Human rights — Right to a fair hearing — Right of access to court — Freezing and confiscation of applicants' assets — Applicants complaining of lack of procedure complying with Article 6 of European Convention on Human Rights, 1950 — Scope of case before Grand Chamber — Admissibility of application — Whether compatible *ratione personae* and *ratione materiae* with Convention provisions — Whether applicants' right of access to court restricted — Whether restriction justified — Whether restriction pursuing legitimate aim — Whether proportionate — International normative context — Whether conflict of international obligations — Extent of obligations of respondent State — Whether respondent State violating Article 6 of European Convention on Human Rights, 1950

Relationship of international law and municipal law — Treaties — United Nations Charter — European Convention on Human Rights, 1950 — Respondent State's obligations under United Nations Charter and European Convention — Whether conflict of obligations — Article 103 of UN Charter asserting primacy of obligations deriving from Charter in event of conflict — Whether primacy rule engaged — Implementation of United Nations Security Council resolution at national level — Whether respondent State having any discretion in implementation — UN Security Council resolution — Interpretation of resolution — Whether restrictive interpretation legitimate — Whether courts of respondent State prevented from reviewing in terms of human rights protection measures taken at national level to implement resolution — Whether respondent State can rely on binding nature of Security Council resolutions — Whether respondent State having duty to ensure measures not arbitrary — Whether practical measures taken by Swiss authorities to improve situation of applicants adequate — Whether respondent State faced with real conflict of obligations — Whether respondent State violating Article 6 of European Convention on Human Rights, 1950

Treaties — Interpretation — Application — Human rights treaties — European Convention on Human Rights, 1950 — Rights and freedoms enshrined in European Convention — Whether guarantees of fair hearing *jus cogens* norm — Applicability of relevant public international law norms — Vienna Convention on the Law of Treaties, 1969 — United Nations Charter — Article 103 of UN Charter asserting primacy of obligations deriving from

Charter in event of conflict with obligations arising from another international agreement — UN Security Council resolutions — Whether conflict between obligations arising under UN Charter and European Convention — Interpretation of Security Council resolutions — Presumption of intention not to impose on Member States obligation breaching fundamental human rights principles — Harmonization of treaty obligations — Whether respondent State violating Article 6 of European Convention on Human Rights, 1950

International organizations — United Nations — Security Council — Maintenance of international peace and security — Threat of terrorism — Economic sanctions — Security Council resolutions — Interpretation — European Convention on Human Rights, 1950 — Role of United Nations in promoting human rights — Presumption of intention not to impose on Member States obligation breaching fundamental human rights principles — United Nations sanctions system — UN Sanctions Committee — Criticisms — Whether procedures adequate — Whether conflict of obligations under UN Charter and European Convention on Human Rights, 1950 — Whether primacy rule of Article 103 of UN Charter engaged

International tribunals — European Court of Human Rights — Role of Court with respect to acts of UN Security Council — State relying on need to apply Security Council resolution to justify limitation on Convention right — Whether resolution consonant with Convention — Examination of resolution's wording and scope — Purposes of United Nations — Maintenance of international peace and security — Promotion of respect for human rights — Article 24(2) of UN Charter

Economics, trade and finance — Economic sanctions — Security Council resolutions — Implementation at national level — Freezing and confiscation of applicants' assets — UN sanctions regime — UN Sanctions Committee — Procedures — Listing and delisting of applicants — Respondent State implementing resolution — Whether text of resolution allowing for delay necessary to grant access to a court to examine whether names appearing arbitrarily on the UN sanctions list — Whether implementing State having discretion — Whether respondent State violating Article 6 of European Convention on Human Rights, 1950

Terrorism — Threat of terrorism — Maintenance of international peace and security — Security Council — Chapter VII of United Nations Charter — Security Council resolutions — Implementation at national level — Economic sanctions — Freezing and confiscation of applicants' assets — Guarantees under Article 6 of European Convention on Human Rights, 1950 — Whether respondent State violating Article 6 of European Convention on Human Rights, 1950

AL-DULIMI AND MONTANA MANAGEMENT INC. *v.* SWITZERLAND[1]

(Application No 5809/08)

European Court of Human Rights (Grand Chamber). 21 *June* 2016

(Trajkovska, *President*; Spielmann, Casadevall, Nußberger, Ziemele, Villiger, Hajiyev, De Gaetano, Laffranque, Pinto de Albuquerque, Sicilianos, Keller, Potocki, Pejchal, Dedov, Kūris and Spano, *Judges*)

SUMMARY:[2] *The facts*:—The first applicant, Mr Al-Dulimi, was an Iraqi national and managing director of the second applicant, Montana Management Inc., a company incorporated under the laws of Panama with its registered office in Panama. According to the United Nations Security Council, the first applicant was head of finance for the Iraqi secret services under the regime of Saddam Hussein. The applicants' assets had been confiscated by Switzerland pursuant to a UN Security Council resolution. Switzerland became a UN member on 10 September 2002.

