, *Al-Dulimi and Competing Concepts of International Organizations*, in *European Papers - European Forum, Insight of 22 December 2016*, www.europeanpapers.eu, p. 1 *et seq.*, and A. PETERS, *The New Arbitrariness and Competing Constitutionalisms: Remarks on ECtHR Grand Chamber in Al-Dulimi*, in *EJIL Talk!*, 30 June 2016, www.ejiltalk.org.

ropean Court of Human Rights dealing with the relations between the two legal orders. The final section concludes.

II. THE JUDGMENT OF THE GRAND CHAMBER

The application against Switzerland was brought by an Iraqi national and on behalf of Montana Management Inc., a company based in Panama. The applicants alleged that the respondent's denial of a right of appeal against the confiscation of their assets violated Art. 6 of the Convention. Switzerland justified its action on SC Resolution 1483 (2003),⁶ which in its view prevailed over the Convention by virtue of Art. 103 of the UN Charter.

SC Resolution 1483 (2003) was adopted after the beginning of the 2003 war in Iraq. It ordered all UN Member States to freeze "without delay" all financial assets belonging to the regime of Saddam Hussein. On 24 November 2003 the SC adopted Resolution 1518 (2003), which created a Sanctions Committee endowed with the task of listing the individuals and entities concerned by Resolution 1483 (2003).⁷ The applicants' names were put on the list on 12 May 2004.

The applicants appealed the confiscation decisions before Swiss Courts, claiming a violation of their rights to a fair trial and to an effective remedy. On 23 January 2008, the Swiss Federal Court dismissed the appeals. Evoking the primacy of the UN Charter, the Federal Court ruled that Resolution 1483 (2003) required Swiss authorities to set aside international human rights obligations. The Federal Court admitted, indeed, that the Resolution could be disregarded in case of conflict with *ius cogens* rules, from which the SC cannot derogate, but it pointed out that none of the rights invoked by the applicants had such a nature.⁸

The Chamber of the European Court of Human Rights followed a different approach. Citing the *Bosphorus* judgment,⁹ it recalled that Member States are not precluded from joining international organisations, provided that such organisation "protects fundamental rights in a manner which can be considered at least equivalent" to the ECHR. If such protection is granted, "the presumption will be that a state has not departed from the requirements of the Convention".¹⁰ Since this was not the case of the Iraq Sanctions Committee, the Chamber concluded that Switzerland had violated Art. 6, para. 1, ECHR.

⁶ Security Council, Resolution 1483 of 22 May 2003, UN Doc. S/RES/1483 (2003), para. 23.

⁷ Security Council, Resolution 1518 of 24 November 2003, UN Doc. S/RES/1518 (2003), paras 1-2.

⁸ The relevant paragraphs of the Federal Court's Judgment can be found in *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], cit., para. 29.

⁹ European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*. See below, par. III.2 and the references cited there.

¹⁰ *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], cit., para. 114.

On appeal, the Grand Chamber came to the same conclusion, albeit on the basis of a different reasoning. In its view, when the SC adopts measures for the maintenance of international peace and security, it must be presumed not to derogate from international human rights obligations unless this is explicitly provided in the relevant Resolution. While Resolution 1483 (2003) established an obligation to freeze “without delay” the assets of individuals named by a Sanctions Committee, “nothing” in the relevant Resolutions, “understood according to the ordinary meaning of the language used therein”, prevented Swiss Courts from protecting fair trial rights.¹¹ Since Switzerland enjoyed some flexibility in implementing Resolution 1483 (2003), it had violated Art. 6, para. 1, ECHR. This conclusion was reached by a majority of fifteen votes to two.¹²

III. THE PRESUMPTION OF HARMONY BETWEEN THE UN CHARTER AND THE ECHR: PRIMACY REVISITED

In this section, I explain why I consider that the Grand Chamber’s decision suffers a number of methodological and substantive flaws: in presuming that Resolution 1483 (2003) is consistent with international human rights obligations, the Grand Chamber fails to recognise the existence of a conflict of obligations that would have precluded the exercise of its jurisdiction. In order to understand this argument, I will first explain the nature and effects of Art. 103 (III.1). Next, I will sketch the approach of the European Court of Human Rights to the interplay between the Convention and the UN Charter (III.2). Finally, I will discuss the Grand Chamber’s interpretation of the relevant SC obligations, and more generally the abovementioned presumption of compliance (III.3).

