

THE NADA CASE BEFORE THE ECTHR: A NEW MILESTONE IN THE EUROPEAN DEBATE ON SECURITY COUNCIL TARGETED SANCTIONS AND HUMAN RIGHTS OBLIGATIONS

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Summary: UN sanctions have been widely used in the last few decades, raising a number of legal questions, particularly since they have been imposed on targeted individuals. Listed people have indeed complained of human rights violations and of the unavailability of effective remedies.

The case examined here is that of Mr Nada, a man listed under Resolution 1267 of the sanctions regime in 2001, and who was consequently subjected to a travel ban and a freezing of assets. The Swiss Federal Court took a traditional position by judging in 2007 that Switzerland, by implementing Security Council resolutions, did not violate Mr Nada's human rights. The European Court of Human Rights (ECtHR) took a different approach, continuing the trend of several international courts which have taken more progressive stances on similar questions in order to protect the human rights of listed people. By reviewing the national implementation of targeted sanctions and examining ways to harmonise obligations under different regimes, the ECtHR both protected human rights and strengthened a workable method to deal with fragmentation.

1. Introduction

Measures of a non-military nature have been widely used by the United Nations (UN) in the last 20 years against states or more recently against individuals who are allegedly threats to international peace and security. These sanctions have been the source of many debates, for example with regards to their humanitarian consequences,¹ their efficien-

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¹ See for example Marc Bossuyt, 'The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights' (2000) Working Paper prepared for the Sub-Commission on the Promotion and Protection of Human Rights, ECOSOC, 52nd Session of the Sub-Commission on the Promotion and Protection of Human Rights (21 June 2000) E/CN.4/Sub.2/2000/33; Jean Drèze and Haris Gazdar, 'Hunger and Poverty in Iraq, 1991' (1992) 20 World Development 921.

cy,² the legislative powers of the Security Council (UNSC),³ or their effects on the civil liberties of the targeted individuals.⁴ Listed people have indeed complained of human rights violations and of the unavailability of effective remedies. National and regional courts, as well as human rights bodies, have had to deal with such cases.

The case examined here is that of Mr Nada, a man listed under the UNSC resolution 1267 sanctions regime in 2001, and who was consequently subjected to a travel ban and a freezing of his assets. Over the years, Mr Nada took administrative and legal actions to challenge the listing and the measures applied against him, but without success, until he was finally delisted by the UNSC Sanctions Committee in 2009. In 2007, the Swiss Federal Court judged that Switzerland had not violated Mr Nada's human rights. In 2008, Mr Nada brought a case to the European Court of Human Rights (hereinafter ECtHR or the Court), a case which was heard before the Grand Chamber in March 2011. The judgment was issued in September 2012.

Recently, courts have taken a more progressive stance than the Swiss Federal Court did in the case of Mr Nada. Indeed, the European Court of Justice (ECJ) in the *Kadi* case,⁵ the Canadian Federal Court in the *Abdelrazik* case,⁶ the Human Rights Committee (HRC) in the *Vinck and Sayadi v Belgium* case⁷ and the ECtHR in the *Al-Jedda* case⁸ agreed to review the substance of the alleged breaches and concluded on the existence of human rights violations. In view of this jurisprudential tendency, but taking into account the particulars of the present case, it is interesting to analyse the approach followed by the ECtHR and to examine the conclusions it reached. To do so, the present article starts by

² See for example Kimberly Ann Elliott, 'The Sanctions Glass: Half Full or Completely Empty?' (1998) 23 *International Security* 50; Robert A Pape, 'Why Economic Sanctions Do Not Work' (1997) 22 *International Security* 90.

³ This is a major issue with regards to UNSC Res 1373 (28 September 2001) but not for the case studied here which is based on UNSC Res 1267 (15 October 1999). See for example Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' (2003) 16 *LJIL* 593; Paul C Szasz, 'The Security Council Starts Legislating' (2002) 96 *AJIL* 901.

⁴ Steven Dewulf and Didier Pacqu e, 'Protecting Human Rights in the War on Terror: Challenging the Sanctions Regime Originating from Resolution 1267 (1999)' (2006) 24 *NQHR* 607, 608.

⁵ 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* [2008] ECR I-06351 (ECJ, *Kadi*).

