

**Forgetting Article 103 of the UN Charter?
Some perplexities on ‘equivalent protection’ after *Al-Dulimi***

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1. *Introduction*

While approaching the question from different perspectives, both the papers of Maura Marchegiani and Luigi Palombella converge in praising the judgment rendered by the second section of the European Court of Human Rights (ECtHR) in the *Al-Dulimi* case.¹ Their assessment is of course justified, if not only for the basic fact that the ECtHR for the first time explicitly submitted the United Nations to the test of equivalent protection,² and eventually found that the Security Council (SC) system of targeted sanctions fails to meet the minimum standards of fair trial enshrined in the European Convention on Human Rights (ECHR). Considering that this outcome was in some respect anticipated by other courts (i.e., in the context of the European Union),³ one can-

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¹ *Al-Dulimi and Montana Management Inc v Switzerland* App no 5809/08 (ECtHR Judgment 26 November 2013).

² This conclusion might however be relativized: for a reasoning echoing the application of the equivalent protection test to a subordinate organ of the UN, the International Criminal Tribunal for the Former Yugoslavia, see for example *Galic v the Netherlands* App no 22617/07 (ECtHR decision 9 June 2009), para 46.

³ See 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* (CJEU Judgment 3 September 2008) paras 321-322 [hereinafter *Kadi I*]; Joined cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Council of the European Union v Yassin Abdullah Kadi* (CJEU Judgment 18 July 2013), paras 133-134 [hereinafter *Kadi II*].



not but welcome the latest endorsement by one of the most influential jurisdictions in the field of human rights protection.

Most of the analysis developed by Marchegiani and Palombella is well argued and sounds appealing, especially if one considers in a human rights-oriented perspective the many shortcomings affecting the UN targeted sanctions regime. There is however, one point in their reasoning where my understanding wanes. This is where both papers submit that equivalent protection may be seen as a tool for ‘bridging or integrating [...] the normative propositions belonging to different orders involved’⁴ or can work as ‘un instrument [...] pour concilier des exigences divergentes et des situations de conflit réel’.⁵ In this vein, both papers tend to present equivalent protection as a method for solving normative conflicts not only as an alternative to, but also as a more convenient means than Article 103 of the UN Charter, insofar as it promotes a less ‘confrontational’ outcome, based on the balancing of the interests at stake rather than on the strict hierarchy existing between the normative values involved.⁶

These considerations call to mind at least two different, but closely connected, questions. The first is, strictly speaking, one of legal logic, and lies in considering whether in *Al-Dulimi*, the recourse to equivalent protection could suffice to evade the application of Article 103 of the UN Charter. The second question is perhaps more substantive, as it concerns the real function of equivalent protection as a technique for the solution or avoidance of normative conflicts.

2. *Could recourse to equivalent protection evade the application of Article 103 of the UN Charter?*

The legal problems arising from the clash between SC decisions imposing targeted sanctions and the fundamental rights of individuals inscribed on blacklists are too widely known to be reconsidered here. Al-

⁴ G Palombella, ‘The Principled, and Winding, Road to *Al-Dulimi*. Interpreting the Interpreters’ (2014) Zoom-in 6 Questions Intl L 28.

⁵ M Marchegiani, ‘Le principe de la protection équivalente dans l’articulation des rapports entre ordre juridique des NU et CEDH après l’arrêt *Al-Dulimi*’ (2014) Zoom-in 6 Questions Intl L 14.

⁶ See Palombella (n 4) 25; Marchegiani (n 5) 14.



so widely known is the critical role that Article 103 of the UN Charter may play in solving such problems. *If* a real conflict exists between SC decisions and human rights treaty obligations, according to a strict (as well as legally coherent) reading of Article 103, the former must prevail, full stop, end of story.⁷

