Third, if Article 16 does apply here, the knowledge threshold required by the Court for engaging Italy's responsibility is much lower than the one actually required by Article 16. This provision requires the complicit state to have had knowledge of the circumstances (or even to have shared the intentions of the aided or assisted state),[24] but the Court satisfied itself with a standard of constructed knowledge. According to this standard, responsibility arose from Italy's knowledge that an extraordinary rendition, in which the risk of violating Article 5 is inherent, was taking place.

The Court's somewhat paradoxical approach to issues of responsibility deserves further reflection and should not be cursorily dismissed because of its internal inconsistency and its divergence from the conceptual constraints of the ILC Articles. One may hope that in the next set of judgments on extraordinary renditions the Court will clarify its views on attribution as well as on the right to the truth.

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UN Charter—authority of Security Council under Chapter VII—imposition of sanctions— interpretation of Security Council resolutions—right to fair and public hearing—conflicting treaty obligations

AL-DULIMI v. SWITZERLAND. Application No. 5809/08. *At* http://hudoc.echr.coe.int. European Court of Human Rights, June 21, 2016.

On June 21, 2016, the Grand Chamber of the European Court of Human Rights (Court) determined that the Swiss courts had not provided a sufficient opportunity for individuals affected by the United Nations Iraqi sanctions program to challenge the imposition of those sanctions on them and their assets.[1] In consequence, the Court concluded, the Swiss courts had violated the rights of those individuals to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law," as guaranteed by Article 6(1) of the European Convention on Human Rights (Convention).[2] This judgment builds on the Court's previous rulings regarding the relationship between the obligations imposed by the Convention and those required by the UN enforcement action.[3]

Specifically, the case concerned the impact of UN Security Council Resolution 1483 (2003) on the financial assets of Khalaf M. Al-Dulimi, an Iraqi citizen living in Jordan who had served

[24] ILC Articles, *supra* note 14, Art. 16(a) & Art. 16 cmt. (5).

[1] Al-Dulimi and Montana Management Inc. v. Switzerland, App. No. 5809/08 (Eur. Ct. H.R. June 21, 2016). Judgments of the Court cited herein are available at its website, http://www.hudoc.echr.coe.int.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 221. The case had been referred to the Grand Chamber following the judgment of the Second Chamber, which also found a violation of Article 6. Al-Dulimi v. Switzerland, App. No. 5809/08 (Eur. Ct. H.R. Nov. 26, 2013) [hereinafter *Al-Dulimi I*].

[3] Al-Jedda v. United Kingdom, 2011-IV Eur. Ct. H.R. 305, 50 ILM 950 (2011) (reported by Miša Zgonec-Rožej at 106 AJIL 830 (2012)); Nada v. Switzerland, 2012-V Eur. Ct. H.R. 115. The Court also referred to the European Court of Justice's decisions in Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 ECR I-6351 [hereinafter *Kadi I*] (reported by Miša Zgonec-Rožej at 103 AJIL 305 (2009)); and Joined Cases C-584/10 P, C-59310 P, & C-595/10 P, Commission v. Kadi (Eur. Ct. Justice July 18, 2013) (reported by Clemens A. Feinäugle at 107 AJIL 878 (2013)).

as head of finance for the Iraqi secret services under the regime of Saddam Hussein, and on the assets of a company registered in Panama that Al-Dulimi managed.

Following Iraq's invasion of Kuwait in 1990, the UN Security Council imposed a general embargo against Iraq and, in 2003, required member states to freeze certain funds and other assets belonging to Iraq or its senior officials and to transfer them to the Development Fund for Iraq.[4] A committee of the UN Security Council was charged with listing specific individuals and entities whose assets were covered by the freeze.[5] On May 18, 2004, the Swiss Federal Council adopted an ordinance on the confiscation of the frozen Iraqi assets and economic resources and their transfer to the Development Fund for Iraq. That ordinance applied to assets subject to Swiss jurisdiction belonging to Al-Dulimi and the Panamanian company he managed. He applied to the UN sanctions committee to have his name removed from the sanctions list, but all his requests were ultimately denied by 2009.