Following Iraq's invasion of Kuwait on 2 August 1990, the UN Security Council adopted Resolutions 661 (1990) and 670 (1990) calling upon UN Member and non-Member States to apply an embargo on Iraq, on Kuwaiti resources confiscated by Iraq and on air transport between Iraq and the rest of the world or involving Iraqi aircraft. Resolution 661 (1990) was superseded by Resolution 1483 (2003) ("the Resolution"),[3] which was adopted on 22 May 2003 following the fall of Saddam Hussein's Government. Paragraph 23 of the Resolution imposed on Member States an obligation to freeze without delay the financial assets of certain individuals or entities connected with the former Iraqi Government and immediately transfer them to the Development

[1] The names of the parties' representatives appear at para. 9 of the judgment.
[2] Prepared by Ms Karen Lee, Co-Editor.
[3] For the text of Resolution 1483, its paragraph 23, and other relevant resolutions, see para. 46 of the judgment.

Fund for Iraq. The UN Sanctions Committee was created by Security Council Resolution 1518 (2003) on 24 November 2003 to identify the persons concerned, since only Saddam Hussein was designated by name, and add their names to the relevant lists.

On 7 August 1990, the Swiss Federal Council adopted an ordinance providing for economic measures against Iraq ("the Iraq Ordinance"), which was amended in particular following the Embargo Act 2002 and to take account of the Resolution. Article 2 of the Iraq Ordinance[4] provided for the freezing of assets belonging to the former Iraqi Government, its senior officials and to companies under the control of that Government or its officials. On 12 May 2004, the applicants were listed under Article 2 following their addition to the list by the UN Sanctions Committee in 2004. The applicants' Swiss assets were frozen on 7 August 1990 pursuant to the Iraq Ordinance and a procedure to confiscate those assets was initiated on 18 May 2004 upon the adoption of the Confiscation Ordinance.[5] Attempts to have the confiscation procedure suspended while the UN Sanctions Committee considered a delisting application failed; their application remained without effect. On 16 November 2006, the Federal Department for Economic Affairs ordered the confiscation of the applicants' assets on the grounds that their names had not been removed from the UN Sanctions Committee list so could not be deleted from the list annexed to the Iraq Ordinance and that Switzerland was bound by UN Security Council resolutions.

The applicants appealed to the Swiss Federal Court to annul the confiscation order. They argued inter alia that the confiscation of their assets breached the property right guaranteed by Article 26 of the Federal Constitution and that the listing procedure had breached procedural safeguards in Article 14 of the International Covenant on Civil and Political Rights, 1966 ("the Covenant"), Articles 6 and 13 of the European Convention on Human Rights, 1950 ("the Convention") and Articles 29-32 of the Federal Constitution. The applicants maintained that there was no conflict between obligations under the UN Charter and Convention or Covenant rights. On 23 January 2008, the Federal Court, concerned to discharge its international obligations to implement the Resolution, dismissed the applicants' appeals,[6] confirming that their names appeared on the UN Sanctions Committee list and their ownership of the assets. Subsequent appeals were dismissed. On 6 January 2009, the applicants' application to be delisted pursuant to the procedure created by Resolution 1730 (2006) was rejected.

On 1 February 2008, the applicants lodged an application with the European Court of Human Rights ("the Court") against Switzerland. They alleged that the confiscation of their assets had not been accompanied by a

[4] For the text of the Iraq Ordinance, see para. 36 of the judgment.
[5] For the text of the Confiscation Ordinance, see para. 37 of the judgment.
[6] For further details, see para. 29 of the judgment.

procedure complying with Article 6(1) of the Convention.[7] They argued that their application was compatible *ratione personae* and *ratione materiae* with Article 6(1). They asserted that Switzerland's obligations under the UN Charter and the Resolution and under the Convention were consistent, and that sanctions had to be implemented with due respect for human rights. They contended inter alia that the restriction imposed on their access to court under Article 6(1) was disproportionate and unjustified, that the Resolution no longer had any direct connection with maintaining peace and security and that there had been no criminal or civil charge.