While some domestic courts concerned with targeted sanctions acceded to this blunt conclusion (including the Swiss courts before which the *Al-Dulimi* case was first proposed), international or supranational jurisdictions have deployed their best efforts to elaborate alternative ways in which to avoid the recourse to Article 103. In this sense, EU jurisdictions took a leading role. Subsequently, the logic of Article 103 found its way into the 2005 decision of the Court of First Instance of EU (then European Communities) concerning the case of Yassin Abdullah Kadi.⁸ The Court of Justice (CJEU) successfully evaded the application of that provision in the *Kadi I* judgment of 2008, by adopting a rigid ‘dualistic’ stance towards the relationship between UN and EU legal orders. Even if the *Kadi I* judgement does not speak this language explicitly, the legal point relevant for the present purposes may be epitomized as follows: insofar as Article 103 exclusively concerns obligations of UN member States, and the EU as an international organization is not a party to the UN Charter, EU institutions (including the Court of Justice) cannot be bound to defer to the hierarchical priority established by Article 103 in favour of Charter obligations.⁹

However, there is room for doubt in the idea that the same reasoning may also apply to the ECtHR, as the position of the latter Court can hardly be equated to that of the EU and its institutions.¹⁰ As a judicial

⁷ See recently R Kolb, ‘L’article 103 de la Charte des Nations Unies’ (2014) 367 *Recueil des Cours de l’Académie de Droit International* 9, 119-123.

⁸ Case T-315/01, *Kadi v Council of the European Union and Commission of the European Communities* (CFI, 21 September 2005) [2005] ECR II-3712 paras 181 and 183.

⁹ See L Gradoni ‘Making Sense of “Solanging” in International Law: The *Kadi* Case before the EC Court of First Instance’ in WJM van Genugten, MP Scharf, SE Radin (eds) *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference* (Asser Press 2009) 151-152. See also, in this sense, the jointly dissenting opinion of Judges Lorenzen, Raimondi and Jociene attached to *Al-Dulimi* (n 1).

¹⁰ It seems therefore problematic to accept unconditionally the conclusion put forward by Maura Marchegiani, according to which art 103 of UN Charter would not apply to the ECtHR, as this Court is part of an autonomous legal system, arguably separated from that of the UN Charter (Marchegiani (n 5) 12-13).

organ charged with the task of determining and interpreting the scope of human rights obligations assumed by States under the ECHR, the European Court can hardly ignore the effects of Article 103, which binds ECHR Contracting Parties to accord priority to UN Charter commitments in the event of a conflict, on ECHR obligations.

This is perhaps the reason why, in the relevant case-law prior to *Al-Dulimi*, the ECtHR paid special attention to bypassing the scope of Article 103, by trying to deny the existence of any actual conflict between the human rights obligations and the SC decisions or authorizations at stake.

This strategic move is well illustrated in the *Al-Jedda v United Kingdom* judgment of 2011, where the ECtHR built the resolution of the case on a general presumption that the SC does not intend to impose on UN member States any obligation to breach fundamental principles of human rights. In this context, the Court affirmed the necessity to choose, in cases of ambiguity in the terms of SC resolutions, the interpretation which is most in harmony with the requirements of ECHR and which avoids any conflict of obligations.¹¹

This ‘consistent interpretation’ test was, however put under severe pressure in the subsequent *Nada v Switzerland* judgement of 2012. In this case, the ECtHR recognized that the presumption of consistency with human rights obligations of ECHR was rebutted by the clear and explicit language of the SC resolution 1390 (2002), requiring States to prevent the transit in their territories of the applicant, whose name was included in the list of suspected terrorists.¹² This notwithstanding, the Court held Switzerland responsible for the breach of ECHR, arguing that the Swiss Government enjoined some latitude – ‘admittedly limited but nevertheless real’ – in implementing relevant SC resolutions and failed to consider all the possible measures to adapt the SC sanctions

¹¹ *Al-Jedda v the United Kingdom* App no 27021/08 (ECtHR [GC] Judgment 7 July 2011) paras 101-102. This approach allowed the Court to hold that, absent ‘a clear and explicit language’ to the contrary in resolution 1546 (2004), no opposition existed between the SC authorization to use all necessary measures to restore stability in Iraq and the United Kingdom obligation under art 5 of ECHR to protect the right to personal liberty of Mr Al-Jedda (ibid para 109).

¹² *Nada v Switzerland* App no 10593/08 (ECtHR [GC] Judgment 12 September 2012) para 172.



regime to the applicant's individual situation.¹³ This suggests that, according to the ECtHR, a real conflict between SC decisions and human rights obligations is deemed to arise only in the most extreme cases, where no discretion at all is allowed to States in the domestic implementation of SC measures.

