Elena LAZĂR

The impact of Security Council's resolutions in the jurisprudence of the ECHR

I. Introduction

Relationships between Security Council resolutions and other international treaties have undergone different conceptualizations in EU and ECHR case law[1]: some of them relate to the monist concept according to which SC resolutions are at the top of a hierarchy of norms, as provided by Article 103 of the UN Charter, so that their provisions prevail over any other treaty, irrespective of their human rights content .Arguing differently would allow a regional court – for example the European Court of Human Rights – «to interfere with the fulfillment of the UN's key mission to secure international peace and security» Thus the responsibility of a state implementing a SC resolution cannot arise from a human rights treaty like the ECvHR, signed by a member state. Other concepts claim that the measures implementing SC resolutions are not immune from judicial review when the resolution at hand is suspected to come in conflict with *jus cogens* norms that also constrain UN institutions.

II. The Jurisprudence of the Court in Strasbourg regarding United Nations Security Council (UNSC) resolutions

In the decisions recently delivered by the European Court of Human Rights *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*, there emerges a clear tendency to guarantee the primacy of decisions of the United Nations Security Council (SC) – under Chapter VII of the UN Charter. Thus the Grand Chamber of the ECHR in Strasbourg refused to verify a resolution of the UNSC. The main reason invoked, that also led to this solution and that represents the relevant difference to the Al-Dulimi[2] (that will be presented later on) case is the lack of rationae personae competence of the Court. In this case, the Court appreciated that the claimed facts (by the first applicant, the failure of France to clear field mines; by the second applicant, the illegal arrest) were committed by the defendant states on behalf of the UN, particularly by its special forces KFOR[3] and UNMIK[4], established by

[1] *A. Guazzaroti*, Security Council Resolutions before European Courts: The Elusive Virtue of Non Direct Effect, Perspectives on Federalism, Vol. 4, issue 3, 2012.

[2] ECHR, *Al. Dulimi v. Switzerland*, 5809/08, 26 November 2013.

[3] „Kosovo Forces" are a military force led by NATO with the purpose of maintaining peace and peaceful surroundings in Kosovo. The forces were under UN administration after the Kosovo war.

KFOR were established in 12 June 1999 and entered Kosovo after a mandate of solely two days at the UN after passing Resolution 1244 of the UNSC.

[4] The Interim Administration Mission of the United Nations in Kosovo represents the interim civil administration in Kosovo, under the authority of the UN. The mission was established on 10 June 1999 by Resolution no. 1244 of UNSC.

Resolution 1244 (1999). Therefore, considering that both missions were created and performing the duties delegated by the UNSC based on Chapter VII of the UN Charter, the impugned acts and omissions were imputed to the UN. However, since the UN has its own legal personality, different from its member states', and is not a party to the Convention, the Court rejected the claims, invoking the lack of personal competence. Moreover, the Court insists on the importance of the UN mission in the issue, which is to maintain international peace and security, mentioning: "operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and they rely for their effectiveness on support from member states. Therefore, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which (…) occur prior to or in the course of such missions"; to do so would mean "to interfere with the fulfillment of the UN's key mission in this field[5]".

In the opinion of certain authors of international law, the decision of the Court in the case of *Behrami* is "realistic", nominating the true responsible for the impugned acts – the UNSC. "Without looking for a refuge behind the abstract veil of a regional legal order", the European judges seem to identify the true difficulty of the case, namely to conciliate the respect for fundamental human rights with the imperative scope of maintaining peace[6]".

Another cause raising the issue of conflict between obligations imposed to a state by the UN Charter and the ones resulting from the EConvHR is *Al-Jedda v. Great Britain*[7]. The British Government, as defendant, argued for the impugned measure of detaining the Iraqi citizen Al-Jedda as the need to comply with obligations resulting from Resolution no. 1546 (2004). These obligations have priority over the EConvHR, according to art. 103 of the Charter. Nevertheless, the Court states that incarceration was not expressly provided by the invoked Resolution. The expressions used in the Resolutions granted member states the freedom to choose between the means necessary to secure stability and security in Iraq. However, "in the absence of a contrary indication that is clear and explicit, measures adopted by the UN impose for member states the obligations to act according to the rules protecting fundamental human rights". Thus, Resolution 1546 (2004) does not impose any obligation on the British state to incarcerate the applicant, which led to the conclusion there is no conflict between obligations of the UN Charter and art. 5, par. (1) of EConvHR, referring to the right to liberty and security.

