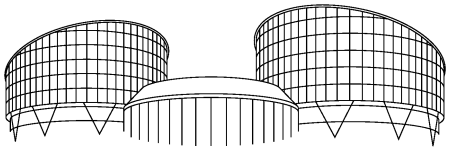

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF AL-DULIMI AND MONTANA MANAGEMENT INC. v. SWITZERLAND

(Application no. 5809/08)

JUDGMENT

STRASBOURG

21 June 2016

This judgment is final but it may be subject to editorial revision.

In the case of Al-Dulimi and Montana Management Inc. v. Switzerland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mirjana Lazarova Trajkovska, *President*,
Dean Spielmann,
Josep Casadevall,
Angelika Nußberger,
Ineta Ziemele
Mark Villiger,
Khanlar Hajiyev,
Vincent A. De Gaetano,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Helen Keller,
André Potocki,
Aleš Pejchal,
Dmitry Dedov,
Egidijus Kūris,
Robert Spano, *judges*,
and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 10 December 2014 and on 9 March 2016,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 5809/08) against the Swiss Confederation lodged with the Court on 1 February 2008 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iraqi national, Mr Khalaf M. Al-Dulimi ("the first applicant"), and on behalf of Montana Management Inc. ("the second applicant" or "the applicant company"), a company incorporated under the laws of Panama and having its registered office in Panama, of which the first applicant is the managing director.

2. The applicants alleged, in particular, that the confiscation of their assets by the Swiss authorities pursuant to a resolution of the United Nations Security Council had been ordered in the absence of any procedure complying with Article 6 of the Convention.

3. The application was initially allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 1 February 2011 the Court's Sections were reorganised. The application was thus reallocated to the Second Section (Rule 25 § 1 and Rule 52 § 1).

4. The parties each submitted written comments on the other's observations. Observations were also received from the French and United Kingdom Governments, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 (a)).

5. On 28 May 2013 the Second Section expressed its intention to relinquish jurisdiction to the Grand Chamber, in accordance with Article 30 of the Convention. In a letter of 18 June 2013 the respondent Government objected to such relinquishment. On 17 September 2013 the Chamber took note of the Government's objection and continued to examine the case.

6. On 26 November 2013 a Chamber of the Second Section composed of Guido Raimondi, President, Danutė Jočienė, Peer Lorenzen, András Sajó, Işıl Karakaş, Nebojša Vučinić and Helen Keller, judges, and Stanley Naismith, Section Registrar, delivered a judgment finding, by a majority, that there had been a violation of Article 6 § 1 of the Convention. The partly dissenting opinion of Judge Sajó and the dissenting opinion of Judge Lorenzen, joined by Judges Raimondi and Jočienė, were appended to the judgment.

7. On 25 February 2014 the Government requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention and Rule 73. On 14 April 2014 the panel of the Grand Chamber granted that request. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

8. The applicants and the Government each filed further written observations (Rule 59 § 1). In addition, third-party comments were received from the French and United Kingdom Governments, which had been given leave by the President to take part in the proceedings (Article 36 § 2 of the Convention and Rule 44 § 3 (a)).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 10 December 2014 (Rule 59 § 3).

There appeared before the Court:

(a) *for the respondent Government*

Mr F. SCHÜRMANN, Head of the International Human Rights Protection Unit, Federal Office of Justice, Federal Department of Justice and Police *Agent*,

Mr V. ZELLWEGER, Director of the Public International Law Directorate, Federal Department of Foreign Affairs,

Mr R. VOCK, Head of Sanctions Section, State Secretariat

for Economic Affairs, Federal Department of Economic, Affairs Training and Research,
Mr A. SCHEIDEGGER, Deputy Head of the International Human Rights Protection Unit, Federal Office of Justice, Federal Department of Justice and Police,
Ms C. EHRICH, scientific assistant, International Human Rights Protection Unit, Federal Office of Justice, Federal Department of Justice and Police,
Ms N. BLUM, scientific assistant, International Treaties, Section Public International Law Directorate, Federal Department of Foreign Affairs, *Advisers;*

(b) *for the applicants*
Mr J.-C. MICHEL, member of the Geneva Bar,
Mr T. OBEIDAT, member of the Amman and New York Bars,
Mr S. FRIES, member of the Geneva Bar, *Counsel*,
Prof. A. BIANCHI, professor of international law, Institut de Hautes Études Internationales et du Développement,Geneva, *Adviser*,
Mr K. AL-DULIMI, *applicant*;

(c) *for the United Kingdom Government*
Ms I. RAO, *Agent*,
Mr J. WRIGHT QC MP, Attorney General,
Mr S. WORDSWORTH QC, *Counsel*,
Mr A. MURDOCH,
Mr T. RYCROFT,
Ms T. NJAI,
Ms N. DAVEY, *Advisers*;

(d) *for the French Government*
Mr G. DE BERGUES, Deputy Director of Legal Affairs, Ministry of Foreign Affairs, *Co-Agent*,
Mr D. LEMÉTAYER, Drafting Officer, Public International Law Section, Ministry of Foreign Affairs,
Mr R. FÉRAL, Drafting Officer, Human rights Section, Ministry of Foreign Affairs,
Ms M. JANICOT, Drafting Officer, Human rights Section, Ministry of Foreign Affairs, *Advisers*.

The Court heard addresses by Mr Michel, Professor Bianchi, Mr Schürmann, Mr Zellweger, Mr Wright and Mr de Bergues, and their replies to questions from judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The first applicant was born in 1941 and lives in Amman (Jordan). According to the Security Council of the United Nations (UN), he was head of finance for the Iraqi secret services under the regime of Saddam Hussein. The second applicant is a company incorporated under the laws of Panama and having its registered office in Panama, the first applicant being its managing director.

A. Background to the case

11. After Iraq invaded Kuwait on 2 August 1990, the UN Security Council adopted Resolution 661 (1990) of 6 August 1990 and Resolution 670 (1990) of 25 September 1990, calling upon UN member States and non-member States to apply a general embargo against Iraq and on any Kuwaiti resources confiscated by the occupier, together with an embargo on air transport.

12. On 7 August 1990 the Swiss Federal Council adopted an ordinance providing for economic measures against the Republic of Iraq (the "Iraq Ordinance"; see paragraph 36 below). The applicants alleged that since that date their assets in Switzerland had remained frozen.

13. On 10 September 2002 Switzerland became a member of the United Nations.

14. On 22 May 2003 the UN Security Council adopted Resolution 1483 (2003), superseding Resolution 661 (1990), among others (see paragraph 46 below). Paragraph 23 of Resolution 1483 (2003) reads as follows:

> "The Security Council
>
> ...
>
> *Decides* that all Member States in which there are:
>
> (a) funds or other financial assets or economic resources of the previous Government of Iraq or its state bodies, corporations, or agencies, located outside Iraq as of the date of this resolution, or
>
> (b) funds or other financial assets or economic resources that have been removed from Iraq, or acquired, by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction,
>
> shall 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 shall cause their transfer to the Development Fund for Iraq, it being understood that, unless otherwise addressed, claims made by private individuals or

> non-government entities on those transferred funds or other financial assets may be presented to the internationally recognized, representative government of Iraq; and *decides further* that all such funds or other financial assets or economic resources shall enjoy the same privileges, immunities, and protections as provided under paragraph 22."[1]

15. The Iraq Ordinance of 7 August 1990 underwent numerous amendments, in particular on 30 October 2002, following the entry into force of the Federal Law of 22 March 2002 on the application of international sanctions (the Embargo Act, in force since 1 January 2003), and on 28 May 2003, to take account of Resolution 1483 (2003). Article 2 of the Iraq Ordinance provided in substance for the freezing of assets and economic resources belonging to the former Iraqi Government, to senior officials thereof and to companies or bodies under the control or management of that Government or its officials. Pursuant to the Ordinance, any person or organisation holding or managing assets covered by the freezing measure must immediately declare them to the State Secretariat for Economic Affairs (the "SECO") (see Article 2a § 1 of the Iraq Ordinance, paragraph 36 below).

16. On 24 November 2003 a sanctions committee created by Security Council Resolution 1518 (2003) ("the 1518 Sanctions Committee"), and consisting of representatives of all members of the Council, was given the task of listing the individuals and entities concerned by paragraph 23 of Resolution 1483 (2003) (see paragraph 46 below). For that purpose, the Committee was to keep up to date the lists of individuals and entities already compiled by the former sanctions committee, created under Resolution 661 (1990), which had been adopted during the armed conflict between Iraq and Kuwait.

17. On 26 April 2004 the 1518 Sanctions Committee added to the list of individuals and entities, respectively, the second applicant, which had its registered office in Geneva, and the first applicant, who was the managing director of the latter.

18. On 12 May 2004 the applicants' names were added to the list of individuals, legal entities, groups and organisations concerned by the national measures under Article 2 of the Iraq Ordinance. On 18 May 2004 the Federal Council also adopted, under Article 184, paragraph 3, of the Federal Constitution, an ordinance on the confiscation of the frozen Iraqi assets and economic resources and their transfer to the Development Fund for Iraq ("the Confiscation Ordinance"; see paragraph 37 below). That Ordinance was initially valid until 30 June 2010 and was then extended until 30 June 2013.

19. The applicants indicated that a confiscation procedure had been initiated in respect of their assets in Switzerland, which had been frozen

1. For the full text of Resolution 1483 (2003), see paragraph 46 below.

since 7 August 1990, by the Federal Department for Economic Affairs, when the Confiscation Ordinance had entered into force on 18 May 2004.

20. The first applicant, wishing to apply directly to the 1518 Sanctions Committee for the removal of his name from the list, called upon the Federal Department for Economic Affairs, in a letter of 25 August 2004, to suspend the confiscation procedure in respect of his assets. In a letter of 5 November 2004 to the Chair of the Committee, the Swiss Government, through their Permanent Representative to the United Nations, supported that application. In a letter of 3 December 2004 the Chair informed the applicants that the Sanctions Committee had received their application and that it was under consideration. He asked them to send supporting documents and any additional information that might substantiate the application.

21. The first applicant replied in a letter of 21 January 2005 that he wished to give oral evidence to the Sanctions Committee. As no action was taken on the request, the applicants, in a letter of 1 September 2005, sought the continuation of the confiscation procedure in Switzerland.

22. On 22 May 2006 the Federal Department for Economic Affairs sent the applicants a draft decision on the confiscation and transfer of the funds that were deposited in their names in Geneva. In observations of 22 June 2006 the applicants challenged that decision.

23. In three decisions of 16 November 2006 the Federal Department for Economic Affairs ordered the confiscation of the following assets:

(a) the sum of 86,276.85 Swiss francs (CHF) belonging to the first applicant, representing the liquidation dividend of a company (not the second applicant) of which he had been the sole shareholder, and deposited in the "client" account of a Swiss law firm which represented him;

(b) a total of CHF 164,731,213 deposited in the applicant company's name with bank X;

(c) a total of CHF 104,739,882.57 deposited in the applicant company's name with bank Y.

24. The Federal Department for Economic Affairs stated the conditions in which the sums would be transferred, within ninety days from the entry into force of the decisions, to the bank account of the Development Fund for Iraq. In support of its decisions, it observed that the applicants' names appeared on the lists of individuals and entities drawn up by the Sanctions Committee, that Switzerland was bound by the resolutions of the Security Council and that it could only delete a name from the annex to the Iraq Ordinance where the relevant decision had been taken by the Sanctions Committee. The Federal Department further observed that the applicants had discontinued their discussions with the Sanctions Committee. It indicated that an administrative-law appeal could be lodged with the Federal Court against its decisions.

25. On 19 December 2006 the Security Council, being committed to ensuring that fair and clear procedures existed for placing individuals and entities on sanctions lists, including those of the 1518 Sanctions Committee, and for removing their names, as well as for granting humanitarian exemptions, adopted Resolution 1730 (2006), which created a delisting procedure (see paragraph 48 below).

26. The applicants lodged separate administrative-law appeals with the Federal Court against each of the Federal Department's three decisions of 16 November 2006, seeking their annulment. In support of their submissions, they argued that the confiscation of their assets breached the property right guaranteed by Article 26 of the Federal Constitution and that the procedure leading to the addition of their names to the lists provided for by Resolution 1483 (2003) and annexed to the Iraq Ordinance had breached the basic procedural safeguards enshrined in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966, in Articles 6 and 13 of the Convention and in Articles 29 to 32 of the Federal Constitution. The applicants took the view that the Federal Court, and before that the Federal Department for Economic Affairs, had jurisdiction to review the legality and the conformity with the Convention and the ICCPR of the 1518 Sanctions Committee's decision to add their names to the list provided for in paragraph 23 (b) of Resolution 1483 (2003). They submitted that there was no incompatibility or conflict between the obligations under the Charter and the rights guaranteed by the Convention or the ICCPR.

27. On 10 December 2007 the applicants filed additional observations limited to an assessment of the impact of a judgment of the Federal Court dated 14 November 2007 (in the case which ultimately led to the *Nada v. Switzerland* judgment ([GC], no. 10593/08, ECHR 2012)) on the merits of their own appeals. They further sought the opportunity to present oral argument on that point. A copy of these observations was sent to the Federal Department for Economic Affairs for information purposes.

28. On 18 January 2008 the applicants wrote to the Federal Court drawing its attention to the opinion delivered on 16 January 2008 by the Advocate General in the case of *Yassin Abdullah Kadi*, then pending before the Court of Justice of the European Communities ("the CJEC", which on 1 December 2009 became known as the Court of Justice of the European Union, "the CJEU"), and reiterating their request of 10 December 2007 to present oral argument.

B. Federal Court judgments of 23 January 2008

29. In three almost identical judgments, the Federal Court dismissed the appeals, confining itself to verifying that the applicants' names actually appeared on the lists drawn up by the Sanctions Committee and that the assets concerned belonged to them. The relevant parts of those judgments

read as follows (unless otherwise stated, this is the text of the judgment concerning the first applicant):

"5.1 On 10 September 2002 Switzerland became a member of the United Nations and ratified the United Nations Charter of 26 June 1945 (the Charter; RS 0.120). Article 24, paragraph 1, of the Charter provides that, in order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. Under Article 25 of the Charter, the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter. The binding nature of Security Council decisions concerning measures taken in accordance with Articles 39, 41 and 42 to maintain or restore international peace and security also stems from Article 48, paragraph 2, of the Charter, which provides that such decisions must be carried out by the members of the United Nations directly and through their action in the appropriate international agencies of which they are members. The mandatory effect of Security Council decisions is the basis for the similar effect of decisions taken by subsidiary organs such as the sanctions committees (see Eric Suy and Nicolas Angelet in Jean-Pierre Cot, Alain Pellet and Mathias Forteau, *La Charte des Nations Unies, commentaire article par article*, 3rd edition, Economica 2005, Article 25, pp. 915 et seq.).

5.2 It was under Chapter VII (Articles 39 to 51) of the Charter that the Security Council adopted Resolution 1483 (2003): having regard to the situation in Iraq, the Security Council considered that it had to take measures 'to maintain or restore international peace and security'. Those measures included, in particular, the decisions stated in paragraphs 19 and 23 of the Resolution: in particular, the Security Council decided that member States were required to freeze and transfer to the Development Fund for Iraq the assets described in paragraph 23 of the Resolution. It also decided that the 1518 Sanctions Committee would have the task of identifying the individuals and entities referred to in paragraph 23.

5.3 At the outset, the 1518 Sanctions Committee published a set of guidelines for the application of paragraphs 19 and 23 of Resolution 1483 (2003) (see http://www.un.org/french/sc/committees/1518/indexshtml); they described the manner in which the lists of individuals and entities would be drawn up and disseminated. In that document the Committee requests as follows: 'The names of individuals and entities proposed for identification should be accompanied by, to the extent possible, a narrative description of the information that forms the basis or justification for taking action pursuant to resolution 1483 (2003)'. The procedure is then described in the following terms. The Committee will reach decisions by consensus. If consensus cannot be reached, the Chairman should undertake such further consultations as may facilitate agreement. If after these consultations, consensus still cannot be reached, the matter may be submitted to the Security Council. Given the specific nature of the information, the Chairman may encourage bilateral exchanges between interested member States in order to clarify the issue prior to a decision. Where the Committee agrees, decisions may be taken by a written procedure. In such cases, the Chairman will circulate to all members of the Committee the proposed decision of the Committee, under the 'no-objection' procedure within three working days. If no objection is received within such a period, the decision will be deemed adopted.

5.4 Company S. SA and [the first applicant] appear on the lists of entities and individuals drawn up by the 1518 Sanctions Committee under number ... for the company and ... for the latter, on the ground that its managing director is [the first

applicant], the head of finance, at the time, of the Iraqi secret services, who also controls the companies H., K. SA and M. [the second applicant], three entities entrusted with the management of the assets of the former regime and its high-ranking members. The decision taken on 16 November 2006 by the Federal Department for Economic Affairs to confiscate the appellant's assets pursuant to the Iraq Ordinance and the Confiscation Ordinance is thus based on Resolution 1483 (2003)."

The two judgments concerning the second applicant:

"5.4 The [second applicant] appears on the lists of entities and individuals drawn up by the 1518 Sanctions Committee under number ..., on the ground that its managing director is [the first applicant], who also controls H. and K. SA, two entities entrusted with the management of the assets of the former regime and its high-ranking members. The decision taken on 16 November 2006 by the Federal Department for Economic Affairs to confiscate the appellant's assets pursuant to the Iraq Ordinance and the Confiscation Ordinance is thus based on Resolution 1483 (2003)."

The judgment concerning the first applicant (continued):

"6.1 Since 28 November 1974 Switzerland has been a Contracting Party to the European Convention on Human Rights. However, even though it signed, on 19 May 1976, the additional Protocol No. 1 of 20 March 1952, which guarantees in particular the protection of property (Article 1), it has not ratified it to date. That Protocol has not therefore entered into force in respect of Switzerland. Consequently, in Switzerland, the protection of property is guaranteed by the Federal Constitution alone (Article 26).

Under Article 1 ECHR, the High Contracting Parties undertake to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention (Articles 2 to 18 ECHR). Article 6 § 1 ECHR, in particular, grants everyone the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of an individual's civil rights and obligations or of any criminal charge against him or her. Under Article 13 ECHR, everyone whose rights and freedoms as set forth in the Convention are violated is entitled to an effective remedy before a national authority.

...

6.4 Even though he relies on the guarantee of the protection of property and points out that restrictions on property are possible only under the conditions laid down in Article 36 of the Constitution, the appellant is in reality only complaining of a breach of procedural safeguards and not of a violation of Articles 26 and 36 of the Constitution. He observes that restrictions on the enjoyment of his possessions, such as the confiscation of his property, can be ordered only after due process under domestic law, including a substantive examination of the legal conditions for such restriction, while ensuring the observance of fundamental rights, basic procedural safeguards, and defence rights, or the right to be heard, and in compliance with the requirement to state reasons, the prohibition of any denial of justice, and the equality of arms and adversarial principles (see appellant's observations, ch. 76-80). He complains that the reasons for his inclusion on the list of the 1518 Sanctions Committee were never brought to his knowledge and that he was not able to comment on them or defend himself in adversarial proceedings before an independent and impartial judicial body, this not being disputed – quite rightly – by the Department for Economic Affairs in the light of the listing procedure (see above, point 4.3).

In this connection, the appellant is of the opinion that Switzerland is required to apply Resolution 1483 (2003), but also the provisions of the European Convention on

Human Rights and those of the International Covenant on Civil and Political Rights concerning procedural safeguards; he argues that there is no contradiction between those various obligations, and that for this reason the decision appealed against should be quashed and the matter referred back for fresh confiscation proceedings before the Swiss courts, which would examine the merits of the measure in compliance with basic procedural safeguards.

It is therefore appropriate to examine the procedural safeguards that Switzerland is required to comply with, having regard to its obligations under the Charter and Resolution 1483 (2003), in the proceedings initiated by the Federal Department for Economic Affairs leading to the confiscation of the appellant's assets.

7.1 Pursuant to Article 5 paragraph 4, of the Constitution, the Confederation and the Cantons comply with international law. Under Article 190 of the Constitution, the Federal Court and the other authorities are required to apply federal laws and international law. International law, within the meaning of Article 190 of the Constitution, is defined by jurisprudence as the entire body of international law that is binding on Switzerland, comprising international agreements, customary international law, the general rules of the law of nations and the decisions of international organisations that have mandatory effect in Switzerland. Accordingly, the Federal Court is in principle required to comply with the provisions of the Charter, United Nations Security Council resolutions, the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

7.2 Article 190 of the Constitution does not, however, provide for any rule of conflict between the various norms of international law that are equally binding on Switzerland. However, under Article 103 of the Charter, in the event of a conflict between the obligations of the members of the United Nations under the Charter and their obligations under any other international agreement, their Charter obligations prevail. This primacy is also enshrined in Article 30 § 1 of the Vienna Convention on the Law of Treaties of 23 May 1969 ('VCLT'; RS 0.111; entered into force in respect of Switzerland on 6 June 1990).

According to legal opinion and case-law, this is an absolute and general primacy which applies regardless of the nature of the treaty which is in conflict with the Charter, whether it is bilateral or multilateral, or whether the treaty entered into force before or after the entry into force of the Charter. The primacy is granted not only to the obligations expressly laid down in the Charter, but also, according to the International Court of Justice, to those that stem from binding decisions of United Nations organs, in particular the binding decisions taken by the Security Council pursuant to Article 25 of the Charter (see the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, ICJ Reports 1992, p. 15, paragraph 39; see also Felipe Paolillo in *Les conventions de Vienne sur le droit des traités, commentaire article par article*, Olivier Corten and Pierre Klein (eds.), Bruylant, Brussels 2006, no. 33 on Article 30 VCLT and the numerous references cited). This primacy does not render null and void the treaty which is in conflict with the Charter obligations, but merely suspends the treaty for as long as the conflict remains (see Eric Suy in *Les conventions de Vienne sur le droit des traités, op. cit.*, no. 15 on Article 53 VCLT and the references cited).

Moreover, neither the European Convention on Human Rights nor the International Covenant on Civil and Political Rights contains clauses which would, in themselves or by virtue of another treaty, prevail over the conflict clause that is enshrined in both Article 103 of the Charter and Article 30 § 1 VCLT.

Article 46 ICCPR certainly provides that '[n]othing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant'. However, according to legal opinion, this provision simply means that the International Covenant on Civil and Political Rights cannot hinder the task of the political organs and specialised agencies which have been entrusted under the Charter with duties relating to human rights (see Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, Kehl 2005, no. 3, on Article 46 ICCPR, p. 798). It does not therefore establish any hierarchy between the decisions of the Security Council and the rights guaranteed by the ICCPR – the United Nations as such is not a party to the latter in any event. It cannot be concluded that the International Covenant on Civil and Political Rights prevails over Charter obligations.

7.3 Consequently, in the event of any conflict between Switzerland's obligations under the Charter and those deriving from the European Convention on Human Rights or the International Covenant on Civil and Political Rights, the Charter obligations in principle prevail over the latter, as the appellant has not in fact denied. He takes the view, however, that this principle is not absolute. In his opinion, the obligations arising from the Charter, in particular those imposed by Resolution 1483 (2003), lose their binding character if they contravene the rules of *jus cogens*.

8. The appellant argues that the procedural safeguards under Article 14 ICCPR and Article 6 ECHR constitute *jus cogens* norms. He submits that, in breaching those safeguards, Resolution 1483 (2003) should lose its binding effect.

8.1 Under the heading '*Treaties conflicting with a peremptory norm of general international law (*jus cogens*)*', Article 53 VCLT provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law, that is, a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Moreover, Article 64 VCLT provides that, if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. Article 71 VCLT governs the consequences of the invalidity of a treaty in such cases.

8.2 Article 53 VCLT does not contain any examples of peremptory norms of general international law (Report of the International Law Commission, Commentary on Art. 50, ILC Yearbook 1966 II, pp. 269 et seq.). The words 'by the international community of States as a whole' do not mean that a norm must be accepted and recognised as peremptory by States unanimously. A significant majority is sufficient. By way of example, the norms concerning the prohibition of the use of force, slavery, genocide, piracy, unequal treaties and racial discrimination are generally cited (see Eric Suy, *op. cit.*, no. 12 on Article 53 VCLT, p. 1912; Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *Droit international public*, 7th edition, LGDJ 2002, no. 127, pp. 205 et seq.; and Joe Verhoeven, *Droit international public*, Larcier 2000, pp. 341 et seq.).

This list of examples does not include the rights deriving from Article 14 ICCPR and Article 6 ECHR, which are relied upon by the appellant. Their mere recognition by the International Covenant on Civil and Political Rights and the European Convention on Human Rights does not go so far as making them peremptory norms of general international law. It transpires, moreover, from the preparatory work in

respect of Article 53 VCLT and the wording of that provision that in principle there can be no regional *jus cogens* norms (see Eric Suy, *op. cit.*, no. 9 on Article 53 VCLT, p. 1910; this is a controversial matter in legal opinion, see *inter alia*: Eva Kornicker, *Ius cogens und Umweltvölkerrecht*, Thesis Basle 1997, pp. 62 et seq. and the numerous references cited therein).

8.3 It is true that, in the event of a public emergency which threatens the life of the nation, Article 4, paragraphs 1 and 2, ICCPR authorises, under certain conditions, measures that derogate from the obligations under the Covenant, except for those deriving from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 (right to life, prohibition of torture, prohibition of slavery, prohibition of imprisonment on the ground of inability to fulfil a contractual obligation, prohibition of retrospective criminal legislation, recognition of legal personality, freedom of thought, conscience and religion). Article 15, paragraphs 1 and 2, ECHR also contain a public emergency clause permitting derogation from Convention obligations, similarly excluding any derogation from Articles 2, 3, 4 (paragraph 1) and 7 (right to life, prohibition of torture, prohibition of slavery, no punishment without law). Some authors take the view that the rights and prohibitions listed in Article 4, paragraph 2, ICCPR and Article 15, paragraph 2, ECHR correspond to the core human rights and could therefore be regarded as peremptory norms of general international law (see Stefan Oeter, 'Ius cogens und der Schutz der Menschenrechte', in Liber amicorum *Luzius Wildhaber* 2007, pp. 499 et seq. and pp. 507 et seq.); for other authors the provisions merely point in that direction (see Eva Kornicker, *op. cit.*, pp. 58 et seq.). The latter opinion seems to correspond to that of the (former) Commission on Human Rights [recte: Human Rights Committee], which found that the list of non-derogable rights in Article 4, paragraph 2, ICCPR might admittedly be related to, but not identical with, the question whether certain human rights corresponded to peremptory norms of general international law (General Comments 29/72 of 24 July 2001 under Article 40, paragraph 4, ICCPR, ch. 11, in Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, Kehl 2005, pp. 1145 et seq. at 1149). In the present case it is not necessary to settle this question in so far as Article 14 ICCPR and Article 6 ECHR do not, in any event, appear in the lists given in Article 4, paragraph 2, ICCPR and Article 15, paragraph 2, ECHR.

8.4 Consequently, contrary to what the appellant has claimed, neither the fundamental procedural safeguards, nor the right to an effective remedy, under Articles 6 and 13 ECHR and Article 14 ICCPR, have *per se* the nature of peremptory norms of general international law (*jus cogens*), in particular in the context of the confiscation procedure affecting the appellant's property (see, to the same effect, the judgment of the Swiss Federal Court no. 1A.45/2007 of 14 November 2007 in the case of *Nada v. DFE*, point 7.3; judgment of the Court of First Instance of the European Communities, 21 September 2005, *Yusuf and Al Barakaat International Foundation v. Council and Commission*, T-306/01 Reports 2005 II, p. 3533, paragraphs 307 and 341; judgment of the Court of First Instance of the European Communities, 21 September 2005, *Kadi v. Council and Commission*, T-315/01 Reports 2005 II p. 3649, paragraphs 268 and 286; judgment of the Court of First Instance of the European Communities, 12 July 2006, *Ayadi v. Council*, T-253/02 Reports 2006 II p. 2139, paragraph 116; judgment of the Court of First Instance of the European Communities, 12 July 2006, *Hassan v. Council and Commission*, T-49/04 Reports 2006 II p. 52, paragraph 92).

As to the rights guaranteed by Articles 29 et seq. of the Constitution, this is a matter of domestic law which cannot constitute *jus cogens* or hinder the implementation by Switzerland of Resolution 1483 (2003).

9. According to the appellant, Switzerland should have sufficient latitude, even in the light of its obligations *vis-à-vis* the Security Council, to fulfil its duties under Article 14 ICCPR and Article 6 ECHR. In his view it is necessary to distinguish between the question of the deletion of his name from the list of the 1518 Sanctions Committee and that of the confiscation of the frozen assets: the question of confiscation could be dealt with in fair proceedings without contravening the Charter obligations.

9.1 That opinion cannot be upheld. The description of the measures (freezing of funds or other financial assets, immediate transfer thereof to the Development Fund for Iraq), of the individuals and entities concerned (previous Iraqi government, Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction), and of the mandate given to the 1518 Sanctions Committee (to enumerate the individuals and entities mentioned in paragraph 23), is detailed and leaves no room for interpretation. Similarly, the list of individuals and entities drawn up by the 1518 Sanctions Committee is not indicative in nature. It is not a matter of deciding whether the appellant's name should be, or is legitimately, included on that list; it is simply a question of observing that his name does appear on the list in question, which must be transposed into Swiss domestic law. In asserting that it should be possible to deal separately with the question of the confiscation of his assets, the appellant overlooks the fact that the measures imposed on member States include the immediate transfer of the frozen assets to the Development Fund for Iraq. This order does not call for any interpretation, nor does it grant any latitude in the result that it requires of member States as to the treatment of the frozen assets of persons who, like the appellant, are included in particular on the list of the 1518 Sanctions Committee. Being clearly ascertained, those assets must be transferred to the Development Fund for Iraq. From that perspective, the present case differs from a case examined by the Court of First Instance of the European Communities, *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union*. It concerned Resolution 1373 (2001) of 28 September 2001 laying down strategies to combat terrorism, which required the member States of the United Nations – in that case the European Community – to identify individuals, groups and entities whose funds had to be frozen, because the Resolution itself did not provide any list of the latter. The Court of First Instance found that procedural safeguards had to be observed in the keeping of such a list (judgment of the Court of First Instance of the European Communities, 12 December 2006, *Organisation des Modjahedines du peuple d'Iran v. Council*, T-228/02, not yet reported).

9.2 In those circumstances, contrary to what the appellant has claimed, the implementation of Resolution 1483 (2003) requires Switzerland to adhere strictly to the measures introduced and to the decisions of the 1518 Sanctions Committee, which, unless found by the Security Council to be in breach of *jus cogens* norms, does not leave any room, even on the grounds of ensuring the procedural safeguards provided for in the European Convention on Human Rights, the International Covenant on Civil and Political Rights or the Swiss Constitution, for an examination of the procedure by which the appellant's name was added to the list issued by the 1518 Sanctions Committee, or for verification of the justification for such addition.

10. The appellant further argued that Article 4 of the Confiscation Ordinance granted the Federal Court full jurisdiction to deal with the various aspects of the matter, enabling it to find that the authority below had failed to ascertain the merits of the confiscation of his assets or, in other words, that the authority had wrongly

accepted their confiscation solely on the basis that his name appeared on the list annexed to Resolution 1483 (2003), without remedying the breach of his procedural rights under, *inter alia*, Articles 29 et seq. of the Constitution.

10.1 According to the foregoing considerations, Article 4 of the Confiscation Ordinance cannot authorise the Federal Court, any more than the authority below, to verify whether the appellant's inclusion on the list issued by the 1518 Sanctions Committee complied with the procedural safeguards of Article 14 ICCPR, Article 6 ECHR and Article 29 et seq. of the Constitution. With the exception of an examination of a possible breach of *jus cogens* norms, as shown above, Switzerland is thus not authorised to scrutinise the validity of Security Council decisions, and in particular that of Resolution 1483 (2003), not even in terms of compliance with procedural safeguards, or to provide redress for any defects in such decisions. For that could have the effect of depriving Article 25 of the Charter of any effectiveness, as would be the case if the appellant's frozen assets were not confiscated and transferred to the Development Fund for Iraq (see Eric Suy and Nicolas Angelet in *La Charte des Nations Unies, Commentaire article par article*, Jean-Pierre Cot, Alain Pellet and Mathias Forteau (eds.), 3rd edition, Economica 2003, Art. 25, p. 917).

10.2. However, with that reservation, Switzerland is free to choose how it transposes into domestic law the obligations arising from Resolution 1483 (2003) and the arrangements for transferring the frozen assets. The Federal Council has made use of this discretion in distinguishing between the measures introduced for the freezing of the assets and those governing the transfer of frozen assets. The Federal Department, for its part, suspended the confiscation procedure at the request of the appellant, who sought to have the matter examined by the Sanctions Committee, and resumed it only upon his express application. With the same reservation, the Federal Council was entitled to guarantee the right of the frozen asset-holders to be heard before the confiscation decision was taken. It was also entitled to make available an administrative-law appeal against such decisions.

In the present case, the appellant made full use of his right to be heard because he obtained access to the file of the Federal Department for Economic Affairs, or at least to the relevant bank documents, and had the opportunity to express himself before that authority. He also fully availed himself of the right provided for in Article 4 of the Confiscation Ordinance by lodging the present administrative appeal. As to that matter, falling as it does within the jurisdiction of Switzerland, it should be noted that the applicant has not submitted any complaint of a violation of Articles 26 and 36 of the Constitution in respect of the confiscation procedure (see point 5.4).

In a further complaint, lastly, the appellant contended that the refusal to annul the decision of the Federal Department for Economic Affairs of 16 November 2006 for a breach of procedural safeguards ran counter to the position defended on many occasions by Switzerland, the Federal Council or the Federal Department for Foreign Affairs, asserting an intangible principle of respect for human rights. He argued that this was an 'indivisible' position in relation to other Nations which had been disregarded by the decision of the Federal Department for Economic Affairs of 16 November 2006.

10.3 The appellant seems to be unaware of the meaning that should be given to indivisibility (in the area) of human rights. According to legal opinion, the principle of indivisibility of human rights means that States cannot choose between human rights in order to give priority to some over others. The aim of this principle is to prevent governments from claiming to defend human rights by choosing from the list, as they see fit, those they accept and those they ignore (see Françoise Bouchet-Saulnier,

Droits de l'homme, droit humanitaire et justice internationale, Actes Sud 2002, pp. 23 and 27 et seq.).

10.4 In the present case, to the extent that his position can be understood, the appellant is complaining more about Switzerland's attitude, which he regards as contradictory. This opinion disregards the fact that the positive legal order, as set out above, is mandatory under Article 190 of the Constitution for reasons of legal certainty. Switzerland cannot, by itself, delete the appellant's name from the list drawn up by the Sanctions Committee, which has sole competence for that purpose, even if the procedure for that purpose is not fully satisfactory (see judgment 1A.45/2007 of 14 November 2007, point 8.3). Moreover, it is not contradictory for the federal authorities to find the system deficient and yet, as in the present case, to advocate and act on a political level in favour of intangible respect for human rights, especially in relation to the listing and delisting procedures applied by the 1518 Sanctions Committee. Switzerland's conduct does not therefore breach Articles 26 and 29 et seq. of the Constitution, Articles 6 and 13 ECHR or Article 14 ICCPR, under that head either.

11. The appeal must accordingly be dismissed. The Federal Court finds, however, that, in the context of Switzerland's power and freedom of implementation (see point 10.2), the authority below should grant the appellant a brief and final period of time, before implementing the decision of 16 November 2006 – which enters into force with the dismissal of the present appeal – to allow him to apply, should he so wish, to the 1518 Sanctions Committee for a new delisting procedure in accordance with the improved arrangements of Resolution 1730 (2006) of 19 December 2006, the appellant not having had the opportunity to make use of the latter because he wrongly placed all his hopes in the present administrative-law appeal.

12. The appeal is thus dismissed for the foregoing reasons ..."

C. Subsequent developments

30. On 13 June 2008 the applicants lodged a delisting application in accordance with the procedure introduced by Resolution 1730 (2006). The application was rejected on 6 January 2009.

31. In a favourable opinion issued by the SECO on 26 September 2008, the applicants were informed that they would be authorised to make use of the assets frozen in Switzerland to pay the fees charged by a lawyer in the United States, that lawyer's activities being confined to their defence in connection with the Swiss confiscation procedure and the delisting procedure. Since 2007, on four occasions (the last being on 26 February 2009), the SECO, on the basis of Article 2, paragraph 3, of the Iraq Ordinance, granted the applicants' requests and authorised the release of certain sums for the payment of lawyer's fees in respect of the confiscation decisions. According to the information provided by the Swiss Government and not denied by the applicants, the SECO has released about CHF 850,000 in respect of lawyers' fees and over CHF 200,000 in respect of court costs.

32. On 6 March 2009 the Swiss authorities stayed the execution of the confiscation decisions pending the judgment of the European Court of

Human Rights, and that of the Federal Court on an application to reopen the domestic proceedings if the Court were to find a violation of the Convention.

33. In its Resolution 1956 (2010) of 15 December 2010 the Security Council decided to terminate the Development Fund for Iraq no later than 30 June 2011 and to transfer the proceeds from that Fund to the Government of Iraq's "successor arrangements account or accounts". The Sanctions Committee set up under Resolution 1518 (2003) continued to operate.

34. On 20 December 2013 the Federal Department for Economic Affairs issued two other confiscation decisions in respect of assets in the name of the first applicant that were frozen in two banks, to be paid into the successor funds of the Iraqi Government. Referring to the Federal Council's decision of 6 March 2009 (paragraph 32 above), the Department decided that the assets concerned would remain frozen and would be transferred to the funds in question only if and when the present application was rejected by the European Court of Human Rights, "or when the confiscation decisions of 16 November 2006 ... were confirmed by the Federal Court in the event of review". An appeal was lodged against those decisions before the Federal Administrative Court which, on 7 May 2014, suspended the proceedings pending the judgment of the Grand Chamber of the European Court of Human Rights.