⁶ *Abousfian Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada* (4 June 2009) 2009 FC 580 (Federal Court of Canada).

⁷ *Nabil Sayadi and Patricia Vinck v Belgium*, Communication No1472/2006 (22 October 2008) (Human Rights Committee).

⁸ *Al-Jedda v UK* App no 27021/08 (ECHR 7 July 2011).

introducing the UNSC sanctions regime, the general facts of the *Nada* case and the conclusions of the Swiss Federal Court (2). Then, the approaches open to the Court to find itself competent are presented before the one preferred here is examined (3). In a third part, the infringements of human rights at stake are considered (4). To conclude, the importance of this judgment, the first one where targeted sanctions were brought under the scrutiny of the ECtHR, is highlighted, as it represents a milestone in the methodology to balance conflicting obligations and confirms that the ECtHR is moving away, as already witnessed in *Al-Jedda*, from total deference to the UNSC (5).

2. Framework

A. UNSC sanctions

1. Introduction to the sanctions regimes

By virtue of article 41 of the United Nations Charter (UNC), the UNSC can take any measure not involving recourse to armed force to react to threats to peace, breaches to peace and acts of aggression. Such measures include, non-exhaustively, 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations'.⁹ Other pressure mechanisms have been developed, such as arms embargoes, the reduction or severance of diplomatic relations, the freezing of assets, or travel bans.¹⁰

Over time, sanctions have been taken against a number of states,¹¹ specific individuals belonging to governmental circles of states¹² and, more recently, people suspected of involvement in terrorism.¹³ As the UNSC has declared that international terrorism is a threat to international peace

⁹ Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 41; Terry D Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (1995) 26 NYIL 33, 48-50; Bibi van Ginkel, *The Practice of the UN in Combating Terrorism from 1946 to 2008: Question of Legality and Legitimacy* (Intersentia 2010) 110-114.

¹⁰ Vera Gowlland-Debbas, 'Sanctions Regimes under Article 41 of the UN Charter' in Vera Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study* (Nijhoff 2004) 3, 6-7.

¹¹ On sanctions regimes against states, see for example Gowlland-Debbas (n 10) 7-8.

¹² On sanctions regimes against states' officials, see for example Alain Tehindrazanarivelo, 'Le droit des Nations Unies et les limites au pouvoir de sanction du Conseil de sécurité' in Laura Picchio Forlati and Linos-Alexandre Sicilianos (eds), *Les sanctions économiques en droit international - Académie de Droit International de la Haye* (Nijhoff 2004) 211, 257.

¹³ Tehindrazanarivelo (n 12) 256.

and security,¹⁴ its actions towards suppressing it fall under Chapter VII and are consequently mandatory for all states parties to the UN.¹⁵

2. (De)listing procedures

The sanctions regime examined here was created by UNSC resolution 1267, adopted in 1999 in response *inter alia* to the continued safe haven offered by the Taliban to Bin Laden and to the attacks on American embassies in Tanzania and Kenya.¹⁶ It was strengthened and modified by several subsequent UNSC resolutions, particularly resolutions 1333 and 1390. It targets Al-Qaida and the Taliban as well as associated individuals and entities, originally based in Afghanistan, but now also wherever they are located.¹⁷ The sanctions include the freezing of assets and travel bans.¹⁸

These restrictions target all individuals and entities placed on the 'consolidated list' by a Sanctions Committee created under the UNSC resolution and responsible for maintaining this list.¹⁹ The fifteen members of the UNSC sit on this Sanctions Committee and are empowered to determine who is to be blacklisted on the basis of nominations by any state party to the UN.²⁰ Guidelines published at the request of the UNSC²¹ confirm the discretionary power of the Sanctions Committee: no criteria are provided to clarify on which basis the listing and delisting decisions are made.²² Ending up on a list is surprisingly easy: following nomination by a state of a person or entity, listing occurs if no state sitting on

¹⁴ In UNSC Res 1189 (13 August 1998), the UNSC was 'convinced that the suppression of acts of international terrorism is essential for the maintenance of international peace and security', which it reaffirmed in UNSC Res 1267 (1999).

¹⁵ Charter of the United Nations arts 25 and 48.

