



INSIGHT

AL-DULIMI AND COMPETING CONCEPTS OF INTERNATIONAL ORGANIZATIONS

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ABSTRACT: This *Insight* focuses on the two judgments of the European Court of Human Rights in the case *Al-Dulimi and Montana Management Inc. v. Switzerland*. It discusses the different approaches adopted by the European Court to deal with the responsibility of Member States of international organizations. It contends that the Court based its reasoning on two different concepts of international organization, founded on their original or derived nature. After introducing the theme, section II deals with the attribution of conduct to Member States and international organizations. Section III analyses the merits of the two judgments, distinguishing between the Chamber (III.1) and the Grand Chamber (III.2). In conclusion, section IV proposes a reading of the two judgments considering that the legal systems developed by international organizations are neither purely original or purely derived from international law.

KEYWORDS: international organizations – international responsibility – European Court of Human Rights – equivalent protection – Member States – conflict of obligations.

I. INTRODUCTION

The way in which facts are presented in judgments is not neutral. From the outset, the *Al-Dulimi* judgments literally oscillate between two protagonists.¹ Indeed, the background to the case shifts between the United Nations and Switzerland until the point that is even difficult to identify the subject of some sentences.² Obviously, formalistical-

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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]; European Court of Human Rights, judgment of 26 November 2013, no. 5809/08, *Al-Dulimi and Montana Management Inc. v. Switzerland*.

² *Al-Dulimi* [GC], cit., and *Al-Dulimi*, cit.: para. 11 of both the judgments roots the dispute in UN Security Council resolutions; para. 12 concern Switzerland's ordinances; para. 13, Switzerland accession to the UN; para. 14, UN resolutions; para. 15, Switzerland's ordinances; para. 16, again the UN.

ly speaking there is only one respondent, but it should not be undervalued that the Court is “the master of the characterisation to be given in law to the facts of the case”.³

This *Insight* discusses the different technics adopted by the European Court to deal with international organizations. The facts of the case concern the sanction regime implemented by the UN Security Council against Iraq,⁴ but the legal issue at stake is rooted in the complex relation between the European Convention on Human Rights (ECHR) and international organizations at large. This *Insight* analyses the issue independently from the organization involved. Indeed, it contends that the UN, the EU, the NATO or any other international organization should be subjected to the same criteria. Whilst it is a common assumption that international organizations are treated differently in different regimes,⁵ it is more problematic if the same legal regime applies different standards. As it will be discussed, problems arise in terms of competing concepts of international organizations that affect the interaction between legal regimes.

The ECHR constitutes a principal example in which organizations are treated differently within the same legal regime. Indeed, as the *Al-Dulimi* judgments highlight, even the same organization is subjected to different treatments. Conflicting approaches are adopted in reason of conflicting concepts of international organizations. This *Insight* contends that beneath the different standards lie the purposes of considering international organizations as original or derivative entities. In order to judge upon the responsibility of Member States without expressly discussing the role of the organization for lack of jurisdiction, the Court is obliged to shift from one concept to the other.

On the one hand, organizations are considered entities derived from international law that do not develop a separate legal system. On the other hand, organizations are considered original entities that develop a legal system separated from international law.⁶ The first concept implies the transparent quality of the institutional veil, under which Member States are visible and subjected to reproach. The second concept implies the non-permeability of the institutional veil, under which Member States are not subjected to reproach.⁷

Looking at future perspective, this *Insight* concludes that every international organization is neither a purely original or purely derivative entity, and it analyses the consequences of this claim in terms of Member States responsibility.

³ *Al-Dulimi*, cit., para. 79.

⁴ A. GARRIDO-MUÑOZ, *License to Presume: The Compatibility between the Eu-ropean Convention of Human Rights and Security Council Resolutions in Al-Dulimi and Montana Management Inc v. Switzerland*, in *European Papers – European Forum, Insight* of 22 December 2016, www.europeanpapers.eu, p. 1 *et seq.*

⁵ G. GAJA, *Note introductive de l'ancien rapporteur spécial*, in *Revue Belge de Droit International*, 2013, p. 9 *et seq.*

⁶ On the original and derivative concepts, see P. CAHIER, *L'ordre juridique interne des organisations internationales*, in R.J. DUPUY (eds), *Manuel sur les organisations internationales*, Leiden: Brill Nijhoff, 1998.

