UNSC Sanctions vs. European Convention on Human Rights[1]

Alina Orosan

Argument

International sanctions have evolved into an essential instrument of foreign policy. Employing restrictive measures is the primary form of pressure adopted by the UN Security Council meant to alter the conduct of the targeted country, government or individuals/ legal persons.

While political considerations of protecting the civilian population and the aim of targeting only those responsible for the sanctioned conduct have directed the UN to moving from sectorial measures to targeted measures, new difficulties have arisen in the form of legal concerns in respect of human rights.

In 2012, the Grand Chamber of the ECtHR considered that Switzerland violated the right to private life and the right to effective remedy,[2] by implementing UNSCR 1269(1999)[3] against a listed individual. The Court emphasised that the act of *implementing* the sanctions measures, and not the restriction imposed by the resolution, was in breach of human rights.

In a later judgment, the Grand Chamber of ECtHR found that Switzerland acted in breach of the right to fair trial,[4] this time by implementing UNSCR 1483(2003).[5]

The Court considers that the Security Council does not intend to impose any obligation on member states to breach fundamental principles of human rights, thus supervision for the respect of human rights should be ensured when implementing international sanctions imposed through UNSC resolutions.

The two landmark cases mentioned above are commonly known and referred to as *Nada case* and *Al-Dulimi case*, respectively.

In the following analysis emphasis falls on several concepts which act as trigger for the actual controversies raised by ECtHR jurisprudence in relation to implementing UNSC resolutions imposing sanctions; at the end of the day, it is states that are left with two apparent contradictory tasks, none of which being escapable: to implement the UNSC resolutions (mandatory in themselves) and to protect the human rights of the individuals within their jurisdiction in accordance with obligations under the relevant international conventions to which they are parties.

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[1] *The views expressed are solely of the author and do not engage in any way the Ministry of Foreign Affairs of Romania nor do they represent official views of the Romanian authorities in relation to the subject matter.*

[2] ECtHR, *Nada v. Switzerland* [GC], no. 10593/08, 12 September 2012.

[3] Al-Qaida sanctions regime.

[4] ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016.

[5] Iraq sanctions regime.

I will confine the presentation to the jurisprudence of the European Court of Human Rights as illustrated by the two cases. I will only note that, while the Court of Justice of the European Union as well as some national jurisdictions dealt with cases of a similar nature, other regional human rights courts (such as the Inter-American Court of Human Rights or the African Court of Human Rights) have not decided on the implementation of UN sanctions regimes while upholding the human rights of the sanctioned individuals. As such, there is no universal uniform interpretation of the application of international sanctions through the standard of human rights protection.

Apparently, for now, just the European states are faced with the dilemma of how to ensure adequate implementation of the UNSC resolutions while also respecting human rights in line with their incumbent obligations under the European Convention on Human Rights.

Diverging obligations?

According to Art. 103 of the UN Charter, *"[i]n 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".*

From the perspective of the UN Charter, the ECHR falls under the concept of "other international agreement" which might be superseded by the provisions of UN Charter should it impose diverging obligations to a UN member state.

As such, the ECHR, being a convention on the protection of fundamental human rights and part of the European public order, does not contain provisions that would run counter to the UN Charter and the principles it embodies and reflects. The UN Charter itself contains provisions pertaining to the human rights protection and aiming, as part of its general scope, "to reaffirm[ing] faith in fundamental human rights, in the dignity and worth of the human person".

Thus, one can conclude that, as a principled matter, there can be no divergence between obligations under the UN Charter and those under the ECHR and, as a consequence, the application of Art. 103 could not even arise in the context of implementation by a state of both legal regimes.

This was indeed the path that the European Court of Human Rights took in both decisions in which it found Switzerland guilty of non-compliance with its obligations under the Convention.

