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# The ECtHR faced with U.N.S.C. chapter VII resolutions containing measures in contradiction with the ECHR

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## **Abstract**

The relationship between U.N. Security Council Chapter VII resolutions and the rights guaranteed by the European Convention on Human Rights has been analyzed by the European Court of Human Rights on multiple occasions when it dealt with complaints concerning violation of human rights by the respondent states in the context of implementing the measures imposed by the Security Council in its Chapter VII resolutions. However, when faced with determining the legal relationship between the ECHR and the Security Council's Chapter VII resolutions, the ECtHR showed inconstancy in its interpretation of both the Convention and the obligations states have as a consequence of the resolutions adopted by the Security Council under Chapter VII of the U.N. Charter. When the Court avoided stating on the possible conflict of norms between the provisions of the Security Council's resolutions and the rights guaranteed by the Convention, it might have created a conflict based on an explicit provision in the resolutions that would require violation of the Convention. By doing so, the Court overlooked the implications that its case law will have on the future of the Security Council's resolutions and the actions that states will take as a consequence. Considering the latest and most relevant case law of the Court, this study will try to identify the risks that such a practice might have if and/or when the Security Council will explicitly impose states obligations in conflict with the human rights provided for by the Convention.

**Mots-clés :** Conseil de sécurité de l'ONU, Convention européenne des droits de l'homme, Cour européenne des droits de l'homme, Chapitre VII, Résolution, Primauté, Violation, Interprétation, Conflit de normes, article 103 Charte des Nations Unies, Droits fondamentaux, Jurisprudence, Protection équivalente

## **Résumé**

La relation entre les résolutions du chapitre VII du Conseil de sécurité de l'ONU et les droits garantis par la Convention européenne des droits de l'homme a été analysée par la Cour européenne des droits de l'homme à plusieurs reprises lorsqu'elle a traité des plaintes concernant la violation des droits de l'homme par les États défendeurs dans le contexte de mettre en œuvre les mesures imposées

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<sup>1</sup> Cet article est tiré d'une communication présentée lors de la Summer School organisée par l'Institut de la Paix et du Développement de l'Université Nice Côte d'Azur en septembre 2020 et portant sur "Les doctrines en droit international et droit européen".

par le Conseil de sécurité dans ses résolutions du Chapitre VII. Cependant, face à la détermination de la relation juridique entre la CEDH et les résolutions du chapitre VII du Conseil de sécurité, la Cour européenne des droits de l'homme a fait preuve d'incohérence dans son interprétation à la fois de la Convention et des obligations des États en conséquence des résolutions adoptées par le Conseil de sécurité en vertu du chapitre VII de la Charte des Nations Unies. Lorsque la Cour a évité de se prononcer sur le possible conflit de normes entre les dispositions des résolutions du Conseil de sécurité et les droits garantis par la Convention, elle aurait pu créer un conflit fondé sur une disposition explicite des résolutions qui exigerait la violation de la Convention. Ce faisant, la Cour a ignoré les implications que sa jurisprudence aura sur l'avenir des résolutions du Conseil de sécurité et les mesures que les États prendront en conséquence. Considérant la jurisprudence la plus récente et la plus pertinente de la Cour, cette étude tentera d'identifier les risques que pourrait avoir une telle pratique si et/ou quand le Conseil de sécurité imposerait explicitement aux États des obligations en conflit avec les droits de l'homme prévus par la Convention.

**Keywords:** UN Security Council, European Convention on Human Rights, European Court of Human Rights, Chapter VII, Resolution, Supremacy, Violation, Interpretation, Conflict of Norms, article 103 Charter of United Nations, Fundamental Rights, Case Law, Equivalent Protection

## I. Introduction

The case of *Al-Dulimi and Montana Management Inc. v. Switzerland*<sup>2</sup> represents a new development on the responsibility of States for acts carried out in the implementation of the United Nations Security Council (U.N.S.C.) Resolutions under Chapter VII of the Charter. The case belongs to a series of cases analyzed by the European Court of Human Rights (ECtHR or the Court) where the respondent state was accused of violating the European Convention on Human Rights (ECHR or the Convention) because of conduct amounting to compliance with international obligations under a Chapter VII U.N. Security Council resolution that imposed sanctions against individuals. Some of these cases (*Behrami and Behrami v. France and Saramati v. France, Germany and Norway*<sup>3</sup>, *Al-Jedda v. Great Britain*<sup>4</sup>, *Nada v. Switzerland*<sup>5</sup>) will also be briefly analyzed in the following. In such cases, respondent states –that were members in the U.N. and also parties to the ECHR– faced a dilemma between their obligation to respect the binding resolutions of the Security Council and their obligation to respect the human rights provided for in the ECHR.

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<sup>2</sup> ECtHR, *Al-Dulimi and Montana Management Inc. v Switzerland*, 5809/08, 21 June 2016.

<sup>3</sup> ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, 71412/01 and 78166/01, 02 May 2007.