II. RELEVANT DOMESTIC LAW

A. Federal Constitution

35. The relevant Articles of the Federal Constitution read as follows:

Article 26: Guarantee of property

"1. Property shall be guaranteed.

2. Full compensation shall be due in the event of expropriation or any restriction of ownership equivalent to expropriation."

Article 190: Applicable law

"The Federal Court and the other authorities shall be required to apply federal statutes and international law."

B. Ordinances of the Federal Council

36. The relevant provisions of the Ordinance of 7 August 1990, instituting economic measures in respect of the Republic of Iraq ("the Iraq Ordinance"), as worded at the relevant time, read as follows:

Article 1: Ban on supply of military equipment

"1. The supply, sale or brokerage of arms to anyone in Iraq, with the exception of the Iraqi Government or the multinational force within the meaning of Security Council Resolution 1546 (2004), shall be prohibited.

2. Paragraph 1 shall apply only to the extent that the Federal War Materiel Act of 13 December 1996 and the Property Regulation Act of 13 December 1996, and their respective implementing ordinances, are not applicable."

Article 2: Freezing of assets and economic resources

"1. The following assets and economic resources shall be frozen:

(a) Those belonging to or under the control of the previous Government of Iraq or to undertakings or corporations under its control. The scope of this freezing measure shall not extend to the assets and economic resources of Iraqi representations in Switzerland or to any assets and economic resources which have been deposited in Switzerland by Iraqi State-owned undertakings or corporations or which have been paid or transferred thereto after 22 May 2003.

(b) Those belonging to or under the control of senior officials of the former Iraqi regime and their immediate family members.

(c) Those belonging to or under the control of undertakings or corporations which are themselves controlled by persons listed in sub-paragraph (b) or which are under the management of persons acting on behalf of or at the direction of persons listed in paragraph (b).

2. The individuals, undertakings and corporations referred to in paragraph 1 are mentioned in the annex hereto. The Federal Department for Economic Affairs shall draw up the annex based on data from the United Nations.

3. The State Secretariat for Economic Affairs ('SECO') may, after consulting the appropriate services of the Federal Department of Foreign Affairs and the Federal Department of Finance, authorise payments from blocked accounts, transfers of frozen capital assets and the release of frozen economic resources, in order to protect Swiss interests or to prevent hardship cases."

Article 2a: Mandatory declarations

"1. Any person or organisation holding or managing assets acknowledged to be covered by the freezing of assets under Article 2 § 1 hereof must immediately declare them to the SECO.

1 *bis*. Any person or organisation knowing of economic resources acknowledged to be covered by the freezing of economic resources under Article 2 § 1 hereof must immediately declare them to the SECO.

2. The declaration must give the name of the beneficiary, the object and the amount of the assets or economic resources frozen.

3. Persons or organisations in possession of cultural property within the meaning of Article 1a hereof must declare it immediately to the Federal Office of Culture."

Article 2c: Implementation of the freezing of economic resources

"On the direction of the SECO, the competent authorities shall take the necessary measures for the freezing of the economic resources, for example, by an indication of freezing in the land register or the seizure or placing under seal of luxury goods."

37. The Ordinance of 18 May 2004 on the confiscation of frozen Iraqi assets and economic resources and their transfer to the Development Fund for Iraq ("the Confiscation Ordinance"), as worded at the relevant time, read as follows:

Article 1: Object

"The present Ordinance shall govern:

(a) The confiscation of the assets and economic resources which have been frozen pursuant to Article 2 § 1 of the Ordinance of 7 August 1990 instituting economic measures in respect of the Republic of Iraq; and

(b) The transfer of the assets and the proceeds from the sale of the economic resources to the Development Fund for Iraq."

Article 2: Confiscation procedure

"1. The Federal Department for Economic Affairs, Training and Research (DEFR) shall be authorised to confiscate, by means of a decision, the assets and economic resources under Article 1 hereof.

2. Before giving notice of the confiscation decision it shall transmit to the parties in writing a draft of that decision. The parties may express their views within 30 days."

Article 3: Exceptions

"The DEFR may, after consulting the appropriate services of the Federal Department for Foreign Affairs and the Federal Department for Finance, authorise exceptions in order to prevent hardship cases. Requests pertaining thereto shall be submitted to the DEFR within the time-limit provided for in Article 2 § 2."

Article 4: Appeals

"Confiscation decisions taken by the DEFR may be appealed against to the Federal Administrative Court."

Article 5: Transfer to the Development Fund for Iraq

"As soon as the confiscation decision has become *res judicata*, the DEFR shall proceed with the transfer of the confiscated assets, and the proceeds from the sale of the confiscated economic resources, to the Development Fund for Iraq."

Article 6: Entry into force and term

"1. The present Ordinance shall enter into force on 1 July 2004 and shall remain in effect until 30 June 2007.

2. The validity of the present Ordinance is extended until 30 June 2010.

3. The validity of the present Ordinance is extended until 30 June 2013."

C. Case-law of the Swiss Federal Court

38. The case of *Makhlouf v. Département fédéral de l'économie* (partly published under ATF (*arrêts du tribunal fédéral* – Federal Court Judgments) no. 139 II 384; 2C_721/2012) concerned the adoption by Switzerland of sanctions parallel to those imposed by a decision of the Council of the European Union (an organisation to which Switzerland does not belong but which is its "principal trading partner" within the meaning of the Federal Law on embargoes) and directed against persons close to the regime of Bashar Al-Assad (Syria). The applicant complained of his inclusion on the lists annexed to the ordinances adopted by the Federal Council and the ensuing freezing of his financial assets. In its judgment of 27 May 2013 the Federal Court (Second Public Law Division) agreed to examine the substance of the applicant's complaint, including in the light of fundamental rights, but it dismissed the claims, not finding any arbitrariness or *ultra vires* acts in the area of international sanctions.

39. Similarly, in the case of *X v. Département fédéral des affaires étrangères* (ATF no. 141 I 20), which concerned sanctions imposed by the Swiss Federal Council on persons closely connected to the regime of former Egyptian President Hosni Mubarak, the applicant had complained about the inclusion of his name on the list annexed to the Federal Council's ordinance. That measure had been decided in parallel to the seizure of his assets following a request for mutual legal assistance by the Egyptian authorities. In its judgment of 13 December 2014 the Federal Court (Second Public Law Division) agreed to examine the substance of the applicant's complaint but, as in the case of *Makhlouf*, did not find any appearance of *ultra vires* acts in the area of international sanctions. It pointed out, however, that in view of the need to protect fundamental rights, the competent authorities had to pursue their investigations with due care and diligence, ensuring that the impugned measure no longer produced any effects in relation to the applicant once the aim of that measure had been attained.

III. RELEVANT INTERNATIONAL AND EUROPEAN LAW

A. The United Nations Charter and relevant case-law of the International Court of Justice

40. The relevant provisions of the UN Charter read as follows:

"Preamble

"We the peoples of the United Nations, determined

...

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,

...”

Article 1

“The Purposes of the United Nations are:

...

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;

...”

Article 24

“1. In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

...”

Article 25

“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

...”

Article 41

“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

Article 48

“1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.”

Article 55

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

...

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 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."

41. The International Court of Justice ("the ICJ") has asserted the primacy of obligations under the UN Charter over any other obligation arising under an international agreement, regardless of whether the latter was concluded before or after the UN Charter or was a purely regional arrangement. In *Nicaragua v. United States of America* (*ICJ Reports* 1984, p. 392, § 107) it declared:

"... Furthermore, it is also important always to bear in mind that all regional, bilateral, and even multilateral, arrangements that the Parties to this case may have made, touching on the issue of settlement of disputes or the jurisdiction of the International Court of Justice, must be made always subject to the provisions of Article 103 of the Charter ..."

42. In its Advisory Opinion of 21 June 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (ICJ Reports* 1971, p. 54, § 116), the ICJ observed as follows:

"... when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter."

43. The ICJ confirmed this principle in its Order of 14 April 1992 in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures (ICJ Reports* 1992, p. 15, § 39), as follows:

"Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; ... and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement ..."

B. International treaties of universal scope

1. The Vienna Convention on the Law of Treaties

44. The relevant provisions of the Vienna Convention on the Law of Treaties of 1969, which entered into force in respect of Switzerland on 6 June 1990, read as follows:

Article 30 – Application of successive treaties relating to the same subject matter

"1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States Parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

Article 53 - Treaties conflicting with a peremptory norm of general international law ("jus cogens")

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Article 64 - Emergence of a new peremptory norm of general international law ("jus cogens")

"If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

2. The International Covenant on Civil and Political Rights

45. The relevant parts of the International Covenant on Civil and Political Rights (to which Switzerland acceded on 18 June 1992) read as follows:

Preamble

"The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

...

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

...

Agree upon the following articles:"

Article 2 § 3

"Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted."

Article 14 § 1

"... In the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ..."

Article 46

"Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant."

C. UN Security Council resolutions relevant to the present case

1. Resolution 1483 (2003)

46. In so far as it is relevant in the present case, Resolution 1483 (2003) of 22 May 2003 reads as follows:

> "The Security Council,
>
> *Recalling* all its previous relevant resolutions,
>
> *Reaffirming* the sovereignty and territorial integrity of Iraq,
>
> ...
>
> *Stressing* the right of the Iraqi people freely to determine their own political future and control their own natural resources, welcoming the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and expressing resolve that the day when Iraqis govern themselves must come quickly,
>
> ...
>
> *Resolved* that the United Nations should play a vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance,
>
> *Noting* the statement of 12 April 2003 by the Ministers of Finance and Central Bank Governors of the Group of Seven Industrialized Nations in which the members recognized the need for a multilateral effort to help rebuild and develop Iraq and for the need for assistance from the International Monetary Fund and the World Bank in these efforts,
>
> ...
>
> *Determining* that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,
>
> *Acting* under Chapter VII of the Charter of the United Nations,
>
> 1. *Appeals* to Member States and concerned organizations to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this resolution;
>
> 2. *Calls upon* all Member States in a position to do so to respond immediately to the humanitarian appeals of the United Nations and other international organizations for Iraq and to help meet the humanitarian and other needs of the Iraqi people by providing food, medical supplies, and resources necessary for reconstruction and rehabilitation of Iraq's economic infrastructure;
>
> 3. *Appeals* to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice;
>
> ...
>
> 8. *Requests* the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in

post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq through:

...

(d) facilitating the reconstruction of key infrastructure, in cooperation with other international organizations;

(e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions;

...

(g) promoting the protection of human rights;

...

9. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority;

...

12. *Notes* the establishment of a Development Fund for Iraq to be held by the Central Bank of Iraq and to be audited by independent public accountants approved by the International Advisory and Monitoring Board of the Development Fund for Iraq and looks forward to the early meeting of that International Advisory and Monitoring Board, whose members shall include duly qualified representatives of the Secretary-General, of the Managing Director of the International Monetary Fund, of the Director-General of the Arab Fund for Social and Economic Development, and of the President of the World Bank;

13. *Notes further* that the funds in the Development Fund for Iraq shall be disbursed at the direction of the Authority, in consultation with the Iraqi interim administration, for the purposes set out in paragraph 14 below;

14. *Underlines* that the Development Fund for Iraq shall be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq;

15. *Calls upon* the international financial institutions to assist the people of Iraq in the reconstruction and development of their economy and to facilitate assistance by the broader donor community, and welcomes the readiness of creditors, including those of the Paris Club, to seek a solution to Iraq's sovereign debt problems;

...

19. *Decides* to terminate the Committee established pursuant to paragraph 6 of resolution 661 (1990) at the conclusion of the six month period called for in paragraph 16 above and further decides that the Committee shall identify individuals and entities referred to in paragraph 23 below;

...

22. *Noting* the relevance of the establishment of an internationally recognized, representative government of Iraq and the desirability of prompt completion of the restructuring of Iraq's debt as referred to in paragraph 15 above, further decides that, until December 31, 2007, unless the Council decides otherwise, petroleum, petroleum products, and natural gas originating in Iraq shall be immune, until title passes to the initial purchaser from legal proceedings against them and not be subject to any form of attachment, garnishment, or execution, and that all States shall take any steps that may be necessary under their respective domestic legal systems to assure this protection, and that proceeds and obligations arising from sales thereof, as well as the Development Fund for Iraq, shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations except that the above-mentioned privileges and immunities will not apply with respect to any legal proceeding in which recourse to such proceeds or obligations is necessary to satisfy liability for damages assessed in connection with an ecological accident, including an oil spill, that occurs after the date of adoption of this resolution;

23. *Decides* that all Member States in which there are:

(a) funds or other financial assets or economic resources of the previous Government of Iraq or its state bodies, corporations, or agencies, located outside Iraq as of the date of this resolution, or

(b) funds or other financial assets or economic resources that have been removed from Iraq, or acquired, by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction,

shall 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 shall cause their transfer to the Development Fund for Iraq, it being understood that, unless otherwise addressed, claims made by private individuals or non-government entities on those transferred funds or other financial assets may be presented to the internationally recognized, representative government of Iraq; and decides further that all such funds or other financial assets or economic resources shall enjoy the same privileges, immunities, and protections as provided under paragraph 22;

...

26. *Calls upon* Member States and international and regional organizations to contribute to the implementation of this resolution;

27. *Decides* to remain seized of this matter."

2. Procedure for inclusion of names on the sanctions list: Resolution 1518 (2003)

47. The relevant parts of Resolution 1518 (2003) of 24 November 2003 read as follows:

"The Security Council,

Recalling all of its previous relevant resolutions,

Recalling further its earlier decision in resolution 1483 (2003) of 22 May 2003 to terminate the Security Council Committee established pursuant to resolution 661 (1990),

Stressing the importance of all Member States fulfilling their obligations under paragraph 10 of resolution 1483 (2003),

Determining that the situation in Iraq, although improved, continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* to establish, with immediate effect, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to continue to identify pursuant to paragraph 19 of resolution 1483 (2003) individuals and entities referred to in paragraph 19 of that resolution, including by updating the list of individuals and entities that have already been identified by the Committee established pursuant to paragraph 6 of resolution 661 (1990), and to report on its work to the Council;

2. *Decides* to adopt the guidelines (reference SC/7791 IK/365 of 12 June 2003) and definitions (reference SC/7831 IK/372 of 29 July 2003) previously agreed by the Committee established pursuant to paragraph 6 of resolution 661 (1990), to implement the provisions of paragraphs 19 and 23 of resolution 1483 (2003), and further decides that the guidelines and definitions can be amended by the Committee in light of further considerations;

...

4. *Decides* to remain seized of the matter."

3. Procedures for deletion of names from the sanctions list

(a) Resolution 1730 (2006)

48. Security Council Resolution 1730 (2006) of 19 December 2006, establishing the delisting procedure, reads as follows in its relevant part:

"The Security Council,

Recalling the statement of its President of 22 June 2006 (S/PRST/2006/28),

Emphasizing that sanctions are an important tool in the maintenance and restoration of international peace and security,

Further emphasizing the obligations placed upon all Member States to implement, in full, the mandatory measures adopted by the Security Council,

Continuing in its resolve to ensure that sanctions are carefully targeted in support of clear objectives and implemented in ways that balance effectiveness against possible adverse consequences,

Committed to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions,

1. *Adopts* the de-listing procedure in the document annexed to this resolution and requests the Secretary-General to establish within the Secretariat (Security Council

Subsidiary Organs Branch), a focal point to receive de-listing requests and to perform the tasks described in the attached annex;

2. *Directs* the sanctions committees established by the Security Council, including those established pursuant to resolution 1718 (2006), 1636 (2005), 1591 (2005), 1572 (2004), 1533 (2004), 1521 (2003), 1518 (2003), 1267 (1999), 1132 (1997), 918 (1994), and 751 (1992) to revise their guidelines accordingly;

3. *Decides* to remain seized of the matter.

De-listing procedure

The Security Council requests the Secretary-General to establish, within the Secretariat (Security Council Subsidiary Organs Branch), a focal point to receive de-listing requests. Petitioners seeking to submit a request for de-listing can do so either through the focal point process outlined below or through their state of residence or citizenship.[2]

The focal point will perform the following tasks:

1. Receive de-listing requests from a petitioner (individual(s), groups, undertakings, and/or entities on the Sanctions Committee's lists).

2. Verify if the request is new or is a repeated request.

3. If it is a repeated request and if it does not contain any additional information, return it to the petitioner.

4. Acknowledge receipt of the request to the petitioner and inform the petitioner on the general procedure for processing that request.

5. Forward the request, for their information and possible comments to the designating government(s) and to the government(s) of citizenship and residence. Those governments are encouraged to consult with the designating government(s) before recommending de-listing. To this end, they may approach the focal point, which, if the designating state(s) so agree(s), will put them in contact with the designating state(s).

6. (a) If, after these consultations, any of these governments recommend de-listing, that government will forward its recommendation, either through the focal point or directly to the Chairman of the Sanctions Committee, accompanied by that government's explanation. The Chairman will then place the de-listing request on the Committee's agenda.

(b) If any of the governments, which were consulted on the de-listing request under paragraph 5 above oppose the request, the focal point will so inform the Committee and provide copies of the de-listing request. Any member of the Committee, which possesses information in support of the de-listing request, is encouraged to share such information with the governments that reviewed the de-listing request under paragraph 5 above.

(c) If, after a reasonable time (3 months), none of the governments which reviewed the de-listing request under paragraph 5 above comment, or indicate that they are working on the de-listing request to the Committee and require an additional definite period of time, the focal point will so notify all members of the

2. A State can decide, that as a rule, its citizens or residents should address their de-listing requests directly to the focal point. The State will do so by a declaration addressed to the Chairman of the Committee that will be published on the Committee's website.

Committee and provide copies of the de-listing request. Any member of the Committee may, after consultation with the designating government(s), recommend de-listing by forwarding the request to the Chairman of the Sanctions Committee, accompanied by an explanation. (Only one member of the Committee needs to recommend de-listing in order to place the issue on the Committee's agenda.) If after one month, no Committee member recommends de-listing, then it shall be deemed rejected and the Chairman of the Committee shall inform the focal point accordingly.

7. The focal point shall convey all communications, which it receives from Member States, to the Committee for its information.

8. Inform the petitioner:

(a) Of the decision of the Sanctions Committee to grant the de-listing petition; or

(b) That the process of consideration of the de-listing request within the Committee has been completed and that the petitioner remains on the list of the Committee."

(b) Other procedures

49. By Resolution 1904 (2009) of 17 December 2009 concerning the regime of sanctions against al-Qaeda, Osama bin Laden and the Taliban, the Security Council created the office of independent Ombudsperson to assist the relevant sanctions committee in its examination of delisting requests. The Resolution states that the Ombudsperson receives delisting requests in accordance with the procedures outlined in annex II to the resolution and drafts for the committee a "Comprehensive Report" on the completion of a given period. By Resolutions 1989 (2011), 2083 (2012) and 2161 (2014), the Security Council considerably extended the duties and mandate of the Ombudsperson, who can now make recommendations concerning delisting requests. If he or she recommends delisting and the relevant sanctions committee does not decide, by consensus, to maintain the person on the list within a period of sixty days, the person's name will be deemed deleted. It should be noted that the introduction of this mechanism, together with the office of Ombudsperson, post-dates the facts of the present case, as the applicants' delisting request was rejected by the Sanctions Committee in January 2009.

50. It should also be noted that the applicants in the present case would not be able to avail themselves of this procedure because the Ombudsperson's mandate is confined to the sanctions imposed on members of al-Qaeda and not those applicable to the senior officials of the former Iraqi regime.

D. Resolution A/RES/68/178 of the UN General Assembly

51. The relevant parts of Resolution A/RES/68/178 of the UN General Assembly of 18 December 2013 (non-binding) read as follows:

> "*The General Assembly*,
>
> ...
>
> 1. *Reaffirms* that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law;
>
> ...
>
> 12. *Urges* States, while ensuring full compliance with their international obligations, to ensure the rule of law and to include adequate human rights guarantees in their national procedures for the listing of individuals and entities with a view to combating terrorism;
>
> ..."

E. Opinions of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

1. Statement by M. Scheinin

52. On 29 June 2011 the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr Martin Scheinin, issued a statement which contained, in particular, the following passage:

> " ... the procedures for terrorist listing and delisting by the 1267 Committee of the Security Council do not meet international human rights standards concerning due process or fair trial. Therefore he takes the view that as long as proper due process is not guaranteed at the United Nations level when listing individuals or entities as terrorists, national (or European Union) courts will need to exercise judicial review over the national (or European) measures implementing the sanctions ..."

2. Report by B. Emmerson

53. On 26 September 2012 Mr Scheinin's successor, Mr Ben Emmerson, submitted his annual report (A/67/396) to the United Nations General Assembly. He listed the key activities undertaken by the Special Rapporteur between 3 April and 31 August 2012 and evaluated the mandate of the Office of the Ombudsperson established by Security Council resolution 1904 (2009) (subsequently amended) and its compatibility with international human rights norms, assessing in particular its impact on the due process deficits inherent in the Council's al-Qaeda sanctions regime. The report made recommendations for amending the mandate to bring it into full conformity with international human rights norms. The paragraphs

of the report that are relevant for the present case read as follows (footnotes omitted):

> "16. Under the Al-Qaida regime, the Council, through its Sanctions Committee, is responsible for designating individuals and entities on the Consolidated List and for adjudicating upon applications for their removal. This is inconsistent with any reasonable conception of due process, and gives the appearance that the Council is acting above and beyond the law. However, some members of the Council are unwilling to cede their Chapter VII powers to any form of binding review by an independent body. Indeed, some argue that this would be contrary to the provisions of the Charter of the United Nations itself, and therefore would be *ultra vires*.
>
> 17. The Special Rapporteur does not share this analysis. While the Security Council is primarily a political body, rather than a legal one, it exercises both quasi legislative and quasi-judicial functions in the present context. Under Articles 25 and 103 of the Charter, States are required to comply with binding decisions of the Council adopted under Chapter VII, even where this would entail violating their obligations under another international treaty. Given the presumption in international law against normative conflict, human rights treaty bodies have developed a principle of construction to the effect that Council resolutions should be read subject to a presumption that it was not the Council's intention to violate fundamental rights. In the case of the Al-Qaida sanctions regime, however, the language of the relevant resolutions does not allow for this approach.
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> ...
>
> 19. In 2005, the World Summit Outcome document called upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures existed for placing individuals and entities on sanctions lists, for removing them and for granting humanitarian exemptions. On 22 June 2006, at the conclusion of its thematic debate on the rule of law, the Security Council expressed its commitment to carrying this recommendation forward. The Council itself has acknowledged that human rights and international law should guide counter-terrorism initiatives. Pertinently, the Council has, since 2008, included a statement to this effect in the preamble to each of its resolutions on the 1267 (1989) sanctions regime.
>
> 20. Pursuant to Article 39 of the Charter, the Council has determined that international terrorism associated with Al-Qaida represents a threat to international peace and security, and that an effective sanctions regime adopted under Article 41 is necessary to address that threat. Since the Council lacks enforcement mechanisms of its own, however, it is dependent on the ability of States to implement its resolutions. Even if the Council itself is not formally bound by international human rights law when acting under Chapter VII (a proposition that is heavily disputed), there is no doubt that Member States are bound by human rights obligations when implementing Council decisions. Experience has shown that the absence of an independent judicial review mechanism at the United Nations level has seriously undermined the effectiveness and the perceived legitimacy of the regime. National and regional courts and treaty bodies, recognizing that they have no jurisdiction to review Council decisions *per se*, have focused their attention instead on domestic measures of implementation, assessing their compatibility with fundamental norms of due process. A series of successful legal challenges has highlighted the problem by quashing implementing legislation, or declaring it unlawful, for precisely this reason.
>
> 21. The most recent such decision is the Judgement of the Grand Chamber of the European Court of Human Rights in *Nada v. Switzerland*. The Court held that

restrictions on the applicant's freedom of movement, imposed by an ordinance of the Swiss Federal Council implementing resolution 1267 (1999) (as amended) had violated his right to respect for his private life, in breach of article 8 of the European Convention on Human Rights. Of much greater practical significance, however, was the Court's finding of a violation under article 13 of the Convention (the right to an effective domestic remedy). The Court concluded that in the absence of effective judicial review at the United Nations level, there was a duty on State parties to the Convention to provide an effective remedy under national law. This implied a full review on fact and law by an entity with jurisdiction to determine whether the measures were justified and proportionate in the individual case and power to order their removal. The *Nada* Judgement thus echoes the approach of the European Court of Justice and the General Court in the *Kadi* litigation, holding that regional implementing measures taken by the European Commission were to be judged against human rights standards binding on the Community institutions. However, the principle in the *Nada* case has wider geographical ramifications than the *Kadi* litigation since it applies to all 47 member States of the Council of Europe, including three permanent members of the Security Council.

22. Foreshadowing the decision in the *Nada* case, the former Special Rapporteur had already expressed the view that as long as there is no effective and independent judicial review of listings at the United Nations level 'it is essential that listed individuals and entities have access to domestic judicial review of any measure implementing the sanctions pursuant to resolution 1267 (1999)'. However, domestic judicial review is not an adequate substitute for due process at the United Nations level since the State responsible for implementation may not have access to the full justification for the listing ... Even if it does, it may not have the designating State's consent to reveal the information. This can obstruct the ability of national or regional courts to carry out an effective judicial review. More generally, as the High Commissioner for Human Rights has observed, the ability of individuals and entities to challenge their listing at the national level remains constrained by the obligation on Member States under Articles 25 and 103 of the Charter.

23. While none of the judicial rulings to date has directly impugned Council resolutions, their effect has been to render those resolutions effectively unenforceable. If the measures cannot be lawfully implemented at the national and regional levels, then the logic of universal sanctions falls away, raising the spectre that targeted funds could begin migrating towards those jurisdictions that cannot lawfully implement the regime. It is therefore imperative that the Council find a solution that is compatible with the human rights standards binding on Member States ..."

54. As regards, more specifically, the due process improvements for persons whose names appeared on the list established by the UN Security Council under Resolutions 1267 (1999) and 1333 (2000), the Special Rapporteur found as follows (footnotes omitted):

"27. On 17 December 2009, the Council adopted resolution 1904 (2009), which introduced an independent Ombudsperson for an initial period of 18 months to assist the Committee in its consideration of delisting requests. The first Ombudsperson, Kimberly Prost, a former *ad litem* judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 with 20 years experience as a federal prosecutor in Canada, was appointed by the Secretary-General on 3 June 2010. Under resolution 1904 (2009), she was mandated to investigate delisting requests according to the procedure set out in annex II to the

resolution and to prepare a 'comprehensive report' for the Committee within a set time frame. She is also required to report to the Council twice a year on the operation of her mandate.

28. There were two major shortcomings to the procedure under resolution 1904 (2009). The first was that the Ombudsperson was given no formal power to make recommendations. Ms. Prost nonetheless took the view that her comprehensive reports should address, to the defined standard, the question whether the continued listing was justified. Resolution 1989 (2011) recognizes and now endorses this practice and gives the Ombudsperson a mandate to make consequential recommendations regarding processed delisting requests.

29. The second shortcoming was that a consensus of the Committee was required for delisting. The most far-reaching change introduced by resolution 1989 (2011) was to reverse this consensus presumption. A delisting recommendation by the Ombudsperson now takes effect automatically 60 days after the Committee completes its consideration of the comprehensive report, unless the Committee decides otherwise by consensus. If there is no consensus, any member of the Committee may refer the delisting request to the Security Council (the 'trigger mechanism' procedure).

...

34. However, as regards an (objective) appearance of independence, the structural flaws remain the same. The United Nations Human Rights Committee has held that the power of an executive body to 'control or direct' a judicial body 'is incompatible with the notion of an independent tribunal'. The European Court of Human Rights has similarly held that a requirement for quasi-judicial determinations to be ratified by an executive body with power to vary or rescind it contravenes the 'very notion' of an independent tribunal. This principle does not depend upon a perception that the existence of such a power might indirectly influence the manner in which such a body handles and decides cases. The 'very existence' of an executive power to overturn the decision of a quasi-judicial body is sufficient to deprive that body of the necessary 'appearance' of independence however infrequently such a power is exercised, and irrespective of whether its exercise was, or even could have been, at issue in any particular case.

35. It follows that, despite the significant improvements brought about by resolution 1989 (2011), the mandate of the Ombudsperson still does not meet the structural due process requirement of objective independence from the Committee. The Special Rapporteur endorses the recommendation of the High Commissioner for Human Rights that the Security Council must now explore 'every avenue of possibility' for establishing 'an independent quasi-judicial procedure for review of listing and delisting decisions'. This necessarily implies that the Ombudsperson's comprehensive reports should be accepted as final by the Committee and that the decision-making powers of the Committee and Council should be removed. To reflect this modification, the Special Rapporteur invites the Security Council to consider renaming the Office of the Ombudsperson as the Office of the Independent Designations Adjudicator.

..."

55. The Special Rapporteur gave the following conclusions and recommendations:

"59. The Special Rapporteur acknowledges and welcomes the significant due process improvements brought about by resolution 1989 (2011), but nevertheless

concludes that the Al-Qaida sanctions regime continues to fall short of international minimum standards of due process, and accordingly recommends that:

(a) The mandate of the Office of the Ombudsperson should be amended to authorize it to receive and determine petitions from designated individuals or entities (i) for their removal from the Consolidated List and (ii) for the authorization of humanitarian exemptions; and to render a determination that is accepted as final by the Al-Qaida Sanctions Committee and the Security Council.

..."

F. Work of the UN International Law Commission

1. Article 103 of the United Nations Charter

56. The report of the study group of the International Law Commission (ILC) entitled "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", published in April 2006, contains the following observations concerning Article 103 of the UN Charter:

4. Harmonization - systemic integration

"37. In international law, there is a strong presumption against normative conflict. Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict. This extends to adjudication as well. As Rousseau puts the duties of a judge in one of the earlier but still more useful discussions of treaty conflict:

... lorsqu'il est en présence de deux accords de volontés divergentes, il doit être tout naturellement porté a rechercher leur coordination plutôt qu'à consacrer à leur antagonisme [Charles Rousseau, "De la compatibilité des normes juridiques contradictoires dans l'ordre international", RGDIP vol. 39 (1932), p. 153].

38. This has emerged into a widely accepted principle of interpretation and it may be formulated in many ways. It may appear as the thumb-rule that when creating new obligations, States are assumed not to derogate from their obligations. Jennings and Watts, for example, note the presence of a:

presumption that the parties intend something not inconsistent with generally recognized principles of international law, or with previous treaty obligations towards third States [Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law* (London: Longman, 1992) (9th ed), p. 1275. For the wide acceptance of the presumption against conflict - that is the suggestion of harmony – see also Pauwelyn, *Conflict of Norms* ... supra note 21, pp. 240-244].

39. As the International Court of Justice stated in the *Right of Passage* case:

it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it [*Case concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India) I.C.J. Reports 1957* p. 142].

...

331. Article 103 does not say that the *Charter* prevails, but refers to *obligations under the Charter*. Apart from the rights and obligations in the Charter itself, this also

covers duties based on binding decisions by United Nations bodies. The most important case is that of Article 25 that obliges Member States to accept and carry out resolutions of the Security Council that have been adopted under Chapter VII of the Charter. Even if the primacy of Security Council decisions under Article 103 is not expressly spelled out in the Charter, it has been widely accepted in practice as well as in doctrine ..."

2. On jus cogens

57. Draft Articles on State Responsibility with commentaries were adopted by the ILC at its fifty-third session, in 2001, and submitted to the General Assembly of the United Nations as part of the ILC's report covering the work of that session (Document A/56/10, ILC Yearbook, 2001, vol. II(2)). In so far as relevant to the present case, Article 26 and its commentary (adopted together with the Article itself) read as follows (footnotes omitted):

Article 26 – Compliance with Peremptory Norms

"Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law."

Commentary

"... 5. The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognised as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognised as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties. Those peremptory norms that are clearly accepted and recognised include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination. ..."

G. Resolution 1597 (2008) of the Parliamentary Assembly of the Council of Europe

58. On 23 January 2008 the Parliamentary Assembly of the Council of Europe adopted Resolution 1597 (2008), entitled "United Nations Security Council and European Union blacklists" based on the report (Doc. 11454) presented by Mr Dick Marty. In it the Assembly reaffirms that terrorism can and must be fought effectively with means that respect and preserve human rights and the rule of law. It considers that international bodies such as the United Nations and the European Union ought to set an example in this respect. While strongly criticising the imposition of targeted sanctions by those organisations, it observes that it is both possible and necessary for States to apply the various sanctions regimes in conformity with their

obligations under the European Convention on Human Rights and the United Nations ICCPR.

H. Relevant European and international case-law

1. *Court of Justice of the European Union: the "*Kadi*" cases and subsequent developments*

(a) The case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* ("*Kadi I*")

59. The case of *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (joined cases C-402/05 P and C-415/05 P; hereinafter "*Kadi I*") concerned the freezing of the applicants' assets pursuant to European Community regulations adopted in connection with the implementation of Security Council resolutions 1267 (1999), 1333 (2000) and 1390 (2002), which, among other things, required all United Nations member States to take measures to freeze the funds and other financial resources of the individuals and entities identified by the Security Council's Sanctions Committee as being associated with Osama bin Laden, al-Qaeda or the Taliban. In that case the applicants fell within that category and their assets had thus been frozen – a measure that for them constituted a breach of their fundamental right to respect for property as protected by the Treaty instituting the European Community ("the EC Treaty"). They contended that the EC regulations had been adopted *ultra vires*.

60. On 21 September 2005 the Court of First Instance (which on 1 December 2009 became known as the "General Court") rejected those complaints and confirmed the lawfulness of the regulations, finding mainly that Article 103 of the UN Charter had the effect of placing Security Council resolutions above all other international obligations (except for those covered by *jus cogens*), including those arising from the EC treaty. It concluded that it was not entitled to review Security Council resolutions, even on an incidental basis, to ascertain whether they respected fundamental rights.

61. Mr Kadi appealed to the Court of Justice of the European Communities ("the CJEC", which on 1 December 2009 became known as the Court of Justice of the European Union, the "CJEU"). The appeal was examined by a Grand Chamber jointly with another case. In its judgment of 3 September 2008 the CJEC found that, in view of the internal and autonomous nature of the Community legal order, it had jurisdiction to review the lawfulness of a Community regulation adopted within the ambit of that order even if its purpose was to implement a Security Council resolution. It thus held that, even though it was not for the "Community judicature" to examine the lawfulness of Security Council resolutions, it

was entitled to review Community acts or acts of member States designed to give effect to such resolutions, and that this "would not entail any challenge to the primacy of that resolution in international law".

62. The CJEC concluded that the Community judicature had to ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, were designed to give effect to resolutions of the Security Council. It held, in particular:

> "...
>
> 281. In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, paragraph 23).
>
> ...
>
> 293. Observance of the undertakings given in the context of the United Nations is required just as much in the sphere of the maintenance of international peace and security when the Community gives effect, by means of the adoption of Community measures taken on the basis of Articles 60 EC and 301 EC, to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.
>
> 294. In the exercise of that latter power it is necessary for the Community to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.
>
> ...
>
> 296. Although, because of the adoption of such an act, the Community is bound to take, under the EC Treaty, the measures necessitated by that act, that obligation means, when the object is to implement a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, that in drawing up those measures the Community is to take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation.
>
> 297. Furthermore, the Court has previously held that, for the purposes of the interpretation of the contested regulation, account must also be taken of the wording and purpose of Resolution 1390 (2002) which that regulation, according to the fourth recital in the preamble thereto, is designed to implement (*Möllendorf and Möllendorf-Niehuus*, paragraph 54 and case-law cited).
>
> 298. It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given

effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

299. It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.

300. What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty.

...

319. According to the Commission, so long as under that system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever.

320. In this connection it may be observed, first of all, that if in fact, as a result of the Security Council's adoption of various resolutions, amendments have been made to the system of restrictive measures set up by the United Nations with regard both to entry in the summary list and to removal from it [see, in particular, Resolutions 1730 (2006) of 19 December 2006, and 1735 (2006) of 22 December 2006], those amendments were made after the contested regulation had been adopted so that, in principle, they cannot be taken into consideration in these appeals.

321. In any event, the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction within the internal legal order of the Community.

322. Indeed, such immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty, appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection.

323. In that regard, although it is now open to any person or entity to approach the Sanctions Committee directly, submitting a request to be removed from the summary list at what is called the 'focal' point, the fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto.

324. The Guidelines of the Sanctions Committee, as last amended on 12 February 2007, make it plain that an applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request.

325. Moreover, those Guidelines do not require the Sanctions Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information. Last, if that Committee rejects the request for removal from the list, it is under no obligation to give reasons.

326. It follows from the foregoing that the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

327. The Court of First Instance erred in law, therefore, when it held, in paragraphs 212 to 231 of *Kadi* and 263 to 282 of *Yusuf and Al Barakaat*, that it followed from the principles governing the relationship between the international legal order under the United Nations and the Community legal order that the contested regulation, since it is designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations affording no latitude in that respect, must enjoy immunity from jurisdiction so far as concerns its internal lawfulness save with regard to its compatibility with the norms of jus cogens.

328. The appellants' grounds of appeal are therefore well founded on that point, with the result that the judgments under appeal must be set aside in this respect.

329. It follows that there is no longer any need to examine the heads of claim directed against that part of the judgments under appeal relating to review of the contested regulation in the light of the rules of international law falling within the ambit of jus cogens and that it is, therefore, no longer necessary to examine the United Kingdom's cross-appeal on this point either.

330. Furthermore, given that in the latter part of the judgments under appeal, relating to the specific fundamental rights invoked by the appellants, the Court of First Instance confined itself to examining the lawfulness of the contested regulation in the light of those rules alone, when it was its duty to carry out an examination, in principle a full examination, in the light of the fundamental rights forming part of the general principles of Community law, the latter part of those judgments must also be set aside.

Concerning the actions before the Court of First Instance

331. As provided in the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, the latter, when it quashes the decision of the Court of First Instance, may give final judgment in the matter where the state of proceedings so permits.