The Court found that there was no normative conflict between the UNSC resolutions and the ECHR and put aside Art. 103 of the Charter as non-applicable. As a matter of fact the Court found the necessary connections that would validate in these cases as well its previous line of argumentation developed in the *Al-Jedda* judgment. In that case the Court established that the presumption must be that the Security Council does not intend to impose any obligations on member states to breach fundamental principles of human rights and that in the event of any ambiguity in terms of a UN SC 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.[6] This is a strong presumption based on the actual interpretation that the SC is supposed to act in accordance with the purposes of the UN as set forth in the UN Charter, including "respect for human rights and fundamental freedoms" (as also mentioned in Art. 1 para. 3).[7]

Further, the ECtHR did not argue against the obligation of the UN member states to act in accordance with the UNSC resolutions,[8] which are mandatory (this being an inherent attribute of these acts of the Security Council), but it considered that, rather than being a conflict in between the Charter and the Convention, it might be a question of placing the intent of the UNSC when passing the resolutions, in the context of the object and purpose of the Charter itself, which include human rights protection.

The Court did not accept the *jus cogens* argument to determine the non-application of Art. 103 of the UN Charter, but preferred a line of argumentation that ensured a consistent application of obligations under both legal regimes.[9]

Therefore, the Court started its analysis from the basic premise that the UNSC acting based on the UN Charter could not possibly impose obligations upon UN member states that would ignore human rights. Moreover, the Court assessed that there was nothing in the language of the resolutions that would have implied derogations from certain human rights. Thus, it was not so much of an external normative conflict (the hypothesis under Art. 103 of the Charter), but rather an internal normative conflict sort out by applying the general rules of treaty interpretation (UNSC resolutions vs. UN Charter).

Although salutary from certain perspectives that deal mainly with the need to ensure a consolidated human rights approach in all circumstances, the reasoning of the Court is criticisable as per the intent of the SC to maintaining human rights in the context of the individual sanctioning regimes. The SC does not seem that much concerned with the human rights protection of the individuals sanctioned, but with attaining the objective of the restrictive regime instituted. This approach is even more so reflected in the later concerns to improve the human rights side of the sanctioning regimes, by, for instance, creating the Ombudsperson mechanism, which deals, *inter alia* with de-listing requests.

I would also note that when developing the argumentation leading to the circumvention of the normative conflict between the UN Charter and the ECHR, the Court based its reasoning on the

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[6] ECtHR, *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 102, 7 July 2011.

[7] Sicilianos L.-A., *The European Court of Human Rights facing the Security Council: towards systemic harmonization*, 66 (4) International and Comparative Law Quarterly 783 (2017), p. 789.

[8] According to Art. 25, *"[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"*.

[9] In *Al-Dulimi* case the applicant invoked the *jus cogens* nature of rights under Art. 6 of ECHR and Art. 14 of the ICCPR respectively in order to point that Resolution 1483 (2003) lost its binding effect. The ECtHR rejected the argument considering that the guarantee of a fair hearing and in particular the right of access to a court cannot be considered a *jus cogens* norm in the current state of international law, albeit it represents one of the universally "recognised" fundamental principles of law (see *Al-Dulimi* [GC], § 136).

need of avoiding fragmentation of international law as included in the ILC report on *Fragmentation of international law*, which states, *inter alia*, that “in international law there is a strong presumption against normative conflict”.[10] From a critical perspective, given the limited territorial relevance of the jurisprudence of the ECtHR and the lack (so far) of similar views in other regional jurisdictions, the risk of fragmentation is still pending in connection with this specific circumstance of application of UN individual sanctions regimes.

Human rights violation in the context of implementing mandatory UNSC resolutions

The interpretation of the text of the UNSC resolutions only served to put aside an eventual normative conflict of international law, but could not have led to affecting the general scope of the sanctioning regimes (otherwise the acts of the UNSC would have been devoid of substance in respect of the territory of the UN member states also parties to the ECHR).

Therefore, the Court acknowledged that indeed the UNSC resolutions had as an intended scope to put aside certain human rights (as was some aspects of the right to private and family life in what concerns Mr Nada or the enjoyment of the property rights in what concerns Mr Al-Dulimi) – as in absence of these restrictions the sanctions regime would not attain its objective – but considered otherwise in what concerns the procedural rights (the right to a fair trial or to an effective remedy).