<sup>4</sup> ECtHR, *Al-Jedda v. Great Britain*, 27021/08, 7 July 2011.

<sup>5</sup> ECtHR, *Nada v. Switzerland*, 10593/08, 12 September 2012.

In the judgment delivered in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*, the ECtHR found a violation of article 6 par. 1 of the European Convention on Human Rights because the Swiss courts did not provide meaningful judicial review of sanctions under the U.N.S.C. Resolution 1483 (2003).

The judgment is particularly interesting because not only the Grand Chamber analyzes the compatibility of the obligations imposed by an U.N.S.C. Chapter VII Resolution with human rights protected by the Convention but also because the Grand Chamber, although it confirmed the findings of the Chamber<sup>6</sup>, it departed from its reasoning.

The first part of this study (II) emphasizes on several concepts relating to the two contradictory obligations that states have in relation to implementing a Chapter VII Resolution of the U.N.S.C., respectively: to implement the mandatory resolution and to respect the human rights provided for in the ECHR to all the individuals within their jurisdiction. The second part of the study (III) analyses the ECtHR jurisprudence before the *Al-Dulimi* case in relation to implementing U.N.S.C. Chapter VII resolutions in order to make it possible to draw a conclusion on the following aspect: if and to what extent the Court is consistent in its interpretation of the ECHR. The third part (IV) emphasizes on the content of the ECtHR's approach in the *Al-Dulimi* case, considering the major difference in reasoning between the Section's judgment and the Grand Chamber's one, with the purpose of evaluating the consequences of this final interpretation given by the Grand Chamber on states' obligations. Last but not least, this study will analyze the effect of the *Al-Dulimi* judgment on future U.N. Security Council Chapter VII resolutions.

## II. Conflicting obligations?

Chapter VII of the Charter of the United Nations (U.N.) confers upon the Security Council the "primary responsibility for the maintenance of international peace and security".<sup>7</sup> To this end, the Council may employ "such action...as may be necessary to maintain or restore" it.<sup>8</sup> Under these provisions, the U.N. Security Council can take decisions that are binding on Member States. As history tells us<sup>9</sup>, the U.N. Security Council's practice of targeted sanctions has significant repercussions for the enjoyment of human rights by the individuals targeted by the Security Council's resolutions.

As a rule of precedence, article 103 of the U.N. Charter<sup>10</sup> stipulates that in case of conflict, obligations derived from Charter provisions will prevail over obligations stemming from other international agreements. Since the U.N. Member States are obliged to "accept and carry out"<sup>11</sup>

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<sup>6</sup> ECtHR, *Al-Dulimi and Montana Management Inc. v Switzerland*, 5809/08, 26 November 2013.

<sup>7</sup> U.N. Charter, art. 24, para. 1.

<sup>8</sup> U.N. Charter, art. 42.

<sup>9</sup> United Nations, Human Rights Council, *Research-based progress report of the Human Rights Council Advisory Committee containing recommendations on mechanisms to assess the negative impact of unilateral coercive measures on the enjoyment of human rights and to promote accountability*, 10 February 2015, p. 6.

<sup>10</sup> U.N. Charter, art. 103: "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."

<sup>11</sup> U.N. Charter, art. 25.

binding decisions of the Security Council, it is widely admitted that the Council's Chapter VII resolutions enjoy this supremacy as well.

From the perspective of the U.N. Charter, the ECHR falls under the concept of "other international agreement" which might be superseded by the provisions of the U.N. Charter should it impose diverging obligations to a U.N. member state and party to the Convention.<sup>12</sup>

Considering the provision of article 103, one possible issue arising from the diversification and fragmentation of the international legal order lies in the possibility (or risk) of conflict between the legal norms and rules belonging to various systems of international law. One such conflict that already became prominent on the international scene is that between the obligations that states have as a consequence of the resolutions adopted by the Security Council under Chapter VII of the U.N. Charter and their impact on individuals' fundamental rights.

As a consequence, in recent years, both domestic and international courts have been repeatedly called upon to consider the question of compatibility of the measures adopted by U.N. Member States against individuals with basic human rights, such as the right to a fair trial, the right to liberty and security, the right to private and family life or the right to property.

One such court is the European Court of Human Rights, which this study will focus on. As shown above, the starting point of this analysis is the supremacy of the Security Council Chapter VII resolutions and their potential conflict with ECHR. When faced with a potential conflict between obligations imposed by the resolution and the Convention, the ECtHR employed different techniques that enabled it to deliver a judgment and evaluate the states' obligations.