We thus observe that European judges applied the same argument in both cases, Behrami and Al-Jedda. In the first scrutinized case, the first part of the argument on the Court's rationae personae competence has been invalidated, which led to the inadmissibility decision. In the second part of the argument of the second case, the Court ascertained discretionary powers of states when applying the UNSC resolution. Consequently, according to the principles stated in the Bosphorus case, the responsibility is fully borne by states, while the Court proceeded to a regular verification of the impugned measure. Given all these factors, it is puzzling that the *Al-Jedda* judgment does not simply attribute the act to the United Kingdom based solely on the concept of effective control. The Strasbourg Court concluded that, in contrast to the case of *Behrami* and *Saramati*, the internment of the applicant was not

[5] ECHR, *Behrami v. France*, 71412/01, 2 May 2007 § 149.

[6] M. Forteau, La CJCE et la Cour europeenne des droits de I'Homme face a la question de I'articulation du droit europeen et du droit des Nations unies. Quelques remarques iconoclastes, op. cit., p. 400.

[7] ECHR, *Al-Jedda v. Great Britain,* 27021/08, 7 July 2011.

attributable to the United Nations, who exercised "neither effective control nor ultimate authority and control[8]"over the acts or omissions of the troops of the Multinational Force. So, the interment was exclusively attributable to the United Kingdom, under whose jurisdiction Mr Al-Jedda was held during the period of his detention. In fact, in the opinion of the Grand Chamber, in contrast to what had occurred in Kosovo, the invasion of Iraq by US and British troops took place without any authorization from the Security Council and nothing in the subsequent resolutions would indicate an assumption of substitute powers of the occupying powers/Coalition Provisional Authority (CPA) by the United Nations. The decision is undoubtedly valuable for the explicit reference to the necessity of interpreting the resolutions of the Security Council in a way that "complies" with international human rights law, suggesting that respect for international law represents a limit to the action of the Security Council and its resolutions.

However, for the first time the Court established the principle that was reaffirmed afterwards in the case Nada v. Switzerland[9]. According to the Court in Strasbourg, when the construal of a UNSC resolution is necessary, the "presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights" applies[10]. In case of ambiguities when interpreting the extent of obligations arisen from resolutions, the Court shall offer an interpretation that makes them compatible with the Convention and which "avoids any conflict of obligations". The UNSC is expected to use "clear and explicit language [when it] (…) intends States to take particular measures which would be in conflict with their obligations under international human rights law"[11].

However, in the case Nada v. Switzerland, the provisions of Resolution 1390 (2002) expressly requested states to prevent entering and transiting their territory by persons whose name was on the lists of the UN. Thus, the presumption formulated in the Al-Jedda decision was overthrown "considering the "clear and explicit language" imposing on states specific measures that might conflict with their other international obligations". Once again, the Court avoids examining the four stages of the equivalent protection "test", stopping at the second: the margin of appreciation of states in implementing the UNSC decisions. In this regard, the Court stated that "Switzerland had a certain margin, of course restricted, but still existent, in the implementation of the relevant and mandatory resolutions[12]". The Court applies mutatis mutandis the ECJ solution in the case of Kadi I, arguing that the Charter of the United Nations "leaves the members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.[13]" Moreover, the resolution in issue does not hinder Swiss authorities in establishing verification mechanisms for domestic transposition measures. Thus, analyzing their proportionality in the context of the appreciation margin of domestic institutions, the Court ascertained that the latter did not take and did not attempt to take all possible measures in order to adjust the sanctions to the applicant's situation. This resulted in a violation of the applicant's right to respect for private and family life (art. 8 EConvHR).

---

[8] ECHR, *Al-Jedda v. Great Britain*, §85.
[9] ECHR, *Nada v. Switzerland*, 10593/08, 12 September 2012.
[10] *Al-Jedda v. Great Britain*, §. 102.
[11] Ibidem.
[12] *Nada v. Switzerland*, § 180.
[13] *Nada v. Switzerland*, § 176.

The European judges use mutatis mutandis the ECJ's argument in the case Kadi I, according to which the UN Charter law does not prohibit the legality check of an act of the legal order at community level solely because the respective act implements a UNSC resolution. Thus, the ECHR considers this to be applicable also for the conformity check of the Swiss national act with EConvHR.

Moreover, until the Al-Dulimi case, the Court avoided to refer to the pre-eminence of art. 103 of the UN Charter by using "harmonization methods"[14]. This does in no way guarantee the prevalence of sanctions imposed by UNSC before the European judges; the latter have solely drawn attention to the fact that applying UNSC resolutions at national level does not hinder national judges from verifying the implementation of such measures[15].