As such, the European Court of Human Rights did not proceed with an analysis of the legality of the restrictive measures imposed by the UNSC – as that would have been *ultra vires* – but focused on the legality of the action of the state party (Switzerland in the two cases) in the implementation of the mandatory UNSC resolutions and assessed it against the State’s human rights obligations. In the context of the analysis, the Court was also concerned about the margin of appreciation Switzerland was left with in the application of the UNSC resolutions, noting, in general terms, that the Charter imposes on states an obligation of result, leaving them to choose the means by which they give effect to the resolutions.[11] Interestingly enough, what the Court seems to require from states parties is more of an *obligation of diligence*, namely that the state does not rely on the binding nature of the SC resolutions, but adopt measures or, even less, just prove that it attempted to adopt measures in order to *adapt* the sanctions regime to each individual situation,[12] and in this way alleviate the human rights impact. In other words, states have a *duty to harmonise* obligations that they regard divergent.

As mentioned already, in the interpretation of the UNSC resolutions the ECtHR developed a *presumption* that those resolutions do not create rights and obligations that are incompatible with those undertaken by the member state in the domain of human rights. In spite of not being defined as an absolute presumption, the threshold for its rebuttal is high, namely only “clear and explicit”

[10] UN Doc A/CN.4/L.682 (13 April 2006), para 37.
[11] *Nada*, § 176.
[12] *Idem* §196.

language might overturn the presumption, vague, ambiguous or implicit terms not having that effect.[13]

What reasons for violations in the Nada case?

In the *Nada* case, the Court found that Switzerland enjoyed a certain margin of appreciation, albeit limited, in implementing the relevant binding UNSC resolution. Based on this, the Court assessed that Switzerland should have made recourse to alternative measures in implementing the restrictive measures imposed against Mr Nada that would have caused less damage to his fundamental human rights.

In particular, Switzerland could (and should) have adopted a proactive attitude towards the Sanctions Committee,

- by informing it of the findings in the investigations and criminal proceedings, thus limiting the period of time in which Mr Nada was subjected to the restrictions of his rights under Art 8 of the ECHR (right to private and family life). Therefore the Court does not contest the legality of the restrictive measures imposed against Mr Nada which affected the enjoyment of his rights under Art 8 of the ECHR, but it sanctioned the lack of action on the part of Switzerland which prolonged the restrictions beyond what was necessary.
- by requesting it to grant a broader exemption to Mr Nada in view of his particular situation. Specifically, it was considered as a somewhat aggravating factor that Mr Nada was living in an Italian enclave which he was forbidden to leave due to the travel ban imposed against him by the UNSC resolution; this circumstance made the restrictive regime even harsher than what was envisaged through the UNSC resolution resulting in a disproportionate interference with Mr Nada's right to respect for his private and family life which was not necessary in a democratic society.

In this case in particular and against the mentioned findings the Court assessed the legality of the measures adopted by the Swiss authorities in the implementation of a UNSC resolution in relation to a substantive right (protected under Art. 8) and held Switzerland accountable. The Court did not find further that the refusal of the Swiss authorities to grant him entry in Switzerland even for transit to Italy were in violation of Art. 5 of the ECHR (right to liberty and security), basically on the argument that Switzerland has, under international law, *the right* to prevent the entry of an alien.[14]

In what concerns the procedural rights, the ECtHR found a violation of Art. 13 (right to an effective remedy), by applying the "clear and explicit" language test and concluding that there was nothing

[13] *Al-Jedda*, § 102; Sicilianos (n 7) p. 800.
[14] *Nada,* § 229.

in the UNSC resolution to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to the resolution.[15]

What reasons for violations in the Al-Dulimi case?

The issue raised in the context of this case was whether the Swiss authorities violated Art. 6 para. 1 of the ECHR in the context of the implementation of the obligations imposed by UNSC Resolution 1483 (2003) in relation to the situation in Iraq. No question in relation to the protection of substantive rights under the Convention was raised. The Court accepted that the Swiss Federal Court was not able to rule on the merits of the appropriateness of the measures entailed by the listing of the applicants, but in a way contested that there was no margin of appreciation available to Switzerland in the implementation of UNSC Resolution 1483.[16]

However, applying subsequently the "clear and explicit" language test corroborated with the *seriousness of the consequences* for the Convention rights of the measures imposed under UNSC Resolution 1483 the Court determined that in absence of "any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorizing the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided".[17] Allowing scrutiny for the purposes of avoiding arbitrariness (thus, just a limited scope for judicial review), the Court considers that it found the right balance "between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security".[18]

The Court precisely defines the scope of Art. 6 para. 1 of the Convention in the context of implementing UNSC resolutions imposing sanctions by stating that "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".[19] This implies that states (even if not members of the UNSC) are responsible for listing individuals and they are accountable for their actions before the national jurisdictions. Hence, national jurisdictions retain *ratione materiae* jurisdiction in these situations.