III.1. ART. 103 OF THE UN CHARTER: BETWEEN HIERARCHY AND CONFLICT

Art. 103 of the UN Charter provides that “[i]n 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”.

This Article establishes the primacy of the UN Charter over any other “international agreement”. The rule is referred to in Art. 30, para. 1, of the Vienna Convention on the Law of Treaties (VCLT), a provision that regulates treaty conflict.¹³ It was discussed in

¹¹ *Ibidem*, para. 143.

¹² The following separate opinions were annexed to the judgment: Concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hagiye, Pejchal and Dedov, Concurring opinion of Judge Sicilianos, Concurring Opinion of Judge Keller, Concurring opinion of Judge Küris, Partly dissenting opinion of Judge Ziemele, Dissenting opinion of Judge Nussberger. Due to space reasons, I will focus only on the judgment.

¹³ According to this provision, “[s]ubject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive Treaties relating to the same subject-matter shall be de-

particular in relation to the *Kadi* saga of cases before the ECJ, in which the legality under EU law of SC sanctions against Al-Qaeda and the Taliban was at stake.¹⁴

Art. 103 is one of the reasons why some scholars argue that the UN Charter is constitutional in nature. In their view, the rule of primacy is a rule of hierarchy that places that instrument above the rest of international obligations.¹⁵ It overrides Treaties of a universal or regional nature and (possibly) customary rules, with the only exception of rules having the nature of *ius cogens*. Some authors even deny the possibility of a conflict between *ius cogens* and the UN Charter, since in their view any UN decision adopted in violation of that restrictive group of norms would simultaneously violate the purposes and principles of the UN Charter, and thus would be void *ab initio*.¹⁶ Last but not the least, many of those authors infer from the primacy of the UN Charter that international and regional courts and tribunals shall always give preference to UN obligations, regardless of the hierarchy of sources in the legal order in which they operate.¹⁷

An alternative approach, shared by the present author, is based on a characterisation of Art. 103 as a rule of conflict instead of a rule of hierarchy.¹⁸ According to this view, Art. 103 does not prescribe as such the conditions under which Charter-based obligations shall penetrate other international legal orders. Instead, it behoves each court or tribunal to determine such a question according to the “legal environment” of the organisation: the more autonomous that “environment”, the less relevant the primacy of the UN Charter in case of conflict between UN obligations and fundamental rules of that order.¹⁹ This is notably the case of the EU, as the ECJ concluded in its 2008 judgment in *Kadi and Al Barakaat* with regard to the protection of human rights as a fundamental principle of EU law.²⁰

terminated in accordance with the following paragraphs” (VCLT, *United Nations Treaty Collection*, 1155, I-18232).

¹⁴ See General Court, judgment of 25 September 2005, case T-315/01, *Kadi v. Council and Commission*; Court of Justice, judgment of 3 September 2008, case C-402/05, *Kadi and Al-Barakaat Foundation v. Council and Commission*; General Court, judgment of 30 September 2010, case T-85/09, *Kadi v. Commission*; Court of Justice, judgment of 18 July 2013, case C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v. Kadi*.

¹⁵ See for all B. FASSBENDER, *The United Nations Charter as the Constitution of the International Community*, New York: Oxford University Press, 2009.

¹⁶ P.M. DUPUY, *L'unité de l'ordre juridique international. Cours général de droit international public*, in CCHAIL, 2002, pp. 305-306.

¹⁷ See in particular L.M. HINOJOSA MARTÍNEZ, *Bad law*, cit., p. 344.

¹⁸ See for all, R. KOLB, *L'Article 103 de la Charte des Nations Unies*, in *Collected Courses of the Hague Academy of International Law*, 2013, p. 235 *et seq.*

¹⁹ See, among many other authors, A. GARRIDO-MUÑOZ, *Garantías judiciales y sanciones antiterroristas del Consejo de Seguridad de Naciones Unidas*, cit., p. 362 *et seq.*; K. LENAERTS, *Droit international et autonomie constitutionnelle de l'ordre juridique de l'Union*, in *Il Diritto dell'Unione europea*, 2010, p. 555 *et seq.*

²⁰ *Kadi and Al-Barakaat Foundation v. Council and Commission*, cit., paras 316-317.