Before moving on to analyzing the case law of the ECtHR, it seems natural to establish the legal effects of article 103 from the U.N. Charter. It was already shown above that article 103 establishes the primacy, in the event of conflict, of the obligations deriving from the U.N. Charter over any other obligation arising from an "international agreement", the ECHR included. Therefore, before the ECtHR could deliver a judgment on whether the respondent state had committed a violation of a right guaranteed by the ECHR, it has to determine whether a conflict of obligations exists that would make article 103 of the U.N. Charter applicable.<sup>13</sup> The establishment of this fact is important because in case of existence of a conflict between the obligations arising from a Security Council Chapter VII resolution and the ones arising from the ECHR, the ECtHR should abstain from exercising scrutiny. So, the ECtHR will analyze the case only if it considers that no conflict exists between the two categories of obligations.

Until now, the Court applied a mechanism through which conflicts that are not clear, at least according to the Court, are left outside the sphere of article 103 of the U.N. Charter, allowing the ECtHR to create space for the implementation of the Convention.<sup>14</sup> By doing this, the Court

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<sup>12</sup> Orosan A., *UNSC Sanctions vs. European Convention on Human Rights*, available at <https://rm.coe.int/the-unsanctions-vs-the-european-convention-on-human-rights/1680a05730> (last accessed on July 6, 2021).

<sup>13</sup> ECtHR, *Al-Jedda v. Great Britain*, 27021/08, 7 July 2011, para. 101: *Article 103 of the Charter of the United Nations provides that the obligations of the members of the United Nations under the Charter shall prevail in the event of a conflict with obligations under any other international agreement. Before 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. In other words, the key question is whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment.*

<sup>14</sup> Tzevelekos V.P., *The Al-Dulimi Case before the Grand Chamber of the European Court of Human Rights: Business as Usual? Test of Equivalent Protection, (Constitutional) Hierarchy and Systemic Integration*, p. 23,

tends to interpret Security Council Chapter VII resolutions in a manner consistent with the obligations deriving from the ECHR, so that its approach is more oriented towards systemic harmonization than towards diverging obligations.<sup>15</sup> The starting point of the analysis that the Court performs stands actually in article 1 third sub-paragraph of the Charter of the United Nations which provides that the United Nations was established to “achieve international cooperation in (...) promoting and encouraging respect for human rights and for fundamental freedoms”. The Court, having this provision in mind, developed a reasoning<sup>16</sup> according to which there is a “presumption that the Security Council does not intend to impose any obligations on member states to breach fundamental principles of human rights”. As a consequence, the Court will usually choose the interpretation of the U.N.S.C. resolution that is in most harmony with the requirements of the Convention, thus avoiding a conflict of obligations.

### III. The ECtHR case law regarding security council chapter VII resolutions prior to the *al-dulimi* case

Although the Court in the joint cases of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* did not engage in an analysis on the alleged violations of the fundamental rights resulting from executing an Chapter VII resolution, because the Court found that it did not have *rationae personae* jurisdiction, the value of these cases and the reason for analyzing them stand in the debate attracted by the reasoning of the Court. In this case, prior to examining the merits, the Court dealt with the matter of admissibility and had to establish to which entity (U.N. Security Council or state party to the Convention) the conduct was attributable. For this purpose, the Court started from Article 1 of the ECHR reads:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention”.

Analyzing the facts, the Court attributed the conduct allegedly amounting to a breach of the ECHR to the Security Council and refrained from holding the respondent state responsible for the conduct of the Security Council, considering that “the UNSC retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO”.<sup>17</sup> Having concluded that U.N. was responsible for the acts and omissions giving rise to the complaint, the Court decided that the case before it was not so much an issue of extra-territorial jurisdiction of state parties under the Convention, but whether the Court was competent to review the acts of those states carried out on behalf of the U.N. Thus, the Court held that “since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties

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downloaded: <http://www.qil-qdi.org/al-dulimi-case-grand-chamber-european-court-human-rights-business-usual-test-equivalent-protection-constitutional-hierarchy-systemic-integration/> (last accessed on July 11, 2021).

<sup>15</sup> Sicilianos L.-A., *The European Court Of Human Rights Facing The Security Council: Towards Systemic Harmonization*, International and Comparative Law Quarterly, Volume 66, Issue 4, 2017, p. 783.

<sup>16</sup> ECtHR, *Al-Jedda v. Great Britain*, 27021/08, 7 July 2011, para. 102.

<sup>17</sup> ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, para. 140.

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.”<sup>18</sup> Given the fact that the U.N. has its own legal personality, different from its member states and is not party to the Convention, the Court rejected the claims, invoking the lack of jurisdiction *rationae personae* over the U.N.<sup>19</sup>

The decision of inadmissibility given by the Court in the case of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* raised the following fears: the Court might have removed from its jurisdiction a potential forum of complaints regarding the conduct of state parties in security operations authorized by a Security Council resolution, thus the states might no longer fear they might have to answer in front of the European Court of Human Rights for their conduct in executing a Chapter VII resolution.<sup>20</sup> By doing this, some authors argue that the Court sidestepped ruling on conflict, instead concocting an untenable test that attributed the impugned conduct to the U.N., rather than the contracting states.<sup>21</sup>

Considering the evolution of the case law that will be analyzed further, part of these fears is no longer supported.