The decision in *Al-Dulimi* raises this particular question as to the effect of the judicial scrutiny on the enlisting of an individual or legal person on the UNSC sanctioning list as the Court considers that the individuals must be 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

[15] *Idem* § 212.
[16] *Al-Dulimi* [GC], § 154, where the Court suggests that the measures adopted by the Swiss authorities reflect that Resolution 1483 could be applied with a certain degree of flexibility.
[17] *Idem* § 146.
[18] *Idem*.
[19] *Idem* § 147.

had been arbitrary".[20] Such a requirement apparently contradicts the findings of the Court in the same case as to the lack of the margin of appreciation of the states parties in implementing UNSC Resolution 1483 or to the very duty to apply harmoniously the apparently diverging international obligations, as the UNSC resolutions are not subject to revision on merits by the national judicial authorities.

Moreover, the Court could only have determined this necessity of examination on merits by implicitly[21] applying the *equivalent protection* test, although it explicitly rejected its application as useless.

Final considerations

In the face of these findings, one might wonder whether the Court does not ask for the right to access to justice to be acknowledged as a simple formality since any findings of a national jurisdiction could not as such impact (at least not directly) on the listing of an individual on a UN sanctions list.

I say at least not directly because, if we are to follow the rationale of the Court in the *Nada* case, once proved non-guilty (and thus, that there is no basis for the listing), the state has the duty of diligence and must take action to inform the UNSC and the established relevant mechanisms of such findings and determinations. Although it might not lead to delisting, the state fulfills the requirements of diligence, which seem to satisfy the Court in the assessment of compliance with Convention obligations.

I would just conclude that the Court seems not to be satisfied that states parties limit themselves to invoking the binding nature of obligations under the UN Charter (as the UNSC resolutions generally are), but requests them to manifest diligence – an obligation of conduct not of result – in ensuring that the individual rights of listed persons within their jurisdiction (persons affected seriously by the administrative measures imposed at UN level by the SC) are protected at all times.

Eventually this is the red line for the Court: *A state cannot simply do nothing*.

Looking at the sanctions system as developed by the UN and analysing specifically their purpose and aim (the two sanctions regimes are based on Chapter VII which mandates the UNSC to take measures for *maintaining peace and security*), it is evident that they did not foresee any kind of due process guarantees and left member states with no margin of appreciation in their implementation. The attainment of such an aim could be almost impossible if such due process guarantees were provided at domestic level, since it would lead to a fragmented application of the

[20] *Idem* § 151.
[21] As a matter of fact, in § 153 the Court extensively criticises the focal point system functioning at the UN level as being far from able to replace appropriate judicial scrutiny at the level of the respondent State or even partially compensate for the lack of such scrutiny.

sanctions measures.[22] One must not forget that we speak about global sanctioning systems and not about regional or national autonomous sanctioning measures (as for instance we see at the EU level).

The point the Court makes in the context of its sanctions-related jurisprudence is that human rights are inherent in the human being irrespective of the wrongdoing and that the individual cannot arbitrarily be deprived of these rights. It does not say that the incident rights are absolute, but that given the seriousness of the consequences of the sanctioning measures on the exercise of certain human rights, some mechanism of protection and some guarantees are necessary.

In any case, in order to ensure that the effectiveness of the sanctioning system is maintained, perhaps one way ahead would be to design at UN level a solid and comprehensive mechanism of human rights protection that would be generally applicable in the context of the implementation of all individual sanctioning regimes.

Coming from a state that is a member of the UN, of the Council of Europe and of the European Union, I remark with enthusiasm the concurring opinions between the ECHR and the CJEU expressed in cases concerning individual sanctioning regimes. This enthusiasm is beyond the possible critical points on the merits, reflecting essentially a selfish thought, that at least one possible conflict was avoided – in between the EU and the Council of Europe. And this even in spite of EU not being yet a party to the European Convention on Human Rights.

[22] Hollenberg S., The Diverging Approaches of the European Court of Human Rights in the Cases of Nada and Al-Dulimi, 64 INT'I&COM. L.Q. 445(2015), p. 456.