

The principled, and winding, road to *Al-Dulimi*. Interpreting the interpreters

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1. *A further shade of principle (Premise one)*

In the famous *Kadi* case, the European Court of First Instance (CFI)¹ held that ‘the resolutions of the Security Council [...] fall, in principle, outside the ambit of the Court’s judicial review and [...] the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations’ (para 225). As a consequence, a domestic review of the decisions of the Security Council cannot take place, because it would end up preventing the States and the Community from complying with the Rule of international law (with the exception of the infringement of a *jus cogens* rule: which is not the case in *Kadi* judgement). Thus, it is the Rule of international law, given its supremacy over any other States’ obligations (pursuant to Article 103 of UN Charter) to deny the expected protection of *Kadi*’s fundamental rights (to a judge, to a defence, and to property), despite their being part of primary law and ‘constitutional traditions’ within the European Union (and admittedly, if more importantly, of human rights in the international law order, as well as within the UN regime).²

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¹ Case T-315/01, *Kadi v Council of the European Union and Commission of the European Communities* (CFI, 21 September 2005) [2005] ECR II-3649.

² For more on this in depth see, G Palombella, ‘The Rule of Law beyond the State: Failures, Promises, and Theory’ (2009) 7 Intl J Constitutional L 442.

Often, the Rule of law (RoL) is actually construed as a legality principle, demanding respect for law, providing certainty and predictability through publicly defined rules and procedures. So it was intended by the CFI, identifying some system-relative idea of compliance, a major concern of priority over matters of substance and content.

Such a stance is no novelty, and traces back to the *dura lex sed lex* prominent in the European continental countries, when the pre-constitutional legal State (Rechtsstaat) was aptly called a 'legislative state', and the law could only be identified through sovereign legislative supremacy.

Let us focus for a moment on the concept of the Rule of law, a concept that is pivotal to the reasoning of the Courts, even within international law. In its normative import, with its historic English roots, the RoL referred to something different, namely, a *duality* of law's texture and fabric, that is, an organisation of law with multiple (and competing) protagonists, sources and jurisgenerative *loci*. At least in principle, this meant that there should be a side to positive law that could not fall legally under the purview of the sovereign: a '*jurisdictio*' (non instrumental law) which would be illegal for politically generated rule-making power (*gubernaculum*) to dispense with.³ The constitutions of contemporary States offer a clear incarnation (after the English common law multiple sources environment) of the RoL rationale, entrenching principles of law and some fundamental rights against the sheer will of the majority, albeit enacted through legislation. Even democratic rule-generation in its ordinary operation is only *one* of the ideals we cherish and it must be framed alongside other ideals, the RoL included. If that kind of *balance* is identified as the core of the Rule of law principle, it amounts to preventing one dominant source of law and its unconstrained whim, from absorbing all the available normativity (*mutatis mutandis*, even if that source or authority is the Security Council). The RoL can only reflect a beneficial tension *within* law itself, one that detaches its structure from either the *rule of men* or the sheer *rule by law*⁴.

International law would be no exception to that. Contrariwise, and although resorting more than once to the notion of RoL in the interna-

³ See G Palombella, 'The Rule of Law as an Institutional Ideal' in L Morlino, G Palombella (eds), *Rule of Law and Democracy* (Brill, 2010) 3-37.

⁴ *ibid.*



tional order, the CFI in the *Kadi* case did not live up to the principle as described above. By making a system relative point, it referred only to a matter of hierarchy and supremacy, and left us with the perception that compliance in a monist setting under the most powerful rule-making authority is all that counts for a RoL argument.

To the contrary, even in international law, the RoL can only be construed by allowing for legal limitation of the legal authority of those in power, be they States, international organizations, supranational bodies or the like. Note, that at issue is not some limitation *of power* through law; more precisely, it is a limitation *of law*, through (another) law. This holds true, for example, in so far as we accept that the development of *erga omnes* rules, or the *super partes* law concerning the interests of a community of peoples, or of humanity at large, is a law preventing either international organizations or States themselves from arbitrary rule-making. In brief, the RoL requires that a duality of law's sides of balanced legal strength develops in the wider international order; in other words, that some other law can limit and curb States (contracting bilateral interests) or international organizations (enacting field related, specialised policies).