Another case raising the issue of conflict between obligations imposed to a state by the U.N. Charter and the ones resulting from the ECHR is *Al-Jedda v. Great Britain*. In this case, the Court linked the clash of obligations with discretion / latitude. According to the relevant literature,<sup>22</sup> states enjoy a margin of discretion whenever the Security Council formulates the resolution in order for a specific aim to be achieved, but it does not tell states how best to do that, so it is up to them to determine how to implement the resolution. But before analyzing the discretion that the respondent state did or did not have, the Court, as in the cases of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, dealt with the issue of jurisdiction.

The Court explained the importance of establishing jurisdiction:

“the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.”<sup>23</sup>

Analyzing the facts, the Court came to a conclusion that was distinguishable from the *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* cases and attributed the conduct to the respondent state: “the Court agrees (...) that the United Nations’ role (...) was

<sup>18</sup> ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, para. 149.

<sup>19</sup> Lazăr E., “The impact of Security Council’s resolutions in the jurisprudence of the ECHR”, *The New Review of Human Rights*, 2015, Issue 2, p. 32.

<sup>20</sup> Fariior S., *Introductory Note to Behrami and Behrami v. France and Saramati v. France, Germany and Norway (31 May 2007)*, Vermont Law School Legal Studies Research Paper Series, no. 09-23, June 2009, available at <http://ssrn.com/abstract=1417982> (accessed on July 8, 2021).

<sup>21</sup> Miko S.A., “Norm Conflict, Fragmentation, and the European Court of Human Rights”, *Boston College Law Review*, Volume 54, Issue 3, 2013, p. 1369.

<sup>22</sup> S. Hollenberg, *Al-Dulimi UN Sanctions Judgments*, 16 December 2013, available at <http://echrblog.blogspot.com/2013/12/al-dulimi-un-sanctions-judgment.html> (last accessed on July 11, 2021). Tzevelekos V.P., *The Al-Dulimi Case before the Grand Chamber of the European Court of Human Rights: Business as Usual? Test of Equivalent Protection, (Constitutional) Hierarchy and Systemic Integration*, p. 9, downloaded at: <http://www.qil-qdi.org/al-dulimi-case-grand-chamber-european-court-human-rights-business-usual-test-equivalent-protection-constitutional-hierarchy-systemic-integration/> (last accessed on July 11, 2021).

<sup>23</sup> ECtHR, *Al-Jedda v. Great Britain*, 27021/08, 7 July 2011, para. 74.

quite different from its role as regards security in Kosovo in 1999”<sup>24</sup> (analyzed in the decision in *Behrami and Saramati* cases). After making a comparison between the two cases, the Court concluded that “the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force and that the applicant’s detention was not, therefore, attributable to the United Nations”.<sup>25</sup>

Then came the analysis of article 103 of the U.N. Charter. The respondent state argued that the impugned measures were a result of the need to comply with obligations resulting from the Security Council’s resolution and that these obligations have priority over the ECHR, according to article 103. Before considering the application of article 103, the Court determined whether any conflict of obligations was present that would necessitate its application<sup>26</sup> and examines the Resolution in order to see if it obliged the respondent state to hold the applicant in internment and concluded that was not the case. For the purpose of this study, it is useful to present the reasoning of the Court, in particular because it recalls that human rights are at the foundation of the United Nations, thus they are also binding on the Security Council and would be impossible for it to ignore the protection of human rights.

The Court began its assessment from the starting point of “the purposes for which the United Nations was created” as embodied in article 1 of the U.N. Charter. Noting first the well-accepted and crucial purpose of maintaining international peace and security, the Court recalled article 1’s third subparagraph which “provides that the United Nations was established to achieve international cooperation in [...] promoting and encouraging respect for human rights and fundamental freedoms”.

Keeping these dual purposes in mind, the Court decided that no such conflict existed, as incarceration was not expressly provided by the resolution. These considerations let the Court to conclude 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. [...] 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.”<sup>27</sup>

Moving further to analyzing the wording of the Resolution, “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 Multinational Force under an obligation to use measures of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments including the Convention. Internment is not explicitly referred to in the Resolution.”<sup>28</sup>

Since the Court found no such language, it held that article 103 did not apply and instead found that the respondent state was responsible for the conduct and was in breach of the ECHR.

So, after analyzing the cases of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* and *Al-Jedda v. Great Britain* the first conclusion that stands out is on the Court’s jurisdiction: in the first case the Court stopped analyzing the case when it stated that it

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<sup>24</sup> ECtHR, *Al-Jedda v. Great Britain*, 27021/08, 7 July 2011, para. 83.

<sup>25</sup> ECtHR, *Al-Jedda v. Great Britain*, 27021/08, 7 July 2011, para. 84.

<sup>26</sup> ECtHR, *Al-Jedda v. Great Britain*, 27021/08, 7 July 2011, para. 101.