If the outcome of *Nada* was reached at the price of some overstretching of relevant texts,¹⁴ this cannot succeed any longer in *Al-Dulimi*, where resolution 1483 (2003) abruptly imposed on Switzerland the obligation to confiscate the financial resources of the applicant. At this juncture, the existence of a conflict between the SC decision imposing targeted sanctions and the right to a fair trial for the applicant was patent, and the ECtHR cannot but recognize that in the case at hand, the Swiss Government enjoined no latitude in the implementation of SC measures.¹⁵ But it was exactly at this point that the Court, instead of considering the possible impact of Article 103 of the UN Charter, held that the *Al-Dulimi* case 'should be examined in the light of the equivalent protection criterion', and started assessing whether the UN system of targeted sanctions offered a level of protection comparable to that required by the ECHR (eventually concluding that this was not the case).¹⁶

Was this bold move by the ECtHR justified in the case at hand? As interpreted in the relevant case law, the effect of equivalent protection is that of establishing a presumption (i.e., that a State is in compliance with its obligations under the ECHR when it implements decisions of an international organization, providing a level of protection of human rights that is at least equivalent to that required by the Convention).¹⁷ In fact, this presumption can also work as a preliminary question, which may eventually bar the Court from ruling on the merits of a case.¹⁸ One may however doubt that the same presumption or preliminary question

¹³ *ibid* paras 175-180 and 195-196.

¹⁴ E de Wet, 'From *Kadi* to *Nada*: Judicial Techniques Favouring Human rights over United Nations Security Council Sanctions' (2013) 12 Chinese J Intl L 806-807.

¹⁵ *Al-Dulimi* (n 1) para 113.

¹⁶ *ibid* para. 117-121.

¹⁷ See especially *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* App no 45036/98 (ECtHR [GC] Judgment 30 June 2005), paras 150-165.

¹⁸ See recently S Platon 'The "Equivalent Protection Test"'. From European Union to United Nations, from *Solange II* to *Solange I* (2014) 10 Eur Constitutional L Rev 249-250.

can overshadow the existence of a normative conflict, the hierarchical or quasi-hierarchical relationship existing between the involved norms and, more importantly, the application of the appropriate rule intended to settle such a conflict (i.e., Article 103 of the UN Charter).¹⁹

The point was not missed by dissenting judges in *Al-Dulimi*, who stressed that the ECtHR 'ha[s] not directly addressed the issue of how such a conflict should be resolved but ha[s] only indirectly concluded that, where no equal protection exists, the Convention obligations prevail'.²⁰ One is therefore left with doubt that the majority of the Court in *Al-Dulimi* circumvented the appropriate criterion for the solution of the normative conflict, as encapsulated in Article 103 of the UN Charter, by having recourse to the alternative, and more human-rights friendly, standard of equivalent protection, without however giving any convincing explanation for the reasons underlying this move. This latter observation brings us to our second point, that of the proper function of equivalent protection.

3. *Does equivalent protection really promotes the balancing of interests at stake?*

The answer provided by Marchegiani and Palombella to the question as to why one should prefer the equivalent protection principle to Article 103 of the UN Charter in solving the clash between SC decisions and fundamental human rights is rather compelling. Insofar as Article 103 postulates the unconditional priority of UN Charter obligations, it would *a priori* bar any proper consideration of the human rights at stake, which as a matter of consequence will inescapably be doomed to defer to SC determinations. Contrariwise, equivalent protection, as a principle premised on the balancing of the interests at stake, would allow a fair consideration of the normative values involved and, ultimate-

¹⁹ See on this M Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke J Comp Intl L* 125-126: 'If there truly is a (quasi-) hierarchical relationship between two norms, the lower-ranked norm by definition cannot set any conditions on the application of the higher-ranked norms, even if that condition is the equivalent protection of human rights'.

²⁰ See *Al-Dulimi* (n 1) the attached dissenting opinion of Judge Lorenzen, joined by Judges Raimondi and Jociene, as well as the partly dissenting opinion of Judge Sajo.



ly, would promote the better coordination or integration of the different legal regimes to which such values belong.