2. *Mitigation (Premise two)*

One can recount the same issue by referring to the posthumous words of Ronald Dworkin. In the article he produced during his remaining days,⁵ Dworkin offered a new template for international law, one that – as we shall see – does *not* imply either a cosmopolitan view or a unification of the world as a homogeneous place (under that idea of substantive ‘integrity’ proper to States’ polities).⁶

He did so, by spelling out what he believed to be the fundamental principles distinctively attaching to international law, and its existential justification, namely the principles of *mitigation* and *salience*. Rejecting the

⁵ R Dworkin, ‘A New Philosophy for International Law’, (2013) 41 *Philosophy & Public Affairs* 2.

⁶ That is, the notion placed by Dworkin himself at the centre of his ‘interpretive’ theory of law wherein the domain of the State is not simply extended to – and does not automatically and with unchanged features play its role within – the international domain (cf R Dworkin, *Law’s Empire*, (Harvard UP and Fontana Press 1986), 176-275).



positivist and Hartian idea⁷ according to which rules are valid depending only on a rule of recognition of the legal system, Dworkin defines the social convention held to pinpoint international law, that is, States' *consent*,⁸ as irredeemably flawed (and he is not alone in making that point).⁹ Such a descriptive, 'sociological' answer cannot be final.¹⁰ For States to accept something as law, 'they need some other standard to decide what they should regard as law'.¹¹ That more basic principle (not the fact of consent), which provides 'the grounds of international law'¹² is *mitigation*. It is in order to improve the legitimacy of *their* coercive strength *vis-à-vis* their citizens, that States have a duty to accept a *mitigation* of their own power, that is, to 'accept feasible and shared constraints' based on international law.¹³ The *international* order makes up for the coercive system that States impose on their citizens: therefore, for the State, '[I]t follows that the general obligation to try to improve its political legitimacy includes an obligation to try to improve the overall international system'.¹⁴

⁷ HLA Hart, *The Concept of Law* (with a *Postscript* edited by PA Bulloch and J Raz) (2nd edn, OUP 1997).

⁸ The latter remains unpersuasive: it does not establish any priority among sources, gives no suggestion on whose consent is ultimately relevant, or when customary rules become preemptory; and what States have consented to is often disputed (for Dworkin, in many cases text cannot be decisive: e.g. art 2 (4) UN Charter on prohibition of the use of force).

⁹ For example, see Martti Koskenniemi on the vicious circle between facts and norms *i.e.* between States' consent and its being norm-generative (normative) upon States themselves: M Koskenniemi, 'The Politics of International Law' (1990) 1 Eur J Intl L, 4-32. And upon the problematic reflexivity of *pacta sunt servanda*, G Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in FM van Asbeck *et al* (eds.), *Symbolae Verzijl* (Martinus Nijhoff 1958), 153-176.

¹⁰ This argument is not only typical to Dworkin's criticism of legal positivism. It is an objection that can be raised against any conventionalist approach. As Cotterrell noted, accepting as law simply what 'people identify and treat through their social practices as "law"', keeps a 'definitional concern with what the concept of law should cover, yet removing from the concept as defined all analytical power' (R Cotterrell, 'Transnational Communities and the Concept of Law', (2008) 21 *Ratio Juris* 1, 8. The reference is to B Tamanaha, *A General Jurisprudence of Law and Society* (OUP, 2001) 166.

¹¹ Dworkin, 'A New Philosophy' (n 5) 9.

¹² Similarly, this applies to the obligating strength of promises, one that cannot be due to the mere *fact* of promising: *ibid* 10 and with reference to ch 14 of R Dworkin, *Justice for Hedgehogs* (Harvard UP, 2011).