The existence of different approaches to Art. 103 does not prejudice the conclusion that the primacy of the UN Charter is aimed at preserving the effectiveness of UN obligations. For that reason, Art. 103 has to be read in conjunction with Art. 25 of the UN Charter, which contains the good faith obligation according to which “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.²¹

III.2. THE EUROPEAN COURT OF HUMAN RIGHTS AND THE UN CHARTER

This explanation helps us understand the legal context of *Al-Dulimi* from the point of view of the UN Charter. But in order to fully understand the case, it is necessary to assess the primacy of the UN Charter from the perspective of the case law of the European Court of Human Rights.

In general, the Court has been receptive to international law. According to consolidated case law, “the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law”.²² More particularly with regard to State obligations arising from membership in third international organisations, the Court has affirmed that “[t]he Convention must be interpreted in such a manner as to allow states parties to comply with international obligations so as not to thwart the current trend towards extending and strengthening international cooperation”.²³

This does not mean that the Court cannot review State action carried out in the implementation of obligations arising from membership in international organisations. But the Court has conditioned such review to a presumption of equivalent protection of human rights by the relevant organisation. As famously put in *Bosphorus* when assessing Ireland’s compliance with EU law, if protection equivalent to the ECHR is offered, “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”.²⁴ It is only when the Court concludes in a particular case that the protection of Convention rights was “manifestly deficient”, that it will proceed to fully review State action.²⁵ This doctrine has been applied (with nuances) to various international organisations, the most notable example so far being the EU.²⁶

²¹ J.M. THOUVENIN, *Article 103*, in J.P. COT, A. PELLET, M. FORTEAU (eds), *La Charte des Nations Unies. Commentaire article par article*, Paris: Economica, 2005, p. 2142.

²² See for instance European Court of Human Rights, judgment of 21 November 2001, no. 35763/97, *Al-Adsani v. United Kingdom* [GC], para. 55.

²³ European Court of Human Rights, judgment of 18 February 1999, no. 26083/94, *Waite and Kennedy v. Germany* [GC], para. 72.

²⁴ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, cit., para. 156.

²⁵ *Ibid.*

²⁶ For more references, see A. GARRIDO-MUÑOZ, *Garantías judiciales y sanciones antiterroristas del Consejo de Seguridad de Naciones Unidas*, cit., p. 280 et seq.

Inasmuch as it is based on a comparative assessment of the level of human rights protection by other international organisations, the presumption of equivalence places the Convention on an equal footing with the law of other organisations. While this may be a sound solution in most cases, the “equivalent protection test” does not fit well with the UN as a consequence of the primacy of the Charter.²⁷ This explains why the Court’s case law relating to State action carried out in the implementation of SC Resolutions has followed an alternative approach. Two judgments stand out in this regard: *Al-Jedda* and *Nada*.

In *Al-Jedda*, the Grand Chamber discussed whether SC Resolution 1546 (2004)²⁸ justified the UK’s arrest without appeal of an individual for alleged terrorist activities in Iraq. In interpreting that Resolution, the Grand Chamber set out for the first time the presumption of harmony between SC Resolutions and the Convention recently recalled in *Al-Dulimi*. In the Grand Chamber’s view,

“[i]n the event of any ambiguity in the terms of a United Nations 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. In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend states to take particular measures which would conflict with their obligations under international human rights law”.²⁹

After a careful textual and contextual analysis of SC Resolution 1456, the Court concluded that the SC did not impose on the UK an obligation to arrest the applicant without a right of appeal. Thus, the UK was held responsible for a violation of Art. 5, para. 1, ECHR.

Nada dealt with the implementation by Switzerland of SC restrictive measures against Al-Qaeda and the Taliban. In its decision, the Grand Chamber recalled the presumption that SC Resolutions do not suspend human rights obligations. It pointed out that the relevant SC Resolution had established a clear obligation to restrict human rights obligations, as it expressly required UN Member States to prevent listed individuals from entering or transiting through their territory.³⁰ At the same time, the Grand Chamber evoked the special situation of the applicant, who had been prohibited from leaving an Italian enclave of approximately 1.6 sq. kilometres despite his medical needs. The Grand Chamber considered that the relevant SC Resolution did not specifically re-

²⁷ Concurring Opinion of Judge Sicilianos, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], cit., para. 7.