There is no denying that equivalent protection, as a judicial technique elaborated in the field of human rights protection, has the potential to promote the dialectic between different legal systems, insofar as it enhances the possibility that the (higher) human rights standards belonging to one legal system be projected into an alien legal system endowed with weaker or lower standards. In this vein, two different models of equivalent protection have been elaborated, starting with the two well known '*Solange*' judgments of the German Federal Constitutional Court.²¹ According to a 'stronger' version of equivalent protection, courts of legal order A may vindicate the continuing right to subject to judicial review, acts coming from legal order B, so long as B does not provide guarantees for fundamental rights which are adequate in comparison' to that contained in A (*Solange I*).²² According to a second and milder version, courts of legal order A will no longer exercise their judicial review, so long as legal order B 'generally ensure an effective protection of fundamental rights' (*Solange II*).²³

Of course, the choice between one or the other of the two models is conditioned by the fact that the legal system subjected to review either provides some measures of protection for human rights, or does not provide it at all. It is on the other hand evident that the outcome of the equivalent protection test depends heavily on the circumstances of the case, especially from the level of protection one can legitimately expect from the legal order that is subjected to the test. It is to ensure a certain amount of flexibility and adaptability that, as further pointed out in international case law, the required protection must be 'comparable', and not 'identical', in order to satisfy the test of equivalence.²⁴ Here lies, in fact, the potentialities of equivalent protection as a technique for the balancing of interests, which have been developed, starting with the 'milder' version of *Solange II* elaborated in domestic case-law.

²¹ As is well known, equivalent protection found its origin in two judgments rendered by the German Federal Constitutional Court respectively in 1974 and 1986, nicknamed as *Solange* from the German expression (equivalent to 'so long as') herein used. See for the English translation of both judgments (1993) 93 ILR 363, 404.

²² *ibid* 395, para 35.

²³ *ibid* 436, para 48.

²⁴ *Bosphorus* (n 17) para 155.

A sketched outlook of the developments of the *Kadi* saga and its aftermath suffices to convey the idea that a particularly rigorous (not to say intransigent) model of equivalent protection has been adopted by European courts in assessing the compatibility of the UN system of targeted sanctions with fundamental human rights.

As is well known, in its 2013 *Kadi II* judgment the CJEU vindicated a full judicial review over SC decisions concerning targeted sanctions, by espousing a typical equivalent protection argument. Judicial review was considered by the Court all the more necessary in light of the fact that the delisting procedure at UN level, despite all the improvements added by the SC (first, through the so-called ‘focal point’, later with the introduction of the ‘ombudsperson’), failed to provide to persons included on blacklists the guarantees of an effective judicial protection.²⁵ In a key passage of the judgment, the CJEU also delineated the essence of this effective judicial protection, which

‘should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognizing of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered’.²⁶

The CJEU’s unwillingness to accept a level of judicial protection falling below such standards was made clear also by its disregard for the opinion of Advocate General Bot, who for his part had advocated for a less intensive model of judicial review, the effect of which would have restricted an encroachment upon the prerogatives of the SC.²⁷ The answer of the CJEU in *Kadi II*, however, was that only a *full* judicial review, modelled on the above characteristics, would ‘ensure a fair balance between the maintenance of international peace and security and

²⁵ *Kadi II* (n 3), para 133.

²⁶ *ibid* para 134.

²⁷ *ibid*, Opinion of AG Bot, para 71.



the protection of the fundamental rights and freedoms of the person concerned'.²⁸

Considering that the above passages of *Kadi II* are extensively quoted in *Al-Dulimi*,²⁹ there are good reasons for assuming that, over and above the peculiarities of the different cases, the ECtHR also adhered to a very similar (and very high) standard of judicial review. That the ECtHR intended to endorse the more stringent, or *Solange I* type, version of equivalent protection is further evidenced in the paragraph of *Al-Dulimi* where it is stated that 'as long as there is no *effective and independent judicial review*, at the level of the United Nations, of the legitimacy of adding individuals and entities to the relevant lists', concerned individuals must be authorised to request the review by national courts of UN measures.³⁰

If this is true, the point at issue is whether the standards of judicial review applied to the UN blacklisting system in both *Kadi II* and *Al-Dulimi* cases is fully consistent with those requirements of flexibility that are necessary for ensuring the balance of interests at stake; or, in other words, whether an equivalent protection argument shaped on such high standards of judicial review can be considered as the best way to attain a 'fair balance' between the goals of peace maintenance and protection of fundamental rights (and provided that this is the intended result).