⁷ On the concept of the transparency of the institutional veil see C. BRÖLMANN, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties*, Oxford: Hart, 2007.

II. ADMISSIBILITY *RATIONE PERSONAE*: ATTRIBUTION OF CONDUCT

In both the *Al-Dulimi* judgments, the European Court seems to have no more doubts about the admissibility of claims against the conduct of States taken in the implementation of acts issued by international organizations. Member States are responsible for their own conduct, which is not exclusively imputable to international organizations.

Copy-pasting the argumentation adopted in *Nada*,⁸ the Chamber distinguished the facts of the case from the one that characterized the inadmissibility of *Behrami and Saramati*,⁹ affirming that in that case UN resolutions required the State to act in its own name, implementing them at the national level. However, in *Al-Dulimi* Switzerland was left without decisions on how implement the resolutions. As pointed out by judge Sajó in his partly dissenting opinion, the case could reflect the *Behrami and Saramati* situation in which Member States were defined as quasi-organ of the organization. Indeed, the *Behrami and Saramati* approach excludes State responsibility considering that the relevant conduct is attributed exclusively to the organization. Member States act as quasi-organ and their autonomous international personality disappears behind the institutional veil of the organization.

A different approach was adopted in *Al-Jedda*, relying on the different circumstance of the authorization issued by an international organization.¹⁰ The Court considered that UN authorization does not transform the acts of soldiers within a multinational force in UN conduct. It should be recalled that the Court goes as far as stating that the UN had neither effective control nor ultimate authority or control on the facts of the case.

Different approaches on attribution of conduct to Member States imply different approaches on attribution of conduct to international organizations. The *Behrami and Saramati* approach would lead to consider Member States as UN organs, implying the adoption of the institutional criteria enshrined in Art. 6, para. 1, of the Articles on the Responsibility of International Organizations (ARIO).¹¹ The *Nada* approach would lead to consider Member States as independent entities, but their conduct could trigger UN responsibility in virtue of the factual criteria enshrined in Art. 7 ARIO.¹² The *Al-Jedda* approach would lead to consider Member States as independent entities, but Art. 7 ARIO

⁸ European Court of Human Rights, decision of 12 September 2012, no. 10593/08, *Nada v. Switzerland* [GC].

⁹ European Court of Human Rights, decision of 2 May 2007, nos 71412/01 and 78166/01, *Behrami v. France and Saramati v. France, Germany and Norway* [GC].

¹⁰ European Court of Human Rights, decision of 7 July 2011, no. 27021/08, *Al-Jedda v. the United Kingdom* [GC].

¹¹ Art. 6, para. 1, ARIO: "The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization".

¹² Art. 7 ARIO: "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct".

could not trigger UN responsibility in absence of effective control. In the last two cases, maybe other forms of indirect responsibility could apply.

From the perspective of the organization, whenever the State is not deemed responsible, the hypothetical criteria of attribution to the organization is based on the institutional link enshrined in Art. 6 ARIO. Vice versa, whenever the State is deemed responsible, the hypothetical criteria of attribution to the organization is based on the factual link enshrined in Art. 7 ARIO.¹³

The two standard are founded on two different concepts of international organizations, seen as original or derivative entities. Respondent's litigation strategy perfectly describes the rhetorical use of the two concepts. A paradigmatic case is offered by the United Kingdom in *Al-Jedda*, where, on the one hand, it demands the *Behrami and Saramati* criteria on the attribution of conduct, and, on the other hand, it demands the primacy of UN obligations over European Convention obligations in virtue of Art. 103 of the UN Charter.¹⁴ The first submission implies a concept of organization that developed a separate legal system; the second implies that obligations pertaining to two different regimes coexist in the same legal system, as derivation requires.