The Al-Dulimi decision pronounced by the European Court of Human Rights on 26 November 2013 focuses on the articulation of the legal system created by the United Nations with the system of The European Convention Human Rights (ECHR). However, we must point out that Al-Dulimi Decision is not final. The decision was appealed by the Swiss government and sent to the Grand Chamber on the 14 April 2014 to pronounce a decision. The case concerns an Iraqi citizen, Al-Dulimi, residing in Jordan and Managing Director of the Montana Company registered in Panama. In 2003, under resolution 1483 (2003) of the Security Council of the United Nations, Al-Dulimi and Panama society were enrolled by the Sanctions Committee on the list of persons and entities associated with the former Iraqi regime and thus affected by the freezing of funds. Switzerland's Federal Council adopted the necessary measures for the implementation of the SC resolutions regarding the freezing of the financial resources of the former Iraqi government. In addition the funds held by Al-Dulimi and Montana Management in Switzerland were frozen and were subject to confiscation, under the ordinance adopted by the Federal Council of Switzerland. The two have made an application in order to be delisted from the lists of Swiss authorities. The latter ordered the confiscation of the economic resources of mister Al-Dulimi and Montana company, noting that their names could not radiated without Sanction Committee's decision in this regard; authorities have reasoned this decision explaining that the name of the citizen and of the company appeared on lists drawn up by the Sanctions Committee and Swiss is obliged to apply SC resolutions. Al-Dulimi notified the Federal Court for the cancellation of this decision, but the request was rejected. The national court has held that she is not competent to achieve effective judicial control over the national measures implementing the SC resolutions. According to internal judges, this is justified by the high hierarchical position SC resolution occupy, by virtue of Article 103 of the UN Charter, including over the obligations arising from ECHR.

In these circumstances, the two plaintiffs alleged the violation the right to a fair trial by the Swiss authorities in front of the European Court of Human Rights. The Court found a violation of Art. 6 parag. (1) ECHR condemning the jurisdictional immunity that the Swiss authorities gave it to an internal act implementing the resolutions of the SC, given that in the UN legal order, there are no mechanisms to ensure a comparable protection of human rights to the one that Switzerland should have guaranteed under the Convention.

---

[14] A. Willems, The European Court of Human Rights on the UN individual counter-terrorist sanctions regime : safeguarding Convention rights and harmonizing conflicting norms in *Nada v. Switzerland*, in Nordic journal of international law, Vol. 83, no. 1, 2014, p. 56.

[15] Ibidem.

In the merits, the ECtHR first emphasized, as already in *Nada*, that the apparently conflicting obligations arising from the UN Charter on the one hand, and the ECHR on the other hand, must be as far as possible harmonized and reconciled (§111).

Secondly, the ECtHR repeated the *Bosphorus*-presumption: States' measures implementing obligations arising out of their membership in an international organization like the UN can be presumed to be in conformity with the ECHR, but only if the organization guarantees an "equivalent protection" to human rights as the Convention itself (§114). However, the state remains fully responsible if it takes measures which are not strictly required by the international organization, notably when it enjoys a leeway and has exercised discretion [16]

Thirdly, the Strasburg Court found that the Iraq sanction regime, even after the establishment of a focal point, did not offer equivalent protection to the ECHR (§118). It referred to the UN special rapporteur on the protection of human rights in combatting terrorism which had found even that the 1267-regime with its ombudsperson procedure fails to satisfy minimal international human right guarantees.

Thus, we appreciate the main contribution of Al-Dulimi decision consists in the application by the ECHR of the principle of equivalent protection with regard to the UN system. The Court established this principle in Bosphorus case, where the European judges have applied the theory of equivalent protection in regard with the Community legal system. This case treats the international cooperation between the European Convention of Human Rights and the European Union system and its problematic possibility of reviewing the Community acts by the Strasbourg Court.

In *Bosphorus*[17] case, we find ourselves again in the presence of the SC resolutions, setting in this case a collective economic sanction, more precisely an embargo on the aircraft that came from Serbia, in the context of the Yugoslavian wars of the 1990s. Later, the SC resolution was implemented at the EU level through an European regulation. A company of Turkish origin, Bosphorus, bought an aircraft from Serbia and subsequently sent it to Ireland where the company Air Lingus had to undertake a series of repairs thereof. Irish authorities have prevented the return of the aircraft to Turkey, citing the European regulation regarding the embargo measures for the aircrafts coming from Serbia. The Turkish company notified the Irish courts, without success though, the Irish judges considering that the decision was justified, the national authorities having only accomplished their duties in conformity to the Community obligations. After exhausting the domestic remedies, the applicant came before the Strasbourg court, alleging the violation of the right to respect of the property. The Irish Government argued that the impugned measure was taken in order to meet the Community obligations, which thus constitutes a legitimate aim justifying the interference with the exercise of the fundamental right to property.