332 In the circumstances, the Court considers that the actions for annulment of the contested regulation brought by the appellants are ready for judgment and that it is necessary to give final judgment in them.

333. It is appropriate to examine, first, the claims made by Mr Kadi and Al Barakaat with regard to the breach of the rights of the defence, in particular the right to be heard, and of the right to effective judicial review, caused by the measures for the freezing of funds as they were imposed on the appellants by the contested regulation.

334. In this regard, in the light of the actual circumstances surrounding the inclusion of the appellants' names in the list of persons and entities covered by the restrictive measures contained in Annex I to the contested regulation, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.

335. According to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) (see, to this effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37).

336. In addition, having regard to the Court's case-law in other fields (see, inter alia, Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 462 and 463), it must be held in this instance that the effectiveness of judicial review, which it must be possible to apply to the lawfulness of the grounds on which, in these cases, the name of a person or entity is included in the list forming Annex I to the contested regulation and leading to the imposition on those persons or entities of a body of restrictive measures, means that the Community authority in question is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action.

337. Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature (see, to that effect, *Heylens and Others*, paragraph 15), and to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.

338. So far as concerns the rights of the defence, in particular the right to be heard, with regard to restrictive measures such as those imposed by the contested regulation, the Community authorities cannot be required to communicate those grounds before the name of a person or entity is entered in that list for the first time.

339. As the Court of First Instance stated in paragraph 308 of *Yusuf and Al Barakaat*, such prior communication would be liable to jeopardise the effectiveness of the freezing of funds and resources imposed by that regulation.

340. In order to attain the objective pursued by that regulation, such measures must, by their very nature, take advantage of a surprise effect and, as the Court has previously stated, apply with immediate effect (*Möllendorf and Möllendorf-Niehuus*, paragraph 63).

341. Nor were the Community authorities bound to hear the appellants before their names were included for the first time in the list set out in Annex I to that regulation, for reasons also connected to the objective pursued by the contested regulation and to the effectiveness of the measures provided by the latter.

342. In addition, with regard to a Community measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against

terrorism, overriding considerations to do with safety or the conduct of the international relations of the Community and of its Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.

343. However, that does not mean, with regard to the principle of effective judicial protection, that restrictive measures such as those imposed by the contested regulation escape all review by the Community judicature once it has been claimed that the act laying them down concerns national security and terrorism.

344. In such a case, it is none the less the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice (see, to that effect, the judgment of the European Court of Human Rights in *Chahal* v. *United Kingdom* of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 131).

...

356. In order to assess the extent of the fundamental right to respect for property, a general principle of Community law, account is to be taken of, in particular, Article 1 of the First Additional Protocol to the ECHR, which enshrines that right.

357. Next, it falls to be examined whether the freezing measure provided by the contested regulation amounts to disproportionate and intolerable interference impairing the very substance of the fundamental right to respect for the property of persons who, like Mr Kadi, are mentioned in the list set out in Annex I to that regulation.

358. That freezing measure constitutes a temporary precautionary measure which is not supposed to deprive those persons of their property. It does, however, undeniably entail a restriction of the exercise of Mr Kadi's right to property that must, moreover, be classified as considerable, having regard to the general application of the freezing measure and the fact that it has been applied to him since 20 October 2001.

..."

63. The CJEC therefore held that the contested regulations, which did not provide for any remedy in respect of the freezing of assets, were in breach of fundamental rights and were to be annulled.

(b) The case of *Commission and Others v. Kadi* ("*Kadi II*")

64. In the case of *Commission and Others v. Kadi* (Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, judgment of 18 July 2013, hereinafter "*Kadi II*"), concerning the same applicant on an appeal from the European Commission, which had adopted a new regulation to comply with "*Kadi I*", the Grand Chamber of the CJEU confirmed that the contested regulation could not be afforded any immunity from jurisdiction on the ground that its objective was to implement resolutions adopted by the UN Security Council under Chapter VII of the UN Charter. The CJEU reiterated that it was the task of that international organ to determine what constituted a threat to international peace and security and to take the measures

necessary, by means of the adoption of resolutions under Chapter VII, to maintain or restore international peace and security, in accordance with the purposes and principles of the United Nations, including respect for human rights. After engaging in criticism of the Security Council sanctions process, the CJEU ultimately preferred to look at the matter from the perspective of the member State's fundamental procedural obligations in the process of the individual application of the sanction, thus confirming the annulment of the impugned regulation in so far as it concerned Mr Kadi. The relevant passages of the judgment read as follows:

> "111. In proceedings relating to the adoption of the decision to list or maintain the listing of the name of an individual in Annex I to Regulation No 881/2002, respect for the rights of the defence and the right to effective judicial protection requires that the competent Union authority disclose to the individual concerned the evidence against that person available to that authority and relied on as the basis of its decision, that is to say, at the very least, the summary of reasons provided by the Sanctions Committee (see, to that effect, the *Kadi* judgment, paragraphs 336 and 337), so that that individual is in a position to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in bringing an action before the Courts of the European Union.
>
> 112. When that disclosure takes place, the competent Union authority must ensure that that individual is placed in a position in which he may effectively make known his views on the grounds advanced against him (see, to that effect, Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21; Case C-462/98 P *Mediocurso* v *Commission* [2000] ECR I-7183, paragraph 36, and the judgment of 22 November 2012 in Case C-277/11 *M*. [2012], paragraph 87 and case-law cited).
>
> 113. As regards a decision whereby, as in this case, the name of the individual concerned is to be maintained on the list in Annex I to Regulation No 881/2002, compliance with that dual procedural obligation must, contrary to the position in respect of an initial listing (see, in that regard, the *Kadi* judgment, paragraphs 336 to 341 and 345 to 349, and *France* v *People's Mojahedin Organization of Iran*, paragraph 61), precede the adoption of that decision (see *France* v *People's Mojahedin Organization of Iran*, paragraph 62). It is not disputed that, in the present case, the Commission, the author of the contested regulation, complied with that obligation.
>
> 114. When comments are made by the individual concerned on the summary of reasons, the competent European Union authority is under an obligation to examine, carefully and impartially, whether the alleged reasons are well founded, in the light of those comments and any exculpatory evidence provided with those comments (see, by analogy, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 58, and *M*., paragraph 88).
>
> 115. In that context, it is for that authority to assess, having regard, inter alia, to the content of any such comments, whether it is necessary to seek the assistance of the Sanctions Committee and, through that committee, the Member of the UN which proposed the listing of the individual concerned on that committee's Consolidated List, in order to obtain, in that spirit of effective cooperation which, under Article 220(1) TFEU, must govern relations between the Union and the organs of the United Nations in the fight against international terrorism, the disclosure of information or

evidence, confidential or not, to enable it to discharge its duty of careful and impartial examination.

116. Lastly, without going so far as to require a detailed response to the comments made by the individual concerned (see, to that effect, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraph 141), the obligation to state reasons laid down in Article 296 TFEU entails in all circumstances, not least when the reasons stated for the European Union measure represent reasons stated by an international body, that that statement of reasons identifies the individual, specific and concrete reasons why the competent authorities consider that the individual concerned must be subject to restrictive measures (see, to that effect, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraphs 140 and 142, and *Council* v *Bamba*, paragraphs 49 to 53).

117. As regards court proceedings, in the event that the person concerned challenges the lawfulness of the decision to list or maintain the listing of his name in Annex I to Regulation No 881/2002, the review by the Courts of the European Union must extend to whether rules as to procedure and rules as to competence, including whether or not the legal basis is adequate, are observed (see, to that effect, the *Kadi* judgment, paragraphs 121 to 236; see also, by analogy, the judgment of 13 March 2012 in Case C-376/10 P *Tay Za* v *Council* [2012], paragraphs 46 to 72).

118. The Courts of the European Union must, further, determine whether the competent European Union authority has complied with the procedural safeguards set out in paragraphs 111 to 114 of this judgment and the obligation to state reasons laid down in Article 296 TFEU, as mentioned in paragraph 116 of this judgment, and, in particular, whether the reasons relied on are sufficiently detailed and specific.

119. The effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person in Annex I to Regulation No 881/2002 (the *Kadi* judgment, paragraph 336), the Courts of the European Union are to ensure that that decision, which affects that person individually (see, to that effect, the judgment of 23 April 2013 in Joined Cases C-478/11 P to C-482/11 P *Gbagbo and Others* v *Council* [2013], paragraph 56), is taken on a sufficiently solid factual basis (see, to that effect, *Al-Aqsa* v *Council* and *Netherlands* v *Al-Aqsa*, paragraph 68). That entails a verification of the factual allegations in the summary of reasons underpinning that decision (see to that effect, *E and F*, paragraph 57), with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.

120. To that end, it is for the Courts of the European Union, in order to carry out that examination, to request the competent European Union authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination (see, by analogy, *ZZ*, paragraph 59).

121. That is because it is the task of the competent European Union authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded.

...

125. Admittedly, overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations may preclude the disclosure of some information or some evidence to the person

concerned. In such circumstances, it is none the less the task of the Courts of the European Union, before whom the secrecy or confidentiality of that information or evidence is no valid objection, to apply, in the course of the judicial review to be carried out, techniques which accommodate, on the one hand, legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process (see, to that effect, the *Kadi* judgment, paragraphs 342 and 344; see also, by analogy, *ZZ*, paragraphs 54, 57 and 59).

126. To that end, it is for the Courts of the European Union, when carrying out an examination of all the matters of fact or law produced by the competent European Union authority, to determine whether the reasons relied on by that authority as grounds to preclude that disclosure are well founded (see, by analogy, *ZZ*, paragraphs 61 and 62).

...

135. It follows from the criteria analysed above that, for the rights of the defence and the right to effective judicial protection to be respected first, the competent European Union authority must (i) disclose to the person concerned the summary of reasons provided by the Sanctions Committee which is the basis for listing or maintaining the listing of that person's name in Annex I to Regulation No 881/2002, (ii) enable him effectively to make known his observations on that subject and (iii) examine, carefully and impartially, whether the reasons alleged are well founded, in the light of the observations presented by that person and any exculpatory evidence that may be produced by him.

136. Second, respect for those rights implies that, in the event of a legal challenge, the Courts of the European Union are to review, in the light of the information and evidence which have been disclosed inter alia whether the reasons relied on in the summary provided by the Sanctions Committee are sufficiently detailed and specific and, where appropriate, whether the accuracy of the facts relating to the reason concerned has been established.

...

161. In its reply of 8 December 2008 to Mr Kadi's comments, the Commission asserted that the indications that Depositna Banka was used for the planning of an attack in Saudi Arabia serve as partial corroboration that Mr Kadi had used his position for purposes other than ordinary business purposes.

162. However, since no information or evidence has been produced to support the claim that planning sessions might have taken place in the premises of Depozitna Banka for terrorist acts in association with Al-Qaeda or Usama bin Laden, the indications relating to the association of Mr Kadi with that bank are insufficient to sustain the adoption, at European Union level, of restrictive measures against him.

163. It follows, from the analysis set out in paragraph 141 and paragraphs 151 to 162 of this judgment, that none of the allegations presented against Mr Kadi in the summary provided by the Sanctions Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking."

(c) Subsequent case-law

65. Since then the European Union courts have had occasion to confirm the obligation of member States to guarantee an effective remedy as regards inclusion on the sanctions lists, in particular following measures taken in the context of the Common Foreign and Security Policy (CFSP) of the European Union (see, for the Court of Justice, case C-314/13, *Peftiev and Others*, 12 June 2014; and for the General Court, case T-306/10, *Hani El Sayyed Elsebai Yusef*, 21 March 2014; three judgments of 4 June 2014, case T-66/12, *Ali Sedghi and Ahmad Azizi*, case T-67/12, *Sina Bank*, and case T-68/12, *Abdolnaser Hemmati*, together with the judgment in case T-293/12, *Syria International Islamic Bank PJSC*, 11 June 2014). In particular, the General Court found as follows in the above-cited *Yusef* case:

> "101. In that regard, the Commission's argument, based on the fact that it had initiated the review procedure, which was still underway, and communicated to the applicant the statement of reasons which had been sent to it by the Sanctions Committee, must be rejected. It is settled case-law that a letter emanating from an institution, stating that examination of the questions raised is in progress, does not, however, constitute the definition of a position which brings to an end a failure to act ...
>
> 102. In particular, it is not acceptable that, more than four years after the ruling in *Kadi I*, Court of Justice, the Commission is still not in a position to discharge its obligation to examine the applicant's case carefully and impartially (*Kadi II*, Court of Justice, paragraphs 114 and 135), where appropriate in 'effective cooperation' with the Sanctions Committee (*Kadi II*, Court of Justice, paragraph 115).
>
> 103. Furthermore, according to the statements made at the hearing, the Commission continues to regard itself as strictly bound by the findings of the Sanctions Committee and as not having any discretion in that regard, in contradiction with the principles laid down by the Court in *Kadi I* and *Kadi II*, Court of Justice (in particular in paragraphs 114, 115 and 135) and by the General Court in its *Kadi II* judgment.
>
> 104 Accordingly, it must be held that the way in which the Commission purports, by implementing the review procedure with regard to the applicant's case, to remedy the infringements of the same kind as those found by the Court of Justice in its judgment in *Kadi I*, is formal and artificial in nature."

2. UN Human Rights Committee: case of Sayadi and Vinck v. Belgium

66. In the case brought by Nabil Sayadi and Patricia Vinck against Belgium (Views of the Human Rights Committee of 22 October 2008, concerning communication no. 1472/2006), the Human Rights Committee had occasion to examine the national implementation of the sanctions regime established by the Security Council in Resolution 1267 (1999). The two complainants (authors of the communication), both Belgian nationals, had been placed on the lists appended to that resolution in January 2003, on the basis of information which had been provided to the Security Council by Belgium, shortly after the commencement of a domestic criminal investigation in September 2002. They had submitted several delisting

requests at national, regional and UN levels, all to no avail. In 2005 the Brussels Court of First Instance had ordered the Belgian State, *inter alia*, to urgently apply to the Sanctions Committee for the deletion of the names in question, and the State had subsequently done so.

67. In the Human Rights Committee's opinion, although the State party itself was not competent to remove the names from the list, it had the duty to do all it could to obtain that deletion as soon as possible, to provide the complainants with compensation, to make public the requests for delisting, and to ensure that similar violations did not occur in the future.

68. On 20 July 2009 the complainants' names were removed from the list pursuant to a decision of the Sanctions Committee.

69. As regards Article 14 of the ICCPR, the Human Rights Committee found as follows:

> "10.9 With regard to the allegation of a violation of article 14, paragraph 1, the authors contend that they were placed on the sanctions list and their assets frozen without their being given access to 'relevant information' justifying the listing, and in the absence of any court ruling on the matter. The authors also draw attention to the prolonged imposition of those sanctions and maintain that they did not have access to an effective remedy, in violation of article 2, paragraph 3, of the Covenant. The Committee notes, in this connection, the assertion of the State party that the authors did have a remedy, since they took the State party to the Brussels Court of First Instance and obtained an order requiring it to submit a de-listing request to the Sanctions Committee. Based solely on consideration of the actions of the State party, the Committee therefore finds that the authors did have an effective remedy, within the limits of the jurisdiction of the State party, which guaranteed effective follow-up by submitting two requests for de-listing. The Committee is of the view that the facts before it do not disclose any violation of article 2, paragraph 3, or of article 14, paragraph 1, of the Covenant."

IV. RELEVANT CASE-LAW OF OTHER STATES

A. The case of Ahmed and others v. HM Treasury (United Kingdom Supreme Court)

70. The case of *Ahmed and others v. HM Treasury*, examined by the Supreme Court of the United Kingdom on 27 January 2010, concerned the freezing of the appellants' assets in accordance with the sanctions regime introduced by Resolutions 1267 (1999) and 1373 (2001). The Supreme Court held that the Government had acted *ultra vires* the powers conferred upon it by section 1 of the United Nations Act 1946 in making certain orders to implement Security Council resolutions on sanctions.

71. In particular, Lord Hope, Deputy President of the Supreme Court, made the following observations:

> "6. ... The consequences of the Orders that were made in this case are so drastic and so oppressive that we must be just as alert to see that the coercive action that the Treasury have taken really is within the powers that the 1946 Act has given them.

> Even in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty."

72. He acknowledged that the appellants had been deprived of an effective remedy and in that connection found as follows:

> "81. I would hold that G is entitled to succeed on the point that the regime to which he has been subjected has deprived him of access to an effective remedy. As Mr Swift indicates, seeking a judicial review of the Treasury's decision to treat him as a designated person will get him nowhere. G answers to that description because he has been designated by the 1267 Committee. What he needs if he is to be afforded an effective remedy is a means of subjecting that listing to judicial review. This is something that, under the system that the 1267 Committee currently operates, is denied to him. I would hold that article 3(1)(b) of the AQO [al-Qaeda Order], which has this effect, is ultra vires section 1 of the 1946 Act. It is not necessary to consider for the purposes of this case whether the AQO as a whole is ultra vires except to say that I am not to be taken as indicating that article 4 of that Order, had it been applicable in G's case, would have survived scrutiny.
>
> 82. I would treat HAY's case in the same way. He too is a designated person by reason of the fact that his name is on the 1267 Committee's list. As has already been observed, the United Kingdom is now seeking that his name should be removed from it. By letter dated 1 October 2009 the Treasury's Sanctions Team informed his solicitors that the de-listing request was submitted on 26 June 2009 but that at the committee's first consideration of it a number of States were not in a position to accede to the request. Further efforts to obtain de-listing are continuing, but this has still not been achieved. So he remains subject to the AQO. In this situation he too is being denied an effective remedy."

73. The Supreme Court found unlawful both the order implementing Resolution 1373 (2001) in a general counter-terrorism context ("the Terrorism Order") and the order implementing the al-Qaeda and Taliban resolutions ("the al-Qaeda Order"). However, it quashed the al-Qaeda Order only in so far as it did not provide for an effective remedy (see Lord Brown's dissenting opinion on this point).

B. The case of Abdelrazik v. Canada (Federal Court of Canada)

74. In its judgment of 4 June 2009 in the case of *Abdelrazik v. Canada (Minister of Foreign Affairs)*, the Federal Court of Canada held that the listing procedure of the al-Qaeda and Taliban Sanctions Committee was incompatible with the right to an effective remedy. The case concerned a ban on the return to Canada of the applicant, who had Canadian and Sudanese nationality, as a result of the application by Canada of the Security Council resolutions establishing the sanctions regime. The applicant was thus forced to live in the Canadian embassy in Khartoum, Sudan, fearing possible detention and torture should he leave that sanctuary.

75. Zinn J, who gave the lead judgment in the case, stated in particular:

> "[51.] I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness."

76. He further observed:

> "[54.] ... it is frightening to learn that a citizen of this or any other country might find himself on the 1267 Committee list, based only on suspicion."

77. After reviewing the measures implementing the travel ban on the basis of the al-Qaeda and Taliban resolutions, the judge concluded that the applicant's right to enter Canada had been breached, contrary to the provisions of the Canadian Charter of Rights and Freedoms.

THE LAW

I. SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

78. The Grand Chamber would observe at the outset that the content and scope of the "case" referred to it are delimited by the Chamber's decision on admissibility (see, among many other authorities, *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 234-235, ECHR 2012; *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 88, ECHR 2010; and *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 109, ECHR 2007-IV). This means that the Grand Chamber may examine the case only in so far as it has been declared admissible; it cannot examine those parts of the application which have been declared inadmissible.

79. Before the Chamber the applicants raised a number of complaints that were declared inadmissible. They alleged that they had not been notified of the grounds for the confiscation of their assets. They also claimed to be victims of a violation of Article 6 §§ 2 and 3, and Articles 7, 8 and 13 of the Convention. All these complaints were rejected either as being incompatible *ratione materiae* with the provisions of the Convention, or for failure to exhaust domestic remedies, or as manifestly ill-founded. In particular, the Chamber found that the criminal limb of Article 6 did not apply, as the procedure complained of by the applicants did not concern a "criminal charge" (see the Chamber judgment, §§ 136-140). The Grand Chamber does not therefore have jurisdiction to examine those complaints.

80. In conclusion, the Grand Chamber's jurisdiction is confined here to ascertaining whether the applicants enjoyed the guarantees of the civil limb of Article 6 § 1 in the procedure concerning the confiscation of their assets.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

81. The applicants alleged that the confiscation of their assets had not been accompanied by a procedure complying with Article 6 § 1 of the Convention, of which the relevant passage reads:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] tribunal ..."

A. The Chamber's findings

82. In its judgment of 26 November 2013 the Chamber began by finding that the applicants' complaint under Article 6 § 1 was compatible with the provisions of the Convention, both *ratione personae* and *ratione materiae*. It took the view that the measures at issue had been taken by Switzerland in the exercise of its "jurisdiction" within the meaning of Article 1 of the Convention and that the impugned acts or omissions were thus capable of engaging Switzerland's responsibility under the Convention. As to the compatibility *ratione materiae* of the complaint, the Chamber noted that the dispute called directly into question the applicants' enjoyment of their property, which was a civil right guaranteed in particular by the Swiss Constitution.

83. As to the merits of the case, the Chamber examined the case in the light of the criterion of equivalent protection, as defined in the Court's settled case-law (see, in particular, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, §§ 152-157, ECHR 2005-VI; *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 338, ECHR 2011; and *Michaud v. France*, no. 12323/11, §§ 102-104, ECHR 2012). Although that criterion had been defined and developed in the light of the obligations of Contracting States as members of the European Union, the Chamber took the view that it also applied, in principle, to situations concerning the compatibility with the Convention of acts of other international organisations such as the United Nations. It thus found that the relevant Security Council resolutions did not confer on the States concerned any discretion in the implementation of the obligations arising thereunder. In the Chamber's view, the system put in place by the United Nations – even in its improved form, enabling the applicants to apply for the deletion of their names from the Security Council lists – did not afford an equivalent level of protection to that required by the Convention. Moreover, given that the Federal Court had refused to examine the merits of the impugned measures, the procedural shortcomings in the sanctions regime could not be regarded as compensated for by domestic human rights protection mechanisms. Having regard to the foregoing, the Chamber found that the presumption of equivalent protection was rebutted in the present case.

84. Lastly, as regards the substance of the complaint under Article 6 § 1 of the Convention, the Chamber found that, even though the decision of the domestic courts to confine themselves to verifying that the applicants' names actually appeared on the lists drawn up by the Sanctions Committee and that the assets concerned belonged to them had pursued a legitimate aim, namely to ensure effective domestic implementation of the obligations arising from the Security Council Resolution, there was no reasonable relationship of proportionality between that aim and the means employed, the applicants' inability to challenge the confiscation measure for several years being difficult to accept in a democratic society. Accordingly, the Chamber held that there had been a violation of Article 6 § 1 of the Convention.

B. Preliminary objections raised by the respondent Government

1. The parties' submissions

(a) The respondent Government

85. As before the Chamber, the respondent Government asked the Court to declare the application inadmissible as being incompatible *ratione personae* with the provisions of the Convention. They observed that the impugned measures in the instant case had been based on Security Council Resolutions 661 (1990), 670 (1990) and 1483 (2003) (superseding Resolution 661 (1990)), which, by virtue of Articles 25 and 103 of the UN Charter, were binding and prevailed over obligations under any other international agreement. They added that the language used in those resolutions, which in their opinion had to be directly enforced by the member States pursuant to the Charter, left those States no discretion or leeway as regards implementation. In the Government's submission, the binding effect of the Security Council resolutions also conferred binding force on the decisions of the sanctions committees.

86. In that connection the respondent Government drew a distinction between the present case and that of *Nada* (cited above), where the Court had found that a violation had not been inevitable because Switzerland had enjoyed a certain latitude in implementing the UN Resolution in question. In the Government's view there had, by contrast, been no such latitude in the present case because the description of the impugned measures in the text of the resolutions was detailed and left no room for interpretation. They argued that Switzerland had acted in this matter as a sort of agent of the United Nations and had therefore had no alternative but to enforce Resolution 1483 (2003) strictly. As it was unable to annul or amend that Resolution, and had no control over the addition or deletion of names to or from the sanctions list, it was doubtful whether Switzerland really had "jurisdiction" in respect of the applicants within the meaning of Article 1 of

the Convention. Admittedly, the measures decided by the Security Council had been implemented at national level by the adoption of the Iraq Ordinance and by the addition of the applicants' names to the national sanctions list. However, the origin of the alleged interference with the applicants' property rights only really lay in the Resolution itself; the obligation to implement the measures imposed would have been exactly the same whether or not it had been transposed into domestic law. The Government concluded that, in those circumstances, Switzerland could not be held responsible.

87. The respondent Government further argued that the present application was incompatible *ratione materiae* with the Convention, as Article 6 § 1 was not applicable in the present case. They submitted that the applicants' assets had been frozen for the purposes of confiscation as a result of the UN Security Council resolutions, which were directly applicable in domestic law. The freezing and confiscation were therefore 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. The direct applicability of the resolutions in domestic law meant that the outcome of the procedure at the level of the Swiss authorities was not directly decisive of the applicants' rights; an examination by the Federal Court of the merits of the sanctions would not have had any influence on the content of the lists drawn up by the Sanctions Committee or on the legal consequences arising therefrom. The Government thus concluded that, in those circumstances, the impugned procedure did not fall within the scope of Article 6 § 1 of the Convention.

(b) The applicants

88. The applicants relied on the grounds of admissibility given by the Chamber in its judgment. As regards compatibility *ratione personae*, they argued that it was unquestionable that the impugned acts were directly attributable to Switzerland, which had acted through its own instruments of domestic law. In the applicants' submission, the argument as to a lack of leeway was erroneous; they referred in this connection to paragraph 298 of the *Kadi I* judgment of the European Court of Justice (see paragraph 62 above), to the effect that: "[t]he Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order". In addition, the applicants argued that their application was also compatible *ratione materiae* with Article 6 § 1 of the Convention, for there was no doubt that they had been deprived of an effective and practical judicial remedy in the context of the confiscation of their assets, which itself constituted an interference with their "civil" rights under that provision.

2. Comments of third-party interveners

(a) The United Kingdom Government

89. The United Kingdom Government took the view that the application had to be declared incompatible with the provisions of the Convention – whether *ratione personae*, as the respondent Government had merely been implementing a sanctions regime pursuant to a binding resolution of the UN Security Council, or *ratione materiae*, on account of the "loss of primacy" of the Convention obligations through the effect of Articles 25 and 103 of the UN Charter.

(b) The French Government

90. The French Government shared in substance the respondent Government's position. They took the view that the application was inadmissible *ratione personae*, as the measures had not been taken by Switzerland on its own account but on behalf of the Security Council, whose Resolution 1483 (2003) left no discretion to States. Consequently, the United Nations alone had to assume responsibility for the measures complained of by the applicants. In the French Government's submission, the measures in question could not therefore be regarded as falling within Switzerland's "jurisdiction" within the meaning of Article 1 of the Convention, if that notion was not to be rendered meaningless.

91. The French Government were also convinced that, even though the decisions in question did not correspond to missions outside the territory of the member States, as in the cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* ((dec.) [GC], nos. 71412/01 and 78166/01), but were measures implemented in domestic law, the arguments developed in that precedent concerning the nature of Security Council missions and the obligations arising therefrom for States should lead the Court to declare such measures attributable to the United Nations, and thus to consider that the applicants' complaints were incompatible *ratione personae* with the Convention. Thus the present case would provide an opportunity for the Court to transpose to the actual territory of the member States the principles established in the case of *Behrami and Behrami* (cited above), taking into account the hierarchy of norms in international law and the various legal spheres arising therefrom.

3. The Court's assessment

92. By way of introduction, the Court reiterates that, under Article 35 § 4 of the Convention, the Grand Chamber may dismiss applications it considers inadmissible "at any stage of the proceedings". Thus, even at the merits stage the Court may reconsider a decision to declare an application admissible if it concludes that it should have been declared inadmissible for

one of the reasons given in the first three paragraphs of Article 35 of the Convention (see, for example, *Gross v. Switzerland* [GC], no. 67810/10, § 37, ECHR 2014; *Gillberg v. Sweden* [GC], no. 41723/06, § 54, 3 April 2012; and *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III).

(a) Compatibility *ratione personae*

93. As regards the compatibility *ratione personae* of the present application with the provisions of the Convention, the Court must examine whether the applicants fall within the jurisdiction of Switzerland within the meaning of Article 1 of the Convention and whether the alleged violation engages the responsibility of the respondent State. Article 1 of the Convention reads as follows:

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

94. In its judgment of 26 November 2013 the Chamber addressed this point as follows:

> "91. In the present case the measures imposed by the Security Council resolutions were implemented at national level by an Ordinance of the Federal Council. The applicants' assets were frozen and the Federal Department for Economic Affairs issued a decision of 16 November 2006 whereby certain assets were to be confiscated. The acts in question therefore correspond clearly to the national implementation of a UN Security Council resolution (see, *mutatis mutandis*, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*, cited above, § 137, and contrast *Behrami and Behrami*, decision cited above, § 151). The alleged violations of the Convention are thus imputable to Switzerland (see, *mutatis mutandis*, *Nada*, cited above, § 121).
>
> 92. The measures in issue were therefore taken in the exercise by Switzerland of its 'jurisdiction' within the meaning of Article 1 of the Convention. The impugned acts and omissions are thus capable of engaging the respondent State's responsibility under the Convention. It also follows that the Court has jurisdiction *ratione personae* to entertain the present application (see, *mutatis mutandis*, ibid., § 122)."

95. In the light of the case file as a whole and the observations of the parties and third-party interveners, the Court does not see any reason to adopt a different approach. Consequently, on this point, it fully endorses the grounds and findings of the Chamber judgment. It would add, moreover, that, according to its settled case-law, a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (see *Bosphorus*, cited above, § 153, and *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 29, *Reports of Judgments and Decisions* 1998-I). The State is thus considered to retain Convention liability in respect of treaty commitments undertaken after the

entry into force of the Convention (see *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 128, ECHR 2010, and *Bosphorus*, cited above, § 154, with the references cited).

96. Consequently, the Court dismisses the objection to admissibility based on the alleged incompatibility *ratione personae* of the application with the Convention. However, it will take into account, in examining the merits of the present case, the detailed arguments of the parties and third-party interveners concerning the primacy of the obligations stemming from decisions of the Security Council taken under Chapter VII of the UN Charter.

(b) Compatibility *ratione materiae*

97. The Court reiterates that, for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("*contestation*" in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. However, Article 6 § 1 does not guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States. In other words, the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see, for example, *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B, and *Roche v. the United Kingdom* [GC], no. 32555/96, § 119, ECHR 2005-X). In order to decide whether the "right" in question really has a basis in domestic law, the starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (see *Masson and Van Zon v. the Netherlands*, 28 September 1995, § 49, Series A no. 327-A, and *Roche*, cited above, § 120).

98. In addition, for Article 6 § 1 to apply, the dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. Lastly, the result of the proceedings must be directly decisive of the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among other authorities, *Micallef v. Malta* [GC], no. 17056/06, § 74, ECHR 2009, and *Boulois v. Luxembourg* [GC], no. 37575/04, § 90, ECHR 2012).

99. In the present case, the Court notes that the applicants complained before it that they had not had access to a procedure complying with Article 6 § 1 of the Convention by which to complain about the confiscation of their assets. As that measure directly affected their peaceful enjoyment of their property, which is guaranteed in particular by Article 26 of the Swiss Constitution, the applicants are entitled to rely on a "civil right".

100. The Court further finds that there has, in the present case, been a dispute ("*contestation*") over the applicants' right to enjoy their property. It

takes the view that, to the extent that the decisions of the Federal Department for Economic Affairs of 16 November 2006 sought to implement a sanction imposed at a political level by the UN Security Council, they clearly constituted an individual measure affecting the exercise and very essence of the right in question. Lastly, in the Court's opinion, there is no doubt about the genuine and serious nature of the dispute brought before the Federal Court (see, *mutatis mutandis*, *Balmer-Schafroth and Others v. Switzerland*, 26 August 1997, §§ 37-38, *Reports* 1997-IV; and contrast *Liepājnieks v. Latvia* (dec.), no. 37586/06, § 95, 2 November 2010).

101. Having regard to the foregoing, the Court finds that it has jurisdiction *ratione materiae* to examine the present application. It therefore dismisses the respondent Government's objection on that ground.

C. Merits of the case

1. The parties' submissions

(a) The applicants

102. The applicants argued that Switzerland was not faced with any dilemma in the present case, because there was no real conflict between the obligations stemming, on the one hand, from the UN Charter (and Resolution 1483 (2003)) and, on the other, from the Convention. In their view, those obligations could, on the contrary, be interpreted as consistent. The applicants observed that the application of the principle of equivalent protection, as defined by the Court – particularly in the cases of *Bosphorus* and *Michaud* (both cited above) –, ensured such compatibility and would enable the Court to discharge its task of supervising respect for human rights in a manner that was consistent with the international legal order. The application of that principle would lead to the conclusion that there were manifest deficiencies – and therefore no equivalent protection of human rights – within the UN sanctions system.

103. The applicants refused to accept the idea that the United Nations could order States to infringe human rights. In reality, it could be seen from the Preamble to the UN Charter that sanctions had to be implemented with due respect for human rights. They added that it was currently clear at the level of the United Nations itself that the targeted sanctions regimes and the corresponding lists of names lacked the basic procedural safeguards, hence the numerous challenges, interventions and statements in that respect at domestic and international levels.

104. In the applicants' submission, the restriction imposed in the present case on their right of access to a court under Article 6 § 1 of the Convention, was clearly disproportionate and therefore unjustified. They doubted that the measures taken were necessary for the maintenance of peace. In their view,

Resolution 1483 (2003) had certainly pursued a legitimate aim at the outset, namely the maintaining of international peace and security at the time of a genuine threat from the former Iraqi regime. While measures such as the temporary freezing of assets or other conventional embargo-type restrictions for a limited period would arguably pass the proportionality test, Resolution 1483 (2003) no longer had any objective or direct connection with the maintaining of peace and security.

105. The applicants emphasised that the confiscation of assets in the present case concerned individuals who had never been charged or brought before any criminal or civil court. In those circumstances, the total denial of their right of access to a judicial remedy could in no event meet the conditions of necessity and proportionality required for restrictions to the fundamental guarantees of the Convention. In that connection, the applicants referred to the reasoning of the Chamber judgment.

106. Lastly, the applicants commended Switzerland's international commitment to improving the legal situation of persons whose names were on the UN lists, but submitted that those efforts did not make good the violations of their Convention rights, arguing that the Swiss authorities had nevertheless seen fit to implement the impugned resolutions as they stood, in breach of their Convention obligations.

(b) The respondent Government

107. The respondent Government reiterated the argument that they had submitted in respect of admissibility, to the effect that the Swiss authorities had no room for manoeuvre in implementing Resolution 1483 (2003), thus acting as if they were agents of the UN Security Council. In that connection they emphasised the absolute and general primacy of the international obligations stemming from the UN Charter over any other obligation under international agreements, pointing out that such primacy was recognised by all States, was clearly and expressly enshrined in Article 103 of the Charter and was confirmed by the case-law of the International Court of Justice and legal opinion. It was only by respecting that primacy that the Security Council's fundamental role in maintaining peace and security in the world could be preserved. The only exception to that rule of primacy would be norms of *jus cogens*; however, the procedural safeguards enshrined in Article 6 § 1 of the Convention were not part of those norms.

108. The respondent Government observed that it was erroneous to argue that the obligation to respect fundamental rights prevailed in general over the obligation to enforce Security Council resolutions. The UN organs had never asked States to examine, in each specific case, whether the implementation of the sanctions was, in their opinion, consonant with human rights protection and the proportionality principle. Among the resolutions adopted under Chapter VII of the UN Charter, a number specifically provided that the obligation to respect and to implement the

impugned measures prevailed over any other obligations, including those aimed at protecting human rights. However, the lack of any such specific provision in Resolution 1483 (2003) could not justify an *a contrario* interpretation. On the contrary, it had to be assumed that the Security Council had accepted the possibility that the implementation of certain resolutions could come into conflict with human rights protection. In that connection, the respondent Government drew the Court's attention to Article 46 of the ICCPR, which stated that nothing in that instrument could be interpreted as impairing the provisions of the UN Charter.

109. In the respondent Government's submission, there was thus a clear conflict in the present case between the obligations created by the Security Council resolutions, on the one hand, and those of the European Convention on Human Rights, on the other. That conflict existed for all UN member States which had ratified the Convention, regardless of whether the State in question had joined the United Nations first or, on the contrary, had ratified the Convention first (like Switzerland). The conflict could not be resolved; the situation in the present case was such that it was impossible to reconcile the various obligations by means of a harmonious interpretation. As regards the criterion of equivalent protection as defined by the Court, especially in the *Bosphorus* judgment (cited above), it could not be applied in the light of the obligations stemming from the UN Charter. That criterion provided a practical means of resolving conflicts of norms at the same hierarchical level, such as European Union law and the European Convention on Human Rights. By contrast, having regard to the rule of primacy in Article 103 of the UN Charter, the two obligations in conflict were not on the same hierarchical plane.

110. The respondent Government argued that, in such a situation, the only possible solution would be to apply the conflict rules existing in general international law, namely under Articles 25 and 103 of the UN Charter and Article 30 of the Vienna Convention on the Law of Treaties. That would necessarily lead to recognition of the primacy of the obligations stemming from Resolution 1483 (2003) over those based on the European Convention on Human Rights.

111. The respondent Government warned against adopting a solution that would leave States facing contradictory obligations. They argued that the Court could not find that there had been a violation without considering the concrete and realistic feasibility of implementing the obligations that such a finding would entail. They criticised the approach of the European Court of Justice in the case of *Kadi I* (see paragraphs 59-63 above), observing that the European Commission had still not been able to implement that precedent (see paragraph 65 above). To make matters worse, such a solution would result in dissociation between the different international systems, with the risk that the inability of States to fulfil their obligations according to the respective systems might lead to a weakening

of those obligations, whose binding force might no longer be perceived in the same manner. That would have the combined effect of minimising the importance of the operations imposed by the Security Council resolutions under Chapter VII of the UN Charter in order to preserve international peace and security, of encroaching upon the exclusive competence of the Security Council as a political decision-maker, and also of weakening the authority of the judgments of the European Court of Human Rights itself.