<sup>27</sup> ECtHR, *Al-Jedda v. Great Britain*, 27021/08, 7 July 2011, para. 102.

<sup>28</sup> ECtHR, *Al-Jedda v. Great Britain*, 27021/08, 7 July 2011, para. 105.



does not have *rationae personae* competence to analyze the alleged breach of the Convention and thus declared the application inadmissible, whilst in the second case, the Court refused to defer to the respondent state's interpretation of its U.N. obligations,<sup>29</sup> instead ruling that "the presumption must be that the Security Council intended States within the Multi-National Force to contribute towards the maintenance of security in Iraq while complying with their obligations under international human rights law."<sup>30</sup>

The second conclusion that stands out at this point is the undoubted value of the judgment for the explicit reference to the necessity of interpreting the resolutions of the Security Council in a way that complies with international human rights law, presuming "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".<sup>31</sup> Thus, the ECtHR suggested that respect for international law represents a limit to the action of the Security Council and its resolutions.<sup>32</sup>

The Court went even further than this in its judgment delivered in the case *Nada v. Switzerland* considering the resolution's clear and explicit language imposing on states specific measures that might conflict with their international obligations. The Court acknowledged that Switzerland's obligations under Article 8 were in apparent conflict with its obligations under the Security Council resolutions, but reiterated that diverging commitments between the ECHR and other obligations of states parties should "be harmonized as far as possible".<sup>33</sup> The ECtHR confirmed the reasoning of *Al-Jedda v. Great Britain*, but distinguished it because in the case *Nada v. Switzerland* the resolution expressly required the respondent state to take measures that would infringe the applicant's rights and freedoms guaranteed by the ECHR. Given the clear and explicit language imposing an obligation to take measures capable of breaching human rights, the Court found the *Al-Jedda v. Great Britain* presumption had been rebutted.<sup>34</sup> At this point it would have seemed logical if the Court held that the authority of the Security Council's resolution prevailed under article 103 of the U.N. Charter, but the Court did not do this. Instead, it went even further and stated that the respondent state "enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant resolutions of the U.N. Security Council"<sup>35</sup> and reasoned that the respondent state "failed to show that [it] attempted, as far as possible, to harmonise the obligations that [it] regarded as divergent".<sup>36</sup> In other words, the respondent state could have done more, even within the confines of the resolution's obligations, to minimize the intrusions on the applicant's human rights<sup>37</sup>. By not doing this, the

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<sup>29</sup> Henderson L., "With (Great) Power Comes (Great) Responsibility: A Move Toward Greater Responsibility for States Exercising Power Abroad, Merkourios", *Utrecht Journal of International and European Law*, Vol. 28/74, p. 55.

<sup>30</sup> ECtHR, *Al-Jedda v. Great Britain*, 27021/08, 7 July 2011, para. 105.

<sup>31</sup> Miko S.A., "Norm Conflict, Fragmentation, and the European Court of Human Rights", *Boston College Law Review*, Volume 54, Issue 3, 2013, p. 1373.

<sup>32</sup> Lazăr E., "The impact of Security Council's resolutions in the jurisprudence of the ECHR", *The New Review of Human Rights*, 2015, Issue 2, p. 33.

<sup>33</sup> ECtHR, *Nada v. Switzerland*, 10593/08, 12 September 2012, para. 168-172.

<sup>34</sup> ECtHR, *Nada v. Switzerland*, 10593/08, 12 September 2012, para. 172.

<sup>35</sup> ECtHR, *Nada v. Switzerland*, 10593/08, 12 September 2012, para. 180.

<sup>36</sup> ECtHR, *Nada v. Switzerland*, 10593/08, 12 September 2012, para. 197.

<sup>37</sup> Miko S.A., "Norm Conflict, Fragmentation, and the European Court of Human Rights", *Boston College Law Review*, Volume 54, Issue 3, 2013, p. 1375.

respondent state's conduct resulted in a violation of the applicant's right to respect for private and family life (art. 8 ECHR).

Once again, the Court avoided the conflict of obligations between the ECHR and the resolutions through, in the Court's opinion, harmonious interpretation, leaving no reason to involve article 103 as a means for resolving the conflict.<sup>38</sup>

Moreover, although we partially anticipate the conclusions of this research, until the *Al-Dulimi and Montana Management Inc. v. Switzerland* Chamber's judgment, the Court used harmonization methods stating that the sanctions imposed by a state when executing a Chapter VII resolution pay attention to human rights protection. Still, this does in no way guarantee neither the prevalence of the sanctions imposed by the Security Council, nor the prevalence of the human rights provided for by the ECHR. This direction in which the Court went so far only draws attention to the fact that applying Security Council resolutions at national level does not hinder national judges from verifying the implementation of such measures.<sup>39</sup>