¹³ Dworkin, 'A New Philosophy' (n 5) 17.

¹⁴ *ibid* 17: 'Any state ... improves its legitimacy when it promotes an effective international order that would prevent its own possible future degradation into tyranny'; it does the same also when it can protect its people, on whom it exercises a



However, being the principle of mitigation, of itself insufficiently determinative as to different possible regimes of international law, Dworkin coined the *principle of salience*, establishing the duty *prima facie* to abide by codes and practices already agreed upon by a consistent number of States and populations. A duty that shall have an obvious ‘snowballing effect’.¹⁵

Dworkin’s international law principles can be traced back to the rationale of the relationship between international organizations’ or States’ power and individuals, not to a hypothetical global government or to universal justice. In place of a global integrity of ends, we find a legal construction of mutual fairness, making sense of a system of legal power organised as a limitation, whose scheme is perfectly compatible with the normative ideal of a RoL that I have exposed in the above section. Dworkin adds the suggestion of (mitigation) a thin but *sui generis* substantive *raison d’être* for it, that is, a principle contributing legitimacy *vis-à-vis* individuals, their liberty and dignity. Moreover and, as I am aware, further stretching Dworkin’s lesson, any power is therefore to be construed in line with some condition. A mitigation rationale can also be intended to prevent one-sidedness from being the last say in a world of concurring legal claims. Thus, States can be asked not to refuse cooperation when facing communal interests of humanity, be they concerning security, hunger, environmental protection, and so forth.

3. *The winding road*

Finally I submit that what I have designed as a Rule of law criterion should work, and all the more so, in the increasing number of cases,

monopoly of force, from invasion of other peoples; moreover, a state further fails if it discourages *cooperation* to prevent economic, commercial, medical or environmental disaster (ibid 18). As to cooperation in international law see for example W Friedmann, *The Changing Structure of International Law* (Columbia UP, 1964).

¹⁵ Dworkin, ‘A New Philosophy’ (n 5) 19. The moral obligation of all nations – for example to treat UN law as law – flows from the combined sense of those two principles, and also explains why even States’ constitutions tend to include and protect more widespread rules considered as *jus gentium* or even peremptory, *jus cogens*. As Dworkin writes: ‘If some humane set of principles limiting the justified occasions of war and means of waging war gains wide acceptance, for instance, then the officials of other pertinent nations have a duty to embrace and follow that set of principles’ (ibid).



where the issues are covered by more than one provision, generated by separate and often diverging international regimes of law leading, *per se*, to divergent outcomes. That Rule of law ideal should, admittedly, mean some equal respect and equal legal chances for competing legal (sub)orders, *i.e.* different confronting bodies of law, global regimes, the WTO and the WHO, the Security Council and ECHR, and so forth.¹⁶

After fragmented-law exemplary cases, like *Mox Plant* and others,¹⁷ attention has been brought to significant cases that have followed some UN Security Council resolutions. Judicial cases have displayed varying attitudes from a self-referential, or one-sided, to a comprehensive legal reasoning, one that attempts at considering the multifaceted nature of each case at stake: pondering – through the lenses of more than one regime’s relative imperatives – the latitude of the question to be decided, both as a whole and for its multisided import. That is, an argument that works through bridging or integrating, for the case at hand, the normative propositions belonging to different orders involved.

¹⁶ Within such a plurality is developing an extensive volume of work, taking account of the elaboration by Courts and scholarship. One can start with C Brown, *A Common Law of International Adjudication* (OUP, 2007); and S Cassese, *I Tribunali di Babele* (Donzelli, 2009).