112. In that connection, the respondent Government criticised the idea that the question of the deletion of names from the Sanctions Committee's list could be distinguished from that of the confiscation of assets. The addition of an individual or entity to the corresponding lists was not an end in itself; it could take effect only in combination with other actions, namely the freezing and confiscation of assets. The description of the impugned measures in the text of the resolutions was detailed and left no room for interpretation. In those circumstances, even if the Federal Court were to examine the dispute on the merits and arrive at the conclusion that the applicants' names should not have been on the list, it would still not be able to "determine" fully the rights in dispute, as required by Article 6 § 1 of the Convention.

113. The respondent Government observed that, in any event, the right of access to a court in civil cases was not absolute. Since this right was secured by the Convention, restrictions were implicitly admitted and the States had a certain margin of appreciation in such matters. The Court itself had recognised in its case-law that the immunity of the States and of the United Nations, respectively, could constitute a justified obstacle to access to the courts (the Government referred, in particular, to *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, and *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), no. 65542/12, ECHR 2013). The principle of primacy enshrined in Article 103 of the UN Charter had to be regarded as an obstacle at least as sound and as justified as that of immunity, the two principles being part of universally recognised norms of international law and pursuing the same aim, namely the maintenance of international peace. Since the domestic authorities had had no room for manoeuvre in the present case, the judicial oversight had been limited to two questions: whether the applicants' names appeared on the Sanctions Committee's list and whether the assets in question belonged to them. That limitation had pursued a legitimate aim, namely the effective maintenance of international peace and security, which had been seriously threatened by the former Iraqi regime.

114. The respondent Government argued that the measures ordered in paragraph 23 of Security Council Resolution 1483 (2003) were entirely proportionate because they were specifically aimed at only a restricted circle of persons, including the first applicant, as a senior official of the former Iraqi regime and managing director of the applicant company. They

admitted that the applicants had not been able to obtain any judicial review of the inclusion of their names on the relevant lists. However, they could have requested their delisting in accordance with Resolution 1730 (2006); that possibility served precisely to mitigate the effects of the lack of any judicial oversight within the UN system. The respondent Government took the view that in the light of the relevant practice it could be concluded that requests submitted to the "focal point" were examined in detail. Accordingly, in the Government's view, the system established by the Security Council afforded, as a whole, appropriate protection of human rights, even though it was neither satisfactory nor equivalent in terms of the Convention requirements.

115. Similarly, as regards the proportionality of the impugned measure, the respondent Government argued that it would be incorrect to make a distinction between the UN Security Council resolutions which addressed an imminent threat of terrorism and those which were part of the follow-up to an armed conflict that had begun in 1990. Both sets of resolutions had been adopted under Chapter VII of the UN Charter and it was not for States to attribute different scopes to them. The respondent Government also took the view that they could not be reproached for the duration of the interference with the applicants' right to enjoy their property, submitting on the contrary that this was inherent in that type of measure. They said that it was incorrect to state, as the Chamber had done in paragraph 131 of its judgment, that the applicants had been "deprived of access to their assets already for a considerable period of time". Prior to 2003 they had never complained about not having access to their property; furthermore, until the inclusion of the applicants' names on the national list, the first applicant had had a credit card of which he had made use.

116. The respondent Government also pointed out that the Swiss authorities had taken concrete measures to improve the applicants' situation. The Federal Court had expressly asked the Federal Department for Economic Affairs to allow the applicants further time in order to submit a delisting request before the assets were transferred to the Development Fund for Iraq. Furthermore, the SECO had authorised the release of certain sums from among the frozen assets to allow the applicants to pay for the costs of their defence. By contrast, prior to February 2014 the first applicant had not taken any action to secure the release of funds to cover his living expenses.

117. Lastly, in a more general context, the respondent Government explained that, since Switzerland had joined the United Nations in 2002, it had been committed, together with other States, to improving the legal situation of the persons concerned and to securing a fair procedure for the addition and deletion of names to and from the sanctions lists. They thus criticised the Chamber for not attaching sufficient weight to those efforts, which had nevertheless been set out in a fairly detailed manner in paragraph 64 of the *Nada* judgment (cited above). They stated that

Switzerland was working with a group of ten other States to make the sanctions regime procedure fairer, and that in April 2014 the group had submitted some new proposals to the Security Council to that effect. They argued that, in sum, Switzerland had taken – and was continuing to take – all steps remaining within its power to ensure compliance with the Convention.

2. Comments of third-party interveners

(a) The United Kingdom Government

118. The United Kingdom Government essentially supported the respondent Government's position. They pointed out that the Convention was part of international law and derived its normative force therefrom. It was not an instrument whose existence and application was independent and insulated from general international law. The primacy of the UN Charter and the resolutions of the Security Council adopted under Chapter VII thereof over any other norms with the exception of *jus cogens* was one of the pillars of general international law at the present time. At the time when the Convention was drafted, the Charter had already existed for several years. Moreover, the *travaux préparatoires* in respect of the Convention showed that the Charter had been firmly in the minds of its drafters, and there could have been no intention to cut across key provisions such as Articles 25 and 103. Indeed, the Preamble to the Convention expressly invoked the aim of the Council of Europe, as recorded at Article 1 (c) of the Council's Statute, which read: "Participation in the Council of Europe shall not affect the collaboration of its members in the work of the United Nations and of other international organisations or unions to which they are parties". It was precisely the UN system which existed to preserve peace and security in the world, in particular enabling human rights to be respected and protected. The integrity of that system and of international law as a whole thus had to be preserved.

119. The United Kingdom Government took the view that it was simply impossible in the present case to avoid the inconsistency between the obligations imposed by the UN Security Council resolutions and the requirements of Article 6 of the Convention. The obligations on States under Resolution 1483 (2003) were clear and explicit, leaving them no room for discretion. It was therefore necessary to choose the obligations which had primacy in the international legal hierarchy – clearly those of the Security Council, under Articles 25 and 103 of the UN Charter.

120. In the United Kingdom Government's view, any decision of the Court to the effect that Article 6 of the Convention required particular processes to be followed domestically prior to the application of the measures in question to a listed individual would inevitably create inconsistency between the requirements of Article 6 and those of the

UN Security Council resolutions. They added that to impose such a requirement under Article 6 would necessarily mean introducing the possibility that a new or different set of processes might need to be followed domestically before decisions could be taken on, for example, the presence of an individual on the UN sanctions list, with the risk of a different substantive result. Such an outcome would place the State in an invidious position, precisely as a result of the diametrical inconsistency already mentioned.

121. Lastly, the United Kingdom Government observed that the procedural safeguards of Article 6 § 1 of the Convention did not have the status of *jus cogens*. However, even assuming that they did, that would not give the Court a jurisdiction that it did not otherwise possess to engage in a judicial review of decisions of the UN Security Council.

(b) The French Government

122. Referring to Article 103 of the UN Charter and the jurisprudence of the International Court of Justice, the French Government observed that, under Article 25 of the Charter, States were required to apply the decisions taken by the UN Security Council, to which they had to give priority over any other prior or subsequent international norm – including the Convention (except for norms of *jus cogens*, which did not come into play in the present case). Such primacy was key to the effectiveness of the UN system, and that was particularly true in the context of Chapter VII of the Charter. In order to carry out effectively its mission of maintaining international peace and security, the Security Council alone was competent to decide on the measures to be taken in that context.

123. As to the criterion of the presumption of equivalent protection, as established by the *Bosphorus* case-law (cited above), the French Government took the view that it could not be taken into account in the present case. That criterion applied only to international organisations whose founding treaties did not indicate that they would prevail over the Convention in the event of conflict, whereas the UN Charter contained such a primacy clause in Article 103. Similarly, the French Government acknowledged that, in the case of *Kadi I*, the European Court of Justice had found that the fact that an EU regulation confined itself to implementing a resolution of the UN Security Council did not deprive the EU court of its jurisdiction to review the internal lawfulness of that regulation in the light of the fundamental freedoms guaranteed in the EU legal order (see paragraph 62 above). However, that solution could not be transposed to the present case. As the European Court of Justice had always held, the EU legal order was of a *sui generis* nature, being distinct from the international legal order and based on treaties of a constitutional nature. However, there was no separate legal order for human rights protection; as the Strasbourg

Court had frequently acknowledged, the Convention formed an integral part of international law.

124. In the French Government's view, the present case could be distinguished from all the similar cases examined by the Court (they referred, in particular, to *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 102, ECHR 2011, and *Nada*, cited above), for, unlike those cases, the respondent Government had had no room for manoeuvre in the present case in implementing Resolution 1483 (2003). The Swiss authorities had had no choice other than to enforce the resolution; that conclusion related both to the substance of the measures and to the identity of the persons concerned. The fact that the freezing and confiscation of the applicants' assets had been based on ordinances adopted by the Swiss Federal Council made no difference; the implementation of UN Security Council resolutions generally entailed their transposition into a domestic legal instrument so that they could take effect in the jurisdiction concerned. However, the State in question could not, on that account, be regarded as having any discretionary power of decision-making or assessment.

125. The French Government thus took the view that, in the present case, the national courts had not been entitled to review the merits of the national measures implementing Resolution 1483 (2003), because such a review, which might lead to the annulment of the measures, would cause Switzerland to refrain from honouring its commitments under the UN Charter and to interfere with the fulfilment of the UN's fundamental mission. They argued that this would have the effect of undermining the integrity and efficiency of the entire international system for the protection of peace and security, with potentially serious consequences. In those circumstances, the French Government were of the opinion that the lack of review by the national courts did not constitute a disproportionate restriction of the applicants' right of access to a court.

3. The Court's assessment

(a) Whether there was a limitation on the right of access to a court and the existence of a legitimate aim

(i) Whether there was a limitation

126. The Court reiterates that the right to a fair hearing, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the rule of law, which requires that all litigants should have an effective judicial remedy enabling them to assert their civil rights (see *Běleš and Others v. the Czech Republic*, no. 47273/99, § 49, ECHR 2002-IX). Everyone has the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings

before courts in civil matters, constitutes one aspect only (see *Cudak v. Lithuania* [GC], no. 15869/02, § 54, ECHR 2010; *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18; and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 43, ECHR 2001-VIII).

127. The Court further reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37). This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see *Aït-Mouhoub v. France*, 28 October 1998, § 52, *Reports* 1998-VIII). It would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from liability on categories of persons (see *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B).

128. Article 6 § 1 of the Convention in principle requires that a court or tribunal should have "full jurisdiction" to hear a complaint, that is to say jurisdiction to examine all questions of fact and law that are relevant to the dispute before it (see, for example, *Sigma Radio Television Ltd v. Cyprus*, nos. 32181/04 and 35122/05, §§ 151-157, 21 July 2011). This means, in particular, that the court must have the power to examine point by point each of the litigant's grounds on the merits, without refusing to examine any of them, and give clear reasons for their rejection. As to the facts, the court must be able to examine those that are central to the litigant's case (see *Bryan v. the United Kingdom*, 22 November 1995, § 45, Series A no. 335 A).

129. However, the Court has always found that the right of access to a court secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation of the right of access to a court, including jurisdictional immunity under international law, will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Cudak*, cited above, § 55; *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 59, ECHR 1999-I; and *Stichting Mothers of Srebrenica and Others*, cited above, § 139).

130. Furthermore, the principle of "full jurisdiction" has been qualified in a number of cases by the Court's case-law, which has often interpreted it in a flexible manner, particularly in administrative law cases where the jurisdiction of the appellate court had been restricted on account of the technical nature of the dispute's subject matter (see, for example, *Chaudet v. France*, no. 49037/06, § 37, 29 October 2009).

131. Turning to the circumstances of the present case, the Court observes that, in its judgments of 23 January 2008, the Swiss Federal Court set out very detailed reasons why it considered itself to be bound only to verify that the applicants' names actually appeared on the lists drawn up by the Sanctions Committee and that the assets concerned belonged to them. On the other hand, it refused to examine the applicants' allegations concerning the compatibility of the procedure followed for the confiscation of their assets with the fundamental procedural safeguards enshrined in Article 6 § 1 of the Convention, among other provisions. In order to justify that refusal, the Federal Court firstly invoked the absolute primacy of obligations stemming from the UN Charter and decisions taken by the UN Security Council in accordance therewith over any other norm of international law, except those with the status of *jus cogens*. Secondly, it noted the very precise and detailed nature of the obligations imposed on States by Resolution 1483 (2003), not leaving them any discretion (see paragraph 29 above). In those circumstances, the Court is of the view that the applicants' right of access to a court, under Article 6 § 1 of the Convention, was clearly restricted. It observes, moreover, that the parties seem to agree on that point. Accordingly, it remains to be examined whether that restriction was justified, that is, whether it pursued a legitimate aim and was proportionate to such aim.

(ii) Legitimate aim

132. The Court observes that the impugned measure, namely the confiscation of the applicants' assets, was ordered pursuant to Resolution 1483 (2003), adopted by the UN Security Council under Chapter VII of the UN Charter with the aim of imposing on member States a series of measures designed to further the stabilisation and development of Iraq. One of those measures, referred to in paragraph 23 of the Resolution, was to ensure that the assets and property of senior officials of the former Iraqi regime, including the first applicant, who was considered by the Sanctions Committee to be a former head of finance of the Iraqi secret services, would be transferred to the Development Fund for Iraq and, accordingly, returned to the Iraqi people to enable them to benefit from those assets. The Court acknowledges that the impugned decision was taken to implement an objective that is compatible with the Convention.

133. The Court therefore accepts the argument of the respondent Government that the refusal by the domestic courts to examine on the merits

the applicants' complaints about the confiscation of their assets could be explained by their concern to ensure the efficient implementation, at domestic level, of the obligations stemming from the Resolution. The refusal thus pursued a legitimate aim, namely to maintain international peace and security. It should thus be ascertained whether, in the light of all the relevant circumstances of the case, there was a reasonable relationship of proportionality between that aim and the means employed to attain it.

(b) The proportionality of the limitation in question

(i) The international normative context

134. The Court reiterates that the provisions of the Convention cannot be interpreted and applied in a vacuum. Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law, and, in particular, in the light of the Vienna Convention on the Law of Treaties of 23 May 1969. Thus the Court has never considered the provisions of the Convention to be the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (see, among other authorities, *Loizidou v. Turkey* (*merits*), 18 December 1996, § 43, *Reports* 1996-VI; *Al-Adsani*, cited above, § 55; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi*, cited above, § 150; *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 67, ECHR 2008; *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, § 23, ECHR 2014; and Article 31 § 3 (c) of the said Vienna Convention, which provides that the interpretation of a treaty must take account of "any relevant rules of international law applicable in the relations between the parties").

135. The Court would emphasise that one of the basic elements of the current system of international law is constituted by Article 103 of the UN Charter, which asserts the primacy, in the event of conflict, of the obligations deriving from the Charter over any other obligation arising from an international agreement, regardless of whether the latter was concluded before or after the UN Charter or was a purely regional arrangement. One of the obligations flowing from this particular authority is provided for in Article 25 of the Charter, namely "to accept and carry out the decisions of the Security Council in accordance with ... the Charter" (see, respectively, the ICJ's Judgment in *Nicaragua v. the United States of America* and Order in the case concerning *Lockerbie*, cited in paragraphs 41 and 43 above).

136. Before the Federal Court, the applicants argued that the procedural safeguards enshrined in Article 14 of the ICCPR and Article 6 of the Convention constituted a norm of *jus cogens* as a result of which Resolution

1483 (2003) lost its binding effect. The Court refers to the terms of Article 53 of the Vienna Convention on the Law of Treaties, which defines *jus cogens* as "a peremptory norm of general international law ... accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". The Court observes that the guarantees of a fair hearing and in particular the right of access to a court for the purposes of Article 6 § 1 occupy a central position in the Convention. As the Court held in *Golder*, "[t]he principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law" (See *Golder*, cited above, § 35). Nevertheless, despite their importance, the Court does not consider these guarantees to be among the norms of *jus cogens* in the current state of international law (see paragraph 57 above). Consequently, on that point, the Court accepts the arguments to that effect in the judgments of the Swiss Federal Court and in the observations of the respondent Government and the third-party interveners.

(ii) The allegation of a conflict of obligations

137. In the present case, the parties disagree as to whether Switzerland was faced with a conflict between the obligations stemming from Resolution 1483 (2003) – and therefore from the UN Charter – and those under the Convention. The respondent Government, supported on that point by the third-party interveners, argued that such a conflict existed and that, moreover, it could not be resolved because Switzerland had no room for manoeuvre in the implementation of the Resolution. The applicants, however, submitted that there was no real conflict of obligations.

138. The Court would first point out that, when 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 (see *Nada*, cited above, § 170, and the case-law cited therein, and the references cited in the report by the International Law Commission's working group entitled "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", paragraph 56 above).

139. The Court emphasises that it is not its role to pass judgment on the legality of the acts of the UN Security Council. However, where 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 (see, *mutatis mutandis*, *Al-Jedda*, cited above, § 76). In that connection the Court must also take into account the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, as stated in its first paragraph, 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 ...". Article 24 § 2 of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations" (ibid., § 102).

140. Consequently, 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 (ibid.). In the event of any ambiguity in the terms of a UN Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law (ibid.). Accordingly, 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. In other words, in such cases, in a spirit of systemic harmonisation, it will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter.

141. The respondent Government, together with the intervening French and United Kingdom Governments, argued that the Swiss authorities had no latitude in implementing the Security Council resolutions relevant to the present case. The Court would point out that in *Al-Jedda* (cited above) it found that the resolution in question in that case, 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 UN Security Council resolution explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq in indefinite detention without charge (ibid., § 109). Shortly afterwards, in the case of *Nada* (cited above, § 172), the Court found, by contrast, that Resolution 1390 (2002) expressly required States to prevent

individuals on the UN list from entering or transiting through their territory. In the Court's view, the presumption that "the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights" (see *Al-Jedda*, cited above, § 102) was thus rebutted in the case of *Nada*, having regard to the clear and explicit wording used in the relevant Resolution, imposing as it did an obligation to take measures that might breach human rights. However, the Court also found that "Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the United Nations Security Council" (see *Nada*, cited above, § 180). On the basis of that finding, it took the view that the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions adopted under Chapter VII of the UN Charter, but should have persuaded the Court that it had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation. The Court observed that this finding made it unnecessary to determine the question of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the UN Charter, on the other (ibid., §§ 196-197).

142. In the present case, the Court notes that paragraph 23 of Resolution 1483 (2003) imposed on States an obligation to "freeze without delay" the financial assets or economic resources of the former Iraqi government or of certain individuals or entities presumed to be connected therewith – unless the assets or resources had been the subject of a prior judicial, administrative or arbitral lien or judgment – and to ensure their immediate transfer to the Development Fund for Iraq. As to the actual individuals and entities targeted by those measures, the Court observes that, except for Saddam Hussein, no other person is designated by name in the above-mentioned paragraph 23; however, Resolution 1518 (2003) entrusted to a specially constituted Sanctions Committee the task of identifying the persons concerned and adding their names to the relevant lists.

143. The Court would emphasise, however, that the present case is notably different from the above-cited cases of *Al-Jedda* and *Nada* (together with *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011), in that it does not concern either the essence of the substantive rights affected by the impugned measures or the compatibility of those measures with the requirements of the Convention. The Court's remit here is confined to examining whether or not the applicants enjoyed the guarantees of Article 6 § 1 under its civil head, in other words whether appropriate judicial supervision was available to them (see paragraph 99 above; see, *mutatis mutandis*, *Stichting Mothers of Srebrenica and Others*, cited above, § 137). There was in fact nothing in paragraph 23 or any other provision of Resolution 1483 (2003), or in Resolution 1518 (2003) – understood according to the ordinary meaning of the language used therein

– that explicitly prevented the Swiss courts from reviewing, in terms of human rights protection, the measures taken at national level pursuant to the first of those Resolutions (see, *mutatis mutandis*, *Nada*, cited above, § 212). Moreover, the Court does not detect any other legal factor that could legitimise such a restrictive interpretation and thus demonstrate the existence of any such impediment.

144. In the case of *Nada* the Court attached particular weight to the fact that paragraph 2 (b) of Resolution 1390 (2002), concerning Osama bin Laden, al-Qaeda or the Taliban, required States to prevent the individuals in question from entering their territory, but that the ban did "not apply where entry or transit [was] necessary for the fulfilment of a judicial process". It also noted that paragraph 8 of that Resolution urged all States to "take immediate steps to enforce and strengthen through legislative enactments or administrative measures, where appropriate, the measures imposed under domestic laws or regulations against their nationals and other individuals or entities operating on their territory". The wording "necessary" and "where appropriate" also had the effect of affording the national authorities a certain flexibility in the mode of implementation of the Resolution (ibid., §§ 177-178).

145. The Court notes, moreover, that the inclusion of individuals and entities on the lists of persons subject to the sanctions imposed by the Security Council entails practical interferences that may be extremely serious for the Convention rights of those concerned. Being drawn up by bodies whose role is limited to the individual application of political decisions taken by the Security Council, these lists nevertheless reflect choices of which the consequences for the persons concerned may be so weighty that they cannot be implemented without affording the right to appropriate review, which is all the more indispensable as such lists are usually compiled in circumstances of international crises and are based on information sources which tend not to be conducive to the safeguards required by such measures. In this connection, the Court would emphasise that the object and purpose of the Convention, a human rights treaty protecting individuals on an objective basis (see *Neulinger and Shuruk*, cited above, § 145), require its provisions to be interpreted and applied in a manner which makes its requirements practical and effective (see *Artico*, cited above, § 33). The Court further observes that, the Convention being a constitutional instrument of European public order (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 75, Series A no. 310, and *Al-Skeini and Others*, cited above, § 141), 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. Even in the context of interpreting and applying domestic law, where the Court

leaves the national authorities very wide discretion, it always does so, expressly or implicitly, subject to a prohibition of arbitrariness (see *García Ruiz v. Spain* [GC], no. 30544/96, §§ 28-29, ECHR 1999-I, and *Storck v. Germany*, no. 61603/00, § 98, ECHR 2005-V).

146. This will necessarily be true, in the implementation of a Security Council resolution, as regards the listing of persons on whom the impugned measures are imposed, at both UN and national levels. As a result, in view of the seriousness of the consequences for the Convention rights of those persons, where a resolution such as that in the present case, namely Resolution 1483, does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided. By limiting that scrutiny to arbitrariness, the Court takes account of the nature and purpose of the measures provided for by the Resolution in question, in order to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security.

147. In such cases, in the event of a dispute over a decision to add a person to the list or to refuse delisting, the domestic courts must be able to obtain – if need be by a procedure ensuring an appropriate level of confidentiality, depending on the circumstances – sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary. Any inability to access such information is therefore capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged, thus continuing to hinder any judicial scrutiny. Accordingly, any State Party whose authorities give legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing is not arbitrary will engage its responsibility under Article 6 of the Convention.

148. Furthermore, the European Court of Justice has also held that "it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations" (*Kadi I,* § 299 (see paragraph 62 above)). As the Court has already observed, the Security Council is required to perform its tasks while fully respecting and promoting human rights (see paragraph 140 above). To sum up, the Court takes the view that paragraph 23 of Resolution 1483 (2003) cannot be understood as precluding any judicial scrutiny of the measures taken to implement it.

149. In those circumstances, and to the extent that Article 6 § 1 of the Convention is at stake, the Court finds that Switzerland was not faced in the present case with a real conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter. This finding makes it unnecessary for the Court to determine the question of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the UN Charter, on the other (see, *mutatis mutandis*, *Nada*, cited above, § 197). The Court's finding similarly renders nugatory the question whether the equivalent protection test should be applied, as argued by the applicants (see paragraph 102 above). Consequently, the respondent State cannot validly confine itself to relying on the binding nature of Security Council resolutions, but should persuade the Court that it has taken – or at least has attempted to take – all possible measures to adapt the sanctions regime to the individual situation of the applicants, at least guaranteeing them adequate protection against arbitrariness (see, *mutatis mutandis*, *Nada*, cited above, § 196).

(iii) Extent of the respondent State's obligations in the present case

150. Turning to the precise obligations imposed by the Convention on Switzerland in the present case, the Court accepts that the Federal Court was unable to rule on the merits or appropriateness of the measures entailed by the listing of the applicants. As regards the substance of the sanctions – the freezing of the assets and property of senior officials of the former Iraqi regime, as imposed by paragraph 23 of Resolution 1483 (2003) – the Court takes the view that the choice fell within the eminent role of the UN Security Council as the ultimate political decision-maker in this field. However, before taking the above-mentioned measures, the Swiss authorities had a duty to ensure that the listing was not arbitrary. In its judgments of 23 January 2008 the Federal Court merely confined itself to verifying that the applicants' names actually appeared on the lists drawn up by the Sanctions Committee and that the assets concerned belonged to them, but that was insufficient to ensure that the applicants had not been listed arbitrarily.

151. The applicants should, on the contrary, have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary. That was not the case, however. The fact that, unlike the situation in *Nada* (ibid., § 187), the applicants in the present case did not submit, either in the Swiss Federal Court or in this Court, any precise argument to show that they should not have been included on the list drawn up by the Sanctions Committee makes no difference to this analysis, since no such omissions on their part were relied on by the Swiss authorities in refusing to examine their complaints. Consequently, the very essence of the applicants' right of access to a court has been impaired.

152. The Court would further note that the applicants have been, and continue to be, subjected to major restrictions. The confiscation of their assets was ordered on 16 November 2006. They have thus already been deprived of access to their assets for a long period of time, even though the confiscation decision has not yet been enforced. The fact that it has remained totally impossible for them to challenge the confiscation measure for many years is hardly conceivable in a democratic society (see, *mutatis mutandis*, *Nada*, cited above, § 186; see also, for the fundamental nature of the right of access to a court, the judgments of the European Court of Justice and the domestic courts cited in paragraphs 59-65 and 70-77 above).

153. The Court observes that the UN sanctions system, and in particular the procedure for the listing of individuals and legal entities and the manner in which delisting requests are handled, has received very serious, reiterated and consistent criticisms from Special Rapporteurs of the UN (see paragraphs 52-55 above), also shared by sources outside that organisation. One such source is the Council of Europe's Parliamentary Assembly, through its Resolution 1597 (2008) (see paragraph 58 above). Such criticisms have also been expressed by a number of courts, such as the European Court of Justice, the United Kingdom Supreme Court and the Federal Court of Canada (see paragraphs 59-65 and 70-77 above). The respondent Government themselves have admitted that the system applicable in the present case, even in its improved form following Resolution 1730 (2006), enabling applicants to apply to a "focal point" for the deletion of their names from the Security Council lists, does not afford satisfactory protection (see paragraph 114 above). Access to these procedures could not therefore replace appropriate judicial scrutiny at the level of the respondent State or even partly compensate for the lack of such scrutiny.

154. Moreover, the Court notes that the Swiss authorities have taken certain practical measures with a view to improving the applicants' situation, thus showing that Resolution 1483 (2003) could be applied with a degree of flexibility (see paragraphs 31-32 and 34 above). However, those measures were insufficient in the light of the above-mentioned obligations on Switzerland under Article 6 § 1 of the Convention.

155. Having regard to the foregoing, the Court finds that there has been a violation of Article 6 § 1 of the Convention in the present case.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

156. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

157. As before the Chamber, the applicants asked the Court to find that the question of the application of just satisfaction was not ready for decision and that it should be reserved in accordance with Rule 75 of the Rules of Court, in the event that the confiscation decisions were enforced by Switzerland at a later stage.

158. The respondent Government took the view that the only contentious question in the present case was whether the applicants had had access to a court for the purposes of Article 6 § 1. They argued that, should the Court find a breach of that guarantee, such a finding would not have any bearing on the issue of the legitimacy of the applicants' claims concerning the frozen assets.

159. The Court shares the respondent Government's opinion and finds that there is no causal link between the finding of a violation of Article 6 § 1 and the allegation of pecuniary damage, the existence of such damage remaining for the time purely hypothetical. The Court further observes that the applicants have requested neither compensation for non-pecuniary damage nor the reimbursement of their costs and expenses.

160. In those circumstances, the Court is of the view that it is not appropriate to reserve the question of just satisfaction and dismisses the applicants' request to that effect. Accordingly, it finds that no sum is due under Article 41 of the Convention.

FOR THESE REASONS, THE COURT

1. *Dismisses*, unanimously, the respondent Government's preliminary objections as to the alleged incompatibility *ratione personae* and *ratione materiae* of the application with the provisions of the Convention;

2. *Holds*, by fifteen votes to two, that there has been a violation of Article 6 § 1 of the Convention;

3. *Dismisses*, unanimously, the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 June 2016.

Johan Callewaert	Mirjana Lazarova Trajkovska
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov;

(b) Concurring opinion of Judge Sicilianos;

(c) Concurring opinion of Judge Keller;

(d) Concurring opinion of Judge Kūris;

(e) Partly dissenting opinion of Judge Ziemele;

(f) Dissenting opinion of Judge Nußberger.

M.L.T.
J.C.

CONCURRING OPINION OF JUDGE PINTO DE ALBUQUERQUE, JOINED BY JUDGES HAJIYEV, PEJCHAL AND DEDOV

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I. Introduction

1. I join the majority in finding a violation of Article 6 of the European Convention on Human Rights ("the Convention"). But I do not subscribe to a substantial part of their reasoning for that finding. Contrary to those of the majority who read into Resolution 1483 of the United Nations Security Council ("the Security Council")[1] much more than it warranted or even permitted, the normative conflict between the respondent State's obligation to implement Resolution 1483 and its Convention obligation to observe the applicants' right of access to a court seems to me to be unavoidable. In order to resolve this normative conflict, my opinion deals, in its first part, with the origins of the conflict, analysing on the one hand the relevant United Nations legal framework, namely Article 103 of the United Nations Charter ("the Charter") and Resolution 1483, and on the other hand the right of access to a court in international humanitarian and criminal law, international human rights law and European human rights law. The second part of the opinion is dedicated to the resolution of the normative conflict between obligations under Security Council resolutions and obligations under human rights treaties, and more precisely between the obligations resulting respectively from Resolution 1483 and from Article 6 of the Convention. After discussing the two radically opposite solutions, consisting of prevalence of the former over the latter and vice versa, and the third solution of avoidance of conflict, I put forward my reservations with regard to the present judgment's solution. Finally, building on that critique, I propose a different solution to the normative conflict, based on the premise of the constitutional nature of the Convention. Taking the Convention seriously warrants the applicability of the *Bosphorus* comparative analytical methodology[2] to the UN Charter obligations. The opinion concludes, on the basis of this methodology, that Article 6 of the Convention was indeed violated in the case at hand.

1. UN Security Council Resolution 1483 (2003) on the situation between Iraq and Kuwait, 22 May 2003, S/RES/1483 (2003).
2. See *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI ("*Bosphorus*").

First Part – The origins of the normative conflict

II. The United Nations legal framework

A. The Interpretation of Article 103 of the Charter

(i) The nature of the rule

2. Article 103 of the Charter is not a primary rule of obligation, but a secondary rule on normative conflicts between concrete obligations derived from the Charter and those resulting from other international agreements[3]. The conflict is resolved by a rule of precedence, which gives priority to the former over the latter, with the purpose of safeguarding the efficacy and integrity of the United Nations legal system. Like Article 30 of the Convention on the Law of Treaties (the Vienna Convention), Article 46 of the International Covenant on Civil and Political Rights (ICCPR), Article 131 of the 1948 Charter of the Organization of American States (the OAS Charter) and the seventh Principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[4], the conflict rule of the Charter does not determine the *ipso jure* abrogation or even *de facto* suspension of the conflicting international treaty or agreement. The prevailing obligation merely sets aside the conflicting obligation, whose legal validity remains untouched. Additionally, failure to abide by the conflicting obligation does not entail liability, as long as the normative conflict persists[5].

(ii) The scope of the rule

3. The scope of the rule includes, on the one hand, all obligations derived from Charter provisions and binding decisions of the United Nations bodies, such as Security Council resolutions adopted under Chapter VII of the Charter[6] and, on the other, all obligations derived from

3. It is evidently the role of the Court to interpret Article 103 of the Charter and the applicable resolution for the purposes of the case in order to examine whether there was a plausible basis in such instruments for the matters impugned before it (see, *mutatis mutandis*, *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, § 122, 2 May 2007 ("*Behrami*")).
4. A/RES/25/2625, 24 October 1970.
5. Article 59 of the International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two.
6. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, ICJ Reports* 1984, p. 392, § 107, and "Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law", Report of the Study Group of the

other present or future, bilateral or multilateral treaties or agreements, including treaties and agreements with States that are not UN members[7], as well as obligations deriving from customary international law[8]. Obligations resulting from the founding treaties of international and regional organisations are evidently also addressed by Article 103, even though these organisations are not parties to the Charter. *A fortiori*, the rule extends to legal or contractual obligations entered into by a State with regard to an individual or private entity[9]. In other words, Security Council resolutions may create obligations for any State, international or regional organisation, private entity or individual, which override in a specific situation previous or future rights or obligations under a treaty or of a customary, legislative or contractual nature.

4. Accordingly, the scope of the rule does include the conflict between Charter obligations and constitutional obligations, i.e., obligations derived from the constitutional framework of a State. In the international legal order, a State cannot adduce its own domestic law, including its Constitution, with a view to evading obligations incumbent upon it under applicable international law, and most notably under the Charter[10]. Constitutional engagements may not serve to circumvent international law commitments. The overriding authority of international obligations over domestic law, including constitutional law, has been particularly stated in the field of international human rights law, in view of the nature of human rights as a matter not reserved to the domestic jurisdiction of States (Article 2 § 7 of the Charter) and the fact that human rights treaties not only bind States Parties, but also recognise rights and freedoms of citizens within

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International Law Commission, A/CN.4/L.682, 13 April 2006 ("ILC Report on Fragmentation"), §§ 331-332.

7. This evidently leaves open the question of responsibility towards non-member States as a result of the application of Article 103 (ILC Report on Fragmentation, cited above, § 343).

8. ILC Report on Fragmentation, cited above, § 345.

9. Ibid., § 355. The Security Council frequently calls upon all States, including States that are not members of the United Nations, "to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to the date of coming into force of the measures imposed" (see, for example, Resolutions 661 (1990), 748 (1992), 757 (1992), 917 (1994), 1267 (1999), 1306 (2000)). This practice has been accepted by the European Union (see, for example, Article 8 of Council Regulation (EC) No 1263/94, of 30 May 1994).

10. See *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion, 1932, PCIJ, Series A/B, No. 44 (Feb. 4)*, p. 24, and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports* 1988, p. 12, § 57. Article 27 of the Vienna Convention confirms a long-standing rule of customary international law, restated by Article 3 of the ILC Draft Articles on State Responsibility.

the jurisdiction of the States Parties (see, for instance, Article 1 of the Convention).

(iii) Intrinsic and extrinsic limitations to the applicability of the rule

5. There are intrinsic and extrinsic limitations to the applicability of the rule set out in Article 103. First and foremost, Article 103 presupposes the validity of the obligations in issue. In case of acts *ultra vires*[11] or against the Charter's aims, the provision itself does not come into play. This is not so much an exception to the rule, but an intrinsic requirement for its applicability. Thus, for example, Security Council resolutions which flagrantly contradict the aims and principles of the United Nations (Article 24 § 2 of the Charter) do not benefit from the precedence rule. Before applying the Article 103 rule, the internal validity of the resolution must therefore be checked.

6. A truly extrinsic limitation to the applicability of the rule set out in Article 103 is *jus cogens*[12], whose most authoritative articulation is still the list of the International Court of Justice (ICJ) in the *Barcelona Traction* case[13]. For example, Security Council resolutions which breach *jus cogens* are invalid in themselves and therefore do not call for the applicability of Article 103[14]. Thus, prior to the application of Article 103, the external validity of the Security Council resolution must likewise be tested.

(iv) The constitutionalisation of the Charter?

7. Individuals being the epicentre of international law, human rights are today the central factor of legitimation of international law. Like a new universal Esperanto, the language of international human rights law is individual-centred, not State-centred. The primary role of sovereignty is the responsibility to protect human rights[15]. The relations between a State and its own nationals are no longer viewed, as in the past, as a purely domestic question. The Copernican revolution that international law faced with the birth of the twin human rights Covenants and their regional counterparts created a new narrative in international law with constitutional overtones, bearing its own counterfactual strength[16]. Remarkable developments in the

11. ILC Report on Fragmentation, cited above, § 331.
12. Since the Charter was adopted before Article 53 of the Vienna Convention entered into force, the relationship between the Charter and *jus cogens* is regulated by customary international law.
13. See *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase), Judgment, ICJ Reports* 1970, p. 3, § 34. In spite of the *erga omnes* language, the examples given are undoubtedly *jus cogens*.
14. ILC Report on Fragmentation, cited above, § 346.
15. See my opinion in *Sargsyan v. Azerbaijan* [GC], no. 40167/06, ECHR 2015.
16. In fact, as early as 1932, Kelsen affirmed that issues traditionally in the domain of constitutional law, such as the duties of a State in relation to its citizens, could be apprehended by international law and therefore the development of an international

treaty law of emerging international and regional organisations, and most notably the European Communities, furthered the process of constitutionalisation of international law. The 2005 World Summit Outcome Document brought this process to a point of no return, the topic having attained the status of a *locus classicus* in international law[17].