²⁸ Security Council, Resolution 1546 of 8 June 2004, UN Doc. S/RES/1546 (2004).

²⁹ European Court of Human Rights, judgment of 7 July 2011, no. 27021/08, *Al-Jedda v. United Kingdom* [GC], para. 102.

³⁰ European Court of Human Rights, judgment of 12 September 2012, no. 10593/08, *Nada v. Switzerland* [GC], para. 172. The relevant resolution is Security Council, Resolution 1390 of 28 January 2002, UN Doc. S/RES/1390 (2002).

quire such restrictive measures, a circumstance that enabled the Grand Chamber to assess the legality of Switzerland's conduct.³¹ As a result, the Grand Chamber concluded that Switzerland had violated Arts 8 and 13 ECHR.

Two main observations can be made on the basis of both decisions.

First, the Court assumes the primacy of the UN Charter over the ECHR. The ECHR is considered as being more "permeable" to international law than other legal orders such as EU law.³²

Second, in order to circumvent the rule on the primacy of the Charter, the Court tries to avoid the conflict with the Convention. For that purpose, the Court applies a "presumption of harmony" between SC Resolutions and international human rights law that is essentially different from the "presumption of equivalence" applied with regard to other international organisations. This is so in at least two ways: first, the "presumption of harmony" refers to the interpretation of SC Resolutions and not to the system of human rights protection of the organisation; second, the "presumption of harmony" is primarily based on the compatibility of SC Resolutions with "fundamental principles of human rights". The Convention is only considered indirectly in the equation.

III.3. THE PRESUMPTION OF HARMONY IN *AL-DULIMI*: BURYING THE HEAD IN THE SAND?

As indicated above, in *Al-Dulimi* the Grand Chamber applied the abovementioned "presumption of harmony" to SC Resolution 1483 (2003). It took note of the obligation established in paragraph 23 to "freeze without delay" the assets of the individuals and entities listed by the SC. Notwithstanding the apparent unconditional character of this obligation, the Court pointed out that, unlike the precedents of *Al-Jedda* and *Nada*, the rights invoked here by the applicants were procedural and not substantive in nature. Thus, according to the Grand Chamber, nothing in the relevant Resolutions "explicitly prevented the Swiss courts from reviewing, in terms of human rights protection, the measures taken at national level".³³

In assessing this finding, attention must be paid to the fact that the interpretation of SC Resolutions is a complex exercise that requires consideration of a number of factors.

³¹ *Nada v. Switzerland*, cit., para. 195.

³² See in particular *Al-Jedda v. United Kingdom*, cit., para. 102: "[b]efore it can consider whether Article 103 had any application in the present case, the Court must determine whether there was a conflict between the United Kingdom's obligations under United Nations Security Council Resolution 1546 and its obligations under Article 5 § 1 of the Convention". For a comparison between the ECHR and EU law, see Opinion of AG Maduro delivered on 16 January 2008, case C-402/05 P, *Kadi v. Council and Commission*, para. 37; A. GARRIDO-MUÑOZ, *Garantías judiciales y sanciones antiterroristas del Consejo de Seguridad de Naciones Unidas*, cit., p. 373 et seq.

³³ *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], cit., para. 143.

While the customary rules of treaty interpretation enshrined in Arts 31-33 VCLT are pertinent, the ICJ has further indicated in its *Kosovo* advisory opinion that:

“[s]ecurity Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process [...] and the final text of such resolutions represents the view of the Security Council as a body [...]. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of states affected by those given resolutions”.³⁴

It is difficult to identify these factors in the reasoning of the Grand Chamber. With the exception of a reference to the “ordinary meaning of the language” of the Resolution and a quotation of *Kadi* (in which the ECJ recalled that the UN Charter does prescribe a means of implementation of SC Resolutions), the Grand Chamber did not refer at all, for instance, to other SC Resolutions or to the reports of its Sanctions Committees.³⁵