It is rather clear that the UN mechanism of blacklisting, which still remains largely para-judicial and quasi-judicial in its essence, in spite of the many improvements elaborated by the SC, can hardly meet the very demanding level of judicial protection required in the above-quoted passage of the *Kadi II*. Of course, to insist on such a high standard of judicial protection might be considered as perfectly legitimate on the part of an organ such as the ECtHR (or the CJEU), conceived for the protection of fundamental rights and striving for a protection of such rights that is not theoretical or illusory, but practical and effective.³¹ But at this point it becomes clear that the real issue is no longer to search for a fair balance between the competing interests at stake, but to affirm

²⁸ *ibid* para 131.

²⁹ *Al-Dulimi* (n 1) para 57.

³⁰ *ibid* para 134.

³¹ As the ECtHR explicitly vindicates *ibid*, para 125.

that certain (minimum) standards of human rights protection are intransgressible and must be prioritized over and above security concerns. That this can be attained under the cover of equivalent protection, rather than through a more radical reconceptualization of the relationship existing between collective security and human rights is, however, something that is questionable. One could, of course, be prepared to accept that equivalent protection has become nothing else than a mechanism intended for ensuring the (relative) priority of human rights in case of conflict with other international obligations. But if that were the case, one might also be forced to admit that the difference between equivalent protection and Article 103 of the UN Charter would reside more in their respective scope than in their very nature and purpose.

4. *Concluding remarks*

There is an apparent logic behind the choice followed by both the CJEU and ECtHR to apply a 'hard' version of the equivalent protection test to the UN system of targeted sanctions. As the dialectic engaged after *Solange I* between the German Federal Constitutional Court and the European Communities (through its Court of Justice) demonstrates, to insist, on the part of the judicial organs of certain legal order, on the guarantee of fundamental rights, by treating them as intransgressible conditions for the validity of the acts originating in an external legal system, could ultimately be a good strategy for stimulating the sensibility of this latter system for human rights protection. But for this strategy to succeed, at least two minimal conditions seem to be needed. First, there must be a certain convergence around the basic values lying at the core of the two legal orders involved in the dialectic; second, the dialectic must be pursued through a constructive dialogue between the principal judicial organs of the two systems.

It can however be doubted that in the case of the confrontation between UN targeted sanctions and fundamental rights that such basic conditions are met. In fact, it must not be overlooked that the counterpart of the European jurisdictions involved in the *Kadi* and *Al-Dulimi* cases is not a judicial organ, but a political one, the SC, and that the basic aims and parameters of this organ lie in the effectiveness of the measures adopted for the maintenance of international peace and secu-



rity. Under these conditions, the kind of ‘judicial dialogue’ over shared values and objectives that was at the core of the *Solange* experience involving the German Federal Constitutional Court and Court of Justice of the European Communities seems to have little chance to be repeated. From this point of view, one just has to take a look at the most recent revisions introduced into the blacklisting system in the aftermath of *Kadi II* and *Al-Dulimi* with SC resolution 2161 (2014), to notice that the advancements, if assessed in the light of the standard of an effective and independent judicial protection, are modest.

One is ultimately left with the impression that using the rhetoric of equivalent protection to try to force into the system of targeted sanctions a structural reform that largely depends on the political willingness of UN member States could eventually be a lost cause.³² Besides the hurdles that depend on political factors, there is also an awareness that one of the claimed objectives of equivalent protection, that is to say the promotion of a fair balance between collective security and human rights, could remain largely illusory. This would be so, at least insofar as that objective is pursued through the most intransigent version of equivalent protection, as encapsulated in *Solange I*.

It is to be hoped that some of the persistent ambiguities that still surround the equivalent protection scope and function will be eventually clarified by the upcoming judgment of the ECtHR Grand Chamber in *Al-Dulimi*.

³² See in this sense the partly dissenting opinion of Judge Sajo annexed to *Al-Dulimi* (n 1), pointing out that ‘It should, however, be the responsibility of the States Parties to the UN Charter to address the failings of the sanctions system and to ensure the system’s consistency with established norms of international human rights’.