8. Although constitutionality has gradually been disconnected from statehood, the time of global constitutionalism has not yet come. The Charter does not yet fulfil the double function of a Constitution, as the foundational, non-derived source of law and the primary limit to the exercise of public power and the use of public force. Neither the principle of speciality of international organisations, nor the lack of a territory and a permanent population are decisive factors in this context. The reasons for the constitutional black hole within the United Nations are twofold. On the one hand, the International Court of Justice has not yet taken its *Marbury* step, submitting the bodies and officials of the United Nations and in particular its most important political and legislative body, the Security Council, to an effective constitutional control[18]. On the other hand, the Human Rights Committee's recommendations under the first optional protocol to the ICCPR do not afford a non-optional, binding, judicial human rights protection system as the guarantee of an effective limitation of public power and public force would have required. The achievement of international cooperation in the promotion and encouragement of respect for human rights and fundamental freedoms for all (Article 1 § 3 of the Charter and ICCPR, fourth preambular paragraph) does not suffice to compensate for the lack of specific human rights constraints in the Charter. Until the day a World Human Rights Court comes into existence, with compulsory jurisdiction over both the bodies and officials of the United Nations and its members, or the International Court of Justice gains compulsory jurisdiction in such matters, the United Nations will not have a constitutional nature. As things stand presently, there may be an emerging foundational, non-derived source of law at the United Nations, but there is no true global Constitution as yet, in the absence of justiciable, human rights limits on the exercise of public power and use of public force. Thus, the Charter of the United Nations has not yet acquired the nature of a Constitution for the international community and consequently there is no hierarchical

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protection of human rights and fundamental freedoms strongly emphasises the unity of the rule of law (François Rigaux, "Hans Kelsen on International Law", *EJIL* 9 (1998), p. 333).

17. See UN General Assembly Resolution 60/1, of 16 September 2005, which adopted the document in question (A/RES/60/1).

18. The reference is obviously to *Marbury v. Madison*, 5 U.S. 137 (1803). For the ICJ's conception of its powers, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports* 1971, p. 16, § 89, and *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of October 23rd, 1956: ICJ Reports* 1956, p. 77 at p. 85.

relationship between Charter obligations and obligations resulting from other international treaties and agreements, most notably human rights treaties.

B. The interpretation of Resolution 1483

(i) The textual interpretation

9. The majority argue that the ordinary meaning of the language used in Resolutions 1483 (2003) and 1518 (2003)[19] did not explicitly prohibit judicial supervision of the measures taken at the national level pursuant to the first of those Resolutions[20]. Having due regard to the rules of interpretation of Security Council resolutions, I beg to differ[21].

10. Resolution 1483 created two different confiscation measures: the one set out in paragraph 23 (a) was an *in rem* confiscation applicable to all funds or other financial assets or economic resources of the previous Government of Iraq or its State bodies, corporations, or agencies, located outside Iraq; and the other set out in paragraph 23 (b) was a strict-liability-based, punitive confiscation, applicable to all funds or other financial assets or economic resources that had been removed from Iraq, or acquired, by Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction. These individuals and entities were to be identified by a "sanctions committee".

11. The Sanctions Committee had to proceed with the identification of the targeted persons and legal entities without having any discretion, according to paragraph 19 ("shall"). Likewise, all member States were required to confiscate the funds and assets without any discretionary powers, according to paragraph 23 ("shall"). In both cases under paragraph 23 (a) and (b), there was neither a ceiling on the amount of confiscated assets, nor a time-limit for the applicability of the confiscation measures. In principle, the confiscation measure, with the ensuing transfer

19. Security Council Resolution 1518 (2003), 24 November 2003, S/RES/1518 (2003).
20. See paragraph 143 of the judgment.
21. International judicial practice and scholarly opinion have affirmed certain rules of interpretation of Security Council resolutions, which mostly derive from a *mutatis mutandis* application of the Vienna Convention rules on interpretation (See *Legal Consequences for States*, cited above, p. 53, § 114, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports* 1992, p. 114; Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadić, Decision on the defence motion for interlocutory appeal on jurisdiction*, IT-94-1, 2 October 1995, §§ 71-137; and, among scholars, Michael Wood, "The Interpretation of Security Council Resolutions", 2 *Max Planck Yearbook of United Nations Law* 77 (1978), and Sufyan Droubi, *Resisting United Nations Security Council Resolutions*, Routledge, 2014, pp. 7-10).

of property and possession of the confiscated funds and assets would be final and irreversible, with the exception of one *ex post facto* non-judicial and non-legal avenue, in the form of the presentation of a "claim" to the legal representative of the Iraqi Government on already "transferred" funds or other financial assets. No criteria were established for the exercise of the review power by this political authority. It was not clear if the "private individuals or non-government entities" who might make a claim were only those targeted by the confiscation or any other persons or legal entities acting on their behalf or under their direction, or anyone else with a legal interest in the transferred funds and assets.

12. With sufficient clarity, the use of words such as "without delay" and "immediately" indicated that there were no other legal avenues by which to impugn the confiscation before an independent authority, neither *ex ante* nor *ex post facto*. Any such legal avenue would entail "delays" and impede the "immediate" transfer of property and possession[22]. The expression "prior judicial, administrative, or arbitral lien or judgement" referred to decisions delivered prior to the date of Resolution 1483 itself and which had acquired the force of *res judicata* before that date. The literal element warranting this interpretation was, of course, the reference in paragraph 23 (a) to "the date of this resolution". Thus, the safeguard of "prior" judicial, administrative or arbitral decisions related to the assets of the targeted individuals and entities ensured the *res judicata* of final judicial, administrative or arbitral decisions as of 22 May 2003. Assets covered by such *res judicata* were immune and not to be confiscated.

(ii) The teleological interpretation

13. Both the preamble and the text of Resolution 1483 envisaged putting into motion an urgent, uniform response of the international community to fund Iraq's economic recovery after the 1990 war and the subsequent 13 year-long trade and financial sanctions programme[23]. The post-conflict situation in Iraq was so troubling that it was considered a threat to international peace and security, justifying Chapter VII measures and "immediate" action by all member States. Under this light, the effectiveness of the international community's response could not be impaired by judicial, administrative or arbitral procedures lodged against the confiscation

22. Resolution 1483 avoided the expressions "necessary" or "where appropriate" of Resolution 1390 (2002).

23. On the teleological interpretation of Security Council Resolutions see *Nada v. Switzerland* [GC], no. 10593/08, § 175, ECHR 2012; *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, joined cases C-402/05 P and C-415/05 P* ("*Kadi I"*), Judgment of the Court of Justice of the European Communities (CJEC), Grand Chamber, 3 September 2008, §§ 296-297; and ICTY Appeals Chamber in *Dusko Tadić*, cited above, §§ 72-78.

measures. Such procedures were incompatible *per se* with the required promptness of the confiscation procedure. Moreover, the Security Council's aim was to secure a cohesive response of the international community, with the purpose of avoiding a multiple, fragmented approach dependent on the peculiarities of different domestic legal confiscation procedures and respective appeals. Different, prolonged domestic procedures contesting the confiscation measures would defeat the very purpose of the Resolution.

(iii) The contextual interpretation

14. Resolution 1483 was approved in the historical context of the reconstruction of Iraq and its economic infrastructure after the fall of the regime of Saddam Hussein[24]. In a situation of immense lack of resources and a humanitarian crisis the assumed policy choice of the Security Council was the identification of resources which should be transferred to the Development Fund for Iraq, thus replacing some of the previous "661 Committee" sanctions, which officially ceased to exist on 22 November 2003. By that date, all prohibitions related to trade with Iraq and the provision of financial or economic resources to Iraq established by Resolution 661 (1990) and others were terminated. One year later, that same threat determined the approval of Resolution 1546 (2004) on the formation of a sovereign Interim Government of Iraq. The international community's reaction was guided by international law and human rights, to which the Security Council explicitly and repeatedly referred in both Resolutions 1483 and 1546[25].

15. In a different context, that of the fight against the terrorism threat posed by Osama bin Laden and the Taliban, Resolution 1452 (2002)[26] provided for exemptions to Resolution 1267 (1999)[27] and Resolution 1390 (2002)[28], for assets or economic resources that had been determined by the relevant State(s) to be necessary for basic expenses, payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for

24. The contextual interpretation of Security Council resolutions was also taken into account by the Court in *Nada*, cited above, § 175, and by the ICTY Appeals Chamber in *Dusko Tadić*, cited above, § 93.

25. While Resolution 1483 (2003) had three references to "international law" and one sole reference to "human rights", Resolution 1546 (2004) had two references to "human rights" and one sole reference to "international law". Quite significantly, Resolution 1390 (2002) on the conflict in Afghanistan had no reference whatsoever to "international law" or "human rights".

26. Security Council Resolution 1452 (2002) on the threats to international peace and security caused by terrorist acts, 20 December 2002, S/RES/1452 (2002).

27. Security Council Resolution 1267 (1999) adopted by the Security Council at its 4051st meeting on 15 October 1999, S/RES/1267 (1999).

28. Security Council Resolution 1390 (2002) on the situation in Afghanistan, 16 January 2002, S/RES/1390 (2002).

routine holding or maintenance of frozen funds or other financial assets or economic resources, and extraordinary expenses. Resolution 1483 did not provide for similar exemptions in line with the strictly resource-oriented Security Council policy[29].

16. On 24 November 2003, in Resolution 1518 (2003) it was decided to establish, with immediate effect, a Committee of the Security Council ("the 1518 Committee"), consisting of all the members of the Council, to continue to identify, pursuant to paragraph 19 of Resolution 1483, individuals and entities referred to in paragraph 23 of that Resolution, and to adopt the guidelines[30] and definitions[31] previously agreed by the Committee established pursuant to paragraph 6 of Resolution 661 (1990). "Guidelines for the application of paragraphs 19 and 23 of resolution 1483 (2003)" provided brief indications related to the Committee's decision-making procedure. A "Non-paper on the implementation of paragraph 23 of Resolution 1483 (2003)", which was "not legally binding", but had been discussed among Committee members and "reflects their common understanding", expanded on the interpretation of certain definitions of Resolution 1483.

(iv) The systematic interpretation

17. In the 2005 World Summit declaration, the General Assembly called on the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures were in place for the imposition and lifting of sanctions measures, including the granting of humanitarian exemptions[32]. The Security Council's response to the Vienna call was a differentiated one. In the majority of cases, it established a Focal Point to examine requests for delisting from the sanctions lists of the following Committees: 751 (1992) and 1907 (2009) concerning Somalia and Eritrea; 1518 (2003); 1521 (2003) concerning Liberia; 1533 (2004) concerning the Democratic Republic of the Congo; 1572 (2004) concerning Côte d'Ivoire; 1591 (2005) concerning the Sudan; 1636 (2005); 1718 (2006); 1970 (2011) concerning Libya; 1988 (2011); 2048 (2012) concerning Guinea-Bissau; 2127 (2013) concerning the Central African Republic; 2140 (2014); and 2206 (2015) concerning South Sudan. The Office of the Ombudsperson was instituted for individuals on the list of the 1267/1989/2253 Committee ("the ISIL (Da'esh) and Al-Qaida Sanctions List")[33]. These two responses

29. Consultation of the 1518 Sanctions Committee's web page confirms that no exemptions are foreseen for the asset freeze ("none"); https://www.un.org/sc/suborg/en/sanctions/1518 (accessed 22 April 2016).
30. See SC/7791 IK/365 of 12 June 2003.
31. See SC/7831 IK/372 of 29 July 2003.
32. UNGA Resolution 60/1, cited above, § 109.
33. Security Council Resolution 2253 (2015), New ISIL (Da'esh) and Al-Qaida Sanctions List, 17 December 2015, S/RES/2253 (2015).

provided totally different approaches to the same legal problem. A logical and systematic interpretation of their interplay is needed in order to truly capture the meaning of each one of them[34].

18. On 14 December 2005, the new "1518 Committee" adopted its "Delisting Guidelines"[35]. Subsequently, Resolution 1730 (2006)[36] adopted the delisting procedure and requested the establishment within the Security Council Secretariat of a Focal Point to receive delisting requests and perform the function of an intermediary between the petitioner and the Committee. The persons concerned could make such requests either through the Focal Point or through their State of citizenship or residence. The Focal Point was responsible for forwarding such requests to the designating government(s) and to the government(s) of citizenship and residence. The latter, before any delisting recommendation, were to consult the government which originally designated the person for inclusion on the list. If the delisting was then recommended, in writing and with reasons, by one of those governments after the consultation, the request was to be placed on the agenda of the Committee by its chairman. However, if one of those governments opposed the delisting request, the Focal Point would inform the Committee and provide copies of the request. Any Committee member possessing information in support of the delisting request was encouraged, but not obliged, to share such information with the governments. The designating state was not obliged to disclose any exculpatory information to the Committee. If, after three months, none of the governments which reviewed the delisting request had commented, any member of the Committee could, after consultation with the designating government(s), recommend delisting by forwarding the request to the chairman of the Committee. If after one month, no Committee member had recommended delisting, the request would be deemed rejected. The Committee was also entitled to grant the request and delete the person's name from the list.

Although its preamble referred to "granting humanitarian exemptions", the text of Resolution 1730 (2006) omitted any reference to such "exemptions". Still in 2006, another important improvement was added by Resolution 1735 (2006)[37]. When proposing names to the Committee for inclusion on the Consolidated List, States had to provide a statement of case, furnishing as much detail as possible on the basis(es) for the listing.

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34. On the logical and systematic interpretation of Security Council Resolutions, see ICTY Appeals Chamber in *Dusko Tadić*, cited above, § 83.

35. The 1518 Committee's "Delisting Guidelines", published on its website, start with the words "without prejudice to available procedures", but no other specification is given. See https://www.un.org/sc/suborg/en/sanctions/1518/materials/delisting-guidelines (accessed 11 May 2016).

36. Security Council Resolution 1730 (2006), General Issues Relating to Sanctions, 19 December 2006, S/RES/1730 (2006).

37. Security Council Resolution 1735 (2006), Threats to International Peace and Security Caused by Terrorist Acts, 22 December 2006, S/RES/1735 (2006).

19. The year 2008 proved to be an *annus horribilis* for the sanctions mechanism. After three successive straightforward, sometimes even caustic, reproaches by the Parliamentary Assembly of the Council of Europe on 23 January ("Such a procedure is totally arbitrary and has no credibility whatsoever")[38], the Court of Justice of the European Communities on 3 September[39] and the United Nations Human Rights Committee (HRC) on 29 December[40], the Security Council finally decided to take serious action to allay the roots of the political and judicial criticism. In the fight against al-Qaeda, Osama bin Laden and the Taliban, and other individuals, groups, undertakings and entities associated with them, Resolution 1904 (2009)[41] decided that, when considering delisting requests, the Committee should be assisted by an Office of the Ombudsperson[42]. The Ombudsperson would perform these tasks in an independent and impartial manner and would neither seek nor receive instructions from any government[43]. The Ombudsperson had no power to overturn Committee decisions or to make recommendations to the Committee[44].

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38. Council of Europe Parliamentary Assembly (PACE), Resolution 1597 (2008), United Nations Security Council and European Union blacklists, 23 January 2008, § 6.1.
39. *Kadi I*, 3 September 2008, cited above.
40. HRC Communication No. 1472/2006, CCPR/C/94/D/1472/2006, 29 December 2008.
41. Security Council Resolution 1904 (2009) [on continuation of measures imposed against the Taliban and Al-Qaida], 17 December 2009, S/RES/1904 (2009), § 20.
42. In addition to the respective annual reports, these documents are very pertinent to assess the practice of the Ombudsperson: Ombudsperson's Statement during an Open Briefing to Member States, 23 November 2015; Remarks to the 49th meeting of the Committee of Legal Advisors on Public International Law (CAHDI) of the Council of Europe in Strasbourg, France, 20 March 2015; Briefing of the Ombudsperson at the Security Council's Open Debate on "Working Methods of the Security Council" (S/2014/725) on the topic: "Enhancing Due Process in Sanctions Regimes", 23 October 2014; Remarks by the Ombudsperson delivered to the panel on "Due Process in UN Sanctions Committees" at Fordham Law School, 26 October 2012; Letter of the Ombudsperson to the President of the Security Council, S/2012/590, 30 July 2012; Remarks of the Ombudsperson at the workshop on the UN Security Council, Sanctions and the Rule of Law, 31 May 2012 (Kimberly Prost, "The Office of the Ombudsperson; a Case for Fair Process"); Lecture by the Ombudsperson at the Institute of Legal Research at The National Autonomous University of Mexico, 24 June 2011; Speaking Notes for Presentation by Kimberly Prost, Ombudsperson at the 41st meeting CAHDI, 18 March 2011; Briefing by the Ombudsperson to the annual informal meeting of Legal Advisers of the Ministries of Foreign Affairs of United Nations Member States, 25 October 2010.
43. As the first Ombudsperson herself stated, the birth of the Office was a "difficult one", since it had been "the product of a compromise forged between two very different perspectives on this use of the Security Council sanctions power" (Kimberly Prost, Speaking Notes, 18 March 2011, cited above, p. 1).
44. The Ombudsperson herself acknowledged that "Structurally the Office of the Ombudsperson does not exist and the administrative and contractual arrangements supporting it in practice do not provide institutional safeguards for independence." (Briefing of the Ombudsperson, 23 October 2014, cited above, p. 4). "There are no institutional protections for the independence of the office of the ombudsperson, which

20. Resolution 1989 (2011)[45] further clarified the competence and working methods of the Ombudsperson. Two critical steps were taken. Firstly, the Ombudsperson was given the power to make a recommendation, in a comprehensive report, on the delisting of those individuals, groups, undertakings or entities that had requested removal from the al-Qaeda sanctions list through the Office of the Ombudsperson[46]. This could be either a recommendation to retain the listing or a recommendation that the Committee consider delisting. Where the Ombudsperson recommended against delisting, the person would remain on the list. Where the Ombudsperson recommended that the Committee consider delisting, the requirement for States to implement the Resolution would automatically terminate with respect to that individual, group, undertaking or entity 60 days after the Committee completed consideration of a comprehensive report of the Ombudsperson, unless the Committee decided by consensus before the end of that 60-day period that the requirement should remain in place with respect to that individual, group, undertaking or entity. Thus, the previous positive consensus requirement for delisting was replaced by a consensus presumption, which could be reversed by a unanimous explicit vote of the 15 Committee members. This "reverse consensus" was the second critical change reinforcing the Ombudsperson position: from now on the Ombudsperson's delisting recommendation prevailed in the absence of a consensus position of the Committee to the contrary or a Security Council reference and vote. In cases where there was no consensus, the Chair had, at the request of a Committee Member, to submit the question of whether to delist that individual, group, undertaking, or entity to the Security Council for a decision within a period of 60 days ("the triggering mechanism"). The possibility of the Committee's consensual overturn or the Security Council's overriding of the Ombudsperson's recommendation built into the process a decisive political element, aggravated by the lack of any obligation of reasoning imposed on the Security Council[47]. The same procedure was followed where the designating State submitted a delisting request.

21. The Resolution strongly urged member States to provide all relevant information to the Ombudsperson, including any relevant confidential

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leaves it very vulnerable, especially when going through the upcoming period of transition." (Remarks by Ombudsperson, 20 March 2015, cited above, p. 6).

45. Security Council Resolution 1989 (2011) on expansion of the mandate of the Ombudsperson established by the resolution 1267 (1999) and the establishment of a new Al-Qaida sanctions list, 17 June 2011, S/RES/1989 (2011).

46. Since its inception, the comprehensive report has been used by the Ombudsperson as a means to ensure that the petitioner's side of the story is heard by the decision maker (Lecture at the Institute of Legal Research, cited above, p. 6).

47. See Kimberley Prost, "The Office of the Ombudsperson; a Case for Fair Process", p. 4. https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/fair_process.pdf (accessed 22 April 2016).

information, where appropriate, the Ombudsperson being bound by any confidentiality restrictions that were placed on such information by the member State providing it. Accordingly, any missing information would not be a part of the case which was analysed by the Ombudsperson and would not be included in the comprehensive report and its recommendations. This would, in principle, bring about an important advantage for the petitioner: the case made known to the petitioner would be the same as that which formed the basis of the recommendation. Furthermore, the report would "level" the information field within the Committee, since all fifteen members would have access to the same information[48]. Yet since there was no obligation to disclose relevant information to the Ombudsperson, nothing hindered the providing State in practice from conveying to the Committee or some of its members the information undisclosed to the Ombudsperson, with the risk that the case be decided on the basis of information that was neither communicated to the petitioner nor analysed by the Ombudsperson[49]. In other words, the al-Qaeda Committee continued to act as judge in its own cause and the exercise of the Ombudsperson's powers of investigation and disclosure of evidence was still subject to the unfettered discretion of the States[50]. The petitioner and the public at large were deprived of access to the Ombudsperson's comprehensive report, its conclusions, incriminating and exculpating evidence, and even to the identity of the designating State[51]. These shortcomings were not offset by the newly imposed obligations to provide publicly a narrative summary of reasons for listing and reasons for refusing delisting requests[52].

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48. See Kimberley Prost, "The Office of the Ombudsperson", cited above, p. 2.

49. After the office became operational, the Ombudsperson herself admitted that the process was "not a transparent one", referring to non-disclosure of the comprehensive reports beyond the Committee but, on a discretionary basis, to some interested States upon request, and to the States' reluctance to provide factual detail and access to confidential information (Remarks delivered to the informal meeting of legal advisers, cited above, p. 2; Briefing of the Ombudsperson, cited above, p. 3; and Remarks by Ombudsperson, cited above, p. 5).

50. There seems to be a State practice to respect the Ombudsperson's position. According to the Ombudsperson, "in all completed cases post resolution 1989 (2011), the decision of an independent and impartial mechanism has prevailed in terms of the assessment of the delisting requests" (Remarks by Ombudsperson, 25 October 2010, cited above, p. 3).

51. For this criticism, see: the report of the UN Special Rapporteur on Protection of human rights and fundamental freedoms while countering terrorism, 26 September 2012, A/67/396 ("the Emmerson Report"), § 31; the report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, 15 December 2010, A/HRC/16/50 ("the High Commissioner's Report 2010"), §§ 21-22, 44; and the report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 6 August 2010, A/65/258 ("the Scheinin Report 2010"), §§ 55-56.

52. Recently, the 1518 Committee made accessible a merely formalistic "narrative summary of reasons for the listing" of the second applicant, Montana Management, Inc. No substantive reasons or evidence were given.

22. Finally, the Resolution encouraged member States to make use of the provisions regarding available exemptions set out in paragraphs 1 and 2 of Resolution 1452 (2002), as amended by Resolution 1735 (2006), and directed the Committee to review the procedures for exemptions as set out in the Committee's guidelines to facilitate their use by member States and to continue to ensure that exemptions would be granted expeditiously and transparently. Resolution 2161 (2014)[53] decided that the Focal Point mechanism might receive requests from listed individuals, groups, undertakings, and entities for exemptions. Nevertheless, the issue remained subject to the Committee's discretion.

23. A systematic interpretation of the delisting systems of Resolution 1730 (2006) and Resolution 1904 (2009), further developed by Resolution 1989 (2011), shows an abyssal difference: the first of these has not even achieved the basic guarantees of fairness of the second[54]. The Focal Point does not study the merits of the delisting petition, having no access whatsoever to the evidence justifying inclusion in the list. The "1518 Committee", which is the competent body for adding names to the list, is also the body responsible for delisting of individuals and entities under Resolutions 1483 and 1730, acting on the basis of a secret and inquisitorial procedure. The Committee reaches a consensual, political decision, which is the outcome of an internal, inter-State, diplomatic negotiation. The unreasoned veto of one single member suffices to block the delisting procedure, without the petitioner having the right to know who cast the veto and on what grounds.

24. With no evident rationale for such difference in the treatment of individuals facing targeted sanctions, the arbitrariness of the overall panoply of sanctions is further aggravated when individuals are delisted from the "first class" al-Qaeda sanctions list (renamed "ISIL (Da'esh) and Al-Qaida sanctions list") and subsequently relisted in another "second-class" sanctions list, as if the latter regime were being instrumentalised as a catch-all subterfuge to punish those who had managed to get through the torment of the former[55]. Blatant errors such as that of Resolution 1530

53. Security Council Resolution 2161 (2014) "[on threats to international peace and security caused by terrorist acts by Al-Qaida]", 17 June 2014, S/RES/2161 (2014).

54. As the Ombudsperson herself concluded, "the Focal Point mechanism by its very nature and structure does not have the fundamental characteristics necessary to serve as an independent review mechanism which can deliver an effective remedy" (Briefing of the Ombudsperson, 23 October 2014, cited above, p. 2).

55. As criticised by the Ombudsperson herself, Kimberley Prost, "The Office of the Ombudsperson", cited above, p. 5, and Briefing of the Ombudsperson, cited above, p. 1. Later on, the Ombudsperson argued that this procedure had "significant advantages over court process" adding "it is a simple procedure, it can be started through an email, the Petitioner can communicate in a language of choice, no lawyer is required, there are no costs, and it has strict deadlines which make it quite fast relatively speaking" (Remarks by Ombudsperson, 20 March 2015, cited above, p. 4). I would oppose the argument that no

(2004), which attributed the 2004 Madrid bombings to the ETA organisation, serve to make even worse the prospect of individuals being caught in a Kafkaesque punitive machine.

C. Preliminary conclusion

25. The Charter of the United Nations has not yet acquired the nature of a Constitution for the international community. Accordingly, Article 103 of the Charter is a rule of precedence, without there being any direct or indirect nugatory effect for provisions of treaties and agreements containing conflicting obligations. Obligations resulting from Security Council resolutions are no exception to this non-hierarchical conflict rule.

26. Resolution 1483 created two confiscation measures, with different requirements: an *in rem* confiscation applicable to funds and assets of the former Iraq government and a strict-liability-based, punitive confiscation of funds and assets owned or possessed by the former Iraqi political leadership. The preamble's reference to the "need for accountability for crimes and atrocities committed by the previous Iraqi regime" and the appeal "to Member States to deny safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities and to support actions to bring them to justice" makes the punitive nature of the confiscation even clearer[56]. The consequences for the listed

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great stretch of the imagination is necessary to conceive a simplified, urgent judicial procedure with all these "advantages". She also argued that judicial review could not take into account evolving situations. I would reply that nothing hinders a court from proceeding with a *de novo* review of the initial situation. This is exactly the case with the evaluation of an accused person's dangerousness in European security measures (*strafrechtliche Maßnahmen, misure di sicurezza*) applied in criminal proceedings.

56. In favour of the punitive character of the United Nations sanctions, including freezing orders, see: the Emmerson Report, cited above, § 55; the High Commissioner's Report 2010, cited above, § 17; the report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, 2 September 2009, A/HRC/12/22 ("the High Commissioner's Report 2009"), § 42; and the report by the former UN Special Rapporteur, 6 August 2008, A/63/223 ("the Scheinin Report 2008"), § 16. The EU General Court judgment in case T-85/09, *Yassin Abdullah Kadi v. European Commission* (30 September 2010, § 150) had raised the issue of the punitive nature of these sanctions with regard to the freezing orders, while accepting that confiscation did affect the very substance of the right to property. The Ombudsperson opposes such understanding, considering (on the Office's website) that the sanctions "are not intended to punish for criminal conduct", but to "hamper access to resources" and "encourage a change of conduct" on the part of the targeted people. At the same time, it is admitted that these sanctions flowing from listing have a "direct and considerable impact on the rights and freedoms of individuals and entities" and are of "indeterminate length" and therefore that there must be "some substance and reliability to the information upon which such sanctions are applied". No specific intent by an individual is required by the Ombudsperson, but it must be demonstrated that the person "knew or [must] have known" that he or she supported ISIL or al-Qaeda or any associated entity. In my view, it is highly disputable to say that a temporary freeze of all assets of a person or entity without any

individuals and their families may be so severe that they have been described as "effectively prisoners of the state"[57].

27. The confiscation measures themselves are attributable to the executing States. Thus, under Article 1 of the Convention, the Contracting Parties to the Convention are responsible for those acts and omissions of their organs which derive from the necessity to fulfil their international obligations. No access to independent and effective review was provided for. Neither Resolution 1730 (2006) nor Resolution 1904 (2009) filled this legal vacuum. Being a mere transmission point, the Focal Point does not even have the features of a substantive review mechanism, independent or not. Differently, the Office of the Ombudsperson does provide basic procedural guarantees, but the decision-making power still lies in the Committee and the Security Council. In any event, the Ombudsperson is not competent for the delisting of individuals and entities listed under Resolution 1483.

III. The right of access to a court in international law

A. The nature of the right of access to a court

(i) In international humanitarian and criminal law

28. It is a well-established rule of customary international law applicable in both international and non-international armed conflicts that no one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial and procedural guarantees[58]. The right to a fair trial is provided for in Article 49, fourth paragraph, of the First Geneva Convention, Article 50, fourth paragraph, of the Second Geneva Convention, Articles 102–108 of the Third Geneva Convention, Articles 5 and 66–75 of the Fourth Geneva Convention, Article 75 § 4 (adopted by consensus) of Additional Protocol I, and Article 6 § 2 (adopted by consensus) of Additional Protocol II. Depriving a protected person of a fair and regular trial is a grave breach under Article 130 of the Third Geneva Convention, Article 147 of the Fourth Geneva Convention, and Article 85 § 4 (e) (adopted by consensus) of Additional Protocol I. Common Article 3 of the Geneva Conventions prohibits the sentencing of persons or the

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sunset clause is merely a preventative measure. In any event, the *Al-Dulimi* case is simpler in so far as it does not deal with a temporary freezing order, but a truly confiscatory measure implying a final and unlimited transfer of property with a clearly punitive purpose.

57. *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants)* [2010] UKSC 2, [2010] 2 AC 534, § 60, referring to Security Council Resolution 1373 (2001). The International Commission of Jurists calls them "international pariahs" (International Commission of Jurists, "Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights", Geneva, December 2008, p. 117).

58. The Scheinin Report 2008, § 9 (customary international law).

carrying out of executions without a prior judgment pronounced by a regularly constituted court. Most importantly, depriving a person of the right to a fair trial is listed as a war crime in Article 8 § 2 (a)(vi) and (c)(iv) of the Statute of the International Criminal Court (ICC), Article 2(f) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), Article 4(g) of the Statute of the International Criminal Tribunal for Rwanda and Article 3(g) of the Statute of the Special Court for Sierra Leone. It can thus be affirmed that the right of access to a court in criminal proceedings has acquired today the status of a norm of *jus cogens*. As the High Commissioner for Human Rights stated precisely on the topic of individual blacklists, "all punitive decisions should be either judicial or subject to judicial review"[59].

29. Pursuant to the above-mentioned provisions, the non-negotiable guarantee of justiciability of criminal punishment implies access to an independent, impartial and regularly constituted court, before which the accused is presumed innocent, is not compelled to testify against himself or herself or to confess and may be heard, contest incriminating evidence and present exonerating evidence, after having been informed of the nature and cause of the accusation. Some of these guarantees are also ensured by Article 67 (1) of the Rome Statute of the ICC, which includes the intrinsic requirements for a fair trial in the context of international criminal law.

(ii) In international human rights law

30. It has been argued that certain human rights obligations bear the nature of peremptory norms of international law. According to the Human Rights Committee, States parties to the ICCPR may in no circumstances invoke its Article 4 as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by deviating from fundamental principles of fair trial, including the presumption of innocence[60]. Among the fundamental principles of fair trial recognised as peremptory norms of international law there is *nemo debet esse judex in*

59. The High Commissioner's Report 2009, cited above, § 42, and Appeals' Chamber of the ICTY in *Dusko Tadic*, appeal judgment on allegations of contempt against prior counsel, Milan Vujin, IT-94-1-A-AR77, 27 February 2001 (see the considerings of the judgment) and Special Tribunal for Lebanon, *Prosecutor v. El Sayed*, President Antonio Cassese's order « assigning matter to pre-trial judge », CH/PRES/2010/01, 15 April 2010.

60. Human Rights Committee, General Comment No. 29, States of Emergency (article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11, §§ 7 and 15, and General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32, §§ 6 and 59. See also Article 27 § 2 of the American Convention on Human Rights and article 4 § 2 of the Arabe Charter on Human Rights; and Inter-American Court of Human Rigths, *Goiburú et al. v. Paraguay*, Judgment (Merits, Reparations and Costs), 22 September 2006, § 131, *Habeas corpus in emergency situations*, Advisory opinion OC-8/87, 30 January 1987, §§ 17-43, and *Judicial guarantees in states of emergency*, Advisory opinion OC-9/87, 6 October 1987, §§ 18-34.

propria sua causa[61]. Equally, if not even more important, the principle that *ideo homo non potest simul esse accusator, judex et testis* is certainly among the non-renounceable "principles of natural justice" referred to by the Canadian Supreme Court[62]. The requirement of competence, independence and impartiality of a tribunal in the sense of Article 14 § 1 of the ICCPR is an absolute right that is not subject to any exception, being essentially incompatible with any supervisory power of a political or executive body over the court's judgments and decisions[63]. This is even more so when the political body acts *sic volo, sic jubeo*, concentrating the legislative power to create the legal framework of the sanctions, the executive power to impose them on (to "list") specific persons and entities, and the "judicial power" to exempt from or even lift the sanctions (to "delist").

31. In *Sayadi and Vinck v. Belgium* the HRC decided that the case concerned the compatibility with the ICCPR of national measures taken by the State Party in implementation of Security Council Resolutions 1267 (1999), 1333 (2000), 190 (2002) and 1455 (2003) and, without any further explanation stated: "Consequently, the Committee finds that article 46 is not relevant in this case" [64]. In addition, it considered that, even though the State Party was not competent to remove the applicants' names from the United Nations and European lists, it was responsible for the presence of the applicants' names on those lists and for the resulting travel ban. On the specific point of judicial review, the HRC concluded that the applicants did have an effective remedy, within the limits of the jurisdiction of the State Party, which had guaranteed effective follow-up by submitting two requests for delisting.

(iii) In European human rights law

32. In the case of *Golder* the Court referred to Article 31 § 3 (c) of the Vienna Convention, in conjunction with Article 38 § 1 (c) of the Statute of the International Court of Justice, as recognising that the rules of international law included "general principles of law recognized by civilized nations". The right of access to a court was one of those general principles of law[65]. Thus, Article 6 of the Convention should be interpreted in the light of those general principles, the Court concluded. Moreover, this right pertains to "an area concerning the public order (*ordre public*) of the

61. See the Emmerson Report, cited above, § 15, and the Scheinin Report 2008, cited above, § 12.
62. *Abdelrazak v. The Minister of Foreign Affairs*, [2009] FC 580, § 51.
63. General Comment No. 32, cited above, § 19.
64. HRC Communication No. 1472/2006, cited above (§ 10.3). The HRC expressed its view against the punitive nature of the sanctions of the above-mentioned Resolutions (§ 10.11).
65. *Golder v. the United Kingdom*, 21 February 1975, § 35, Series A no. 18.

member States of the Council of Europe", and therefore any measure or decision alleged to be in breach of Article 6 calls for "particularly careful review"[66]. The power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a "tribunal"[67].

B. A norm of *jus cogens*?

(i) In civil proceedings

33. In a fairly abrupt conclusion, the majority state that the right of access to a court is not yet part of *jus cogens*[68]. No further explanation is added. The right of access to a court in civil proceedings is certainly not absolute, since it may be subject to limitations permitted by implication[69]. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a "legitimate aim" and if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved"[70]. For example, a treaty-based rule on the immunity of an international organisation from national jurisdiction may pursue a legitimate aim[71], but is only permissible from the standpoint of Article 6 § 1 if the restriction stemming from it is not disproportionate. Thus, it will be compatible with Article 6 § 1 if the persons concerned have available to them reasonable alternative means to protect their rights effectively under the Convention[72].

34. The most problematic issue relates to State immunity in respect of personal injury caused by an act or omission within the forum State[73] and State immunity for State acts against norms of *jus cogens* committed outside the forum State[74]. *Al-Adsani*, reiterated and enlarged by *Jones and Others*[75], does not accord a norm of *jus cogens* an overriding effect over the State's right to immunity in civil matters under customary international law. In other words, the peremptory effect of the higher-ranking norm of *jus cogens*

66. *Deweer v. Belgium*, 27 February 1980, Series A no. 35, § 49.
67. *Van de Hurk v. the Netherlands*, 19 April 1994, § 45, Series A no. 288.
68. See paragraph 136 of the judgment.
69. *Golder*, cited above, § 38; *Stanev v. Bulgaria* [GC], no. 36760/06, § 230, ECHR 2012.
70. *Ashingdane v. the United Kingdom*, 28 May 1985, § 57, Series A no. 93, and *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B.
71. *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 63, ECHR 1999-I.
72. Ibid., §§ 68-74, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 48, ECHR 2001-VIII.
73. *McElhinney v. Ireland* [GC], no. 31253/96, § 38, ECHR 2001-XI (extracts).
74. *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 54, ECHR 2001-XI.
75. *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, 14 January 2014.

prohibiting and punishing torture is nullified by a lower-ranking norm of customary law. The question that should be put is whether the right of access to a court in civil matters is not a general principle of law which belongs to *jus cogens* whenever the civil right protected has such status itself. The Court is reluctant to admit as such. In *Stichting Mothers of Srebrenica and Others*[76], the Court again found that international law did not support the position that a civil claim should override immunity from suit for the sole reason that it was based on an allegation of a particularly grave violation of a norm of international law, invoking a recent case of the International Court of Justice in which it had clearly stated this in respect of the sovereign immunity of foreign States[77]. In the Court's opinion this also held true as regards the immunity enjoyed by the United Nations.

(ii) In criminal proceedings

35. The right of access to a court is evidently more imperative in criminal than in civil matters. While it might still be subject to implied limitations, in criminal cases these will be much less important than in civil cases[78]. In any event, such limitations must not restrict the exercise of the right in such a way or to such an extent that the very essence of the right is impaired. Additionally, they must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved[79]. When the penalty is applied by a body or officer who does not have a judicial quality, an appeal to a court must be ensured[80]. Article 15 of the Convention must be read in the light of the development of international humanitarian and criminal law, which warrants the upholding of the right of access to a court in criminal matters as a non-derogable right. Such a reading alone is compatible with the emergence of this right as an intransgressible norm of *jus cogens*. Otherwise *jus cogens* could be discarded like an exquisite – but useless – Bentley that never leaves the garage, to use Brownlie's image[81].