In 2006, the applicants challenged, before the Swiss courts, the confiscation decision and the procedure leading to the addition of their names to the lists provided for by Resolution 1483 and annexed to the Iraq ordinance, claiming that these had breached the basic procedural safeguards enshrined in Article 14 of the 1966 International Covenant on Civil and Political Rights,[6] and in Articles 6 and 13 of the European Convention. Failing to get adequate remedies from Swiss courts, they submitted an application in 2008 to the European Court of Human Rights, alleging that Resolution 1483 required the Swiss courts to restrict or deny the applicants' rights under Article 6(1). Pending the Court's decision, the Swiss authorities stayed the execution of confiscation decisions.

The Swiss government contended that the freezing and confiscation of assets were "an immediate consequence of the addition of the applicants' names to the list drawn up pursuant to the Resolution in question, without Switzerland having the slightest leeway in that connection" (para. 87). It asserted that human rights obligations could not offset the binding force of Security Council resolutions, which arguably enjoyed primacy pursuant to Article 103 of the UN Charter. The governments of the United Kingdom and France, acting as interveners in the case, supported this reasoning premised on normative hierarchy (paras. 108, 118–25).

For his part, Al-Dulimi denied that the obligations incumbent on the Swiss government were in conflict. In any event, in light of the principles and purposes of the Charter, UN sanctions had to be implemented compatibly with fundamental human rights and the United Nations could not lawfully order states to infringe human rights (paras. 102–03).

In response to these arguments, and after an extensive review of the relevant legal provisions and principles, the Court stressed that Article 6 of the Convention mandates that "all litigants should have an effective judicial remedy enabling them to assert their civil rights" (para. 126). At the same time, it acknowledged that this "right of access to a court . . . is not absolute, but may be subject to limitations [which] are permitted by implication since the right of access by its very nature calls for regulation by the State" (para. 129). It accepted that the Swiss ordinance

[4] SC Res. 1483, para. 23 (May 22, 2003) (requiring UN member states to "freeze without delay those funds or other financial assets or economic resources and, unless these funds or other financial assets or economic resources are themselves the subject of a prior judicial, administrative, or arbitral lien or judgement, immediately [to] cause their transfer to the Development Fund for Iraq").

[5] SC Res. 1518 (Nov. 24, 2003).

[6] International Covenant on Civil and Political Rights, Art. 14, S. EXEC. DOC. NO. 95-E (1978), 999 UNTS 171.

had been adopted for a legitimate purpose and granted that Article 103 of the UN Charter asserts "the primacy, in the event of conflict, of the obligations deriving from the Charter over any other obligation arising from an international agreement" (para. 135). It also emphasized that "it is not [the Court's] role to pass judgment on the legality of the acts of the UN Security Council" (para. 139). Nonetheless, it formulated its approach in the following way:

> [W]here a State relies on the need to apply a Security Council resolution in order to justify a limitation on the rights guaranteed by the Convention, it is necessary for the Court to examine the wording and scope of the text of the resolution in order to ensure, effectively and coherently, that it is consonant with the Convention. In that connection the Court must also take into account the purposes for which the United Nations was created. . . . Article 1 of the Charter provides in its third paragraph that the United Nations was created "[t]o achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms . . .". (Para. 139)[7]

The Court therefore concluded that the Security Council must be presumed not to intend to impose obligations on member states that breach fundamental human rights, and "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" (para. 140).

Further endorsing the textual method of interpretation of resolutions, the Court found nothing in the relevant Security Council resolutions, from the perspective of human rights protection, that explicitly prevented the Swiss courts from reviewing the measures taken to implement those resolutions at the national level (para. 143). Consequently, the Security Council resolutions "must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided" (para. 146). In this instance, the applicants should "have been afforded at least a genuine opportunity to submit appropriate evidence to a court . . . to seek to show that their inclusion on the impugned lists had been arbitrary" (para. 151).