¹⁶ UNSC Res 1267 (1999) Preamble; Dewulf and Pacquée (n 4) 611; Yvonne Terlingen, 'The United States and the UN's Targeted Sanctions of Suspected Terrorists: What Role for Human Rights?' (2010) 24 *Ethics & International Affairs* 1, 2.

¹⁷ Noah Birkhäuser, 'Sanctions of the Security Council Against Individuals: Some Human Rights Problems' 5 <<http://www.statewatch.org/terrorlists/docs/Birkhauser.PDF>> accessed 28 September 2012; Dewulf and Pacquée (n 4) 611-613; Gowlland-Debbas (n 10) 15. '[A]ssociated with' was clarified in UNSC Res 1617 (29 July 2005) para 2 with a very full definition.

¹⁸ UNSC Res 1267 (1999) para 4; UNSC Res 1333 (19 December 2000) para 8c; UNSC Res 1390 (28 January 2002) para 2a for assets freezing; UNSC Res 1390 (2002) para 2b for the travel ban.

¹⁹ UNSC Res 1267 (1999) para 6; UNSC Res 1333 (2000) paras 8c and 16b.

²⁰ Terlingen (n 16) 2.

²¹ UNSC request found in UNSC Res 1390 (2002) para 5d; Guidelines to the Committee for the Conduct of its Work, adopted on 7 November 2002 and last amended 26 January 2011.

²² Ginkel (n 9) 240; Gowlland-Debbas (n 10) 18.

the Sanctions Committee challenges it within a short period of time.²³ Nomination is based on intelligence reports containing sometimes vague suspicions rather than proofs.²⁴ Detailed reasons which have led to a listing do not have to be publicised - outside a 'narrative description' of reasons when possible.²⁵

As for delisting, consensus between all states members of the Sanctions Committee and agreement of the nominating state are needed.²⁶ No reason is required to justify disagreement with such removal. Until recently, the only way for listed people to challenge the measures imposed on them was to ask their state of nationality or residence to represent them before the Sanctions Committee, which no state was obliged to do. The creation of a Focal Point²⁷ and later the appointment of an Ombudsperson²⁸ now allow people to start a procedure in their own name. A review of all names was to take place by 30 June 2010 and since then a regular review has been required.²⁹

B. Facts of the Nada case

Mr Nada, an Egyptian-Italian national, was subjected to targeted sanctions from November 2001, when he was added to the consolidated list,³⁰ to March 2010, when removed. During that time, he lived in an Italian enclave within Swiss territory and was not allowed to move from that municipality. Indeed, Switzerland, implementing UNSC resolution 1390, refused to allow Mr Nada to enter into or transit through its territory, at least from October 2003 - it had not revoked Mr Nada's permit before that time. His bank accounts and assets were also frozen, in accordance with resolutions 1333 and 1390. Swiss implementation took place through an executive order (the Swiss ordinance).³¹

²³ Iain Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72 *Nordic Journal of International Law* 159, 166.

²⁴ Intelligence reports have sometimes been criticised for their lack of substance. See Cameron (n 23) 168; Dewulf and Pacquée (n 4) 620.

²⁵ Guidelines (n 21) para 6b; UNSC Res 1822 (30 June 2008) para 12; Dewulf and Pacquée (n 4) 620.

²⁶ Terlingen (n 16) 3.

²⁷ Created under UNSC Res 1730 (19 December 2006).

²⁸ UNSC Res 1904 (19 December 2009) paras 20-27.

²⁹ UNSC Res 1822 (2008) paras 25-26; UNSC Res 1904 (2009) para 32.

³⁰ UN Press Release, 'Security Council Committee Concerning Afghanistan issues further addendum' (9 November 2001) AFG/163 SC/7206.