76. *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), no. 65542/12, 27 June 2013.
77. *Jurisdictional Immunities of the State (Germany v. Italy : Greece intervening), Judgment, ICJ Reports* 2012, p. 99.
78. *Deweer*, cited above, § 49, and *Kart v. Turkey* [GC], no. 8917/05, § 67, ECHR 2009 (extracts).
79. *Guérin v. France* [GC], 29 July 1998, § 37, *Reports of Judgments and Decisions* 1998-V.
80. See my separate opinion in *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011.
81. Ian Brownlie, "Comment", in Weiler and Cassese (eds.), *Change and Stability in International Law-Making*, Berlin: de Gruyter, 1988, p. 110.

C. Preliminary conclusion

36. Resolution 1483 is hardly compatible with international humanitarian law, international criminal law or international human rights law[82]. The 1518 Committee is a purely political body, an emanation of the Security Council. The same political body legislates and decides on listing and delisting individuals and entities. Worse still, the accuser may also be the judge, since the State requesting listing may be asked to decide on the listing and delisting.

37. The applicants were subjected to confiscation measures under paragraph 23 (b) of Resolution 1483[83]. Although it does not contain a formal accusation, paragraph 23 (b) does satisfy the Convention criteria for triggering the procedural guarantees of the criminal limb of Article 6, and in particular the presumption of innocence[84]. The deprivation of access to a court in order to challenge punitive confiscation measures breaches a *jus cogens* norm, with the consequence of depriving the conflicting Resolution 1483 obligation, together with its implementing measures, of their legal force under Articles 24 and 103 of the Charter[85]. But even assuming, for the sake of argument, that this is not the case, those confiscation measures do raise an issue in terms of European public order, since they breach fundamental minimum standards of human rights protection. At the very least, the procedural guarantees of the civil limb of Article 6 are at stake. The limitation of access to a court will be compatible with Article 6 § 1 only if the persons concerned have available to them reasonable alternative means to protect their rights effectively under the Convention, namely access to another body or official authorised to exercise judicial authority. When no other legal avenue is offered to the targeted individuals and entities, the essence of the right to independent and impartial review – the right to judicial supervision – might be impaired, as the majority admit in paragraph 151 ("the very essence of the applicant's right of access to a court has been impaired"). No additional proportionality balancing is then needed.

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82. See, among other independent voices, both from inside and outside the United Nations: the Emmerson Report, cited above, §§ 55-57; the High Commissioner's Report 2010, cited above, §17; International Commission of Jurists, "Assessing Damage", cited above, pp. 115-116; and the Scheinin Report 2008, cited above, § 16.

83. See paragraph 26 of the judgment.

84. The Emmerson Report (cited above, §§ 56-58) pleads for a balance of probabilities test and a sunset clause imposing a time-limit on the duration of designations. In its most recent Resolution 2253 (2015), paragraph 16, the Security Council urged the member States to apply "an evidentiary standard of proof" of "reasonable grounds" or "reasonable basis".

85. See, *mutatis mutandis*, Articles 53 and 64 of the Vienna Convention, cited above. The UN Special Rapporteur is of the view that the absence of independent judicial review of sanctions of a penal nature is so grave that it has rendered the current sanctions regime *ultra vires* of the Security Council's Chapter VII powers (the Scheinin Report 2010, cited above, § 57).

Second Part – The solution to the normative conflict

IV. The conflict between Charter obligations and human rights treaty obligations

A. The possible solutions

(i) Primacy of Charter obligations

38. A radical solution for the conflict between Charter obligations and human rights treaty obligations consists in a strictly hierarchical submission of the latter to the former, in accordance with Article 103 of the UN Charter[86]. Corresponding to an acknowledgment of the constitutional role of the Charter, this solution was followed by the Court of First Instance of the European Communities ("CFI", now known as the General Court) in *Kadi I*. In its judgments of 21 September 2005[87], the CFI took the view that the European Union judicature had limited jurisdiction as regards the interpretation of Community regulations adopted pursuant to Security Council resolutions. By the effect of the transfer of sovereign powers from the member States to the Union, the latter was bound by the Charter even though it was not itself a member of the United Nations. In addition, it found that the violations of the right to a fair trial and the right to be heard were acceptable in the light of the "essential public interest in the maintenance of international peace and security in the face of a threat clearly identified by the Security Council".

39. From a hierarchical perspective, Article 103 of the Charter would thus rule out any review by the Court of the acts of State Parties implementing Charter obligations. As a matter of pure logic, the Court would have no choice but to declare inadmissible any complaint with such subject-matter. Yet the lack of constitutionality of the Charter, coupled with the multiplication of normative strata and legal institutions with constitutional claims in the international arena, especially in the field of international human rights protection, both call for an adaptation of the Charter model of normative conflict resolution. In other words, at the universal level, a strictly Kelsenian perspective of the hierarchy of norms in international law is still ill-adapted to reality.

Since Article 103 of the Charter cannot be interpreted independently of the Charter's primary rules of obligation, a systematic interpretation of the

86. See, for example, R. Kolb, "L'article 103 de la Charte des Nations Unies", *Collected Courses of The Hague Academy of International Law*, 2013, vol. 367, pp. 119-123; Arcari, "Forgetting Article 103 of the UN Charter? Some perplexities on 'equivalent protection' after Al-Dulimi", in *QIL, Zoom-in* 6 (2014), p. 33; and Bernhardt, "Commentary to Article 103", in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2002, p. 1300.

87. CFI, cases T-315/01, Reports II-3649, and T-306/01, Reports II-3533, respectively.

Charter cannot ignore the limitations and deficiencies of the State-centred United Nations architecture in the case of conflicting constitutional claims in international law. Putting forward an emerging, but still weak, constitutional claim, UN Charter primary law may, in specific instances of conflict, be displaced by international norms with a stronger constitutional claim and whose effect is not offset by the secondary rule of Article 103 of the Charter.

(ii) Primacy of human rights treaty obligations

40. The exact opposite solution expressly rules out any watering-down of the human rights protection norms by submission to binding Security Council resolutions[88]. In *Kadi I* the Court of Justice of the European Communities (CJEC, now known as the Court of Justice of the European Union) found that it had jurisdiction to rule on the lawfulness of Regulation (EC) no. 881/2002 implementing Security Council Resolutions 1267 (1999), 1333 (2000) and 1390 (2002), directed against al-Qaeda and the Taliban. In its judgment of 3 September 2008 the CJEC found that its review of the validity of any Community measure in the light of fundamental rights had to be regarded as the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which was not to be prejudiced by an international agreement[89]. It explained that this review concerned the Community act adopted to give effect to the international agreement in question, and not the latter as such, emphasising the principle that all Community acts must respect fundamental rights – that respect constituting a condition of their lawfulness[90]. In *Kadi I* the CJEC found that the applicants' defence rights, in particular the right to be heard, had been breached[91]. In addition, their right to an effective legal remedy had been infringed as they had been unable to defend their rights in satisfactory conditions before the Community judicature, and there had been a breach of their right to property, in the absence of basic procedural safeguards[92]. In

88. See, for example, Bruno Simma, "Universality of International Law from the perspective of a practitioner", in 20 *EJIL* (2009), p. 294: "If ... universal institutions like the UN cannot maintain a system of adequate protection of human rights, considerations of human rights deserve to trump arguments of universality".
89. *Kadi I*, 3 September 2008, cited above, § 316.
90. Ibid., §§ 284-287.
91. The Ombudsperson herself considered this judgment the "tipping point" in the context of the criticism emanating from many geographic corners, by putting the enforceability of the Security Council regime "clearly directly in peril" (Kimberley Prost, Remarks delivered to the informal meeting of Legal advisors, 25 October 2010, p. 2).
92. *Kadi I*, 3 September 2008, cited above, § 353.

the light of those violations, the Court annulled the contested regulation in so far as it concerned Mr Kadi and the foundation Al Barakaat[93].

41. Summing up, the CJEC attributed to the constitutional order of the European Union a benchmarking effect for the evaluation of any Community or domestic act implementing Security Council resolutions. Affirming that immunity from jurisdiction within the Community's internal legal order "appear[ed] unjustified, for clearly that re-examination procedure [before the Sanctions Committee] [did] not offer the guarantees of judicial protection", the CJEC implicitly introduced a *Solange*-type caveat[94]. The question that now follows is whether the same applies to the community of 47 European States which compose the Council of Europe.

(iii) Harmonisation of Charter and human rights treaty obligations

42. The middle-ground solution avoids the normative conflict. It does that by two, or in reality three, different means. The first consists in examining whether the impugned act or omission can be attributed to the United Nations, and consequently whether the Court has jurisdiction *ratione personae* to review any such action or omission found to be attributable to the UN; and in concluding that the impugned act or omission cannot be attributed to the respondent State because the ultimate authority and control over them belonged to the Security Council and therefore the Court does not have jurisdiction *ratione personae* (the *Behrami* approach)[95]. The second

93. In *Commission and Others v. Kadi* (joined cases C-584/10 P, C-593/10 P and C-595/10 P, judgment of 18 July 2013) ("*Kadi II"*), the Court of Justice of the European Union (CJEU) confirmed the annulment of the new Regulation adopted by the Commission to comply with *Kadi I*. It is instructive to observe how, in the *Kadi II* judgment, the CJEU gives precise details as to the conduct that it expects of the competent Union authority (see §§ 111-116, 135-136). But in *Kadi II* the CJEU did not include in its analysis the Ombudsperson, an omission which the latter considered as "unfortunate". She added that such consideration by the CJEU "would have been helpful … even if it considered the mechanism did not go far enough" (Remarks by the Ombudsperson to the CAHDI, cited above, p. 4).

94. See *Kadi I*, 3 September 2008, cited above, § 322, and Kokott and Sobotta, "The Kadi Case – Constitutional Core Values and International Law – Finding the Balance", in *EJIL* (2012), vol. 23, no. 4, p. 1019. Most notably, Malenovsky considers that the CJEC applied the *Bosphorus* test by implicitly finding the protection at UN level to be manifestly deficient (see "L'enjeu délicat de l'éventuelle adhésion de l'Union européenne à la Convention européenne des droits de l'homme : de graves différences dans l'application du droit international, notamment général, par les juridictions de Luxembourg et Strasbourg", *RGDIP* 2009-4).

95. See *Behrami*, cited above, § 133. The Court adopted Sarooshi's "overall authority" test, as set out in his *The United Nations and the Development of Collective Security* (1999), which is distinct from the more rigorous criterion of Article 5 of the Draft Articles on the Responsibility of International Organisations. See, for a critique of the *Behrami* approach, L.-A. Sicilianos, "Le Conseil de Sécurité, La responsabilité des Etats et la Cour européenne des droits de l'homme : vers une approche intégrée ?", in *RGDIP*, 2015-4, p. 782, and the literature cited therein.

involves an interpretation of the text of the Security Council Resolution in such a manner as to make the obligations coexist, either by finding that the impugned measure taken by the respondent State was not in reality required by the Security Council (the *Al-Jedda* approach)[96], or by finding that, in the implementation of the resolution, the respondent State had some latitude – perhaps limited but nevertheless real – and that the alleged violation stemmed from the insufficient use of that room for manœuvre by the respondent State (the *Nada* approach)[97].

43. As formulated in the *Al-Jedda* judgment, the presumption against normative conflict aims at the systemic integration of the United Nations legal order with the European legal order. But this is an instrument of interpretation of limited value, since in cases of unambiguous language imposing an obligation in breach of human rights no conclusions are drawn from the reversal of the presumption – and thus, the presumption remains unnecessary – and in cases of language imposing no obligation at all, there is no normative conflict – and thus, the presumption is simply beside the point. The *Nada* reasoning does not help much in this context. It is permeated by the belief that the Charter leaves to United Nations member States a free choice among the various possible models for transposition of Security Council resolutions into their domestic legal order[98]. But the *Nada* refinement of a two-tier compliance obligation of members of the United Nations, regarding both the interpretation and the implementation of Security Council resolutions, is not convincing. Methodologically speaking, the *distinguo* between interpretation and implementation ignores a long established *acquis* of legal theory, namely that any act of interpretation of a norm is already a particular way of implementing it, and *vice versa*, any act implementing a norm implies a certain interpretation of the norm. Furthermore, by putting the emphasis on the "implementation stage", *Nada* tacitly nullifies the effect of the allegedly autonomous interpretation test, admitting that the *Al-Jedda* presumption may be rebutted even in the case of clear and explicit language imposing an obligation of result. In such a case, the fiction of "some latitude"[99] risks overstretching the text by means of an artificially in-read linguistic ambiguity. The best evidence of this artificiality is reflected in the obligations of *facere* imposed on the respondent State, which have no foothold in reality. By creating a duty to act to alleviate the strictness of the Resolution within the confines of the Article 103 obligation, the *Nada* judgment is insistently looking for some sort of Swiss State discretion where the Security Council did not want it to be so. When the laudable effort of systemic integration, as warranted by

96. See *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011. The Court followed the concurring opinion of Sir Nigel Rodley in *Sayadi and Vinck*, cited above.
97. See *Nada*, cited above.
98. Ibid., § 176.
99. Ibid., §§ 179-180.

Article 31 § 3 (c) of the Vienna Convention, goes beyond the limits of reasonableness, it is no longer persuasive. That was the case in *Nada*.

44. In spite of the fact that no "latitude" was accorded by the language of the text of the Resolution, State discretion is resuscitated at the level of the transposition tier of the State-compliance obligation, to avoid explicitly performing the equivalent protection test. In fact, there is a covert comparable assessment, which is carried out in the Article 13 part of the *Nada* judgment. The Court concludes that, in the absence of an effective judicial review at UN level, the respondent State had a duty to provide an effective remedy, without specifying how such a review should have been organised. In this context, the *mutatis mutandis* reference in *Nada* to paragraph 299 of *Kadi I* (2008) is quite illuminating[100], revealing that the *Nada* majority were indeed won over by the CJEC's constitutional philosophy, whilst avoiding the same head-on, confrontational posture.

B. Critique of the majority's reasoning

(i) The unfulfilled promise of an interpretation of Resolution 1483

45. The majority's promise of an examination of the wording and scope of the text of Resolution 1483 made in paragraph 139 of the present judgment remains unfulfilled. Instead of interpreting the text, the majority reinvent the text of Resolution 1483, stretching the meaning of its language and, worse still, decontextualising the text. No interpretative effort is made to reconcile expressions such as freeze "without delay" and "immediate" transfer with the possibility of a long judicial review procedure. Even less effort is made to explain the exception for assets or resources which are "the subject of a prior judicial, administrative, or arbitral lien or judgement", this exception being simply ignored by the majority. The silence of the majority on this point is positively deafening.

46. The majority's superficial interpretation of Resolution 1483 is particularly salient in view of the fact that no consideration is given to parallel regimes of sanctions, and namely to the Security Council Committee pursuant to Resolutions 1267 (1999),1989 (2011) and 2253 (2015) concerning ISIL (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities. In particular, no study is made of the applicability of the regime of exemptions, if any, to the asset freeze, compounded by the omission of any research into the UN legal basis for authorisations by the State Secretariat for Economic Affairs (SECO) to make use of the applicants' frozen assets in Switzerland.

100. Ibid., § 212.

(ii) The implicit "constitutional nature" of the right of access to a court

47. The majority note that the inclusion of individuals on the sanctions lists may have "extremely serious" consequences for the targeted individuals[101]. They further argue that, in view of such "weighty" consequences, these lists "cannot be implemented without affording the right to appropriate review". What is noteworthy in this reasoning is not so much the very broadly worded assessment of sanctions lists by the majority, which could be read as setting a general standard for all Security Council resolutions imposing sanctions, i.e. a standard for the fifteen ongoing sanctions regimes which focus on supporting political settlement of conflicts, nuclear non-proliferation, and counter-terrorism. What really stands out is the fallacious nature of that assessment.

48. As a matter of pure logic, the majority commit two major intellectual errors. First and foremost, they err in a natural fallacy, deriving a value judgment (on the existence of "the right to appropriate review") from a factual statement (on the consequences of inclusion in the sanctions lists). In addition, the majority err in a consequential fallacy, deriving the existence of a requirement in law (an "appropriate review") from the probable negative consequences of its inexistence. This fallacy is particularly notorious, due to the uncertain nature of the statement on the facts, which only refers to potential consequences ("may be extremely serious", "may be so weighty").

49. Even if one would want to concede to the majority's logically tortuous line of argument a limited, purely rhetorical value, the added value of their reasoning could be said to lie not in any strength of the consequential argument (*argumentum ad consequentiam*) but somewhere else. Reading the whole of paragraph 145 of the judgment, it is evident that the consequential line of argument serves the majority's purpose of placing the discussion where it really belongs: in the midst of European public order. In the same paragraph 145 of the judgment, where reference is made to the "extremely serious" and "so weighty" consequences of the sanctions lists, the majority observe that the Convention is a constitutional instrument of European public order, which is based on the rule of law, and arbitrariness is the negation of that principle. The gravity of the consequences of the sanctions lists is a rhetorical instrument to draw the attention of the reader to what is really at stake: the infringement of so basic and non-negotiable values of the European legal order to which the Court could not remain indifferent.

50. In fact, the majority read into Resolution 1483 not only the guarantee of "judicial supervision" (paragraph 146) or "judicial scrutiny" (paragraph 148), but also the power of domestic courts to access "sufficiently precise

101. See paragraph 145 of the judgment. In paragraph 146 the "seriousness of the consequences" is also mentioned.

information in order to exercise the scrutiny that is incumbent on them" (paragraph 147). In a quite voluntaristic approach, the majority further state that the scope of such judicial scrutiny includes any "dispute over a decision to add a person to the list or to refuse delisting"; not only must a "substantiated and tenable allegation made by listed individuals to the effect that their listing is vitiated by arbitrariness" be entertained by domestic courts, but also the giving of "legal effect" to "the addition of a person – whether an individual or a legal entity – to a sanctions list" must be preceded by an assessment of arbitrariness. This logically presupposes that the restrictive measure is reasoned and that the reasons pertain to the individual circumstances of the targeted person. This also requires that such assessment of the Convention compatibility of the confiscation measures entailed by the listing must be done not only *a posteriori* at the request of the targeted person, but also *a priori* and of the domestic authorities' own motion.[102] Finally, the majority add that the targeted persons should be allowed to submit to a court, "for examination on the merits, appropriate evidence in order to show that their inclusion on the impugned lists had been arbitrary" (paragraph 151). In other words, the European domestic courts and authorities must disclose the evidence available against the targeted person and he or she must be put in a position to effectively make known his or her views on the grounds advanced against him or her. There should be no doubt: the similarity of the substance of the reasoning of *Al-Dulimi* and *Kadi II* is indisputable, meaning that Strasbourg's level of scrutiny is very close to that of the Luxembourg court[103]. The two courts want to speak with one voice.

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102. The majority are not clear at all in paragraph 147. As they are talking about the UN decision to list or delist, any "dispute" would be at UN level, so this passage conflates the UN level with the domestic level. In the present case, the applicants appealed directly to the Sanctions Committee (with the support of the government) and at that point – when there was already a dispute – the domestic courts were not yet involved. Reading the paragraph as a whole, and particularly its last sentence, it seems that the majority are not requiring an *a priori* assessment of the original listing itself – which would be at UN level – but an assessment at the domestic level before the "measures" are taken, or before "legal effect" is given to the UN listing. The point at which such domestic *ex proprio motu* assessment by the administration is to be carried out remains, however, unclear. Should it have taken place before 12 May 2004, when the applicants' names were added to the Swiss list (paragraph 18 of the judgment) in accordance with Article 2 § 2 of the Swiss Iraq Ordinance (paragraph 36 of the judgment)? Or before the actual confiscation decision, which took place only on 16 November 2006 (paragraph 23 of the judgment), in accordance with Article 2 § 2 of the Swiss Confiscation Ordinance (paragraph 37 of the judgment)? By stating in paragraph 150 that "before taking the above-mentioned measures, the Swiss authorities had a duty to ensure that the listing was not arbitrary", the majority still fail to resolve the crucial question of the timing of the *a priori* assessment. This lack of clarity on the part of the majority entails a serious problem in terms of the guidance that should have been given to the respondent State for the future.

103. It is highly relevant to compare paragraphs 147 and 152 of the *Al-Dulimi* judgment with paragraphs 111-114, 118, 135-136 of the *Kadi II* judgment.

51. In addition to the above-mentioned procedural requirements, the *Al-Dulimi* majority define a new, substantive test for judicial review in cases of conflict between Convention obligations and binding Security Council resolutions, namely the test of "arbitrariness"[104]. They nevertheless also add that the impossibility of challenging the confiscation measures had lasted "for a long period of time", "for many years"[105]. This time factor again adds a considerable degree of uncertainty to the majority's reasoning. Would the majority's conclusion be different if the lapse of time had been shorter? What is the minimum acceptable lapse of time without any access to a court?

52. Unseated by their own artificially inflated reading of Security Council Resolution 1483 (2003), the majority go on to admit "a degree of flexibility" in applying that Resolution[106], in line with the similar reasoning in *Nada*. In the logic of *Nada*, the *Al-Jedda* interpretation test is supplemented by the test of "latitude in implementation" whenever the presumption of conformity between Security Council resolutions and human rights has been reversed by the usage of clear and explicit language in the resolution[107]. As in *Nada*, the majority pretend that the respondent State enjoyed "a degree of flexibility" in implementing the Security Council Resolution, but unlike *Nada*, they do so after concluding that there is no clear and explicit wording contrary to the Convention obligations. The establishment of "flexibility" in implementation is evidently superfluous, from the majority's own perspective, since the interpretation of the Resolution itself did not impose obligations that would breach the Convention. In *Al-Dulimi*, the second stage of the *Nada* reasoning, pertaining to an assessment of "flexibility" in implementation, did not need to be engaged, according to the majority's own logic, simply because the presumption based on the interpretation test had not been reversed.

53. Impaired by hesitation until the end, the majority close their argument by returning to the initial fallacious reasoning, deriving the respondent State's obligation (to take practical measures with a view to improving the applicants' situation) from the fact that Switzerland did take "certain practical measures", although finding these measures "insufficient". No care is taken to check whether these practical measures were in conformity with the Security Council Resolution. Had these exemptions been granted by Switzerland in breach of UN obligations, they would evidently not show that Resolution 1483 could be applied with a degree of flexibility. The majority's conclusion that these exemptions were evidence of a "degree of flexibility" in the execution of Resolution 1483 could only be reached if they had been directly or indirectly authorised by the United

104. Paragraph 146 of the judgment.
105. Paragraph 152 of the judgment.
106. Paragraph 154 of the judgment.
107. See *Nada*, cited above, § 175.

Nations. The Grand Chamber fails to investigate if that had been the case. In other words, the majority succumb again to the temptation of the natural fallacy, by easily passing from a statement of fact to a judgment on obligations.

(iii) The disguised Bosphorus *solution*

54. Ultimately, according to the majority, the "extent of the respondent State's obligations in the present case" is determined by a comparison between the guarantees of the "system applicable in the present case" at UN level and the European standard, namely, by the previously rejected test of "equivalent protection". In practice, it is this test that rebuts the repeatedly invoked *Al-Jedda* presumption, by concluding that the protection afforded to the applicants by Resolution 1483 is not sufficient.

55. Although the majority seek to avoid at all costs the equivalent protection test (see paragraph 149, *in fine*), they betray their real intention in paragraph 153, where they accept the argument of the respondent Government that the system applicable in the present case, even in its improved form following Resolution 1730 (2006), does not afford "satisfactory protection", in other words, a level of protection comparable or equivalent to that required by the Convention. This is obviously the *Bosphorus* test, and the artifice of deleting the prohibited word "equivalent" changes nothing[108]. The majority's endorsement of this test is made even clearer by the final lapidary sentence of paragraph 153, which consists in a general comparative assessment of the protection provided by the "access to these procedures" (the Focal Point), on the one hand, and the Convention requirement of "appropriate judicial scrutiny", on the other. The general and abstract tone used is similar to that of *Bosphorus*[109].

56. It is already regrettable that the majority criticise "the UN sanctions system", offering nothing but a cursory dismissal on the basis of "serious, reiterated and consistent criticisms" from the Special Rapporteurs of the

108. Compare paragraphs 114 and 153 of the judgment.

109. Inspired by the so-called *Solange II* case (Federal Constitutional Court, judgment of 22 October 1986, BVerfG 73, 339), this general and abstract evaluation was criticised by Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki in their separate opinion annexed to *Bosphorus*, inviting the Court to proceed with a more specific and concrete analysis of the equivalent protection. The *Solange II* test of the German Constitutional Court, which only purported to "generally ensure (*generell gewährleisten*) an effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights", was less stringent than the *Solange I* test, which focussed on a comparison between the catalogues of specific guarantees for fundamental rights in the conflicting legal orders as long as there was insufficient protection at EU level ("*in Geltung stehenden formulierten Katalog von Grundrechten enthält, der dem Grundrechtskatalog des Grundgesetzes adäquat ist"*, Federal Constitutional Court, judgment of 29 May 1974, BVerfG 37, 211).

United Nations and "sources outside that organisation", indicating one such source (PACE) and a "number of courts, such as the CJEU, the United Kingdom Supreme Court and the Federal Court of Canada". But it is even more censurable that the majority do not assume transparently the exercise of the "equivalent protection test", which they effectively use in paragraph 153.

C. Preliminary conclusion

57. The conflict between obligations deriving from Security Council resolutions and from human rights treaties has been resolved by three possible solutions: the primacy of Article 103 obligations, the opposite solution, and the harmonisation of obligations under Article 103 and under other international treaties and agreements. The Court has favoured this latter solution. But the appearance of uniformity should not deceive. Under the cover of systemic integration, three different approaches – the *Behrami*, *Al-Jedda* and *Nada* approaches – have been proposed. This uncertain path alone shows the degree of methodological hesitation on the part of the Court.

58. In the present case, the majority again half-heartedly try to have it both ways. On the one hand, they acknowledge the fundamental nature of the right to judicial review and the attached procedural and substantive guarantees in the light of the highly demanding *Kadi II* scrutiny test, reading into the text of Resolution 1483 guarantees that it does not accord. Here *Al-Dulimi* goes even further than *Nada*. But on the other hand, as in *Nada*, they ultimately yield to the temptation of a covert, general comparison of the Convention and United Nations systems, engaging in a *Bosphorus*-like reasoning in order to find that the UN sanctions system has "serious deficiencies". In constitutional-law terminology, the majority hesitate until the very last moment between the more stringent *Solange I* approach, when they creatively interpret Resolution 1483, and the less demanding *Solange II* approach, when they superficially criticise the "UN sanctions system". Yet if the legal reasoning is fragile, the message is not: the Court is determined not to accept UN sanctions without adequate procedural guarantees, including "appropriate judicial scrutiny". The EU-sized hole in the sanctions net has become a Europe-wide hole.

V. Taking the Convention seriously

A. The constitutional nature of the Convention

59. The Council of Europe is an autonomous legal order, based on agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms (Article 1,

paragraph b, of the 1949 Statute of the Council of Europe). With more than 217 treaties, the legal order of this international organisation has at its top an international treaty, the European Convention on Human Rights, that has direct, supra-constitutional effect on the domestic legal orders of the member States of the Council of Europe[110]. Being more than just a multilateral agreement on reciprocal obligations of States Parties, the Convention creates obligations for States Parties towards all individuals and private entities within their jurisdiction. With its transformational role emphatically proclaimed in the preamble as an instrument for building a closer union of European States and developing human rights on a pan-European basis, the Convention is subordinated neither to domestic constitutional rules, nor to allegedly higher rules of international law, since it is the supreme law of the European continent[111]. In the Council of Europe's own internal hierarchy of norms, United Nations law is equal to any other international agreement and subordinated to the primacy of the Convention as a constitutional instrument of European public order[112].

60. From this derives the nature of the Court as the European Constitutional Court, whose judgments have an *erga omnes res interpretata* effect that goes far beyond its *inter partes res judicata* effect, as well as a potent prescriptive effect that goes far beyond its commonly stated declaratory effect. The pilot-judgment and the quasi-pilot judgment procedures are typical constitutional review instruments which play a critical role in resolving the dysfunctional operation of domestic law or the

110. See *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, § 50, 4 July 2013; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, §§ 40, 41, 54, ECHR 2009; *Dumitru Popescu v. Romania (no. 2)*, no. 71525/01, § 103, 26 April 2007; and *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 29, *Reports of Judgments and Decisions* 1998-I. In other words, the principles of primacy and direct effect developed by the CJEU are to be found in the Court's case-law as well. Similar principles have been ascertained under the American Convention on Human Rights by the Inter-American Court of Human Rights, especially since *"The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile, Merits, Reparations, and Costs, Judgment*, 5 February 2001 (see Mac-Gregor, "The Constitutionalization of International law in Latin America, Conventionality Control, The New doctrine of the Inter-American Court of Human Rights", in *AJIL Unbound*, 11 November 2015, and the case-law referred to therein).

111. This does not mean that the Convention is an exclusive, self-contained document. On the contrary, it is an inclusive treaty, generously open to other texts which promote a higher degree of protection of human rights (Article 53 of the Convention).

112. See *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 75, Series A no. 310. It is relevant to note in this context that the preamble to the Convention only refers to the Universal Declaration of Human Rights and not to the Charter. Moreover, the Convention does not contain a general provision, unlike other treaties, to the effect that the rights guaranteed therein are qualified to the extent required or authorised by the Charter or by United Nations Resolutions.

legislator's failure to regulate systemic dysfunctions[113]. If need be, the Court exercises an indirect annulment power, by means of Article 46 injunctions, in the operative part of its judgments, summoning the respondent State to review its laws and administrative regulations and practices. Although not yet used, the Court also has competence to entertain an infringement action (Article 46 § 4 of the Convention). Finally, the Court has the power to determine its own jurisdiction (*Kompetenzkompetenz*), which does not exclude the possibility that, in case of a political blockade of the execution procedure and the infringement action at the level of the Committee of Ministers, it may agree to play its supervisory role with regard to the non-execution or incomplete execution of a judgment of the Court, even in the absence of such an action. It is stating the obvious today that the once primarily intergovernmental enforcement mechanism has radically changed its nature as a result of the Court's own leading role in guaranteeing the efficiency of the European human rights protection system[114]. The Council of Europe can thus put forward a strong constitutional claim.

B. The applicability of *Bosphorus* to UN Charter obligations

(i) The material scope of Bosphorus

61. In the light of the constitutional role of the Convention, the Contracting Parties remain responsible under the Convention for measures taken by them in discharging their international legal obligations, including where those obligations stem from their membership of an international organisation to which they have transferred part of their sovereign powers[115]. However, a measure taken for the purposes of fulfilling such obligations must be deemed justified where the organisation in question confers on fundamental rights at least an equivalent or comparable level of protection to that guaranteed by the Convention. Nevertheless, that justification will be negated in two situations: where the impugned acts do not strictly fall within the international legal obligations of the respondent State, particularly where it has exercised discretion; or where the protection of the Convention rights in question is manifestly deficient.

62. Since no part of the Contracting Parties' legal orders falls outside the jurisdiction of the Court, instruments of international cooperation come under its supervision. *Bosphorus* set a twofold test, both procedural and substantive, for that purpose. At the admissibility stage, *Bosphorus* called

113. See, among many other authorities, *M.C. and Others v. Italy*, no. 5376/11, 3 September 2013; *Kurić and Others v. Slovenia* [GC], no. 26828/06, ECHR 2012; *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, ECHR 2010; and *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, 3 November 2009.
114. On the European-wide, constitutional competence of the Court, see my previous separate opinions in *Fabris v. France* [GC], no. 16574/08, ECHR 2013, and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, ECHR 2013.
115. *Bosphorus*, cited above, § 153.

for the identification of an action, an omission or conduct under the jurisdiction of the respondent member State which was imposed under some other treaty, in the absence of any discretion. At the merits stage, *Bosphorus* entailed a qualitative comparison of the substantive human-rights and respective protection mechanisms provided for in both the Convention and the relevant international organisation's legal framework. Such comparison is based on a rebuttable presumption of Convention compatibility until the case for manifest deficiencies in the relevant international organisation's legal order is made out. There is nothing to prevent the applicability of this methodology to the United Nations, the practical consequence being that both the *Al-Jedda* presumption (regarding the interpretation of binding UN decisions) and the *Nada* presumption (regarding latitude in the implementation of binding UN decisions) become redundant, and even detrimental.

(ii) The temporal scope of Bosphorus

63. With regard to international organisations other than the European Union, the Court has adopted a nuanced approach, distinguishing between two different situations. Where the applicant has complained of structural shortcomings in the internal mechanism of the international organisation concerned, the Court has applied the *Bosphorus* logic, "retrospectively" as if it were ascertaining whether the States at the time when they transferred part of their sovereign powers to the international organisation had ensured that the Convention rights would receive an equivalent protection to that afforded by the Convention[116].

(iii) The personal scope of Bosphorus

64. Where the applicant has complained, not of structural shortcomings in the internal mechanism of the international organisation concerned, but of a specific decision taken within it, the Court has declared the application inadmissible *ratione personae*. Sometimes implicitly or even explicitly, the Court has not refrained from simultaneously applying the *Bosphorus* test, or considering the possibility of its application, to international organisations other than the European Union. Thus, in accordance with Article 35 § 4 of the Convention, it rejected complaints with regard to acts of the United Nations Interim Administration Mission in Kosovo and the Kosovo Force[117], the international civil administration in Bosnia and Herzegovina[118], the Administrative Tribunal of the International Labour Organisation and the European Organisation for the Safety of Air

116. See, for example, *Gasparini v. Italy and Belgium* (dec.), no. 10750/03, 12 May 2009.
117. *Behrami*, cited above.
118. *Berić and Others v. Bosnia and Herzegovina* (dec.), nos. 36357/04 and 25 others, § 30, 16 October 2007. It replicates the *Behrami* reasoning.

Navigation[119], the European Commission, the European Court of Justice (CFI and CJEC)[120], the ICTY[121], the ICC[122], and the International Olive Council[123]. The same reasoning was applied to the Administrative Tribunal of the Council of Europe itself[124].

C. The application of *Bosphorus* to the present case

65. In applying the *Bosphorus* test, the Court reviews neither the merits of Resolution 1483 itself nor the pertinence of the listing act, thus not proceeding as if it were an appellate instance of the United Nations bodies. It suffices for it to adopt a less intrusive posture, which is in fact more conducive to the furtherance of international cooperation and mutual trust. As has been shown, neither the 1518 Committee nor the Focal Point provides an independent and impartial mechanism for the taking and reviewing of listing and delisting decisions. Consequently, the Contracting Parties to the Convention must then ensure that the pertinence of the complainant's inclusion on the sanctions list is examined by their courts and that the latter have sufficient evidence on which to assess it, if appropriate in the light of exonerating evidence presented by the complainant and the necessary clarifications from the Security Council on the incriminating evidence[125]. If such concordance between the Resolution and the listing cannot be verified in a sufficiently credible manner, it will be for the State concerned to assume the consequences in the form that it considers appropriate. Such a shortcoming could in particular lead to a formal finding of an absence of necessary evidence upon which to adopt a binding domestic measure against the person concerned.

66. It cannot be argued that the application of the *Bosphorus* method to the United Nations would be a useless, redundant exercise, based on a foregone conclusion that an intergovernmental organisation such as the

119. *Boivin v. 34 member States of the Council of Europe* (dec.), no. 73250/01, ECHR 2008. The Court was tempted to use the *Bosphorus* test.

120. *Connolly v. 15 member States of the European Union* (dec.), no. 73274/01, 9 December 2008. The Court clearly used the *Bosphorus* test before concluding that, "in any event" (*quoi qu' il en soit*), the acts were not imputable to the respondent State.

121. *Galić v. the Netherlands* (dec.), no. 22617/07, 9 June 2009. In § 46 the reasoning echoes the *Bosphorus* test.

122. *Djokaba Lambi Longa v. the Netherlands* (dec), no. 33917/12, ECHR 2012. Here again, the reasoning in § 79 is inspired by *Bosphorus*.

123. *López Cifuentes v. Spain* (dec.), no. 18754/06, 7 July 2009. The Court refers to § 73 of *Waite and Kennedy* to conclude that the refusal of access to the domestic courts did not attain the core of the applicant's Article 6 right.

124. *Beygo v. 46 member States of the Council of Europe* (dec.), no. 36099/06, 16 June 2009. The reasoning is similar to *Boivin*.

125. The power of the national court to carry out effective judicial review will be gravely impaired if the implementing State does not have access to the full justification for the listing or, even if it does, the designating State does not consent to reveal the information to the targeted person (see the Emmerson Report, cited above, § 22).

United Nations will never be able to provide a measure of equivalent protection to individuals and private entities targeted or affected by a UN act or conduct. This argument is invalid for two principled motives. First, it sounds like a *petitio principii*. There is no plausible reason not to apply the human rights standards of the United Nations to its own decisions. As a matter of principle, nothing hinders the adoption of adequate substantive and procedural safeguards by the United Nations bodies, in conformity with the Charter and the ICCPR themselves, when they take binding decisions which impose sanctions on individuals and entities. The Office of the Ombudsperson is not an insignificant development, which shows that incremental changes in the system are possible. It can be further strengthened, if the political will is there. Second, the issues addressed by Security Council resolutions imposing sanctions, like genocide, crimes against humanity and terrorism, are not *per se* strictly political or excluded from any legal considerations. On the contrary, these issues warrant a robust but lawful response from the international community.

67. The reinforcement of the political legitimacy, legal accuracy and practical effectiveness of the United Nations sanctions system is crucial for the future of mankind. No lawyer experienced in the fight against transnational organised crime and State-sponsored crime would dispute that these sanctions are essential in order to combat effectively the many threats that the world currently faces. But that international response must comply with the basic tenets of the rule of law, for the defence of which the United Nations itself was set up in 1946. This is also the ultimate meaning of the United Nations General Assembly's call for States, "while ensuring full compliance with their international obligations, to ensure the rule of law and to include adequate human rights guarantees in their national procedures for the listing of individuals and entities with a view to combating terrorism"[126]. Such a call is also valid for the Security Council. The argument that this is a unique body, exercising distinctive sanctions powers, and that therefore the regulation of international due process for it can also be unique, is problematic[127]. The same applies to the political argument that the United Nations is such a unique institution that it should deserve privileged treatment *vis-à-vis* other international organisations[128]. History shows that the uniqueness argument in international law, and in law in general, is often an open door to arbitrariness.