III. MERITS: COEXISTENCE OR CONFLICT OF OBLIGATIONS

The two judgments in *Al-Dulimi* differ on the merits in the adoption of two different approaches to find Switzerland responsible. The Chamber relied on the presumption of equivalent protection, while the Grand Chamber relied on the presumption of harmonious interpretation. The issue arises in the conflict between human rights standard and UN Security Council resolutions, and it is rooted in the interactions between legal regimes. The way in which international organizations are perceived is the cause of the different treatment.

On a textual level, the Chamber immediately deals with the core issue. It is headed: "Coexistence of Convention guarantees and obligations imposed on States by Security Council resolutions".¹⁵ Conversely, the Grand Chamber faced the issue only after ascertaining if there has been a limitation of the right and a legitimate aim. It considered that it falls under "the proportionality of the limitation in question", discussing first "the international normative context", and only after "the allegation of a conflict of obligations".¹⁶

The position of a legal reasoning in the literary structure of a judgment is relevant insofar it justifies the rational logic that construct it. Indeed, as a matter of logic, the

¹³ On the notion of factual and institutional criteria see F. MESSINEO, *Attribution of Conduct*, in A. NOLLKAEMPER, I. PLAKOKEFALOS (eds), *Principles of Shared Responsibility in International Law*, Cambridge: Cambridge University, 2014.

¹⁴ *Al-Jedda* [GC], cit., para. 60.

¹⁵ *Al-Dulimi*, cit., paras 111-122.

¹⁶ *Ibid.*, paras 134-155.

presumption of equivalent protection (if applied) could exclude the limitation of the right in question; while the harmonious interpretation can be used only after the ascertainment that the limitation actually took place.

III.1. THE CHAMBER

In *Al-Dulimi*, The Chamber considered that Switzerland merely implemented UN resolutions, and it is not responsible if the UN provides for a human rights protection equivalent to the one provided by the European Convention. The equivalent protection is one of the first approaches developed in order to deal with a human rights violation in the context of international organizations.¹⁷ It was adopted in order to exclude Member States responsibility when the conduct is taken in a legal regime that guarantees a human rights protection equivalent to the one of the European Convention. The *Bosphorus* presumption has been used as a means to reveal the role of the organization when the Member State does no more than implementing legal obligations flowing from its membership.¹⁸

On the one hand, it is based on the concept of international organization implied in the *Behrami and Saramati* presumption. When the Member State acts as quasi-organ, its conduct disappears behind the institutional veil. On the other hand, it is based on the concept of international organization implied in the *Al-Jedda/Nada* presumption. If the Member State does not act as quasi-organ, or if the organization does not provide for sufficient guarantees, the presumption is rebutted and the State can be deemed responsible. When the presumption is applied the Court recognizes the separate nature of the legal system in which the State acted; when the presumption is rebutted the Court recognizes the transparency of the institutional veil of the organization in which the State acted.

The Chamber contended that the United Nations does not provide for a mechanism of protection equivalent to the one of the Convention and it rebutted the presumption. Furthermore, it considered that the applicant suffered a limitation of its right, justified in the aim but not proportional.

This stage of the decision is subjected to criticism. After rebutting the presumption, the Court avoided to discuss the conflict of obligations. It created an erroneous link between non-equivalent protection and violation of the obligations without considering the role of Art. 103 of the UN Charter. If the protection is indeed equivalent, the Member State is not in front of the dilemma about which obligation to respect. However, if the protection guaranteed by the organization is not equivalent, a conflict of obligations arises

¹⁷ European Commission of Human Rights, decision of 9 February 1990, n. 13258/87, *M. and Co v. Germany*.

¹⁸ European Court of Human Rights, decision of 13 September 2001, n. 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*.

and the Member State is left with the choice of breaching its obligations with the European Convention or with the organization. Art. 103 of the UN Charter plays its role here.

The Chamber applied a false syllogism: if the protection is equivalent, the Member State is not responsible; if the protection is not equivalent, the Member States is responsible. In doing so it confuses the two concepts of international organizations. First, it implied that the UN does not create a separate legal system and that the conduct of Member States is not covered by its institutional veil, after, it implied that the UN has a separate legal system and Art. 103 of the UN Charter does not play a role in relation with the ECHR.