The respondent Government argued that the application was inadmissible due to its incompatibility *ratione personae* and *ratione materiae* with Convention provisions. It maintained inter alia that the confiscation of assets had been based on Security Council resolutions which, by virtue of Articles 25 and 103 of the UN Charter,[8] were binding and prevailed over any other treaty obligations as well as conferring binding force on Sanctions Committee decisions. It argued that Article 6(1) was not applicable as the asset freezing was the result of the resolutions which were directly applicable in domestic law; the contents of the UN Sanctions Committee lists could not be changed by any domestic examination. It maintained that the right of access to court in civil cases was not absolute and that State and UN immunity could constitute a justified obstacle. It also argued that the measures ordered pursuant to the Resolution were proportionate since they were aimed at certain persons, which included the first applicant, and that Switzerland had taken measures to improve the situation of listed individuals since joining the United Nations in 2002.

On 26 November 2013, a Chamber held, by four votes to three, that there had been a violation of the civil limb of Article 6(1) of the Convention.[9] The applicants' complaint was found to be compatible with the Convention both *ratione personae* and *ratione materiae*. The Chamber held that States had no discretion in implementing the obligations arising under the relevant Security Council resolutions and that the presumption of equivalent protection had been rebutted. The UN sanctions system, even as improved, did not afford an equivalent level of protection to that required by the Convention. Its procedural shortcomings had not been compensated for by domestic mechanisms as the Federal Court had refused to examine the merits of the impugned measures. Although the domestic decision pursued the legitimate aim of ensuring domestic implementation, there was no proportionality with the means employed as the applicants had not been able to challenge the confiscation measure for several years. The case was referred to the Grand Chamber at the Swiss Government's request.

[7] Article 6(1) of the Convention provided that: "In the determination of his civil rights and obligations . . ., everyone is entitled to a fair . . . hearing . . . by [a] tribunal . . ."

[8] See para. 40 of the judgment.

[9] The Chamber found that the criminal limb of Article 6(1) did not apply since the procedure complained of did not concern a criminal charge. For further details of the Chamber's findings, see paras. 82-4 of the judgment.

Held (by fifteen votes to two):—There had been a violation of Article 6(1) of the Convention.

(1) The Grand Chamber's jurisdiction was confined to ascertaining whether the applicants enjoyed the guarantees of the civil limb of Article 6(1) of the Convention in the procedure concerning the confiscation of their assets. It could only examine those parts of the application that had been declared admissible (paras. 78-80).

(2) (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 were dismissed.

(a) The Grand Chamber could dismiss applications it considered inadmissible at any stage (para. 92).

(b) The application was compatible *ratione personae* with the provisions of the Convention. The applicants fell within the jurisdiction of Switzerland within the meaning of Article 1 of the Convention and the alleged violation engaged the responsibility of the respondent State. The applicants' assets were frozen and confiscated as a result of the national implementation of a UN Security Council resolution and in the exercise by Switzerland of jurisdiction within the meaning of Article 1. A Contracting Party was responsible under Article 1 for all acts and omissions of its organs whether they were a consequence of domestic law or international obligations. There was no distinction as to type of rule and no part of a Contracting Party's jurisdiction was excluded. The State retained Convention liability in respect of treaty commitments undertaken after the Convention had entered into force (paras. 93-6).

(c) The application was compatible *ratione materiae* with the provisions of the Convention. The applicants had complained 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. They were entitled to rely on a civil right as the confiscation had directly affected their peaceful enjoyment of their property, which was guaranteed by Article 26 of the Swiss Constitution. There had been a dispute over their right to enjoy their property. To the extent that the confiscation order sought to implement a sanction imposed at a political level by the UN Security Council, it was an individual measure affecting the exercise and very essence of the right in question. The dispute was genuine and serious (paras. 97-101).

(3) (by fifteen votes to two) There had been a violation of Article 6(1) of the Convention.

(a) The applicants' right of access to a court was clearly restricted. Although the Swiss Federal Court gave detailed reasons why it only verified that the applicants' names were on the Sanctions Committee lists and that the assets belonged to them, it refused to examine the compatibility of the procedure with the procedural safeguards in Article 6(1).

(i) The right to a fair hearing guaranteed in Article 6(1) had to be construed in the light of the rule of law, which required an effective judicial remedy enabling litigants to assert their civil rights. The Convention was

intended to guarantee rights that were practical and effective; this was particularly so for the right of access to the courts given the prominence of the right to a fair trial in a democratic society. The domestic court had to have full jurisdiction to hear a complaint; the Court had interpreted this flexibly (paras. 126-8).