126. UN General Assembly Resolution A/RES/68/178, 28 January 2014.

127. This was the position of the first Ombudsperson Kimberley Prost, in her "Remarks delivered to the informal meeting of Legal Advisors", 25 October 2010, p. 8. The same position is reflected on the Ombudsperson's website page on "approach and standard", when it refers to the "unique context of decisions by a Committee acting under the express direction of the Security Council" as a justification for the adopted evidentiary standard.

128. This was the position of the Court in *Behrami*, cited above, and *Stichting Mothers of Srebrenica*, cited above, which clearly departed from the general principles established in *Waite and Kennedy* and *Bosphorus*.

D. Preliminary conclusion

68. The *Al-Dulimi* majority engaged in a denial strategy, avoiding confrontation with reality at all costs. For that purpose, it assembled both the *Al-Jedda* presumption and the *Nada* "latitude in implementation" test – or, with an unnecessary rewording, the "degree of flexibility" test. As in *Nada*, a relentless effort was made to re-invent an alternative conduct that the Contracting Party to the Convention could have entertained in order to avoid infringing Convention obligations while respecting the Article 103 pre-eminence.

69. If the constitutional value of the Convention is taken seriously, the equivalent protection test must be imposed with regard to any obligations deriving from other international treaties and agreements, including the Charter of the United Nations. This is not a confrontational, but a dialectic, progressive approach. In the case of Security Council binding resolutions, there is no encroachment on its prerogatives, but an open-minded, constructive dialogue between two major stakeholders in the safeguard of international law and human rights.

70. In the present case, even assuming, for the sake of argument, that the confiscation obligation does not have a punitive nature and there is no *jus cogens* right of access to a court in criminal proceedings, the *Bosphorus* presumption of an equivalent protection within the United Nations framework is clearly rebutted by the facts at hand, as demonstrated above. Furthermore, in view of the lack of any alternative, effective, justiciable avenue in domestic law to protect the applicants' right to the enjoyment of their property, there has still been a violation of the essence of the applicants' right of access to a court as enshrined in Article 6 (civil limb) of the Convention.

VI. Final conclusion

71. Instead of a solipsistic and parochial approach to international law, the Council of Europe prefers a multicentre and cosmopolitan view of international law, which envisages the relationship between international law and Convention law beyond the orthodox, yet outdated, monist/dualist dichotomy. The Convention is both international and constitutional law, the conflict between Convention obligations and UN Charter obligations being an intra-systemic conflict. The Charter's weak constitutional claim may not always prevail in this conflict, in spite of the secondary rule of Article 103. In the absence of a constitutionally binding catalogue of freedoms and rights enforceable by a court of law, or other body or official authorised to exercise judicial power, within the United Nations, Council of Europe member States may have to verify the internal and external validity of UN resolutions. In view of the constitutional black hole in the United Nations, this exercise may even have to be performed by invoking the Council of

Europe's own strong constitutional claim, based on the Convention and its additional protocols, not forgetting that the Convention drew inspiration from the Universal Declaration of Human Rights itself. In a world of decentralised international law-making, *Bosphorus* appears to be the best example of an open-minded form of verification of the legal orders of other international organisations, and this is favoured by the ecumenical philosophy of Article 53 of the Convention.

In spite of the lack of a Constitution for the international community as a whole, the irreducible plurality of present-day international law does not necessarily mean persistent fragmentation into self-contained, hermetic regimes as if they were isolated towers. On the contrary, decentralised plurality may foster cross-fertilisation and synergy between competing legal orders[129]. This does not mean that the risk of a cacophony of multiple regional constitutional orders is not omnipresent, with the concomitant emergence of conflicts and overlaps, at least in Europe and the Americas with their own regional human rights courts increasingly playing the role of regional constitutional courts. But that risk can only be prevented once a World Human Rights Court comes into being. On that day, the United Nations will have established itself as a truly constitutional order. Hopefully, the synchronised criticism from Luxembourg and Strasbourg will be heeded in New York and give new impetus to the construction of a World Human Rights Court. Only then can a universal, homogenous, hierarchical meta-system of human rights be built, for the benefit of all mankind, as a limitation to the exercise of public power and the use of public force by the bodies and officials of the United Nations and its members.

72. Until such time one thing is certain: the apocalyptic statements portraying international law as "non-law"[130] or even anticipating its "death"[131] after the Luxembourg and Strasbourg Courts' reaction to the Security Council's "black lists" are nothing but a defensive reflex to what should be a most welcome development of international law. International law would be seriously impaired if blind and mechanical obedience to United Nations measures which flagrantly contradict international law itself had prevailed. Furthermore, the European human rights protection system itself would be severely damaged if European judges were to adopt a *perinde ac cadaver* attitude, as if they were faced with a *legibus solutes*

129. On the "hegemonic competition" between different treaties and the systems created thereby, see Koskenniemi, "Droit international et hégémonie : une reconfiguration" in M. Koskenniemi (ed.), *La politique du droit international*, Paris: Pédone, 2007, pp. 291-320.

130. See A. Nollkaemper, "Rethinking the Supremacy of International Law", *Zeitschrift für öffentliches Recht*, 65 (2010), p. 74.

131. See A. Rosas, "The Death of International Law?", *Finnish Yearbook of International Law*, 20 (2011), p. 227.

Security Council whose diktat had an unconditional, unassailable seal of legality. Since the majority of the permanent members of the Security Council (United Kingdom, France and Russia) are bound by the European constitutional order's values, as PACE Resolution 1597 (2008) pointed out, the Court could certainly not turn a blind eye to the Convention incompatibility of its exercise of legislative power, on pain of a serious risk that Security Council resolutions might be used as a means to defraud Convention obligations.

73. The way out of the present deadlock is clear: either the United Nations faces up to the challenge of the times and seizes this opportunity to go ahead with the creation of a World Human Rights Court, opening up this legal avenue to the individuals and entities targeted by conduct of UN bodies and officials, such as the listing of suspected terrorists, transfer of their property and restriction of their freedom of movement; or it acknowledges alternative judicial avenues, for example, by extending and strengthening the Ombudsperson Office's mandate and powers to such an extent that it takes on a judicial nature[132]. Since the present State-oriented UN architecture is unprepared to protect the rights and freedoms of those subject to non-forcible Chapter VII Security Council sanctions, a new human rights accountability mechanism is definitively needed. I repeat what I have said elsewhere: as a matter of principle, all States are to be considered as the "injured State" in the case of the *delicta juris gentium*, such as genocide, crimes against humanity and terrorism, whose perpetrators are deemed to be *hostis human generis*[133]. The international community as a whole has not only the right, but also a legal obligation to react, yet to react lawfully. Since it fulfils this legal imperative, the UN's constantly extending sanctioning power, and specifically the Security Council's growing assertiveness in the field of collective law-enforcement, are most welcome, but they themselves warrant increased legal foreseeability and judicial accountability. A regression to less targeted, less rules-based sanctions is no option, because they would face an even more resolute opposition and ultimately be counterproductive and ineffective. Infused with due process, the United Nations sanctions regime can only become stronger. Failure to do so in the near future will promote a heightened adverse collective reaction, which will not only further distance natural allies such as the Council of Europe and the United Nations from each other, but will certainly undermine a robust fight against the many threats that the world faces.

132. Since domestic remedies can only provide limited relief, because the relevant Security Council resolution, the ensuing obligations and the universal "blacklists" remain valid even when the State implementation measure is invalidated at national level, an effective remedy at UN level is indispensable. Such a universal remedy may render unnecessary additional domestic remedies, provided it is effective.

133. See my separate opinion in *Sargsyan*, cited above, § 30.

CONCURRING OPINION OF JUDGE SICILIANOS

(Translation)

1. I am in full agreement with both the conclusion and the reasoning of the present judgment. However, given the importance of some of its passages in terms of general international law, I wish to add the following reflections, which concern, firstly, the non-applicability in the present case of the "equivalent protection" test (I) and, secondly, the general orientation of the judgment, seeking as it does to ensure "systemic harmonisation" between the European Convention on Human Rights and the UN Charter (II).

A. The non-applicability in the present case of the "equivalent protection" test

2. The "equivalent protection" test was defined in the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* ([GC], no. 45036/98, ECHR 2005-VI) and has been used in various cases since then (see, in particular, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, § 338, ECHR 2011, and *Michaud v. France*, no. 12323/11, §§ 102-104, ECHR 2012). The *Bosphorus* case has some significant similarities with the present case as it also concerned the implementation of the Security Council's economic sanctions, imposed in that case under Resolution 820 (1993) in the context of the conflict in the former Yugoslavia. However, the issue of the impact of such sanctions on Convention rights is to be considered differently depending on whether they are implemented in a given case by a member State of the European Union or by a State outside the EU.

3. In the first type of situation, the EU regulation implementing the Security Council sanctions acts as a kind of screen. It was the existence of such a screen which enabled the CJEC to find, in the case of *Kadi I*, the violation of a series of fundamental rights, without calling into question – at least not formally – the lawfulness of the Security Council's measures. The CJEC's review focussed on the "internal lawfulness of the contested regulation" (see point 299 of the *Kadi I* judgment, cited in paragraph 63 of the present judgment), and not on the sanction measure *per se*.

4. This is also true *mutatis mutandis* in the Court's case-law. It can be clearly seen from the facts of the *Bosphorus* case, as summed up in the Grand Chamber's judgment, that the terms of enforcement of Security Council Resolution 820 (1993) had been imposed by the UN Sanctions Committee in New York. However, the European Community Regulation governing the implementation of the UN sanctions formed the legal basis

for the impounding of the aircraft in dispute and it thus served as a partition to shield the Security Council itself. The Court focussed its attention on the guarantees available to ensure the protection of human rights under Community law. Those were the guarantees that it thus found to be "equivalent" to those secured by the Convention, and it took the view that there was generally a presumption of equivalence – albeit a rebuttable one – between the protection of fundamental rights by Community law and that guaranteed by the Convention system (see *Bosphorus*, cited above, §§ 159-165). So once the Court has found that, in a particular case, EU law does actually provide an equivalent level of protection, the respondent State will be beyond reproach where it has correctly applied that law. Its responsibility cannot be engaged. In other words, if the Court finds that the presumption comes into play in the case at hand and it is not rebutted, the conclusion will be inevitable: a finding of no violation.

5. In the present case the impugned implementation measures were adopted by Switzerland, a State that is not a member of the European Union. Even though, on the facts, there may not appear to be any major difference between the present case and that of *Bosphorus*, from a legal perspective there is a substantive distinction to be made. In the case of a State outside the EU, when it takes steps to implement a Security Council resolution imposing economic sanctions it is directly enforcing that resolution. In that context there is no EU instrument – no screen or partition – between the domestic legal order and the UN Charter system. This means that if the equivalent protection test is to be applied it would be necessary to engage in a direct comparison between the guarantees secured by the Convention and those afforded by the procedure at the level of the Security Council and its sanctions committees.

6. This is precisely the approach that was adopted by the Chamber in the present case (see, in particular, the Chamber judgment, §§ 115 et seq.) – an approach also defended by the applicants before the Grand Chamber. The Chamber thus observed that, even though the equivalent protection test had been defined and developed in relation to the obligations of States Parties as members of the EU, it also applied more generally to situations concerning the compatibility with the Convention of acts of other international organisations, including the United Nations.

7. It is true that in the case of *Gasparini v. Italy and Belgium* ((dec.), no. 10750/03, 12 May 2009), for example, the Court applied the equivalent protection test outside the EU context, the subject-matter there being the rights of NATO officials. However, NATO's constitutive treaty – the North Atlantic Treaty of 4 April 1949 (*UN Treaty Series*, vol. 34) – contains no clause that is comparable to Article 103 of the UN Charter. In fact no other constitutive instrument of an international organisation contains such a clause. The UN Charter and its Article 103 are unique in that regard. The provision in question constitutes the cornerstone of the international legal

order, because it contains a key element of that order's hierarchical structure. It is significant that Article 30 of the Vienna Convention on the Law of Treaties (see paragraph 44 of the judgment) on the "[a]pplication of successive treaties relating to the same subject matter" starts with the words "Subject to Article 103 ...". That is to say, the regulation of the main aspects of the question of "parallel and contradictory undertakings" (to use the words of E. Roucounas, "Engagements parallèles et contradictoires", *Collected Courses of the Hague Academy of International Law*, vol. 206, 1987), as codified by the Vienna Convention, is subject to the provisions of Article 103 of the UN Charter. The United Nations and other international organisations cannot therefore be placed on the same plane. This means that the equivalent protection test does not simply apply to all international organisations alike. UN law itself contains a rule which governs any conflict between obligations arising from the Charter and from any other international agreement.

8. More specifically, when it comes to the implementation of the Security Council's economic sanctions by non-members of the EU, such as Switzerland, there are two sides to the equation: either there is no real conflict of obligations for the respondent State, as the Court has found in the present case, in which case the equivalent protection test does not even come into play (see paragraph 149 of the judgment); or there is a conflict of obligations, but then it will be governed by Article 103 of the UN Charter. In both cases – and *tertium non datur* – the equivalent protection test is inapplicable to a situation such as the present. It is, moreover, significant that in the *Nada v. Switzerland* judgment ([GC], no. 10593/08, ECHR 2012) – which fell into a similar legal context, since it concerned the addition of the applicant's name to a Security Council blacklist and implementation thereof by the Swiss authorities – the Grand Chamber carefully avoided relying on that test.

B. Concern for systemic harmonisation

9. Among the many judgments (and decisions) of the Court which concern the responsibility of States parties to the Convention when implementing a Security Council resolution (see L.-A. Sicilianos, "Le Conseil de sécurité, la responsabilité des États et la Cour européenne des droits de l'homme : vers une approche intégrée ?", *Revue générale de droit international public*, 2015, pp. 779-795), the present judgment is the first to refer expressly to "systemic harmonisation" (see paragraph 140 of the judgment). However, far from heralding a departure from precedent, this judgment is in keeping with that case-law and particularly with the judgments in *Al-Jedda v. the United Kingdom* ([GC], no. 27021/08, ECHR 2011) and *Nada* (cited above). When looked at closely, and going beyond the specificities of each case, the three Grand Chamber judgments –

Al-Jedda, *Nada* and the present one – follow a common pattern of reasoning, the main points of which may be summed up as follows.

1. Non-existence of a normative conflict in the abstract

10. The Court is first guided by the report of the International Law Commission (ILC) on the "Fragmentation of international law", which, under the heading "Harmonization – Systemic integration", states in general terms that "[i]n international law, there is a strong presumption against normative conflict" (report quoted in paragraph 56 of the judgment; see also paragraph 138, together with *Nada*, cited above, §§ 81 and 170). On that premise, the Court emphasises that the United Nations is based on the values of human rights, pointing out that the purposes of the universal organisation, as stated in Article 1 of its Charter, include "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" (Article 1, paragraph 3). In the same vein, Article 55 (c) of the Charter, which is part of the chapter on "[i]nternational economic and social cooperation", provides that "the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

11. Those two provisions of the UN's constitutive treaty form the legal basis for the whole comprehensive normative framework of the United Nations in the field of human rights, starting with the Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948. It is well known that this historic document was the source of inspiration *par excellence* for the European Convention on Human Rights, as shown by the fact that the Convention's preamble refers to it three times: in the first and second of its *consideranda* and again in the last, where the governments signatory thereto express their resolve to "take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration". To be sure, the Convention system has been much enriched since then (just like the UN's own normative framework). Nevertheless, the fact that the Convention is soundly anchored in the values proclaimed by the Universal Declaration is unquestionable and unquestioned. In those circumstances, it is impossible to refer in the abstract to any normative conflict between the UN system and the Convention system.

2. Interpretation of Security Council resolutions in terms of human rights

12. The second stage of the Court's reasoning stems from the first and concerns the interpretation of Security Council resolutions. It should be noted here that the organs of international organisations are generally bound

by the rules applicable to their functioning. In other words, the Security Council is in principle bound by the provisions of the UN Charter, including Article 1 § 3 and Article 55 concerning respect for human rights. That is what the Court stated in substance when it found that "Article 24 § 2 of the Charter require[d] the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to 'act in accordance with the Purposes and Principles of the United Nations'". The Court has thus drawn the legal conclusion (see *Al-Jedda*, cited above, § 102) that when resolutions are interpreted "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" and that "[i]n the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations".

13. To put it another way, having regard to the normative framework governing the Security Council's activities, there is a presumption whereby its resolutions do not create any obligations that are incompatible with those undertaken by the member States in the domain of human rights. The presumption in question is, admittedly, rebuttable. Nevertheless, any doubt must be dispelled in favour of an interpretation of the relevant Security Council resolutions which avoids a conflict of obligations. This idea of presumption was used in *Nada* (cited above, §§ 171 et seq.) and has been developed in the present judgment (see in particular paragraphs 139-140).

14. The Court first reiterates the findings of its case-law according to which, in view of the UN's 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" (from *Al-Jedda*, cited above, § 102, and *Nada*, cited above, § 171). The Court thus assumes the logical consequence of that idea: in the absence of 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" (paragraph 140 of the judgment).

15. The words "must always presume" does not mean that the presumption in question suddenly becomes irrebuttable. It is certainly not in dispute that, except in respect of norms of *jus cogens*, the Security Council has the possibility of provisionally departing from specific human rights provisions. This is what transpires, moreover, from the judgments given in the context of the present case by the Swiss Federal Court, and this Court shares its conclusions on that point (see paragraph 136 of the judgment). However, the presumption of human-rights compliance by Security Council

resolutions is a strong presumption, in the sense that only "clear and explicit" language is capable of negating it. Any vague, ambiguous or implicit terms would not have that effect.

16. In sum, the Court has made every effort to limit, to the extent possible, the situations where a real conflict of obligations would arise for the Contracting States when they implement Security Council resolutions in general and more specifically those which – as in the present case – impose economic sanctions under Article 41 of the UN Charter. To the extent that they are binding, resolutions based on the latter provision are covered by the effect of Article 103 of the Charter. However, the method of interpretation used by the Court has tended to minimise the significance of the primacy rule in Article 103. The rule in question has only to be applied *in ultima ratio*, once all the possibilities of a human-rights-compliant interpretation have, so to speak, been exhausted.

17. On the basis of that methodology, which is common to the three Grand Chamber judgments – *Al-Jedda, Nada* and the present judgment – the question is whether the Resolutions underlying the present dispute – especially Security Council Resolution 1483 (2003) – may be interpreted such as to avoid a conflict of obligations.

3. Interpretation of the Resolutions underlying the present dispute

18. As a general rule, Security Council resolutions, even where they are binding, which is in principle the case for those which impose economic sanctions, leave a certain latitude to States in their implementation. This is true in particular as regards the means to be used, or the possibilities of derogations or exceptions on humanitarian and other grounds. Such latitude – "admittedly limited but nevertheless real" (see *Nada*, cited above, § 180) – may enable States to find the appropriate solutions in order to harmonise their various obligations.

19. Resolution 1483 (2003) is no exception to that rule. Indeed, the crucial paragraph – paragraph 23 (cited in paragraph 46 of the judgment) – while using prescriptive language, requiring that the member States "shall freeze without delay" the relevant funds or other financial assets or economic resources and "immediately ... cause their transfer" to the Development Fund for Iraq, nevertheless allows for a significant exception by excluding funds or other financial assets or economic resources which are "the subject of a prior judicial, administrative, or arbitral lien or judgement". In other words, it suffices for there to be a dispute or for the assets or economic resources to have been the subject of an administrative measure or decision, and they will be excluded from the scope of the transfer obligation. It would thus appear that the wording of the paragraph at issue cannot be regarded as unconditional in nature. It is, moreover, noteworthy that the Swiss authorities have taken certain practical decisions,

as described in paragraphs 31, 32 and 34 of the judgment, which show that it was indeed possible to apply Resolution 1483 (2003) with some flexibility.

20. Going beyond those textual considerations, what is most important, having regard to the Court's methodology, is to ascertain whether Resolution 1483 (2003) or Resolution 1518 (2003), which created the relevant Sanctions Committee, expressly prohibited access to a court and, accordingly, whether it was possible for the national courts to verify, in terms of human rights, the measures taken at national level pursuant to the first of those Resolutions. Applying *mutatis mutandis* the general rule of interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties, the Court finds that the above-mentioned Resolutions, when "understood according to the ordinary meaning of the language used therein", did not contain any such prohibition. Nor does the Court detect any other legal factor that could legitimise such a restrictive interpretation (see paragraph 143 of the judgment). However, given the nature and purpose of the measures provided for by Resolution 1483 (2003), the Court circumscribes the extent of the judicial scrutiny under Article 6 of the Convention.

4. Extent of access to a court: obligation to ensure that measures are not arbitrary

21. It is certainly to be borne in mind that, according to the Court's settled case-law, the right of access to a court, as secured by Article 6 § 1 of the Convention, is not absolute: it may be subject to limitations, since by its very nature it calls for regulation by the State. The Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court, which must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, such a limitation of the right of access to a court will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among many other authorities, *Cudak v. Lithuania* [GC], no. 15869/02, § 55, ECHR 2010, and the references cited therein,).

22. In the same vein, the Court considers in the present judgment that "the 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" (see paragraph 152 of the judgment). The Court thus seems to be suggesting that such a drastic restriction on the right of access to a court would impair the essence of that right. On the other hand, the Court takes account of the nature and legitimate aim of the impugned

measures, namely the protection of international peace and security. In order to strike a "fair balance" between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security, the Court takes the view that the courts of the respondent State should have exercised "sufficient scrutiny so that any arbitrariness [could] be avoided" (see paragraph 146). The Court reiterates in this connection that "[o]ne of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle" (see paragraph 145). Moreover, in the context of such scrutiny – admittedly minimal, but nevertheless important – the applicants should have been afforded "at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, in order to show that their inclusion on the impugned lists had been arbitrary" (see paragraph 151). This means that, at least at the outset, the burden of proof is on the applicants, who should have sufficient evidence at their disposal to enable them, if appropriate, to prove that the measures taken against them are arbitrary in nature.

23. As thus defined, the scrutiny intended by the Court does not seem to place an excessive burden on the national judicial authorities, while taking into account, in a balanced manner, the imperatives of the protection of international peace and security – and, accordingly, the responsibilities of the Security Council under the Charter, on the one hand, and the values at the heart of the Convention system, on the other.

CONCURRING OPINION OF JUDGE KELLER

1. I agree with the finding of the majority as to the admissibility of the complaint (see paragraphs 92-101 of the judgment).

2. The majority based their reasoning in the present case on two points. First, my colleagues found that there was no "real conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter", in other words that the obligations imposed on the respondent State by the UN sanctions regime and the rights protected in Article 6 § 1 of the Convention could be harmonised. This finding allowed the Court, secondly, to declare nugatory the question whether the equivalent protection test should apply (see paragraph 149 in both regards). I respectfully disagree with both of these conclusions of the majority.

A. No Real Conflict with a Strict International Obligation?

3. At the time of its referral to the Grand Chamber, the present case seemed to concern the requirements under the Convention for member States which are strictly bound by a conflicting international obligation and therefore have no margin of discretion in implementing the obligations created by a UN Security Council Resolution. Before examining this case, the Court had never clarified that difficult issue with regard to the UN. The Chamber tasked with examining this case considered that the respondent State was under a strict obligation to freeze the applicants' assets under the relevant Security Council Resolution. After applying the *equivalent protection test*, the Chamber then concluded that there had been a violation of Article 6 § 1 of the Convention by Switzerland[1].

4. The Grand Chamber's approach, by contrast, has the advantage of allowing the Court to avoid the difficult issues raised by a real conflict of obligations and to eschew the handing down of an ultimate answer concerning Article 103 of the UN Charter and its relationship to the Convention. While the harmonising approach chosen by the Grand Chamber might seem convincing at first, one has to accept that it comes at a high price: in the present case, the Court has stretched the possibilities of a

1. This approach has been criticised mainly because it does not provide a clear answer regarding Article 103 of the UN Charter. See, in this vein, Hollenberg Stephan, "The Diverging Approaches of the European Court of Human Rights in the Cases of *Nada* and *Al-Dulimi*", *International and Comparative Law Quarterly* 64 (2015) 445-460; Auke Willems, "The European Court of Human Rights on the U.N. Individual Counter-Terrorist Sanctions Regime: Safeguarding Convention Rights and Harmonising Conflicting Norms in *Nada v. Switzerland*", *Nordic Journal of International Law* 83 (2014) 39-60. However, I believe that it is not within the Court's competence to make a final determination regarding the role of Article 103 of the UN Charter. And, last but not least, the harmonisation approach discussed by the two authors and applied here by the Grand Chamber does not provide an answer to this issue either.

harmonised interpretation beyond the plain text and the general understanding of the relevant Security Council Resolution.

5. In the 2011 *Al-Jedda v. the United Kingdom* judgment ([GC], no. 27021/08, § 102, ECHR 2011) the Court presumed that the UN Security Council did not intentionally impose obligations on States that would breach fundamental human rights principles, and found that *textual ambiguities* in Security Council resolutions should be interpreted *so as to harmonise them with the Convention and avoid any conflicting obligations*. Were the Security Council willing for States to abandon their human rights commitments, the Court expected that it would use "clear and explicit language" to make this intention plain (ibid.).

6. The text of Article 23 of Resolution 1483 (2003), relating to the funds and financial assets of the former Iraqi senior officials subsequently included on the relevant sanctions list, clearly states that UN member States shall "*freeze without delay* those funds or other financial assets or economic resources ... and *immediately* shall cause their transfer to the Development Fund for Iraq" (all emphasis added). The relevant question here is whether this wording allowed UN member States to provide listed persons with access to judicial review – in other words, whether Resolution 1483 (2003) could be understood as creating an obligation to *freeze without delay, except for the delay necessary in order to grant access to a court and to examine whether the names appear arbitrarily on the UN sanctions list*. The latter interpretation is the one reached by the Court, though it conflicts with the wording of Resolution 1483 (2003) and with the manner in which it was understood by all bodies involved. In determining whether the majority's interpretation is correct, it must be noted that the Resolution does not authorise States to choose the means by which to attain their objective. Furthermore, the fact that the Federal Supreme Court granted the first applicant a period of time so he could introduce a fresh delisting request (see point 11 of that court's judgment, cited in paragraph 29), and the fact that the Swiss authorities unfroze certain sums in order to allow the applicants to pay their legal fees, do not mean that the authorities had any leeway regarding the decision to freeze and confiscate the applicants' assets. Finally, the fact that Article 23 of Resolution 1483 (2003) excludes from the sanctions regime any "funds or other financial assets ... [that] are themselves the subject of a *prior* judicial, administrative, or arbitral lien or judgement [*sic*]" (emphasis added) does not alter this result. The assets concerned in the present case clearly do not belong to this latter category. In my opinion, there is no ambiguity in the text with regard to the absence of any margin of appreciation for the implementing State. This is also underlined by the fact that neither the respondent State nor the two third-party interveners, nor any organ at UN level, had understood the text in the sense in which the Court has now interpreted it (see paragraphs 107, 119 and 124).

7. By seeing a State margin of discretion in the implementation of the Security Council Resolution in the present case, the Court is going a step beyond the harmonisation approach taken in the *Al-Jedda* judgment and is reinterpreting the words of the Security Council. I have some doubts as to whether it is the Court's task to interpret a Security Council resolution beyond the ordinary meaning of its text. In this regard, the Court has certainly reached the limits of its competence. Moreover, I note that the Court has always been cautious in that it has refrained from interpreting EU law in its own manner, instead leaving this task to the EU authorities (see, for example, *Jeunesse v. the Netherlands*, [GC], no. 12738/10, § 110, 3 October 2014, referring to *Ullens de Schooten and Rezabek v. Belgium*, nos. 3989/07 and 38353/07, § 54, 20 September 2011). Much speaks in favour of applying the same restraint *vis-à-vis* UN law that imposes obligations diverging from the Convention on the member States.

8. Contrary to the majority's approach, it therefore emerges that the present application, for the first time, has required the Court to decide a case in which there is no room for compliance with both the ECHR and the UN Charter. While resolving this conflict of obligations is certainly difficult, in my opinion it is no longer possible to avoid the problem at hand: the Court should have taken a stand on the issues that arise when a Council of Europe member State faces an irreconcilable conflict between its obligations under the ECHR and those under the UN Charter.

9. In the following paragraphs, I will provide an alternative view on how the dilemma between obligations stemming from Article 6 § 1, on the one hand, and the Security Council Resolution, on the other, could have been resolved.

B. Origin and Significance of the Presumption of Equivalence

10. It is the Court's settled case-law that nothing in the Convention prohibits a Contracting Party from transferring part of its competences to an international organisation in order to pursue international cooperation. Nonetheless, the Court has stressed that, according to Article 1 of the Convention, a Contracting Party remains responsible for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. In order to reconcile this stance with the reality of international cooperation, the Court has held that State action taken in compliance with such international legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, both as regards the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to the protection provided by the Convention (see, for example, *M. & Co. v. the Federal Republic of Germany*, no. 13258/87, Commission

Decision of 9 February 1990, Decisions and Reports 64, p. 145; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, §§ 152-155, ECHR 2005-VI ("*Bosphorus*"); *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* (dec.) [GC], nos. 71412/01 and 78166/01, § 145, 2 May 2007 ("*Behrami*"); and *Michaud v. France*, no. 12323/11, §§ 102-104, ECHR 2012).

11. The principle of equivalence was never thought to be limited solely to the European Union. Instead, it has received wider application in order to help the Court overcome a fundamental problem, namely that international organisations are usually not signatories of human rights treaties. The principle provides an elegant and comprehensive solution for harmonising disparities between States' international obligations where both of the relevant systems guarantee analogous human rights protection, though that protection need not be identical. Moreover, it enables the Court to review human rights violations in cases where the protection provided by the international organisation concerned is manifestly deficient, while still ensuring that the ability of international cooperation to function is preserved. The Court's competence to review cases related to international organisations, albeit limited and conditional, also prevents the Contracting Parties from circumventing their obligations under the Convention through the transfer of sovereign powers to such organisations.

12. Today there are hundreds of international organisations and institutions[2] in existence which create their own internal rules, enjoy various immunities and create new obligations *vis-à-vis* their member States. The chances that States will be faced with a divergence in their obligations stemming from the Convention, on the one hand, and from the legal framework of an international organisation, on the other, are high. Therefore, the Court needs a principled approach to dealing with such cases.

13. The principle of equivalent protection provides the instrument that the Court needs in order to resolve cases in which a strict conflict of obligations deprives States of the discretion necessary to comply with the demands of the Convention. Indeed, the Court has developed a *presumption of equivalent protection* of human rights and fundamental freedoms in favour of a number of international organisations, notably the EU, NATO and the UN (compare *Michaud*, cited above, §§ 102-104; *Bosphorus*, cited above, §§ 152-155; *Gasparini v. Italy and Belgium* (dec.), no. 10750/03, 12 May 2009; and *Perez v. Germany* (dec.), no. 15521/08, 6 January 2015). The Court has also found, however, that the presumption of equivalent

2. Some authors count 250 such organisations (Rittberger Volker, Zangl Bernhard and Kruck Andreas, *Internationale Organisationen*, Grundwissen Politik (Springer 2013), 17-18; Wheatley Steven, *The Democratic Legitimacy of International Law* (Hart 2010), 65); others gauge the number at over 500 (Wouters Jan, Brems Eva, Smis Stefaan and Schmitt Pierre, *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010), 2).

protection is rebuttable if the failure to protect human rights is manifest in a particular case. Where the presumption is rebutted, member States can be held accountable for Convention violations that ensue from compliance with their conflicting international obligations (compare, in particular, *Michaud*, cited above, §§ 114-115, and *Perez*, cited above, § 66).

14. In addition, it must be noted that not all presumptions of equivalence are created equally. Indeed, even within the same organisation, there is a distinction to be made according to the type of procedure concerned. For example, the principle of equivalent protection has been applied differently in EU-related cases concerning labour disputes within the European Commission (see *Connolly v. 15 member States of the European Union* (dec.), no. 73274/01, 9 December 2008, and *Andreasen v. the United Kingdom and 26 other member States of the European Union* (dec.), no. 28827/11, 31 March 2015), the regular enforcement of EU acts (see *Bosphorus*, cited above; *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands* (dec.), no. 13645/05, ECHR 2009; and *Povse v. Austria* (dec.), no. 3890/11, 18 June 2013) or the application of primary EU law (see *Matthews v. the United Kingdom* [GC], no. 24833/94, ECHR 1999-I). With regard to the European Patent Organisation, the Court has made a distinction, in terms of the equivalence of the fundamental rights protection offered, between its internal staff dispute settlement procedure (see *Klausecker v. Germany* (dec.), no. 415/07, 6 January 2015) and the recognition or withdrawal of patents (see *Lenzing AG v. Germany*, no. 39025/97, Commission decision of 9 September 1998; *Lenzing AG v. the United Kingdom*, no. 38817/97, Commission decision of 9 September 1998; and *Rambus Inc. v. Germany* (dec.), no. 40382/04, 16 June 2009). Similarly, with regard to the UN, the Court has separately examined the equivalence of protection regarding specific resolutions of the UN Security Council on the one hand (see *Behrami*, cited above, § 145; *Berić and Others v. Bosnia and Herzegovina* (dec.), nos. 36357/04 and 25 others, 16 October 2007; *Al-Jedda*, cited above; and *Nada v. Switzerland* [GC], no. 10593/08, ECHR 2012), and the staff dispute settlement procedure in the UN's relevant internal bodies, on the other (see *Perez*, cited above).

15. Regarding the internal mechanisms available in employment-related disputes, where no State intervention is involved, the Court has developed a lighter form of the principle of equivalent protection. Taking into consideration the practically inexistent influence of the State in relation to such internal complaints, the Court has first examined whether States acceded to the particular organisation in the good faith that its protection of fundamental rights was equivalent to that provided under the Convention. Where this was the case, the Court has applied a presumption that the Contracting Party fulfilled its obligations under the Convention when joining the organisation concerned. This presumption will be rebutted if it

can be shown that the fundamental rights protection offered by the organisation in question is in flagrant contradiction to the provisions of the Convention or simply manifestly deficient (see *Boivin v. 34 member States of the Council of Europe* (dec.), no. 73250/01, ECHR 2008 (vol. IV, p. 244); *Connolly*, cited above (p. 6); *Gasparini*, cited above (p. 7); *Rambus Inc.*, cited above (p. 8); *Klausecker*, cited above, § 97; *Perez*, cited above, § 62; and *Andreasen*, cited above, § 73).

16. For the sake of completeness, it must be noted that the presumption of equivalence does not apply regarding acts linked to a member State by the sole fact that it hosts the seat or the premises of the international organisation concerned on its territory. The presumption does not apply here because such acts do not fall under the jurisdiction of the host State. This was the case, for example, for the Netherlands in relation to the activity of the International Criminal Tribunal for the former Yugoslavia (see *Blagojević v. the Netherlands* (dec.), no. 49032/07, § 46, 9 June 2009, and *Galić v. the Netherlands* (dec), no. 22617/07, §§ 46 and 48, 9 June 2009).

17. The preceding examples have shown that its high degree of flexibility in applying the principle of equivalent protection to different cases enables this Court to find sound solutions to conflicts between the Convention and obligations arising from membership of the UN. It has also been shown that the applicability of the equivalence test is not restricted to the European Union. Such a limitation would entail different treatment for that particular organisation as compared to other powerful international organisations, without good reason. The application of the presumption of equivalence in cases such as the present one not only provides a principled approach for harmonising various legal systems, but also gives international organisations an opportunity to adapt in order to comply with human rights norms and thus to contribute to the avoidance of conflicts between the various international commitments of their member States.

18. In the present case, it was argued that the Swiss authorities, in complying with their obligations under Security Council Resolution 1483 (2003), had violated the applicants' Convention rights. In my view, the Court therefore needed to answer three main questions: (1) whether the respondent State is under a strict obligation stemming from the UN sanctions regime; (2) if so, whether the UN system provides equivalent human rights protection; and (3) if not, whether there has been a violation of Article 6 § 1 of the Convention in respect of the applicants.

C. Applicability and Rebuttal of the Presumption of Equivalent Protection

19. Assuming that the Security Council Resolution at issue created a strict international obligation that did not leave States any leeway, it is possible to apply the principle of equivalent protection to the present case. It

is certainly valid to apply that principle to the UN, given its strong commitment in the area of human rights. Not only does the text of the UN Charter have a strong connection to human rights protection[3], but the UN has also adopted nine major human rights conventions, each institutionally secured by a human rights body[4], and some of these instruments have been universally ratified by the international community of States[5]. In particular, the sister treaty to the Convention – the ICCPR – has been ratified by 168 States (among them all Council of Europe member States). Finally, Article 14 § 1 ICCPR protects substantially the same rights as Article 6 § 1 of the Convention.

20. Taking into consideration the universal character of the UN, its primary mandate to maintain international peace and security, as well as its extensive powers under Chapter VII of the UN Charter, I believe it to be appropriate to apply the lighter version of the principle of equivalent protection, as developed in the *Gasparini* case, to this organisation (see paragraph 15 above), notwithstanding the direct intervention of Switzerland in the particular case. Therefore, it is necessary to first examine whether Switzerland acceded to the UN in the good faith that this organisation provided equivalent protection of fundamental rights. Further, it should be examined whether the smart sanctions regime at issue in this particular case showed structural deficiencies capable of rebutting the presumption and engaging the responsibility of Switzerland.