In fact, both the text and the object and purpose of para. 23 of Resolution 1483 (2003) (read in light of Resolution 1518) seem precisely to lead to an opposite conclusion, namely that the SC has not left in the hands of UN Member States the power to review its listing decisions.³⁶ The rationale of the efforts made by the SC to improve fairness in the working methods of the ISIL/Al-Qaeda Sanctions Committee (previously Al-Qaeda/Taliban Sanctions Committee) points precisely in this direction. Such efforts suggest that the SC intended to retain the monopoly of delisting decisions. It is not by chance that Resolution 1904 (2009) (which created an Office of the Ombudsman to deal with delisting applications) affirmed that the sanctions “are preventative in nature and are not reliant upon criminal standards set out under national law”. The Resolution further stressed “the need for robust implementation of the measures”.³⁷

But it is not only the particular conclusion of the Court regarding Resolution 1483 (2003) that is not persuasive. The general presumption of harmony between SC Resolutions and international human rights obligations is also questionable in light of the nature of the powers of the SC and the rules of interpretation of its Resolutions.

When adopting measures under Chapter VII, the SC is entitled to depart from basic principles of the UN Charter concerning relations among UN Member States such as State sovereignty, the use of force and non-intervention in the internal affairs of States.

³⁴ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, advisory opinion of 22 July 2010, para. 442.

³⁵ *Kadi and Al-Barakaat Foundation v. Council and Commission*, cit., para. 299.

³⁶ See in this regard A. PETERS, *The New Arbitrariness and Competing Constitutionalisms*, cit.

³⁷ Security Council, Resolution 1904 of 17 December 2009, UN Doc. S/RES/1904 (2009), preamble, para. 10.

Such a departure is inherent in the broad powers that this organ enjoys for the purpose of maintaining international peace and security.³⁸ While the powers of the SC are not unfettered,³⁹ they are certainly exceptional and the interpretation of its Resolutions cannot be settled in terms of presumptions.

Instead, *each Resolution* has to be assessed in light of the interpretative elements outlined by the ICJ.⁴⁰ Systemic interpretation may be one of them, provided that its application does not result in *a contrario* reading of SC Resolutions that contradicts the main elements of treaty interpretation (text, context and object and purpose) which, as indicated above, are equally applicable to SC Resolutions. As the ICJ has affirmed in its two recent *Nicaragua v. Colombia* judgments with regard to Treaties,

“[a]n *a contrario* reading of a treaty provision — by which the fact that the provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded — [...] is only warranted [...] when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case”.⁴¹

For these reasons, the conclusion that Art. 103 of the UN Charter did not preclude review of Swiss confiscation orders is unconvincing. In my view, the respondent State did not have any power to review listing decisions made by SC Council. No margin of discretion having been left by Resolution 1483 (2003), the application should have been rejected.

IV. CONCLUSION

In *Al-Dulimi*, the Grand Chamber has sought to respect the primacy of the UN Charter over the ECHR by applying its judge-made presumption of compatibility between SC Resolutions with “fundamental principles of human rights”. In my view, the intentions of the Grand Chamber are laudable, but the reasoning is flawed for two reasons: because a conflict does exist between Resolution 1483 (2003) and the Convention and because SC Resolutions cannot be interpreted in accordance with general presumptions of com-

³⁸ See for all E. JIMÉNEZ DE ARÉCHAGA, *Derecho constitucional de las Naciones Unidas (comentario teórico-práctico de la Carta)*, Madrid: Escuela de Funcionarios Internacionales, 1958, pp. 42-43.

³⁹ ICTY, decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995, IT-94-1-AR72, *Prosecutor v. Tadić*, paras 23 *et seq.* and 28 *et seq.*

⁴⁰ See for instance J. KLABBERS, *Treaty Conflict and the European Union*, Cambridge: Cambridge University Press, 2009, p. 104 *et seq.*

⁴¹ International Court of Justice, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), judgment of 17 March 2016, para. 37; International Court of Justice, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (Nicaragua v. Colombia), judgment of 17 March 2016, para. 35.

pliance. Since the European Court of Human Rights does not consider the Convention to be an autonomous legal order (in my opinion, for good reasons), the UN Charter should have taken precedence in *Al-Dulimi*.⁴² Such a solution would have required UN Member States (particularly EU Member States) to choose between conflicting international obligations and/or national human rights standards. While imperfect, this solution is in my view a lesser evil, as the problem is more political than legal, and it rests with the Members of the SC to put an end to it.

⁴² For a contrary view, see the Concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], cit., paras 59-60.