¹⁷ I wish to recall Martti Koskenniemi, on this case, among the most discussed around a decade ago, to which three different regimes were applicable: ‘Let me quote the Tribunal [Arbitral Tribunal set up under the UNCLOS]: “even if the OSPAR Convention, the EC Treaty and the Euratom treaty contain rights or obligations similar to or identical with the rights set out in [the UNCLOS], the rights and obligations under these agreements have a separate existence from those under [the UNCLOS]”. The tribunal then held that the application of even the same rules by different institutions might be different owing to the “differences in the respective context, object and purposed, subsequent practice of parties and *travaux préparatoires*”. It is not only that the boxes have different rules. Even if they had the same rules, they would be applied differently because each box has a different objective and a different ethos, a different structural bias’ (M Koskenniemi, ‘International Law: between Fragmentation and Constitutionalism’, (27 November 2006) 4-5 <www.helsinki.fi/eci/Publications/Koskenniemi/MCanberra-06c.pdf> accessed 30 July 2014. However in the same line there had been equally famous cases like *Swordfish* at WTO (*Chile–Measures Affecting the Transit and Importation of Swordfish–Arrangement between the European Communities and Chile–Communication from the European Communities* (6 April 2001) doc WT/DS193/3) and at the ITLOS (*Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-eastern Pacific Ocean (Chile/European Community)* (Order 15 March 2001) ITLOS Reports 2001, 4); or *Soft Drinks* at WTO (*Mexico–Tax Measures on Soft Drinks and Other Beverages–Report of the Panel* (7 October 2005) doc WT/DS308/R).



After the milestone ECJ *Kadi* judgment,¹⁸ other relevant judgments followed at the ECtHR. In *Kadi* the European Court of Justice found that Kadi's fundamental rights had been infringed by the EU regulation implementing the Security Council resolution against him. According to the ECJ, however, those rights are not simply part of a well founded individual claim, they are pillars of European primary law: RoL in the European order requires that internal regulations are unlawful, regardless of a Security Council mandate, when they violate the fundamental norms of Community law. In a sense, it made an argument for European primary law to prevail consequently over the obligations stemming from international law (so disregarding Article 103 UN).

The ECJ decision was criticised because, contrary to the 2005 decision of the CFI,¹⁹ it meant the EU did not comply with international law, thus betraying true internationalism (like the US in *Medellín*²⁰ and elsewhere): a kind of American style *exceptionalism*,²¹ contradicting the original attitudes of the EC in the '50s.²² But it was also welcomed (and properly so) for its defence of fundamental rights. Beyond its virtues, however, the ECJ reasoning amounted to a pronouncement about the primacy between two legal orders, *instead of an assessment about the infringement of fundamental rights in a supranational sphere where the two are interrelated*. It settled not a question of *disagreement*, but a question of *primacy*. The two things, as it should be clear from the above sections on the premises, are not compatible.

A rather different approach was displayed by the ECtHR in *Al-Jedda* (2011) and in *Al-Dulimi* (2013).

In *Al-Jedda v United Kingdom*²³ the ECtHR decision does not embrace simply an adversarial, self-referential point of view, that is, the single European Convention's regime for the individual, human rights' protection. Its argumentation, albeit without specifically mentioning it,

¹⁸ Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* (ECJ, Judgment 3 September 2008).

¹⁹ *Kadi v Council EU and Commission EC* (n 1).

²⁰ *Medellín v Texas*, 552 US 491 (2008).

²¹ G de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi*', (2010) 51 *Harvard Intl LJ* 1.

²² G de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor', (2011) 105 *AJIL* 649.

²³ *Case of Al-Jedda v The United Kingdom* App no 27021/08 (ECtHR, 7 July 2011).



interprets the RoL and its implications as a general and shared principle within the common supranational legal setting (in which the Security Council is included). The Grand Chamber of the ECtHR found that indefinite detention without charge of Al-Jedda (a dual British/Iraqi citizen) by the UK in a Basra facility controlled by British forces was unlawful and infringed his rights to liberty under Article 5 of the ECHR. The significance of the argumentative strategy adopted by the Grand Chamber marks an innovative step.