III.2. THE GRAND CHAMBER

In *Al-Dulimi*, whilst the Chamber does not discuss Art. 103 of the UN Charter, the main concern of the Grand Chamber is avoiding a conflict between UN and ECHR obligations. For doing so, it first avoided any mention to the presumption of equivalent protection and it went directly to analyse the compatibility of State conduct in comparison with human rights standard. It first recognized that the applicant suffered major limitations to its right, justified by a legitimate aim. The Grand Chamber decided to address the conflict of obligations under the section devoted to proportionality. Indeed, it is not clear why Art. 103 of the UN Charter should play a role at this level of the legal reasoning. The conflict of obligations is related with the interaction between legal regimes and it seems better situated after the recognition that the conduct violated the Convention, but it could be justified by the prevalence of the UN Security Council Resolution.

In para. 135 of *Al-Dulimi* judgment, the Grand Chamber recalls the role of Art. 103 of the UN Charter in international law, and excludes the *jus cogens* nature of the right at stake. Thus, the conflict seems inevitable. If the conduct attributed to the Member State is in violation of an obligation pertaining to the legal system in which the adjudication takes place, this does not mean that the same conduct will be illicit in any regime, under which it may even be compulsory.

In *Al-Jedda*, the Court resolved the issue considering that the resolution authorized the Member State to take measure to contribute to the maintenance of security and stability in Iraq, but it did not authorize to violate human rights obligations.

In *Nada*, the Court considered the language of the resolution clear enough to impose a conduct capable of breaching human rights. However, the resolution did not impose a particular model for its implementation, leaving a certain latitude to the Member State.

In *Al-Dulimi*, the power of legal interpretation plays again its major effect. The Grand Chamber first recalled the need for harmonious interpretation; than recalled that it is not its task to pass judgment on the legality of UN resolutions, issued to achieve the UN purposes to promote the respect for human rights; consequently, it applied the *Al-Jedda* presumption to the present case.

The Grand Chamber did not apply the *Nada* exception even if Switzerland did not have latitude in implementing the resolution, stating that the Court must always presume the compatibility with the ECHR in absence of a clear language imposing the human rights violation. The difference with *Nada* is in term of “implicit” or “explicit” language. In *Nada*, the resolution was “capable of breaching human rights”;¹⁹ in *Al-Dulimi*, the resolution must contain “clear or explicit wording”.²⁰

In sum, the Grand Chamber considered that the resolution “cannot be understood as precluding any judicial scrutiny of the measure taken to implement it”.²¹ From this conclusion, the Court deduced two fundamental findings: 1. a real conflict of obligations capable of engaging Art. 103 of the UN Charter did not occur; 2. the question whether the equivalent protection test should be applied was nugatory.

Both findings are subjected to criticism. Concerning the conflict of obligations, the Grand Chamber inevitably ruled on the conflict, concealing as interpretation the prevalence of human rights obligations. Concerning the equivalent protection, the Grand Chamber inevitably applied and rebutted the presumption.

Again, the Court founded its reasoning on the two competing concepts of international organizations. The application of the *Bosphorous* presumption is founded on a concept of international organization as an original entity, while the harmonic interpretation is founded on a concept of international organization as an entity derived from international law.

To pretend that ECHR obligations and UN obligations can be harmonised by interpretation means that they both derive from the same legal system. It implies that the ECHR legal regime and the UN legal regime are part of the same legal system, which is international law in a broad sense. In *Al-Dulimi*, the Grand Chamber founded the first part of its reasoning on this concept of international organization, in order to avoid ruling on the primacy of UN obligations.²²

Conversely, to contend that the UN mechanism of human rights protection is not equivalent to the ECHR mechanism means that their obligations are not in the same legal system. It implies that the ECHR legal regime and the UN legal regime are not part of the same legal system but they constitute separate legal systems. In *Al-Dulimi*, the Grand Chamber founded the second part of its reasoning on this concept of international organizations,²³ implicitly applying the equivalent protection test as revealed in the concurring opinion of Judge Pinto de Albuquerque.²⁴

¹⁹ *Nada* [GC], cit., para. 172.

²⁰ *Al Dulimi* [GC], cit., para. 140.

²¹ *Ibid.*, para. 148.

²² *Ibid.*, paras 137- 141.

²³ *Ibid.*, paras 142-155.