³¹ 'Ordonnance instituant des mesures à l'encontre de personnes et entités liées à Ousama ben Laden, au groupe 'Al Qaida' ou aux Taliban' (2 October 2000) (Swiss ordinance) arts 3 and 4(a). It was enacted first on the basis of art 184 of the Constitution (Mathias-Charles Krafft, Daniel Thürer and Julie-Antoinette Stadelhofer, 'National Studies - Switzer-

Exemptions for judicial reasons or, with agreement from the Sanctions Committee, for medical, humanitarian or religious reasons, were planned in the relevant resolutions³² and were included in the Swiss ordinance.³³ The federal office of migrations granted exemptions for judicial procedures on two of the six occasions requested. Mr Nada did not use them because, according to him, they were too short for a man of his age to take the trips and he would have risked not respecting the prescribed time allowance.³⁴

The investigation undertaken by the prosecutor's office of the Swiss Confederation closed in 2005, with nothing found to charge Mr Nada of supporting a criminal organisation. Italy also started and closed an investigation for similar reasons.³⁵ However, this did not change his status as a blacklisted person, nor consequently the sanctions applied to him.³⁶ He unsuccessfully requested delisting and the lifting of sanctions at both national and international levels.³⁷ His name was finally removed from the international list in 2009 without any reason given, and also, shortly after, from the Swiss ordinance.³⁸

Mr Nada's last request to the Swiss Federal Council to be delisted was transferred to the Swiss Federal Court which issued its judgment in November 2007, rejecting Mr Nada's claim on the basis of a three-fold argumentation line. First, Switzerland, as a party of the UN, is bound to implement UNSC resolutions; in case of conflict of rules, this obligation takes precedence over others. Second, the only exception would be if

land' in Vera Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study* (Nijhoff 2004) 523, 531-532) and then of 'Loi fédérale sur l'application de sanctions internationales' (Loi sur les embargos, LEmb) (22 March 2002, état le 27 July 2004) 946.231).

³² UNSC Res 1267 (1999) para 4b for exemptions to assets freezing on humanitarian grounds; UNSC Res 1390 (2002) para 2b for exemptions to travel ban on judicial grounds or others, decided on a case-by-case basis by the Sanctions Committee.

³³ According to art 4(a) al 2 of the Swiss ordinance (n 31), the federal office of migrations can grant exemptions for judicial procedures.

³⁴ *Nada v Switzerland* Public Audience before the ECtHR, webcast (23 March 2011).

³⁵ Parliamentary Assembly, 'UN Security Council and European Union blacklists' (22 January 2008) Doc. 11454 Addendum, para 6.

³⁶ Parliamentary Assembly - Committee on Legal Affairs and Human Rights, 'UN Security Council and Human Rights: introductory memorandum' (19 March 2007) AS/Jur (2007) 14 para 2.

³⁷ *Youssef Moustafa Nada contre la Suisse* Requête no 10593/08 (19 February 2008), Exposé des Faits (17 March 2009) paras 1-3.

³⁸ Security Council News Press 'Security Council Al-Qaida and Taliban Sanctions Committee Removes Names of Three Entities from Consolidated List' (11 March 2010) SC/9877; 'Ordonnance instituant des mesures à l'encontre de personnes et entités liées à Oussama ben Laden, au groupe 'Al Qaida' ou aux Taliban', Modification du 22 March 2010; *Nada v Switzerland* App no 10593/08 (ECHR 12 September 2012) para 62.

the conflicting rules were *jus cogens* rules, which was not the case here. Third, Switzerland had no margin of manoeuvre in the implementation of these UN sanctions.³⁹

Following this ruling against him and since Switzerland is a member of the Council of Europe (CoE), Mr Nada brought a case before the ECtHR alleging that his rights under the European Convention on Human Rights (ECHR) had been breached by Switzerland.⁴⁰ The case was heard by the Grand Chamber in March 2011 and the judgment issued in September 2012.

C. Main conclusions of the Swiss Federal Court

1. Obligation to implement UNSC resolutions over other obligations

The central argument of the Swiss Federal Court was that since Switzerland is a party of the UN,⁴¹ it is bound to accept and implement the obligations found in the Charter, as well as UNSC resolutions.⁴²

More generally, member states to any treaty are bound, under the *pacta sunt servanda* principle, to comply with the obligations they have undertaken. In the case of the UNC, this is reinforced by the fact that in some cases even non-parties can be bound by the principles enunciated in article 2.⁴³ Also, '[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'.⁴⁴ The UNSC is granted primary responsibility for the maintenance of international peace and security and, in doing so, it acts on member states' behalf.⁴⁵ Its decisions and those of its subsidiary organs taken under chapter VII are binding on all or some member states, depending on the wording of the resolution.⁴⁶ The Sanctions Committee was created according to resolution 1267, passed under chapter VII, so the member states are bound to implement its decisions.