The ECtHR rejected the opinion upheld by the House of Lords in the proceedings that had decided Al-Jedda in the UK: a universally reputed champion of the Rule of law, Lord Bingham (House of Lords) had asserted that the treatment reserved to Al-Jedda derives from the unavoidable compliance with the UN Security Council resolution 1546 (2004), as requested by Article 103 of the UN Charter.²⁴ This is the argument (already featuring in the opening section, above) of conformity with the Rule of international law, centered upon *respect for the law*, as a matter of hierarchy of rules in the international order,²⁵ one that cannot be objected against even if implying human rights infringements.

The ECtHR neither took such a path, nor did resort to the other and famous reasoning adopted in the *Kadi* case by the European Court of Justice.

Now, as one can see, despite bearing some similar and self referential logic, what the RoL is deemed to command in one path (House of Lords, *Al-Jedda*) is contrary to what RoL commands in the other (the ECJ in *Kadi*). There was a third interpretive alternative available, though: using a less strict interpretation, the *Kadi* decision can be intended as an appeal to the Security Council, aiming to grant compliance in the future if it can guarantee some *equivalent protection* of human rights of the targeted individuals. Seen in these latter terms, it represents more than a vindication of the 'RoL in this EU jurisdiction'. It is a

²⁴ See para 35 (Lord Bingham) of the House of Lords decision, as quoted in the ECtHR, *Al-Jedda* (n 23), 11: 'Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in article 103 [UN] to 'any other international agreement' leaves no room for any excepted category, and such appears to be the consensus of learned opinion'. The same author, Tom Bingham, though, has written the important book, *The Rule of Law* (Penguin, 2011).

²⁵ That kind of appeal to the RoL in the international legal order, resonates in the 2005 decision of the CFI in *Kadi v Council EU and Commission EC* (n 1).



pattern of RoL beyond the State, with promising potential in the relationship among legalities (the UN Security Council and the EU).²⁶

However, by walking down a peculiar path, different from those just mentioned, *Al-Jedda* (2011) can be understood as further contributing to the theoretical profile of the RoL. In proclaiming the unlawfulness of indefinite detention without charge under Article 5 (1) ECHR, the ECtHR adopted a more comprehensive interpretive pattern, which goes even further than the ‘equal protection’ reading of the *Kadi* (ECJ) decision.

The Court refers to the RoL as a principle whose consistency is not a matter for each separate regime/order of law to internally (self) assess; the judges reason around it as an issue and a model ultimately controlling the interactions among the respective orders. They do not put to the forefront the issue of the supremacy through Article 103 of the UN Charter. The ECtHR refuses to agree that the unlawful indefinite detention *was implicitly commanded or authorised* by the Security Council resolution. On the contrary, it finds that under the relevant resolution, the security task assigned to the UK could not be considered an authorisation (and less than ever an obligation) to preemptively and indefinitely detain Al-Jedda, without judicial review, and lacking necessity.

Accordingly, it does not ask the question about which is the most powerful law in international *hierarchy*. Despite this (not asking/not answering) being perhaps a prudential withdrawal from the core issue of the ‘last word’ and ultimate authority in international law, therein lies its strength, and its deep value. The Court raises an argument not of ‘sources’ but of the *meaning* of the RoL, in the wider and plural, supra-national order. The issue is no longer which is the higher to rule, whether that be the UN Security Council or the European Convention, in ‘pyramidal’ terms, but which articulation and import should be given to the whole of the *relevant* law (including that of the Security Council). As the Courts states, Article 1 of the UN Charter ‘provides that the United Nations was established to “achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental freedoms”. Article 24 (2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for

²⁶ This line is further explained in my ‘The Rule of Law beyond the State’ (n 2) 442-467. In that article I started my analysis on one of the issues in the present article.



the maintenance of international peace and security, to “act in accordance with the Purposes and Principles of the United Nations”.²⁷