The Court observed that "[t]he fact that it has remained totally impossible for [the applicants] to challenge the confiscation measure for many years is hardly conceivable in a democratic society" (para. 152). As a result, it ruled that a violation of Article 6 had occurred. But damages were not awarded, as pecuniary damage was merely hypothetical, and the applicants had not requested any compensation or reimbursement (para. 159).

The decision regarding Article 6(1) was not unanimous. Judge Ziemele dissented in part, disagreeing with the Court's analysis of the relevant proceedings before the Swiss courts and contending that it raised significant questions about "what is expected under Article 6 from the States [parties to the European Convention] as far as their domestic proceedings implementing UN Security Council sanctions are concerned" (Ziemele, J., sep. op., para. 14). Judge Nußberger disagreed more fundamentally with the Court's conclusions, contending that no violation of Article 6 had in fact occurred. Switzerland was confronted with treaty obligations that were not simply conflicting but in fact "mutually exclusive." In addressing the issues, it had "applied the *de lege lata* existing conflict [resolution] mechanism" prescribed by the UN Charter and the Vienna Convention on the Law of Treaties[8] and given priority to its obligations

[7] Citation omitted.

[8] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331.

under the Charter (Nußberger, J., sep. op., para. E(3)). In addition, separate concurring opinions were filed by seven of the seventeen members of the Grand Chamber.

* * * *

The Court was entirely correct to reject the contention by the respondent and intervening governments that the efficiency of the policies upheld by the UN Security Council must be given precedence over the fundamental rights of individuals. Because Security Council resolutions reflect the Council's collective will, they can command only such effect as follows from their plain and ordinary meaning. As agreements between the Security Council's member states, resolutions of this body should be interpreted in the same way as treaties, pursuant to the interpretative methods provided for under Articles 31 and 32 of the 1969 Vienna Convention.[9] Paragraph 140 of the judgment subscribes to such a priority of textual interpretation, a method that fully applies to treaty interpretation as well.

In consequence, Judge Nußberger's point that Resolution 1483 "demands that these measures be taken 'immediately' and 'without delay' " and that "this wording does not leave any discretion or choice of interpretation for implementation" (Nußberger, J., sep. op., pt. A) does not reflect the resolution's ordinary meaning. To say that a demand must be implemented immediately and without delay is not the same as removing it from judicial control, and many systems of administrative law are familiar with the distinction.

Apart from the use of the textual method of interpretation focusing on the plain and ordinary meaning of words, a major interpretative factor of Security Council resolutions emphasizes the relevance of the purposes and principles of the United Nations, that is, the object and purposes of the UN Charter, which require the Security Council to act in compliance with fundamental human rights. These are not purposes that the Security Council pursues but purposes of the Charter that serve as limitations on the Council's authority. In this sense, *Al-Dulimi* follows a path similar to the one pursued in *Al-Jedda v. United Kingdom*, where the obligation to detain certain individuals was not identified as part of the Security Council's intention and the purposes of the United Nations Charter were accorded relevance in terms of both the interpretation of resolutions by the Security Council and the determination of the limits of its powers.[10]

It is rather curious, however, that the Grand Chamber still professes its allegiance to the doctrine of "harmonious" interpretation, which it describes in the following terms:

> [W]hen creating new international obligations, States are assumed not to derogate from their previous obligations. Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law. (Para. 138)

[9] *Id.*, Arts. 31, 32. For a fuller discussion of the interpretation of Security Council resolutions, see ALEXANDER ORAKHELASHVILI, COLLECTIVE SECURITY, ch. 2 (2011); Alexander Orakhelashvili, *UN Security Council Resolutions Before UK Courts*, 2015 MAX PLANCK Y.B. UN L. 39; Alexander Orakhelashvili, Case Report: R (On the Application of Al-Jedda) (FC) v. Secretary of State for Defense, 102 AJIL 337 (2008).