As we have seen so far, in the cases of *Al-Jedda v. Great Britain* and *Nada v. Switzerland*, the Court, using the interpretation method of harmonization, established the following: in addition to maintaining international peace and security, the purposes of the U.N. include encouraging respect for human rights and fundamental freedoms as well and that there must be a presumption of compliance of the measures imposed by the Security Council with the human rights, meaning that the Security Council does not intend states to take measures that would result in a breach of their obligations under international human rights law.<sup>40</sup>

#### IV. The section's and grand chamber's judgment in *al-dulimi and montana management inc v. Switzerland*

The ECtHR first emphasized, as it already did in the case *Nada v. Switzerland*, that the apparently conflicting obligations arising from the U.N. Charter on the one hand, and the ECHR on the other hand, must be as far as possible harmonized and reconciled, stating that:

“the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 1969, of ‘any relevant rules of international law applicable in the relations between the parties’, and in particular the rules concerning the international protection of human rights (...)”.<sup>41</sup>

Then, referring to the previous case law, the Court held the following:

“The Court observes that in the case of *Al-Jedda* (judgment cited above, § 109), it found that the resolution in question, namely Security Council Resolution 1546 (2004), authorised the United Kingdom to take measures to contribute to the maintenance of security and stability in Iraq, but that neither Resolution 1546 nor any other subsequent Security Council Resolution expressly or implicitly required the United Kingdom to place an individual whom

<sup>38</sup> *Ibidem*.

<sup>39</sup> Lazăr E., “The impact of Security Council's resolutions in the jurisprudence of the ECHR”, *The New Review of Human Rights*, 2015, Issue 2, p. 34.

<sup>40</sup> S. Hollenberg, *Al-Dulimi UN Sanctions Judgments*, 16 December 2013, available at <http://echrblog.blogspot.com/2013/12/al-dulimi-un-sanctions-judgment.html> (last accessed on July 11, 2021).

<sup>41</sup> ECtHR, *Al-Dulimi and Montana Management Inc. v Switzerland*, 5809/08, 26 November 2013, para. 112.

its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge. In the subsequent case of *Nada* (judgment cited above, § 172), the Court found, by contrast, that Resolution 1390 (2002) expressly required States to prevent the individuals on the United Nations list from entering or transiting through their territory. As a result, in the Court's view, the presumption that 'the Security Council [did] not intend to impose any obligation on Member States to breach fundamental principles of human rights' (*Al-Jedda*, cited above, § 102), was rebutted in *Nada*, having regard to the clear and explicit language, imposing an obligation to take measures capable of breaching human rights, that was used in Resolution 1390."<sup>42</sup>

Even if it was to be expected that the Court would employ this same interpretative method in the case of *Al-Dulimi and Montana Management Inc v. Switzerland*, the Court (Second Section) distinguished this case from the *Nada v. Switzerland* case, considering that the state did not have such a wide margin of appreciation / discretion as it did in the *Nada v. Switzerland* case for the implementation of the measures imposed by the Security Council in the relevant resolution.<sup>43</sup> Subsequently, it engaged in an equivalent protection test –the *Bosphorus* presumption (the Court, when reviewing a state's conduct strictly required by the quality of that state as member of an international organization, it shall presume that the state did not act in contravention of the ECHR if the international organization in question protects human rights in a manner that is at least equivalent to the protection offered by the ECHR)<sup>44</sup> and found that in the United Nations legal order there are no mechanisms to ensure a comparable protection of human rights to the one guaranteed under the Convention:

"As to the protection afforded in the present case (...), does not provide a level of protection that is equivalent to that required by the Convention."<sup>45</sup>

So, the ECtHR replaced the harmonious interpretation method with the equivalent protection presumption. By doing this, the Court indirectly made the following distinction: when the protection is equivalent, it does not matter what obligation the Member State will choose to respect, because the human rights will be protected, but when the protection is not equivalent, a conflict of obligation arises and the Member State is left with the choice of either breaching its obligations imposed by the Security Council resolution or breaching the rights guaranteed by the ECHR. In the latter situation, considering the explanations given before on the scope of application of article 103 of the U.N. Charter, it is clear that it plays a part in this situation. However, the Court, by not analyzing the conflict of obligations, indirectly, reached the following conclusion: if the protection given by the international organization is equivalent,

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<sup>42</sup> ECtHR, *Al-Dulimi and Montana Management Inc. v Switzerland*, 5809/08, 26 November 2013, para. 113.

<sup>43</sup> ECtHR, *Al-Dulimi and Montana Management Inc. v Switzerland*, 5809/08, 26 November 2013, para. 117: "The Court takes the view that the present case should be examined in the light of the equivalent protection criterion, particularly on account of the fact 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. This essentially distinguishes the situation in the present case from that of the *Nada* case, where the Grand Chamber found that Switzerland had a certain latitude in implementing the relevant Security Council resolutions (see *Nada*, cited above, §§ 175-180)."

<sup>44</sup> S. Hollenberg, *Al-Dulimi UN Sanctions Judgments*, 16 December 2013, available at <http://echrblog.blogspot.com/2013/12/al-dulimi-un-sanctions-judgment.html> (last accessed on July 11, 2021).