(ii) The right of access was not absolute but subject to limitations. Contracting States enjoyed a margin of appreciation although the Court took the final decision. Limitations could not be so restrictive as to impair the very essence of the right. Limitations on the right, including jurisdictional immunity under international law, had to pursue a legitimate aim and the means had to be proportionate to that aim (paras. 129-31).

(b) The restriction pursued the legitimate aim of maintaining international peace and security. The domestic courts' refusal to examine on the merits the applicants' complaints about the confiscation of their assets was in order to ensure the efficient implementation, at domestic level, of the obligations arising from the Resolution (paras. 132-3).

(c) The restriction was not, however, proportionate.

(i) Convention provisions could not be interpreted and applied in a vacuum. Despite its human rights character, the Convention was an international treaty to be interpreted in accordance with relevant public international law norms and principles and, in particular, in light of the Vienna Convention on the Law of Treaties, 1969. In interpreting the rights and freedoms enshrined in the Convention, other rules of public international law applicable between the Contracting Parties were relevant (para. 134).

(ii) A basic element of the international law system was constituted by Article 103 of the UN Charter, which asserted the primacy, in the event of conflict, of obligations deriving from the Charter over any other obligation arising from an international agreement, regardless of whether that agreement was concluded before or after the UN Charter or was a regional arrangement (para. 135).

(iii) Although the guarantees of a fair hearing, and in particular the right of access to a court under Article 6(1), occupied a central position in the Convention, they did not constitute a *jus cogens* norm (para. 136).

(iv) When creating new international obligations, States were assumed not to derogate from their previous obligations. Apparently contradictory instruments applicable simultaneously were to be construed by international case law and academic opinion so as to coordinate their effects and avoid opposition in accordance with existing law (paras. 137-8).

(v) While it was not the Court's role to judge the legality of the acts of the UN Security Council, where a State relied on the need to apply a Security Council resolution to justify a limitation on the rights guaranteed by the Convention, it was necessary to examine the resolution's wording and scope to ensure, effectively and coherently, that it was consonant with the Convention. The purposes for which the United Nations was created were to be taken into account. These were to maintain international peace and security as well as to

achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms. The Security Council was required to act in accordance with those purposes under Article 24(2) of the Charter (para. 139).

(vi) There was thus a presumption that the Security Council did not intend to impose on Member States any obligation that breached fundamental human rights principles. Where there was any ambiguity in the terms of a resolution, it was to be interpreted so as to harmonize most with Convention requirements and to avoid conflict of obligations. Given the United Nations' important role in promoting human rights, clear and explicit language was expected where the intention was for States to take measures in conflict with their obligations under international human rights law. In the absence of such explicit language, it was assumed that there was no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter (paras. 140-1).

(vii) In this case, the Court was confined to examining whether the applicants enjoyed the guarantees of Article 6(1) of the Convention under its civil head, that is, whether there was appropriate judicial supervision. Nothing in the ordinary meaning of the Resolution's language prevented the Swiss courts from reviewing, in terms of human rights protection, the measures taken at national level to implement the Resolution. Neither did any other legal factor legitimize such a restrictive interpretation (paras. 142-4).

(viii) The right to review was indispensable given that inclusion on lists, usually in times of crisis, entailed practical interferences that might seriously affect Convention rights. The Convention, a human rights treaty, was to be interpreted and applied so as to afford individuals practical and effective protection. Since the Convention was a constitutional instrument of public order, the rule of law had to be preserved and arbitrariness prohibited (para. 145).

(ix) Given the serious consequences on the Convention rights of those listed, and that the Resolution did not clearly or explicitly exclude the possibility of judicial supervision of implementing measures, the Resolution was to be understood as authorizing national courts to exercise sufficient scrutiny so as to avoid arbitrariness. By limiting that scrutiny, account had been taken of the nature and purpose of the measures provided for by the Resolution in order to strike a fair balance between ensuring respect for human rights and the protection of international peace and security. A prolonged inability to access sufficiently precise information to enable such scrutiny indicated an arbitrary impugned measure. Any State Party whose authorities gave legal effect to the addition of a person to a sanctions list without ensuring that the listing was not arbitrary therefore engaged responsibility under Article 6 of the Convention (paras. 145-8).

(x) Switzerland had not been faced with a real conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter. It could not rely on the binding nature of Security Council resolutions but had

to persuade the Court that it had taken, or attempted to take, all possible measures to adapt the sanctions regime to the applicants' situation, at least guaranteeing adequate protection against arbitrariness (para. 149).