[10] *Al-Jedda*, *supra* note 3, para. 102.

The initial problem with this reasoning is that case law or academic opinion can at most be "subsidiary means" for determining the rules of law under the regular sources of international law (namely, Article 38(1)(d) of the Statute of the International Court of Justice), but they cannot constitute sources of international law that could independently generate the rights and obligations of states. Still more important, as the Court had clarified, no conflicting prescriptions arose under Resolution 1483 and the European Convention, so that exclusion of the available national judicial mechanisms was not among the acceptable or plausible outcomes that interpretation of the resolution could sustain. Accordingly, the Court's task did not really involve avoidance of "opposition between them."

The Court's statement that "[t]wo diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law" hardly makes sense, because both of those instruments producing "two diverging commitments" are already part of existing law. On those terms, moreover, the Court's reasoning does not accord with the view of the International Court of Justice that "[t]here can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another."[11] If the tasks of interpretation are properly undertaken, the two instruments in question could never be "apparently contradictory," as the European Court put it. They could be either mutually compatible or mutually contradictory. The interpreter cannot legitimately pretend that the Security Council's will is something different from what it expressed. And if the particular act is lawful under a Security Council resolution yet unlawful under the Convention, an outcome upholding the individual's rights under the latter would have involved trumping the Security Council's will, not the interpretation of the Council's decisions.

This result could legitimately be arrived at only through the analysis of the Council's powers under the UN Charter. If the above *Al-Jedda* approach is used, Article 103 will make a Security Council resolution supersede another treaty only if it imposes an obligation on the state to conduct itself contrary to the obligations under that other treaty. For human rights treaties, this model is not feasible because, as the Court confirmed in *Al-Jedda*, the observance of fundamental human rights is among the purposes of the UN Charter anyhow, and thus imposes limits on the Council's authority and a precondition for the bindingness of Council decisions under Charter Article 25.

In the final analysis, a court considering which of the ostensibly acceptable interpretations of "diverging commitments" of Resolution 1483 to follow and how to harmonize its content and effect with the Convention would not be engaging in interpretation at all. Rather, it would be deciding to enforce one set of binding legal commitments at the expense of another set. It all boils down to whether a normative conflict exists between legal instruments. Harmonization is a task premised on the antecedent divergence of things that need to be harmonized. Since in this case no normative conflict was actually involved, the Court must have understood that its allusion to harmonization served no practical purpose in relation to the underlying principles or outcomes reached.

[11] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), para. 474 (Int'l Ct. Justice Feb. 3, 2015).

One tool the European Court has repeatedly used to elaborate on standards protecting individuals within the framework of international organizations is the doctrine of "equivalent protection." That doctrine is premised on the identification of an antecedent normative conflict between the Convention and other rules of international law.[12] As the Court emphasized (para. 149), simply owing to the resolution's text and wording, the Security Council has not adopted any decision that would trigger a normative conflict between Resolution 1483 and the Convention. Had the resolution's wording endorsed such an outcome, the Court would have had to resolve the underlying normative conflict. Unlike the Court of Justice of the European Union in *Kadi v. Council*,[13] however, it would have had to do so not in the light of any discrete European fundamental rights doctrine, but in terms of the direct conflict between the UN Charter and the Convention.

Notwithstanding its initial distancing from the "equivalent protection" thesis, the Grand Chamber observed that "[a]ccess to these procedures [provided for by the Security Council, such as a focal point to receive applications for removal from the sanctions list] could not therefore replace appropriate judicial scrutiny at the level of the respondent State or even partly compensate for the lack of such scrutiny" (para. 153).