<sup>45</sup> ECtHR, *Al-Dulimi and Montana Management Inc. v Switzerland*, 5809/08, 26 November 2013, para. 118-120.

the Member State is not responsible, but if the protection is not equivalent, the Member State is responsible.<sup>46</sup>

The case was referred to the Grand Chamber at the respondent state's request. As already mentioned in the beginning of this paper, the Grand Chamber confirmed the solution given by the Chamber, but departed from its reasoning. While the Chamber attempted to solve the potential conflict of obligations in *Al-Dulimi and Montana Management Inc. v. Switzerland* by adopting the *Bosphorus* presumption, the Grand Chamber reversed the Chamber's ruling and instead returned to the harmonious interpretation method it has established in previous cases, thus applying the presumption of compatibility between Security Council Resolutions and fundamental human rights. The Grand Chamber found that there was nothing in the text of the resolution explicitly preventing the Swiss judiciary from reviewing the measures taken at the national level pursuant to the Security Council's resolutions:

“where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures are compatible with the Convention”.<sup>47</sup>

Therefore, the Grand Chamber held that in the absence of any clear and explicit wording excluding or limiting respect for human rights in the context of the implementation of the Security Council's resolutions at national level, it shall interpret the resolution in question harmoniously as to avoid any conflict. This means that the respondent state was not faced with a real conflict of obligations that would make article 103 of the U.N. Charter applicable:

“in such cases, in a spirit of systemic harmonisation, it [the Court] will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter”.<sup>48</sup>

The Court provided the following explanation for the inapplicability of the *Bosphorus* presumption:

“the Convention being a constitutional instrument of European public order (...), the States Parties are required, in that context, to ensure a level of scrutiny of Convention compliance which, at the very least, preserves the foundations of that public order. One of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle”.<sup>49</sup>

The Grand Chamber's reversal implicitly affirmed that, unless explicit wording regarding the implementation of the resolution that would create a conflict between the obligations deriving from the resolutions and those deriving from the ECHR, the harmonious interpretation method rather than the *Bosphorus* presumption, solves the apparent conflict of obligations between the resolutions and the Convention.<sup>50</sup>

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<sup>46</sup> L. Gasbarri, “Al-Dulimi and Comepting Cocnepts of International Organizations”, *European Papers*, 22 December 2016, p. 4.

<sup>47</sup> ECtHR, *Al-Dulimi and Montana Management Inc. v Switzerland*, 5809/08, 21 June 2016, para. 140.

<sup>48</sup> *Ibid.*

<sup>49</sup> ECtHR, *Al-Dulimi and Montana Management Inc. v Switzerland*, 5809/08, 21 June 2016, para. 145.

<sup>50</sup> S. Bilgic, *Harmonious Interpretation Meets the UN Charter: The Derogation Presumption*, Harvard Human Rights Journal, available at <https://harvardhrj.com/harmonious-interpretation-meets-the-un-charter-the-derogation-presumption/> (last accessed on July 11, 2021).

This position of the ECtHR challenged criticism, expressed even in the judges' concurrent opinions, according to which the state in question did not benefit from any matter of appreciation as Switzerland did not have any possibility to choose whether or not to uphold the restrictive measures imposed.<sup>51</sup> In her dissenting opinion given in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland* (Grand Chamber), Judge Nussberger stated that the Court was employing a “fake harmonious interpretation that is not in line with basic methodological requirements of international treaty interpretation” and concluded that “the treaty obligations Switzerland has been confronted with in the present case are not only conflicting, but also mutually exclusive.” Also, a number of judges (Judge Pinto de Albuquerque, Judge Hajiyev, Pejchal and Dedov) built their concurring opinion around the topic of global constitutionalism, acknowledging the existence of two constitutional orders, one established by the U.N. Charter and another established by the ECHR.<sup>52</sup>

## V. Conclusion

The *Al-Jedda v. Great Britain*, *Nada v. Switzerland* and *Al-Dulimi and Montana Management Inc. v. Switzerland* (Grand Chamber) created the presumption that the Security Council does not intend to authorize behavior not compliant with international human rights law, but the Court remained repeatedly and markedly silent on the crucial issue of whether a resolution could prevail over the ECHR if it did rebut the presumption with such explicit wording.<sup>53</sup> However, it can be said that the Grand Chamber's judgment in *Al-Dulimi and Montana Management Inc. v. Switzerland* partially reveals the direction in which the ECtHR wants to go in what U.N. Security Council Chapter VII resolutions are concerned: unless there is a clear conflict of obligations (resulting from explicit language), the resolutions of the Security Council will be submitted to the scrutiny of the Court and will only be permitted to produce effects to the extent allowed by human rights law. As it was stated in the literature, “if the Council truly intends to derogate from human rights, that intent must be manifested in the language of the resolution, and the reasons for doing so should be explained openly, not left to backroom dealings between diplomats.”<sup>54</sup> This conclusion is also supported by the fact that the ECtHR had several chances to rule on the problem of conflict of obligations, but, although given the opportunity, the court failed to rule conclusively on the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the United Nations Charter, on the other.<sup>55</sup>

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ECHR, Press Release issued by the Registrar of the Court, *Swiss authorities should have verified that UN sanctions listings were not arbitrary*, 201.06.2016.