It cannot be really *presumed* that Security Council imperatives are to be conceived either in isolation or as unconditional, regardless of any *other law*. In fact, for the Court, ‘in interpreting its resolutions, 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’.²⁸ Human rights seem to escape a sheer source-hierarchy, bearing a countervailing, autonomous strength, in the interpretive scope, even *vis-à-vis* the ultimate security authority. Accordingly, ‘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’.²⁹ Now, human rights law becomes a meaningful check on the Security Council. Eventually, in a last statement, the Court, as I see its reasoning, raises the point that the law of human rights enjoys an *equally* concurring weight: therefore, should the Security Council want to impose a rupture in the fabric of UN law, this could result only from ‘clear and explicit language’ (para 102) against international human rights law. As I submit, this last point raises, ultimately, an argument *per absurdum*, in so far as there can hardly be coherence in the system, and convincing interpretation, that would beyond dispute allow for that. Here lies the challenge, one that leads to the denial that a *legitimate* international law norm can be conceived that shall undermine the basis of such a *duality* of the RoL.

Naturally, one can recall the principle of legal civilisation that an extensive, beyond the text, interpretation (of the resolution, in our case) can be used only in favour of the less powerful or the accused person. But more importantly, how can the ‘sovereign’ authority of the Security Council *explicitly phrase* an order of direct negation of fundamental basic human rights (that is, outside state of necessity)? And how could it be defended as unconditionally legitimate, that is, holding – in the UN system – an unassailable seal of legality? While the ECtHR commits itself to comply with any Security Council resolution, it requires, against human rights, only explicit terms: but those very terms could hardly be

²⁷ *Al-Jedda* (n 20) para 102 (and the premised para 44).

²⁸ *ibid.*

²⁹ *ibid.*



worded, without making the resolution apparently unlawful, that is, equally explicitly, illegitimate in the integrity frame that the Court itself has aptly drawn.

As I can suspect, this interpretation of ECtHR in *Al-Jedda* might be considered dubious or even aspirational. At least, until *Al-Dulimi*.

4. *Al-Dulimi*

It is that subsequent decision, namely, *Al-Dulimi*, both to make it explicit and to confirm that such an interpretation of the import of *Al-Jedda* is correct. The question would be, in fact, what should happen in case of ‘clear and explicit language’ against human rights law? The Court has answered that question, overcoming the kind of acoustic separation between the involved legalities sharing a common terrain, upon which to settle a potential disagreement.

The ECtHR³⁰ deals – indirectly – with UN Security Council resolution 1483 (2003), which in ‘clear and explicit language’ compels Switzerland, (allowing the State no discretion³¹), to freeze the assets of Al-Dulimi, one of those blacklisted as a suspected terrorist, who had been denied any rights to a defence. Since Switzerland³² had rejected Al-Dulimi’s complaints and resolved to confiscate his assets, the Court decided that violation of Article 6 ECHR (access to justice) had taken place on behalf of the State, and that consequent responsibility fell on it as a Party to the Convention, regardless of the duty to implement sanctions from the Security Council, and even in the absence of any State’s discretionary power. In the reasoning of the Court, judicial review was not granted either at the UN or in the domestic procedure. Denial of access to justice, even in pursuing the legiti-

³⁰ *Al-Dulimi v Switzerland* App no 5809/08 (ECHR, 26 November 2013).

³¹ The Court had already decided the case *Nada* where discretion was deemed existent (*Nada v. Switzerland* App no 10593/08 (ECtHR (Grand Chamber) 12 September 2012).

³² The Swiss Federal Tribunal (BGE 2A.783/784/785/2006, all of 23 January 2008) had maintained that it was not entitled to revise the legality of Security Council resolutions except in the event (it was not) of violation of a *jus cogens* rule (as in the reasoning of the CFI in *Kadi v Council EU and Commission EC* (n 1)). After allowing Al-Dulimi more time for a (unsuccessful) further appeal to that Committee, the Tribunal concluded that Switzerland’s behaviour was legitimate, and did not violate either domestic constitutional norms or arts 6 and 13 of the ECHR.



mate ends of peace and security, is deemed *disproportionate* to achieve those objectives.