There is no significant difference between the reasoning of the Second Chamber in its earlier decision in this case[14] and the approach adopted by the Grand Chamber to the application of the European Convention to the enforcement measures adopted by the Security Council. The equivalent-protection thesis focused upon by the Second Chamber enables the assessment of the impact of enforcement measures on the individual's position, even if that impact materializes through a normative conflict between the Security Council resolution and the Convention. This way, the equivalent-protection thesis could justify the Court's denial of incompatibility between the legal effect of the pertinent Security Council resolutions and the Convention.

Nevertheless, the Second Chamber did not expressly state that there was such a normative conflict between the two instruments (one that would arise out of the Council's failure to extend the adequate judicial or quasi-judicial safeguards to the affected individuals). Instead, it attributed the adverse impact on the individuals' right entirely to the conduct of the Swiss government; namely, the inability of Swiss courts, as required under Convention Articles 1 and 6, to provide for a fair hearing[15] to everyone within Switzerland's jurisdiction, as opposed to the Security Council's intention to deny judicial remedies to affected individuals. Certainly, there was some lack of equivalence between the protection level under Article 6 of the Convention and the one established by the Security Council and available within the UN system. But the Security Council could not be seen to have—implicitly or otherwise—displaced the former by the latter, or to have replaced the full national jurisdiction of a Convention state party by the partial—"nonequivalent," as understood under the Convention—international one (the creation of the focal point for applications regarding delisting) to be designated as exclusive of any other relevant jurisdiction.

[12] *See* Alexander Orakhelashvili, *Responsibility and Immunities: Similarities and Differences Between International Organizations and States*, 11 INT'L ORG. L. REV. 114 (2014).

[13] *Kadi I, supra* note 3.

[14] *Al-Dulimi I*, *supra* note 2.

[15] *Id.*, para. 126.

The lack of conflict between the Convention and the resolution also explains why the Court's scrutiny was limited to arbitrariness. Resolution 1483 did not specify that the Convention must be disapplied, nor did the Convention's provisions involved in the case suggest that the relevant listings should not be implemented. All the Court could address was whether the Swiss government had complied with Resolution 1483 arbitrarily in relation to the applicants.

The emphasis on arbitrariness did not introduce any new concept or threshold of review but is a simple rationalization of the underlying normative context. As the International Court of Justice emphasized in its *Elettronica Sicula* judgment, arbitrariness involves "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety,"[16] and thus directly draws on the subject matter of Article 6. In *Al-Dulimi*, arbitrariness became relevant because there was no other cause of action apart from the violation of Article 6, and judicial review and access to courts under that provision were not excluded (para. 146).

As the Security Council resolution did not displace the effect of Article 6, the relevance of that article to sanctions was as a mechanism for ensuring that the applicants had not been subjected to them without the proper hearing and evidence. The words "without delay" in Resolution 1483 referred only to the temporal element, not to absolute efficiency to be secured through arbitrary listing. Surely, the Security Council would also have wanted the sanctions to apply only to persons genuinely falling within their remit. The hearing and evidence at the listing stage, as required by Article 6, serve precisely that purpose.

A further questionable aspect of the judgment concerns the Court's claim that the right to access to a court is not *jus cogens* (para. 136). The Court's point is not clear, especially as a normative conflict in which that right could be engaged by the Security Council resolution was lacking, and the principal relevance of *jus cogens* arises when such normative conflicts are identified. Moreover, the Court did not support its assertion about the nonperemptory nature of the right of access to a court with research or evidence, and it seems contrary to the approach adopted by the UN Human Rights Committee in its General Comment No. 29.[17] Therefore, this assertion matters little as regards either the outcome of the case at hand or the further development of the doctrine of *jus cogens*.

The principal lesson from the Grand Chamber's judgment is that the relationship between the UN Charter and Security Council resolutions, on the one hand, and any other source of international law, on the other hand, is governed not by broad policy considerations but by principles of positive international law. On this front, the principal outcome of *Al-Dulimi* is the defeat of the respondent's and intervening governments' litigation strategy to have the Article 6 rights superseded by anything less than stipulated by the Security Council expressly, and then in full compliance with the letter of the Charter, as well as its object and purpose.