21. In the present case, it can be presumed that the Swiss authorities acceded to the UN Charter in good faith from an ECHR perspective. In addition, given that several human rights bodies under the auspices of the UN can hear human rights-related complaints, there are strong reasons to apply a presumption of equivalence in this context. These arguments were reflected in the *Al-Jedda* judgment (cited above, § 102), where the Court presumed that the UN Security Council had not intentionally obliged States

3. UN Charter, Article 1 (3), Article 13 (1) b), and Article 55 c).

4. International Covenant on Civil and Political Rights (ICCPR), entry into force 23 March 1976, ratified by 168 States; International Covenant on Economic, Social and Cultural Rights (ICESCR), entry into force 3 January 1976, ratified by 164 States; International Convention on the Elimination of All Forms of Racial Discrimination (CERD), entry into force 4 January 1969, ratified by 77 States; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), entry into force 3 September 1981, ratified by 189 States; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), entry into force 26 June 1987, ratified by 158 States; Convention on the Rights of Persons with Disabilities (CRPD), entry into force 3 May 2008, ratified by 161 States; International Convention for the Protection of All Persons from Enforced Disappearance (CED), entry into force 23 December 2010, ratified by 51 States; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), entry into force 1 July 2003, ratified by 48 States. For the CRC see next note.

5. Convention on the Rights of the Child (CRC), entry into force 2 September 1990, ratified by 196 States (as of March 2016).

to breach fundamental human rights principles. However, the various targeted sanctions regimes set up by the Security Council are notoriously problematic as regards the provision of adequate human rights protection (see paragraph 52-56 of the judgment). This and other criticisms[6] led to the creation of a focal point for de-listing requests and a de-listing procedure in Security Council Resolution 1730 (2006) of 19 December 2006. However, as the respondent State admitted in the course of the present proceedings, these procedures are "neither satisfactory nor equivalent in terms of the Convention requirements" (see paragraph 114 of the judgment).

22. On this basis, at least for the time being, it is possible to argue that the targeted sanctions regime set up by the UN Security Council shows a structural deficiency capable of rebutting the presumption of equivalent protection. Given that several actors – among them some prominent figures from inside the UN (see paragraphs 52-55 of the judgment) – have convincingly argued that the sanctions regimes do not sufficiently respect human rights guarantees, and that the applicants in the present case have been unable to gain access to a court regarding these matters for such a long period of time, the presumption is rebutted in this instance and States must therefore take action.

D. Merits of the Article 6 Complaint

23. Although Switzerland's obligations under Article 6 § 1 of the Convention are engaged here, given the failure of the UN Security Council to provide equivalent protection, it is important to note that this provision is not absolute. It is possible to legitimately restrict the guarantees of Article 6 § 1 under certain circumstances; in the present case the protection under the provision that remains unrestricted consists of an arbitrariness test (see paragraphs 146-148 of the judgment). As long as the targeted sanctions regimes do not provide adequate human rights protection, States must apply this test. Adequate human rights protection at UN level need not take the same form as in domestic criminal proceedings, but as long as there is a manifest deficiency in this regard then States must intervene in order to compensate for it[7]. The temporal element may also have an influence: in cases where an applicant is unable to secure access to a court for a number

6. See, in this regard, the present judgment (paragraphs 52-55) and the Chamber judgment (§§ 106 and 118). In terms of literature, compare for example Ciampi Annalisa, "Security Council Targeted Sanctions and Human Rights", in Fassbender Bardo, *Securing Human Rights: Achievements and Challenges of the UN Human Rights Council*, Oxford University Press 2011, 98-140.

7. Compare, in this vein, the considerations of the UK Supreme Court in *Youssef (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)* [2016] UKSC 3, §§ 55-59, on the standard of review required in a similar context.

of years, as was the case here, then the lacuna in the Security Council's protection system becomes particularly difficult to ignore.

24. In the present case, the Federal Supreme Court only conducted a formal investigation regarding the listing of the applicants and the need to freeze their assets. In many cases such as the present one, it is likely that any further examination will require access to information and documents available only to the Security Council. On the other hand, it would most likely have sufficed if the Federal Supreme Court had gone one step further and conducted an examination allowing it to hear the applicants and to determine whether there were obvious reasons to consider the applicants' listing arbitrary. The Court cannot require States to do the impossible, but it can require them to determine, within the bounds of the available information, whether it is evident that the listing of an applicant facing sanctions under a UN Security Council resolution is unfounded. Regarding the background and identity of the first applicant in the present case, a significant amount of information is available in the public domain. Most likely, it would therefore have been possible to use public information to conduct such an examination without needing to gain access to the classified information available only to the Security Council.

25. A further question concerns how the respondent Government should have proceeded if the Federal Supreme Court had found, as a result of its examination of the available information, that the applicants' listing was indeed arbitrary. In these situations, which certainly place the respondent State in a difficult situation, the authorities are nonetheless not entirely powerless. If a judicial examination finds that a listing is arbitrary, it is possible for the Government to engage in a dialogue with the United Nations to seek more information about the case. To prevent intractability in this context, the Federal Supreme Court could set a time-limit within which it requires the further information, after which it will – absent the ability to better evaluate the possible arbitrariness of the listing – order the unfreezing of the assets concerned. It is neither advisable nor necessary for confidential information to be made public for this purpose. Nevertheless, absent an adequate remedy at UN level, some sort of dialogue is certainly necessary to allow the domestic authorities to fulfil the minimum requirements of Article 6 § 1 of the Convention.

E. Conclusion

26. Security Council resolutions can, and indeed do, bring States into conflict with their human rights obligations. For one thing, the precisely worded obligation to "freeze without delay" in the present case precludes any domestic discretion that would allow for access to a court as required under Article 6 § 1 of the Convention. One way of resolving the problem before the Court would be to bring the UN sanctions regime into

compliance with the right to a fair trial. Hopefully, the Court's judgments will provide an impetus in that direction[8].

27. The crucial question in this case concerns the actions required of a State facing a strict international obligation that conflicts with its human rights obligations. In answering this question, the Court – as a human rights body charged with upholding the rights and freedoms enshrined in the Convention – would be failing in its duty if it did not require member States to intervene where applicants are blatantly deprived of human rights protection[9]. With the present judgment, the Court has missed an opportunity to clarify to States what is required of them when they have no discretion in the application of a Security Council resolution that is incompatible with the ECHR system. By skirting round the issue, it has instead given States no additional guidance – zero, zilch, *Nada* – on how to proceed in such situations.

8. On the potential responsibility of the UN, see the Draft Articles on the Responsibility of International Organizations (DARIO) adopted by the ILC at its sixty-third session in 2011 (Document A/66/10, ILC Yearbook 2011, vol. II(2), Articles 15, 16 and 17).

9. Or, in the words of Nina Blum (*The European Convention on Human Rights beyond the Nation-state: The Applicability of the ECHR in Extraterritorial and Inter-governmental Contexts*, Helbing 2015, p. 223), "[f]rom the perspective of the individual and the human rights courts, states should not be let off the hook. The UN is not (yet) within reach of the courts, but the member states are."

CONCURRING OPINION OF JUDGE KŪRIS

1. I agree with the finding that Switzerland has violated the applicants' rights under Article 6 § 1 of the Convention. At the same time, I do not unreservedly support the line of reasoning, wherein the basis for the finding of this violation is sought, first of all, in the possibility of a Convention-friendly interpretation of the United Nations Security Council resolutions relevant to the present case. It is difficult to accept unconditionally that Switzerland enjoyed much in the way of meaningful latitude in implementing the resolutions in question. Be that as it may, the violation of Article 6 § 1 had to be found in this case regardless of whether Switzerland enjoyed such latitude or not. The violation thus found is a violation of the law of the Convention, and the law of the Convention has been violated even though the law of the United Nations was scrupulously followed.

2. This case deals with one occurrence of fragmentation of international law. There are more such instances. Full consistency of international law, including full coherence between the law of the Convention and the law of the United Nations, would be an ideal. Ideals are unachievable by definition. Moreover, such coherence cannot be achieved by the efforts of this Court alone, especially bearing in mind its regional nature. Any progress in this direction depends, first and foremost, on the political will of the UN member States, which, given the nature of the international political process, means that such progress cannot go all the way up to the absolute.

3. Still, all attempts to rationally interpret the provisions of the two co-existing and, at the same time, competing legal systems is praiseworthy. In this context, I am of the opinion that the present judgment, wherein the United Nations Security Council resolutions are interpreted in such a manner that the gap between them and the Convention is minimised, at least to some extent, could have benefited from some of the insights so elegantly expounded in the concurring opinion of Judge Paulo Pinto de Albuquerque. Although I am not able to agree with all of his ideas (for instance, with the opinion that this Court should be seen as the "European Constitutional Court"), I endorse many of his arguments aimed at judicial harmonisation of international law.

PARTLY DISSENTING OPINION OF JUDGE ZIEMELE

1. I voted against the finding of a violation of Article 6 § 1 in the circumstances of this case. My disagreement lies primarily with the Court's analysis of the domestic proceedings and of the reasoning of the domestic courts. At the same time, I share a number of important statements of principle as regards the place of the Convention in the system of international law and its relationship with the obligations stemming from the UN Charter. I will first reiterate those principles.

– The purpose of maintaining international peace and security, which the United Nations pursues, is both a legitimate aim for limiting access to a court, which is an issue at stake in this case, and an important element in the analysis of the alleged conflict of obligations.

– The Court does not interpret the Convention in a vacuum; it takes into account any relevant rules and principles of international law applicable between the Contracting Parties.

– The Court puts forward a presumption of human-rights compliance, i.e., that the Security Council does not intend to impose any obligations on member States to breach human rights; where there is such an intention, it has to be explicit.

– Conflict of obligations should be avoided through a systemic interpretation and harmonisation of international obligations.

2. The Court has, however, added to the above list the principles that derive specifically from its interpretation of the object and purpose of the Convention. In the case at hand, the Court has considered it necessary to resort to the principle that the Convention is a constitutional instrument of European public order. It explains that "the States parties are required ... to ensure a level of scrutiny of Convention compliance which, at the very least, preserves the foundations of that public order. One of the most fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle" (see paragraph 145).

3. In sum, in the Court's view Contracting Parties should implement their UN Charter obligations in their domestic legal orders in such a manner as to avoid arbitrariness. This is confirmed by the Court's view in the case at hand that paragraph 23 of Resolution 1483 (2003) cannot be understood as precluding any judicial scrutiny of the measures taken to implement it (see paragraph 148). While I agree both with the reading of the Resolution and the standard set forth by the Court in terms of the need for judicial scrutiny at domestic level, I cannot agree that the Swiss Federal Court did not exercise such scrutiny in the circumstances of the case. In my view the Court has not, first, been very clear as to what the standard of scrutiny should be and in relation to what type of claim. Second, and as a result of the first problem, the examination of the domestic proceedings has not sufficiently appreciated what exactly was done by the Swiss authorities.

4. I also note that, even though the Court yet again puts forward the principle of the importance of European public order, this has not given rise to new approaches or obligations, at least not clearly, in the circumstances of the case (see L. Wildhaber, "The European Convention on Human Rights and International Law", *International and Comparative Law Quarterly*, vol. 56, April 2007, pp. 217-232; and I. Ziemele, "How International Law Matters for the European Court of Human Rights" in L. Lopez Guerra *et al.* (eds.), *El Tribunal Europeo de Derechos Humanos. Una visión desde dentro. En homenaje al Juez Josep Casadevall*, Valencia, 2015, pp. 416-417).

5. In this regard I should point out that throughout the judgment an uncertainty persists. Thus, the Court determines that it has to ascertain "whether the applicants enjoyed the guarantees of the civil limb of Article 6 § 1 in the procedure concerning the confiscation of their assets" (paragraph 80). The Court takes the view that in this case there was a dispute over the enjoyment of the applicants' right to property, since the implementation of the UN sanctions at domestic level affected that right in its very essence (paragraph 100). Such delimitation of the question leaves some uncertainty as to which procedure exactly is subject to scrutiny by the Court. Will it be the domestic proceedings or the procedure by which the applicants were included in the UN list compiled on the basis of Resolution 1483 (2003)? This question lingers over the judgment till its very last paragraph.

6. Subsequently, the Court explains the aspect of Article 6 § 1 against which it examines the facts. The Court seeks to establish whether the applicants were granted access to a court (see paragraph 126). More precisely, the Court states that it does not have to assess the essence of the substantive rights or the compatibility of the measures with the Convention. "The Court's remit here is confined to examining whether or not the applicants enjoyed the guarantees of Article 6 § 1 under its civil head, in other words whether appropriate judicial supervision was available to them ..." (paragraph 143). It appears that the confiscation as such is not part of the case, this approach being compatible with the fact that the applicants did not pursue a property claim in domestic proceedings. Like the Federal Court, which focused on the issue of safeguards at domestic level, the Court too identifies this, in principle, as the subject-matter under Article 6.

7. However, already in paragraph 131 the Court observes that the Swiss Federal Court refused to examine the applicants' allegations concerning the compatibility of the procedure followed for the confiscation of their assets with the guarantees of Article 6 § 1. Here again, it is unclear which procedure the Court has in mind. At the same time, the Court accepts that the Federal Court set out very detailed reasons in its judgments. But the Court insists that the Federal Court did not examine the merits of the case. It characterises the judgments of the Federal Court as confining itself to

verifying that the applicants' names actually appeared on the lists drawn up by the Sanctions Committee and that the assets concerned belonged to them (see paragraph 29). This approach in the judgment, albeit a little circular, seems to suggest that in the Court's view the very detailed reasoning of the domestic courts in this case is not necessarily Article 6-compliant. It is the substance of the reasoning that the Court is interested in. This suggests that in the Court's view the reasoning could be arbitrary (see point 3 above) and the Court under Article 6 may look at the quality or substance of the reasoning in domestic proceedings. In view of the Court's case-law, also referred to in paragraphs 127–128, such a broad reading of Article 6 is not obvious and especially if confronted with the principle of subsidiarity and the fourth-instance doctrine. Therefore it was very important to determine and explain the standard of reasoning required in cases concerning UN sanctions.

8. Towards the end of the judgment, where the Court points out what the Federal Court did not achieve, a clearer idea emerges as to the scope of examination of the UN sanctions that the Court considers necessary and appropriate under Article 6. The Court states (paragraph 151) as follows:

> "The applicants should, on the contrary, have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, in order to show that their inclusion on the impugned lists had been arbitrary. That was not the case, however. The fact that, unlike the situation in *Nada* (ibid., 187), the applicants in the present case did not submit, either in the Swiss Federal Court or in this Court, any precise argument to show that they should not have been included on the list drawn up by the Sanctions Committee makes no difference to this analysis, since no such omissions on their part were relied on by the Swiss authorities in refusing to examine their complaints."

At the same time, the Court accepts that the Federal Court was unable to rule on the merits or appropriateness of the measures entailed by the listing of the applicants (see paragraph 150). I do not share the view that the applicants could not submit evidence and arguments to the domestic courts as they would have wanted to. I also have great difficulty in seeing how the very detailed reasoning of the Federal Court could be regarded as arbitrary in terms of Article 6.

9. The Swiss Federal Court addressed all the arguments that the applicants had raised. In essence the applicants' claim was about the absence of procedural safeguards at UN level when their inclusion on the list by the Sanctions Committee took place. It is this claim that they submitted for examination in the Swiss domestic proceedings and not the issue of whether or not they were linked to the Saddam Hussein regime or that the manner in which Switzerland had transposed the obligations arising from Resolution 1483 (2003) was contrary to human rights. At the same time, the Federal Court in fact responded to all the aspects of the case (see points 9 and 10 in the domestic judgments, paragraph 29 of the judgment). It looked at the mandate of Sanctions Committee 1518 and concluded that it

was detailed and left no room for interpretation. The list drawn up by Sanctions Committee 1518 is not indicative. In other words, there is no room for Switzerland itself to identify individuals, groups and entities in implementing measures against the former Iraqi regime's officials, unlike the implementation of other UN Security Council resolutions. Likewise Resolution 1483 (2003) requires the immediate transfer of the frozen assets to the Development Fund for Iraq. It is important to note that Resolution 1483 (2003) superseded Resolution 661 (1990), which had been adopted as part of the international measures to counter the Iraqi invasion of Kuwait, the first international joint action to address unlawful use of force between States after the end of the Cold War. In other words, the overall context of the measures is different and the UN obligations have been differently drafted.

10. In the domestic case of *Ahmed and others v. HM Treasury*, to which the Court refers in support of its position, the issue at stake was the measures adopted in the United Kingdom to implement UN Security Council anti-terrorism resolutions. This and the other domestic decision referred to in the present judgment do not answer the question whether Article 6, as a minimum human-rights standard for Europe, imposes an obligation to conduct domestic judicial proceedings of a particular content concerning the procedure by which persons are included on the list by the Sanctions Committee.

11. The Federal Court responded to the main complaint in dispute (see point 10 of its judgment), namely that the Swiss authorities had accepted the confiscation of the applicants' assets solely on the basis that their names appeared on the UN list compiled pursuant to Resolution 1483 (2003) without remedying the breach of their procedural rights. The Federal Court explained why the Swiss authorities could not scrutinise the validity of Security Council decisions unless they violated *jus cogens* norms, and it had already explained that this was not the case. However, it also pointed out that it had the freedom to choose how it transposed UN obligations into domestic law. The facts show that all that could have been done at domestic level was available to the applicants. The confiscation proceedings were suspended while the applicants sought to have the matter re-examined by the Sanctions Committee. They were resumed only upon express application. The applicants had full access to the file and could express themselves before the relevant authority. They were also entitled to lodge an administrative appeal, and they did so. The Federal Court examined all the arguments in detail and responded that Switzerland had no power to delete the applicants' names from the list drawn up by the Sanctions Committee. They also agreed that the procedure by which the applicants had been included on the list was deficient, as several domestic courts around the world have also pointed out.

12. I would like to contrast the Federal Court's judgment with the domestic judgments under scrutiny in the *X v. Latvia* case ([GC], no. 27853/09, ECHR 2013), where the applicant had submitted arguments and evidence to the domestic courts but the latter had not examined them, considering that their obligations under the 1980 Hague Convention on the Civil Aspects of International Child Abduction prevented such examination in the abduction proceedings. In that case, the difference between the majority and the minority in the Court concerned procedural obligations under Article 8, in particular the role of the domestic courts in child abduction cases, when confronted with different arguments and evidence. In a case concerning the best interests of the child, it was thus not easy for the Court to arrive at a conclusion as to what scrutiny it should apply to domestic courts' reasoning.

13. In the case at hand, no evidence that would in any manner indicate that the first applicant was not who he was thought to be had been submitted to the courts. It is in this context that it remains unclear whether the Court considers that the Swiss courts ought to have examined of their own motion the issue of his participation in the Hussein regime and, if so, on what principles of the Convention that should have been based (see and compare on *ex officio* obligations in asylum cases, *F.G. v Sweden* [GC], no. 43611/11, 23 March 2016). This is not a line that the Court has pursued either.

14. Ultimately, I find that paragraph 153 leaves the question open as to what is expected under Article 6 from the States as far as their domestic proceedings implementing UN Security Council sanctions are concerned. The observation that the Court makes is rather obvious but it is not clear how that is linked to the obligation to exercise proper judicial scrutiny in respect of various claims that may arise within the sanctions context, nor is it clear how the domestic courts could decide on the procedures in the United Nations and what would happen as regards the execution of such judgments. On this point I join Judge Nußberger in her dissenting opinion.

15. It might seem that the Court has further strengthened the protection of individual rights. For my part, I place this judgment within the framework of deconstructivist thinking. The European Convention has not yet consolidated a constitutional framework for Europe which could be the context for the development of a more demanding human-rights standard, if that is what the Court had in mind. For the time being, the Convention is part of an international legal system, something that the Court has itself repeated. If the effect of this judgment is such that it provides a precedent for all domestic courts of the world to scrutinise the obligations imposed on States by the Security Council, that would be the beginning of the end for some elements of global governance emerging within the framework of the United Nations. I believe that it would have been more constructive and in line with the principles of the Convention to indeed scrutinise, on its terms,

what the Federal Court said. I can agree that the European Court of Human Rights should engage in the process of improving decision-making in the area of UN Security Council sanctions. This was done in the *Nada v. Switzerland* case ([GC], no. 10593/08, ECHR 2012) with correct messages. I do not see how the message of the present judgment would help in that process.

DISSENTING OPINION OF JUDGE NUSSBERGER

In the present case the majority of the Grand Chamber have tried to resolve a conflict by denying its very existence (A). In my view this is not an acceptable approach as it does not follow the normal methods of treaty interpretation (B), it is not in line with other leading judgments on the interaction between Convention law and general international law (C), and it creates unnecessary problems and tensions both for the State concerned and the UN as a whole (D). Switzerland was confronted with the dilemma of being bound by contradictory treaty obligations, accepted the *de lege lata* existing conflict resolution mechanism, and did its utmost to mitigate the consequences for the individual concerned (E). Therefore I cannot find any violation of the Convention.

That does not mean that I would not endorse the finding of an obvious deficiency in the UN targeted-sanctions regime. To block the existing mechanism of implementing UN sanctions (only) in the bilateral relationship between the UN and the member States which are also parties to the Convention does not, however, promote the rule of law. It is a dead end, as it leaves the State concerned in a legal limbo. An effective solution must be found at UN level.

A. Existence of a conflict

The existence of a growing number of bilateral and multilateral treaty obligations unavoidably creates for States the danger of being confronted with contradictory duties under international law. In the present case Switzerland was bound to implement several UN Resolutions, among them Resolution 1483 (2003), that were adopted in the context of the Iraqi invasion of Kuwait and the ultimate overthrow of the Iraqi regime. On this basis Switzerland was required to "freeze without delay ... funds or other financial assets or economic resources and [to] immediately ... cause their transfer to the Development Fund for Iraq....". The names of those whose funds were concerned were included in a specific list. At the same time, Article 6 of the Convention prescribed a right to a fair hearing which, according to the Court's jurisprudence, included "[t]he principle whereby a civil claim must be capable of being submitted to a judge" (see *Golder v. the United Kingdom*, 21 February 1975, § 35, Series A no. 18).

The majority of the Grand Chamber could not see any conflict between those obligations, arguing that "[t]here was in fact nothing [in Resolutions 1483 or 1518] – understood according to the ordinary meaning of the language used therein – that explicitly prevented the Swiss courts from verifying, in terms of human rights protection, the measures taken at national level pursuant to the first of those Resolutions" (paragraph 143 of the judgment). This position follows up on a line of argument that was

developed in *Al-Jedda v. the United Kingdom* ([GC], no. 27021/08, § 102, ECHR 2011) and then transferred to *Nada v. Switzerland* ([GC], no. 10593/08, § 180, ECHR 2012). But while it was convincing in *Al-Jedda* and arguable in *Nada* it goes beyond what is acceptable in the present case. In *Al-Jedda* the relevant UN Resolution clearly left room for interpretation as it only required the United Kingdom to take "all necessary measures to contribute to the maintenance of security and stability in Iraq" (UN Security Council Resolution 1511 passed on 16 October 2003, paragraph 13). That wording was obviously vague and open and did not oblige States to detain persons without trial as the United Kingdom was reproached for having done. The Court was therefore right to argue that it was possible to "choose the interpretation which [was] most in harmony with the requirements of the Convention and which avoid[ed] any conflict of obligations" (see *Al-Jedda*, cited above, § 102). Although the language of UN Resolution 1390 in *Nada* was much more explicit and required the prevention of entry into or transit through Swiss territory by listed individuals, nevertheless there was a clause which stated: "this paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Committee determines on a case by case basis only that entry or transit is justified." Concerning the immediate steps to be taken, the words "where appropriate" were used. The Court could once more argue that the terms "necessary" and "where appropriate" left the States discretion and allow for a Convention-compliant application of the Resolution (see *Nada*, cited above, §§ 177 and 178).

The present case is, however, different. The UN Resolution does not only describe the measures of freezing and transferring funds in a very concrete way and explain that they have to be applied to specific "listed" persons, but also demands that these measures be taken "immediately" and "without delay". I agree with my colleague Helen Keller that this wording does not leave any discretion or choice of interpretation for implementation. To hold otherwise turns a "harmonious interpretation" into a "fake harmonious interpretation" that is not in line with basic methodological requirements of international treaty interpretation.

In my view it is impossible to deny that the treaty obligations Switzerland has been confronted with in the present case are not only conflicting, but also mutually exclusive.

B. Interpretation of the conflicting treaty obligations

1. Interpretation of the UN Resolution

It is convincing to take, as proposed by the UN International Law Commission (ILC), as a starting-point for the interpretation of obligations arising out of different treaty regimes, a "strong presumption against

normative conflict" (see the Report of the ILC study group cited in paragraph 56 of the judgment). It is also to be welcomed if this principle can be stretched, as far as possible, in order to resolve otherwise unresolvable conflicts between obligations arising out of the Convention and out of other international treaties. But that does not mean that the generally accepted methods of interpretation as defined in the Vienna Convention on the Law of Treaties (VCLT) can be ignored.

The ordinary meaning of taking a measure "immediately" or "without delay" is hardly compatible with allowing substantial judicial review. "Without delay" clearly indicates that no intermediate steps are permitted. Furthermore, it is obvious that judicial review takes time, more time than the notions "immediately" and "without delay" could possibly allow. The majority of the Grand Chamber do not seem to assume that a quick procedure would be possible, as they require the domestic courts to obtain "sufficiently precise information in order to exercise the scrutiny that is incumbent on them" (paragraph 147 of the judgment). Taking into account the fact that most, if not all, of the information will be confidential, even the preparatory phase before starting judicial review can be expected to last for a long time.

The object and purpose of the Resolution, which is based on Chapter VII of the UN Charter and has to be applied by all member States of the United Nations, implies the necessity of uniform implementation. If judicial control at national level were allowed, one would have to expect divergent implementation practices according to the respective standards used. Sanctions against the same listed person might be allowed in one jurisdiction and stopped in another. This cannot be intended if the system is to be efficient, especially not in a situation where funds are urgently required for the most basic needs of the Iraqi population. The Court has stated in *Al-Jedda* "... that a United Nations Security Council resolution should be interpreted in the light not only of the language used but also [of] the context in which it was adopted" (*Al-Jedda*, cited above, § 76).

The majority of the Grand Chamber draw far-reaching conclusions from the silence of the Security Council Resolution as to procedural safeguards (see paragraph 146):

> "... where a resolution such as that in the present case, namely Resolution 1483, does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided."

This presumption is not, however, compatible with a systematic interpretation of the Resolution in the light of its object and purpose and goes far beyond what was stated in *Al-Jedda*.

In *Al-Jedda* (cited above, § 102) the Court held that "[i]n 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". It cannot be said that Resolution 1483 (2003) did not use "clear and explicit language". The requirement to freeze and transfer funds immediately and without delay is not ambiguous. In the present case, the majority of the Grand Chamber are, however, no longer satisfied with the clear and explicit language describing the particular measures to be taken, but expect "clear and explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation" (see paragraph 146 of the judgment). This turns the obligation to clearly and explicitly state what is intended into an assumption that what is not clearly and explicitly stated is not intended. That is a completely different approach.

Chapter VII of the UN Charter establishes competences for the Security Council in situations which are characterised as "threats to the peace, breaches of the peace and acts of aggression". Even the use of armed force may be authorised on the basis of Article 42 of the UN Charter. The measures have to be applied by all members of the United Nations (Article 25 of the UN Charter). Human rights protection is nevertheless not denied. As clearly stated in Article 24 § 2 of the UN Charter "[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations", among them "promoting and encouraging respect for human rights and for fundamental freedoms" (Article 1 § 3 of the UN Charter). But the very idea of Chapter VII of the UN Charter is that the Security Council should be the one which has the last word in deciding on the necessity of the measures to be taken in order to maintain peace and security. Under such conditions, it would be the exception rather than the rule to allow judicial control by domestic courts in the member States obliged to implement the measures, as this would transfer the last word to domestic judicial institutions. This is all the more so as fair trial and access to a court are considered to be derogable rights in emergency situations, as is also confirmed by Article 15 of the Convention. Up to the present time there has never been a practice whereby the Security Council asks States to examine whether the implementation of sanctions is consonant with human rights protection.

Thus, there is no ground on which an assumption of some sort of separation of powers between the Security Council and the domestic courts could be based.

2. Interpretation of Article 6 of the Convention

Even assuming that judicial review were possible within the time span defined by the words "immediately" and "without delay", there would still be an unbridgeable conflict between the obligation under the UN Resolution

and Article 6 of the Convention as interpreted by the Court. According to the Court's long-standing jurisprudence, it is not sufficient merely to provide access to a court (see *Hornsby v. Greece*, 19 March 1997, § 40, *Reports of Judgments and Decisions* 1997-II):

> "... that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention ... Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6; ...".

The majority of the Grand Chamber require the domestic courts to verify whether the implementation of the measures ordered in the UN Resolution would be arbitrary. The result of such a procedure in the domestic court would necessarily be open. If the court came to a negative conclusion and found the measures arbitrary, the refusal to implement the sanctions would no longer be transitory, but permanent. The obligation to freeze and transfer the funds would be definitively frustrated.

It is not possible to cut Article 6 of the Convention in half. Access to a court would be fictitious if a final judgment did not have any consequences. In trying to harmonise the different treaty obligations the majority do not address this crucial question.

C. Interaction between the Convention and general international law on the basis of the Court's case-law

The Court has stated on many occasions that the Convention must be interpreted in harmony with other rules of international law of which it forms part (see *Hassan v. the United Kingdom* [GC], no. 29750/09, § 102, ECHR 2014, with reference to Article 31 § 3 (c) VCLT).

Therefore the Convention obligations have to be interpreted in the light of the UN Charter.

The precondition for the existence of a "European public order" to which the majority of the Grand Chamber allude in their reasoning (paragraph 145) is peace and security. For that reason all the Contracting Parties to the Convention have transferred sovereign rights to the United Nations and more specifically to the Security Council on the basis of Articles 24 and 25 of the UN Charter. The cornerstone of this whole system is Article 103 of the Charter, which grants priority to the obligations under the Charter, a provision taken up in Article 30 VCLT. This is confirmed by the case-law of the International Court of Justice (ICJ) and legal opinion (see the references to ICJ case-law in paragraphs 41-43 of the judgment).

I agree with the argument of the respondent Government that this concept is as fundamental as the principle *par in parem non habet imperium*, which the Court accepted as a total barrier to access to a court in the case of *Al Adsani v. the United Kingdom* ([GC], no. 35763/97, ECHR 2001-XI). The same conclusion was reached in the case of *Stichting Mothers of Srebrenica and Others v. the Netherlands* ((dec.), no. 65542/12, § 154, ECHR 2013), where the Court held as follows:

> "... since operations established by UN Security Council Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the UN. To bring such operations within the scope of domestic jurisdiction would mean to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the UN in this field, including with the effective conduct of its operations."

In the present case, even though the legal question is a different one, the interaction between UN law and Convention law poses the same problems. The consequences of not interpreting the Convention in line with UN law are also the same. Nevertheless, this time the Court has come to the opposite conclusion.

In my view the conflicting obligations on the basis of Article 6 of the Convention and UN Resolution 1483 (2003) should not have been artificially denied, but put in the context of general international law as it stands, of which Article 103 of the UN Charter is a basic pillar. In view of the overarching aim of having an efficient mechanism for guaranteeing peace and security worldwide, a restriction on the right of access to a court under Article 6 is proportionate, unless the arbitrariness of a measure ordered by the Security Council is so plain to see that no State governed by the rule of law could agree to implement it. This is not so, however, in the present case (see below).

The explicit regulations in the UN Charter also contradict the solution to the conflict elaborated on the basis of the *Bosphorus* presumption in the Chamber judgment. While there are no norms resolving the conflict between EU law and Convention law, Article 103 of the UN Charter is clearly designed for conflict regulation; there is no lacuna to be filled by a presumption.

D. Problems and tensions caused by the Court's judgment

On the basis of Resolution 1483 (2003), immediate implementation of the sanctions was required in 2003. Nevertheless, in 2016 the funds have still not been transferred. The process has been dragging on for thirteen years already. Neither the first applicant, who still does not have access to his funds, nor the Iraqi people, who still cannot use the money for

rebuilding the country, have profited in any way from this long-lasting legal meander. On the basis of the Court's judgment this legal limbo will probably continue to exist for many more years to come. This is detrimental both for human rights protection and for the effective functioning of the UN Security Council resolutions under Chapter VII of the UN Charter.

Different scenarios are foreseeable. First, the Swiss Federal Court could examine the claim on the merits, but based on the assumption that the outcome would not have any legal consequences, as Switzerland would in any case be bound by the Security Council Resolution. The legal procedure would thus be *l'art pour l'art* – purely fictitious. Second, the Swiss Federal Court could examine the claim on the merits with the intention of disregarding the duty to implement the resolutions if any arbitrariness is found. This would create major tensions within the UN system. If followed as a general example, targeted economic sanctions would become ineffective. Third, it might be that the Swiss Federal Court does not obtain any information for adjudication of the claim on the merits. The procedure would thus end without any tangible result.

None of these scenarios is to be welcomed for the purposes of effective human rights protection. On the basis of Article 46, Switzerland has to abide by the Court's judgment. But, as is clearly stated in the judgment (paragraph 149), the legal message is not directed at Switzerland, but at the Security Council; namely, that it should not forget the rule of law principles in ordering targeted measures. This message is not new (see the Opinions of the UN Special Rapporteurs quoted in paragraphs 52 et seq. of the judgment). It is an important message for human rights protection. But it would have been sufficient to express it in an *obiter dictum* without finding a violation of the Convention by Switzerland.

E. The exemplary approach of the Swiss authorities

Even assuming that the obligations arising out of UN Security Council Resolution 1483 (2003) and Article 6 of the Convention were compatible and domestic courts were required to exercise a basic review of arbitrariness in implementing the Resolution, I would argue – like my colleague Ineta Ziemele – that Switzerland has fulfilled this requirement.

1. The applicants' situation

The first applicant's main complaints were that he had never been told why his name had been put on the list and that he had never been heard by a judge. While this is true, it has to be put into perspective in the light of the historical context and the actual wording of the Security Council Resolution. Resolution 1483 (2003) clearly explained both against whom the sanctions should be directed and the reasons why they were necessary.

The personal scope of the application of the Resolution was defined by the words "Saddam Hussein or other senior officials of the former Iraqi regime and their immediate family members, including entities owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction". According to the Security Council the first applicant had been the head of finance for the Iraqi secret services under the regime of Saddam Hussein (paragraph 10 of the judgment); thus there was *a priori* a presumption that he fell within the group indicated. As to the reason for the freezing and transfer of his funds, the Resolution takes as a precondition for the sanction that such funds or financial assets have been removed from Iraq. The first applicant's more than 200 million Swiss francs were kept in bank accounts in Switzerland and his company was incorporated under the laws of Panama. So even if the applicant had not personally been informed about the reasons for the measures taken, he must have known or could at least have presumed why his accounts and assets were targeted. It is important to note that he never claimed not to have been the head of the Iraqi secret services, or not to have removed funds from Iraq to Switzerland, or not to have incorporated a company under the laws of Panama. This aspect clearly distinguishes the case from *Nada* (cited above), where the applicant had always argued that he did not have any connection with Osama bin Laden and the al-Qaeda organisation, against which the sanctions were directed.

It is also not entirely true that the first applicant had never been heard. When applying to the 1518 Committee he was asked to provide supporting documents, but he did not follow up on this request. He only asked to be allowed to give oral testimony (see paragraphs 20 and 21 of the judgment). Even though he was not in fact offered an oral hearing, at least he was given an opportunity to present his counter-arguments.

It is thus unclear on what factual elements a suspicion of arbitrariness could be based. This is all the more true as the first applicant's lawyer was asked in the hearing before the Court why his client thought that the sanctions applied to him were arbitrary. He referred only to the procedure, i.e. the fact of not having been heard, but did not advance any substantive reason for finding the targeted sanctions arbitrary.

What is at stake is thus only procedural arbitrariness.

2. The Swiss authorities' support for the first applicant

From the very beginning, the Swiss authorities tried to mitigate the negative consequences for the first applicant and to counterbalance the procedural deficiencies of the listing procedures for which they were not responsible and which they could not influence.

They allowed and supported his application to the 1518 Committee and suspended the domestic procedure for over a year (from 18 May 2004 until

1 September 2005). They gave reasoning for the decision to transfer the funds and made available an administrative-law appeal. They guaranteed the right to be heard in the procedure, granted him access to the file of the Federal Department for Economic Affairs, and gave him the opportunity to express himself before that authority.

The Swiss Federal Court, in its judgments of 23 January 2008, examined the legal basis for the confiscation and the basic elements required in order to avoid arbitrariness, verified that the applicants' names actually appeared on the lists drawn up by the Sanctions Committee and that the assets belonged to the first applicant and the company of which he was managing director, referred to the reasons for putting him on the list, namely, his role in the regime of Saddam Hussein, analysed a potential conflict of the Resolution with *jus cogens* and added an *obiter dictum* as to the insufficiency of the procedure before the Sanctions Committee. As the applicants had never advanced any substantive ground of arbitrariness, the court had no indication of where or how to further scrutinise the matter even in the framework of the decision on admissibility.

In my view this form of judicial review should be seen to have fulfilled the requirement of exercising "sufficient scrutiny so that any arbitrariness can be avoided" (paragraph 146 of the judgment).

The execution of the final judgment of the Federal Court was suspended in order to allow the first applicant to apply for a new delisting procedure (from 23 January 2008 until 6 January 2009). The Swiss authorities furthermore allowed him to deduct the amount necessary to pay his lawyers' fees from the frozen funds. Finally they once more suspended the domestic procedure when he brought his application to the Court.

Besides these individual measures the authorities made general efforts to improve the system of delisting.

What else could they possibly have done?

3. Acceptance of the *de lege lata* existing mechanism of conflict resolution

The Swiss authorities interpreted the obligations arising out of the Convention, on the one hand, and out of the binding resolutions of the Security Council, on the other, as conflicting and gave priority to the UN law. They accordingly applied the *de lege lata* existing conflict mechanism enshrined in Articles 25 and 103 of the UN Charter and Article 30 of the VCLT. Based on Article 1 of the Statute of the Council of Europe, pursuant to which "participation in the Council of Europe shall not affect the collaboration of its members in the work of the United Nations", I cannot accept that Switzerland has violated the Convention.