(xi) While the Swiss Federal Court was unable to rule on the appropriateness of the measures, or the substance of the sanctions, which was to be decided by the Security Council as the ultimate political decision-maker in this field, the Swiss authorities did have a duty to ensure that the listing was not arbitrary. The applicants should have had the opportunity to submit evidence that their inclusion on the list had been arbitrary. The UN sanctions system, in particular the listing and delisting procedures, had received criticism. The very essence of the applicants' right of access to a court had been impaired; the practical measures taken by the Swiss authorities to improve the applicants' situation were insufficient in light of Switzerland's obligations (paras. 150-5).

(4) (unanimously) The applicants' claim for just satisfaction was dismissed. There was no causal link between the finding of a violation of Article 6(1) of the Convention and the allegation of pecuniary damage (paras. 156-60).

Concurring Opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov: (1) There was a conflict between the respondent State's obligation to implement the Resolution and its Convention obligation to observe the applicants' right of access to a court (para. 1).

(2) The UN Charter had not yet acquired the nature of a Constitution for the international community. Article 103 was therefore a rule of precedence; there was no direct effect for treaty provisions containing conflicting obligations. This also applied to obligations arising from Security Council resolutions (paras. 2-27).

(3) The Resolution was not compatible with international humanitarian, criminal or human rights law. The UN Sanctions Committee was a political body. Paragraph 23 of the Resolution triggered the procedural guarantees of the criminal limb of Article 6 of the Convention. The deprivation of access to a court to challenge punitive confiscation measures breached a *jus cogens* norm, thus depriving the conflicting obligation under the Resolution, and its implementing measures, of their legal force under Articles 24 and 103 of the UN Charter. In any event, the confiscation measures raised issues of European public order since they breached human rights minimum protection standards. At the very least, the procedural guarantees of the civil limb of Article 6 were at stake. Since the applicants had no alternative means to protect their rights, their right to judicial supervision might be impaired; no additional proportionality balancing was needed (paras. 28-37).

(4) In resolving the conflict between obligations deriving from Security Council resolutions and from human rights treaties, the majority had opted to harmonize the obligations. While its legal reasoning was fragile, it was clear that the Court would not accept UN sanctions without adequate procedural

guarantees, including appropriate judicial scrutiny. To respect the constitutional value of the Convention, the equivalent protection test had to be imposed with regard to obligations deriving from other international treaties, including the UN Charter. A world human rights court or a new human rights accountability mechanism was needed (paras. 38-73).

Concurring Opinion of Judge Sicilianos: (1) The equivalent protection test was not applicable. That test did not apply to all international organizations alike; UN law itself contained a rule which governed any conflict between obligations arising from the UN Charter and from any other international agreement (paras. 1-9).

(2) The judgment sought to ensure systemic harmonization between the Convention and the UN Charter. There was no normative conflict between the two systems in the abstract. Security Council resolutions were to be interpreted in terms of human rights. Where possible, the Court had limited situations where a real conflict of obligations would arise for Contracting States upon their implementation, particularly for economic sanction resolutions. The relevant resolutions did not expressly prohibit access to a court. The scrutiny intended by the Court did not place an excessive burden on the national judicial authorities (paras. 10-23).

Concurring Opinion of Judge Keller: (1) There was a conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter. The Grand Chamber's harmonized interpretation went beyond the plain text and general understanding of the Resolution. The text of its paragraph 23, or how bodies understood it, did not allow for the delay necessary to grant access to a court to examine whether the applicants' names appeared arbitrarily on the UN sanctions list; the implementing State had no margin of appreciation (paras. 1-9).

(2) The conflict of obligations deriving from the Convention and the UN Charter could have been resolved by applying the principle of equivalent protection whereby human rights were protected in a manner at least equivalent to the protection provided by the Convention (paras. 10-18).

(3) The principle of equivalent protection was applicable, assuming that the Resolution created a strict international obligation for the respondent State. The principle could be applied to the UN given its strong commitment to human rights; the principle's lighter version was appropriate given the UN's universal character and primary mandate of maintaining international peace and security. The presumption of equivalent protection was rebutted on account of the structural deficiency of the UN's targeted sanctions regime. States had to intervene to compensate for the deficiency in human rights protection at the UN level. The Swiss authorities should have examined whether there were reasons to consider the applicants' listing arbitrary (paras. 19-27).

Concurring Opinion of Judge Kūris: A Convention-friendly interpretation of the Resolution was not possible; Switzerland did not enjoy much latitude in