The present case provided the ECtHR with an opportunity to define its role regarding the review of Community acts more systematically, introducing a new theory for justifying the interference with human rights by Member States when applying Community acts. The Court had always emphasized that it is sufficient in abstracto that an act has been adopted by an international organization that provides an equivalent standard of human rights protection compared to the ECHR. In the *Bosphorus* judgment, the Court applied a more concrete test to

---

[16] *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?, in EJIL, 4 December 2013.

[17] ECHR, *Bosphorus v. Ireland* 45036/98, 30 June 2005, § 153.

conclude to the general equivalence of human rights protection at Community level by reviewing the Community's substantive guarantees and procedural mechanisms. Thus, on the one hand, the ECtHR clarified its ambition to examine the specific circumstances of future cases in order to effectively review potential shortcomings in the protection of human rights at Community level. On the other hand, this also indicates that the Court will not fully review Community acts, but rather engage in a general abstract review of the Community system. With the *Bosphorus* judgment, the ECtHR confirmed its former case law that it has no competence to review Community acts as such. But the Court recognizes a competence to review these acts indirectly through examining specific implementation measures at national level. The Strasbourg jurisdiction thus held that the Contracting Parties to the ECHR are not prohibited from transferring sovereign powers to an international organization but that they remain responsible for all acts and omissions of their organs „regardless whether the act or omission was a consequence of domestic law or of the necessity to comply with international legal obligations[18]. The Court went on to state that as long as the international organization „is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides[19] the Court will presume that a State has acted in compliance with the Convention, where the state had no discretion in implementing the legal obligations flowing from its membership of the organization.

Coming back to Al- Dulimi's case, the ECtHR position regarding the leeway of states when implementing UNSC decisions has challenged criticism. Moreover, such criticism has been already expressed in judges' concurrent opinions. Judges Bratza, Yudkivska and Nicolaou consider that the states in question did not benefit from any margin of appreciation, as Switzerland did not have the possibility to choose whether or not to uphold restrictive measures imposed against persons whose name were on the Committee list for sanctions. On the other hand, the concurring opinion of Judge Malinverni anticipates the first instance decision in the case Al-Dulimi and Montana Managemen. As already mentioned at the beginning, the ECHR considered in the Al-Dulimi and Montana Management v. Switzerland case that the right to a fair trial, guaranteed by the Convention, was violated. Even if Switzerland followed a legitimate scope – securing peace and collective security by applying the UNSC decision adopted in this respect, the Court's opinion was that the restrictive measures enforced against the applicants were disproportional, since there was no actual jurisdictional verification carried out by the UN or by the national system. The Court had two possible solutions at hand: either to refer to the coordination mechanism set out in art. 103 of the UN Charter, or to apply its traditional doctrine of equivalent protection. The first option would involve the "consideration of a strict hierarchical criterion, which would ensure the decisive and radical primate of the obligations imposed by UNSC". The second solution for incompatible obligations would be to examine the protection of fundamental human rights within the onus system[20.]

---

[18] ECHR, *Bosphorus v Ireland* 45036/98, 30 June 2005, § 153.

[19] Ibidem, § 156.

[20] *G. Palombella*, The principled, and winding, road to Al-Dulimi. Interpreting the interpreters, in Questions of International Law, 31 July 2014, p. 27, available *at* (*http://www.qil-qdi.org/the-principled-and-winding-road-to-al-dulimi-interpreting-the-interpreters/*), visited in February 2015.

Conclusions

To conclude, we cannot deny the role the European Court played in clarifying that UN Security Council resolutions have to be interpreted in a way that implies their compatibility with human rights. From this presumption we may observe though an exception: if the text of the resolution itself clearly and explicitly requires the adoption of acts in violation of those rights, potential violations of human rights by invoking art.103 and the cover of binding resolutions of the Security Council, may be invoked, but even this option seems greatly restricted. Furthermore, it extends the possibility for the European Court and, hopefully, international courts in general, to exercise widespread control over the acts of implementation of these types of resolutions. We would also like to emphasize again the importance of the evolution noted in the case law of the EctHR, that rejected the criteria proposed in the Behrami and Saramati cases, criteria that proved to be not helpful from the viewpoint of human rights protection because it tends to remove any responsibility from states who act in peacekeeping contexts and who should be the first to respect human rights.