²⁴ Concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov, *Al Dulimi* [GC], cit., para. 54.

IV. FUTURE PERSPECTIVES

In sum, the Chamber first applied the presumption of equivalent protection and later the absence of conflict. Vice versa, the Grand Chamber first applied the absence of conflict and later the presumption of equivalent protection. Their approaches do not differ on the conclusions, and reveal that the fundamental variable is the nature of international organizations.

A way out to the dilemma is through the recognition that international organizations are neither purely original or purely derivative entities.²⁵ They constitute separate legal systems deriving from international law.²⁶ However, in terms of international responsibility, this means to judge upon the responsibility of both subjects. Whenever the conduct of a State is taken in the context of an international organization, both entities have to be considered in reason of their participation in the wrongful act. Conversely, the European Court deals with international organizations only with the purpose to find different ways to avoid ruling on their responsibility.

At the level of admissibility, the facts of the case should define whether the role of the organization is identified in terms of an institutional link (Art. 6 ARIIO) or a factual link (Art. 7 ARIIO or other provisions on factual basis). In both cases the role of Member States should not be undervalued and it could arise in terms of direct or derived responsibility. The extent of latitude in implementing the act of the organization should play a role at this stage of the reasoning. Indeed, this factual variable is capable of distinguishing between institutional or factual criteria of attribution. Again, this is not far from what the ECHR is doing already with the purpose to avoid ruling on the organization.

On the merits, the presumption of equivalent protection should be used in order to define the role of the organization in the wrongful conduct. If the presumption is applied, there will be no conflict of obligations between the ECHR and the organizations' regimes. Hypothetically, the organization did whatever it could to avoid the violation. This could still lead to Member State responsibility, for example if the State wrongfully implements the resolution. If the presumption is rebutted, there will be a conflict of obligations.

Conflicts of obligations do not change if the organization in question is the European Union, the United Nations or the NATO. Obviously, every organization tends to claim primacy for their own norms. Art. 103 of the UN Charter is a rule of coordination. Similar rules are enshrined in others fundamental treaty of international organizations, as Art. 351 TFUE. The latter is a rule of the organization that regulates only one possible form of conflict, granting priority to treaties concluded by Member States prior to the

²⁵ L. GASBARRI, *The Dual Legality of the Rules of International Organizations*, in *International Organizations Law Review* (forthcoming).

²⁶ With the word of the Court of Justice, judgment of 5 February 1963, case 26/62, *van Gend & Loos v Nederlandse Administratie der Belastingen*: "the Community constitutes a new legal order of international law".

entry into force of the EC treaties, or prior to the date of accession. However, in its jurisprudential application, Art. 351 TFEU was applied extensively claiming that it protects only the rights of third parties, while the rights of Member States under such treaties have to be considered substantially renounced.²⁷

It is not a question of constitutionalization or competing constitutionalisms between fundamental instruments of international organizations.²⁸ The ECHR, or the EU, is not hierarchically superior to the UN if it develops an original and constitutional system. In their legal system, organizations are autonomous in identifying the rules that govern their relation with the law of different regimes. Considering organizations as purely original entities, Member States will be obliged to follow a rule in one regime and responsible for the violation of another rule in a different regime. However, every organization derives from international law and if UN resolutions prevail over ECHR obligations is in reason of a norm of international law that says so.

If this is the case, the European Court should recognize the UN primacy in the existence of a conflict between human rights standard and UN Security Council resolutions. In ascertaining the conflict, a major role could be played by the *Al-Jedda/Al-Dulimi* approach. The use of clear or explicit wording in UN resolutions allowing a human rights violation could trigger or not the primacy of UN obligations. If the resolution expressly derogates from human rights, the European Court could not blame Member States, but the responsibility of the UN would be – at least *de facto* – engaged.

²⁷ J. KLABBERS, *Treaty Conflicts and the European Union*, Cambridge: CUP, 2009.

²⁸ A. PETERS, *The New Arbitrariness and Competing Constitutionalisms: Remarks on ECtHR Grand Chamber Al-Dulimi*, in *EJIL Talk!*, 30 June 2013, www.ejiltalk.org.