The emphasis on the textual method of interpretation and the ensuing strict distinction between the situations focusing on interpretation and those focusing on normative conflict are inevitably required if we are ever to have a clear picture as to who expresses a particular intention or adopts a particular decision, and whatever consequences and responsibilities flow from those

[16] Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), 1989 ICJ REP. 15, 76, para. 128 (July 20).

[17] Hum. Rts. Comm., General Comment No. 29, States of Emergency (Art. 4), para. 11, UN Doc. CCPR/C /21/Rev.1/Add.11 (Aug. 31, 2001).

decisions. In line with this approach, it is high time to stop entertaining the myth of harmonization as an interpretative factor.

In broader terms, the *Al-Dulimi* judgment confirms that the era in which the ideology of judicial deference to international political authority still maintained some currency has definitely ended. It is the law, not the political utility calculus, that both provides and delimits the authority of the Security Council and determines the content and effect of its resolutions. The Security Council is not above the law; but should it get carried away by the perception that it is above the law, greater certainty as to the legal consequences is developing.

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WHO Framework Convention on Tobacco Control—bilateral investment treaties—public health—trademark rights—expropriation—regulatory measures—fair and equitable treatment—denial of justice

PHILIP MORRIS BRANDS SÀRL v. ORIENTAL REPUBLIC OF URUGUAY. ICSID Case No. ARB/10/7. *At* http://www.italaw.com/cases/460.
International Centre for Settlement of Investment Disputes, July 8, 2016.

On July 8, 2016, an arbitral tribunal (Tribunal) constituted under the Convention and Rules of the International Centre for Settlement of Investment Disputes (ICSID)[1] handed down its much-anticipated award in *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*.[2] The arbitrators rejected the claimants' assertions that certain tobacco control measures implemented by the government of Uruguay had interfered sufficiently with their property rights to constitute an expropriation or denial of justice. This award represents a significant victory for regulators in the ongoing battle between "Big Tobacco" and governments seeking to implement increasingly stringent public health measures in fulfillment of obligations under the Framework Convention on Tobacco Control (FCTC) of the World Health Organization (WHO).[3]

The dispute arose when Uruguay implemented the "single presentation requirement" (SPR) and the "80/80 regulation" in 2008 and 2009, respectively. The SPR prohibited sales in Uruguay of more than one variant of cigarette per brand. Previously, Abal had sold multiple varieties of cigarettes under various brand names (such as Marlboro Red and Marlboro Gold), but, after adoption of the SPR, it could sell only one brand variant and was therefore forced to discontinue seven of its thirteen variants. The 80/80 regulation mandated an increase in the size

[1] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1958, 17 UST 1270, 575 UNTS 159 (both Switzerland and Uruguay are parties); Rules of Procedure for Arbitration Proceedings, *as amended*, Apr. 2006. Both documents are available at https://icsid.worldbank.org.

[2] Philip Morris Brands Sàrl, Philip Morris Products S.A., & Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (July 8, 2016). The arbitrations cited herein are available at http://www.italaw.com. Philip Morris Brands Sàrl is a *société à responsabilité limitée* and Philip Morris Products S.A. is a *société anonyme*; both are organized under the laws of Switzerland, with registered offices in Neuchâtel, Switzerland. Abal Hermanos S.A. (Abal) is a *sociedad anónima* organized under the laws of Uruguay, with its registered office in Montevideo, Uruguay. Philip Morris Brands Sàrl is the direct 100 percent owner of Abal.

[3] WHO Framework Convention on Tobacco Control, May 21, 2003, 2302 UNTS 166, *available at* http://www.who.int/fctc/en. Uruguay became a party on Sept. 9, 2004; Switzerland signed on June 24, 2004, but has not yet ratified.