<sup>51</sup> Lazăr E., “The impact of Security Council's resolutions in the jurisprudence of the ECHR”, *The New Review of Human Rights*, 2015, Issue 2, p. 36.

<sup>52</sup> Peters A., *The New Arbitrariness and Competing Constitutionalisms: Remarks on ECtHR Grand Chamber Al-Dulimi*, June 30, 2016 available at <https://www.ejiltalk.org/the-new-arbitrariness-and-competing-constitutionalisms-remarks-on-ecthr-grand-chamber-al-dulimi/> (last accessed on July 11, 2021).

<sup>53</sup> Miko S.A., “Norm Conflict, Fragmentation, and the European Court of Human Rights”, *Boston College Law Review*, Volume 54, Issue 3, 2013, p. 1375.

<sup>54</sup> M. Milanović, *Norm Conflict in International Law: Whither Human Rights?*, 20 *Duke J. Comp. & Int'l L.* 69, 2009, at 102.

<sup>55</sup> ECtHR, *Nada v. Switzerland*, 10593/08, 12 September 2012, para. 197.

Analyzing the merits of the previously mentioned judgments, another conclusion relevant for this paper can be drawn: the scope of the Court's harmonious interpretation practice remains unpredictable.<sup>56</sup> If in the case of *Al-Jedda v. Great Britain*, the Court stated several reasons for the lack of the Security Council's intent to obligate the respondent state to take measures in breach of the Convention obligations and in the case of *Nada v. Switzerland*, the Court found that the respondent state could have done more to minimize the intrusion on the applicant's human rights, in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*, the Security Council left very little discretion for the respondent state and had used unambiguous terms such as "immediately" and "without delay", facts that do not support the Court's choice to use harmonious interpretation.

As mentioned earlier, the Court has remained silent on the question of whether a Security Council's resolution would prevail over the Convention if it were to expressly conflict with the Convention. In light of the aforementioned, it is clear that the harmonious interpretation method would be futile in terms of resolving genuine conflicts of obligations, generated by the situations in which the Security Council's resolutions expressly contradict the Convention.

As stated in the literature,<sup>57</sup> the Grand Chamber's judgment delivered in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland* poses a threat on human rights protection if the Security Council introduces in its future resolutions a clause containing clear language that forbids the national courts of the U.N. Member States to analyze those resolutions. If that would be the scenario, the ECtHR would have two options<sup>58</sup>: the first one would be to acknowledge the primacy of Charter obligations pursuant to article 103 of the U.N. Charter and, as a consequence, to abstain from analyzing the acts of the Member States that would be, allegedly, in breach of the Convention: the second option would be to explicitly deny the primacy of the Security Council's resolutions and give primacy to the human rights protection over the obligations stemming from the resolutions.

Until now, the ECtHR managed to avoid choosing one of the two options and, if the Security Council proves to be "a reliable partner who shares the preoccupations of the ECtHR and wishes to engage in a meaningful dialogue leading to harmony and balance between peace and security, and human rights",<sup>59</sup> the ECtHR might not need to choose one of the two said options. But what if that is not the case and the Security Council is not a "trust-worthy, reasonable political player who acts in good faith and is ready to tolerate (international human rights) courts conditioning the effectiveness of its policies"?<sup>60</sup>

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<sup>56</sup> S. Bilgic, *Harmonious Interpretation Meets the UN Charter: The Derogation Presumption*, Harvard Human Rights Journal, available at <https://harvardhrj.com/harmonious-interpretation-meets-the-un-charter-the-derogation-presumption/> (last accessed on July 11, 2021).

<sup>57</sup> Tzevelekos V.P., *The Al-Dulimi Case before the Grand Chamber of the European Court of Human Rights: Business as Usual? Test of Equivalent Protection, (Constitutional) Hierarchy and Systemic Integration*, p. 34, available at: <http://www.qil-qdi.org/al-dulimi-case-grand-chamber-european-court-human-rights-business-usual-test-equivalent-protection-constitutional-hierarchy-systemic-integration/> (last accessed on July 11, 2021).

<sup>58</sup> C. De Koker, *Al-Dulimi and Montana Management Inc. v. Switzerland: Norm conflict between UNSC Resolution and ECHR?*, 5 September 2016, available at <https://strasbourgobservers.com/2016/09/05/al-dulimi-and-montana-management-inc-v-switzerland-norm-conflict-between-unsc-resolution-and-echr/> (last accessed on July 11, 2021).

<sup>59</sup> *Idem*.

<sup>60</sup> *Idem*.