It is important that the Court, in the same vein as in *Al-Jedda*, does not take a merely external attitude toward the normative corpus of the UN, assuming that it should be taken into consideration *qua normative* in its scope, meaning and aims. Accordingly its reasoning is not shielded in a self-referential closure, but pursues a comprehensive assessment, because it is relevant to the issue at stake. This is why it believes that apparently conflicting obligations from the UN Charter and the ECHR must be at their best harmonised and reconciled (Article 31 (3) (c) VCLT (para 112)). The presumption (formulated in its *Al-Jedda* decision) according to which UN Security Council does not in principle mean to impose obligations contradicting international law of human rights, is defeated. But it does not follow that any behaviour is legitimate if it is commanded by the Security Council, the highest source for UN security purposes. The Court engages in a *proportionality* judgment, that is, a contextual evaluation between two divergent rules/principles (belonging to different domains) one that might exceed the strict limits of its own jurisdiction (such a judgment implies a revision of the legality of the Security Council resolution, that other Courts in the EU had considered themselves not competent to carry).

But for such an assessment one cannot simply resort to ‘formal’ tools; it can only flow from taking the participant’s point of view³³ in a shared interconnection between diverse international law regimes. It requires bridging the gap that separates the two orders, that is, a deeper self understanding of its role as an agent of international law as a whole, and a further insight into the purposes and meaning concerning the ‘grounds’ of those laws, the mutual relation between institutions, and the founding ideals of the diverse orders in their relations. At least insofar as that is required within the remit of the issue to be solved.

It has been from such an approach that the Court has chosen (rightly or wrongly) to hold the State ‘responsible’, putting the State ‘caught between the obligation to carry out Security Council decisions under

³³ The question of the participant is explained in the opening of Dworkin’s *Law’s Empire* (n 6) 13-14. Dworkin wrote that the book ‘takes up the internal, participants’ point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face’.



Article 25 of the UN Charter and the obligation to respect international or regional human rights guarantees'.³⁴

It is to be noted that the Court in *Al-Dulimi* did not resort to the argument of extreme injustice, or to peremptory norms: it did not assume that the issue verged into a *jus cogens* violation, nor that only a *jus cogens* case would authorise some scrutiny of the legality of a Security Council resolution. Furthermore, by its reasoning, the Court neither retreated into its own domain nor did it simply concede the protection of the Convention after realising that the Security Council regime could not grant an equal system of guarantees. On the contrary, it transcended its conventional jurisdiction, at least as it is designed under the legal positivist criteria of one's own rule of recognition.

5. Conclusion

Given the approach taken to the case, the Court's reasoning might on one side be viewed as interpreting the rules and principles of each legal regime involved, and on the other side arbitrating their interplay on a *proportionality* assessment. One possible argument to justify this latter move, that is, a kind of 'jurisdiction overstepping', requires the invocation of some further principle premised to supranational law, beyond States. Plausible candidates might be the RoL as a principle of duality and balance among discrete legalities, as well as the Dworkinian principle of *mitigation* of States' power and of international organisations, one that justifies both positive and negative duties. The exercise of power, from whichever actors, can only be legitimate under the limitations imposing equal respect to each concurring regime of law on a case by case basis. From the foregoing, *Al-Dulimi* becomes the point of reference, if one dares to interpret the interpreters, within a significant road of principle.

³⁴ So suggests A Peters, 'Targeted Sanctions after Affaire Al-Dulimi et Montana Management Inc. c. Suisse: Is There a Way Out of the Catch-22 for UN Members?' (22 April 2014) *EJIL:Talk!* <www.ejiltalk.org/author/anne-peters/> accessed 30 July 2014. See the dissenting opinion of Judge Sajó: the complaint should have been dismissed, as inadmissible *ratione personae*, because the State is not acting of its own but clearly under the order of the Security Council, which gave it no leeway. But he did join the majority in deciding that a violation of human rights *occurred* due to the insufficient guarantees provided by the UN sanctions system. Read it *in coda* to the *Al-Dulimi* judgment.