³⁹ *Youssef Mustapha Nada gegen SECO, Staatssekretariat für Wirtschaft* (14 November 2007) 1A.45/2007/daa (Swiss Federal Court).

⁴⁰ That the review is against the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), not the Swiss Constitution is important to keep in mind, because the rights and freedoms protected do not totally overlap, ie the Swiss Constitution protects the right to property under art 26, but the country has not ratified the ECHR Protocol 1.

⁴¹ Switzerland has been party to the UN since 2002.

⁴² *Nada gegen SECO* (n 39) para 5.

⁴³ Charter of the United Nations art 2(6); Gill (n 9) 48.

⁴⁴ Charter of the United Nations art 25.

⁴⁵ Charter of the United Nations art 24(1).

⁴⁶ Charter of the United Nations art 48.

Since 1974, Switzerland has been a party to the ECHR, which creates obligations, as member states must secure for everyone under their jurisdiction the rights found in the Convention.⁴⁷ While Switzerland has to respect the obligations flowing from this latter treaty, if international rules conflict, the obligations under the UNC shall prevail.⁴⁸ Indeed, article 103 of the UNC provides that in the case of a conflict of rules, the obligations flowing from the Charter take precedence over any other obligations that states might have under international law. This is also stated in the 1969 Vienna Convention on the Law of Treaties in the successive treaties article, which is a reminder of the special status of the UNC to which the normal provisions on the conflict of rules do not apply.⁴⁹

2. Limits to the UNSC powers when acting under chapter VII⁵⁰

It is widely agreed that the UNSC is bound by *jus cogens* and must respect the purposes and principles of the Charter.⁵¹ The latter means that, to some extent, the UNSC must take human rights into account while making decisions.⁵²

The only exception to the supremacy of the UNSC resolutions accepted by the Swiss Federal Court would have been if the human rights in question were rules of *jus cogens*. The UN organs are indeed obliged to respect these without any derogation being possible; UN primacy is to be curbed when the rules conflicting with the resolutions are peremptory norms.⁵³ As expressed by ad-hoc Judge Lauterpacht:

⁴⁷ ECHR art 1.

⁴⁸ Charter of the United Nations art 103; Rudolf Bernhardt, 'Article 103' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (vol II, OUP 2002) 1295ff; *Nada gegen SECO* (n 39) para 6.

⁴⁹ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 30.

⁵⁰ Chapter VII only applies if the UNSC decides the situation is serious enough to amount to a threat to international peace and security (Charter of the United Nations art 39). Discussing whether the UNSC made such a decision on valid grounds falls beyond the scope of this article and is not a controversial question in most opinions about sanctions regimes. For some remarks on the topic, see Gill (n 9) 39-46; Ginkel (n 9) 108-110; Tehindrazanarivelo (n 12) 213-214, 244-247; Sir Michael Wood, 'The UN Security Council and International Law' (Hersch Lauterpacht Memorial Lectures 2006, University of Cambridge) 4-5 <http://www.lcil.cam.ac.uk/Media/lectures/pdf/2006_hersch_lecture_1.pdf> accessed 28 September 2012.

⁵¹ Charter of the United Nations art 24(2); Wood (n 50) 3.

⁵² On the basis of the Charter of the United Nations art 24(2) in conjunction with art 1(3) (promotion of human rights) and art 2(2) (good faith) and because the UNSC affirmed that 'States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights' (UNSC Res 1456 (20 January 2003) para 6).

⁵³ VCLT art 53; International Law Commission, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversifica-

[t]he relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation *cannot* - as a matter of simple hierarchy of norms - extend to a conflict between a Security Council resolution and *jus cogens*.⁵⁴

The Swiss Federal Court considered that the right to an effective remedy is not a norm of *jus cogens* and that while the interdiction of torture is,⁵⁵ it is not applicable to the facts of the case. No definite criteria to define peremptory norms or lists thereof have been put together. However, the right to an effective remedy cannot be considered as *jus cogens*, particularly as it can be derogated in case of emergency.⁵⁶ Indeed, any such right falls out of that category,⁵⁷ as derogability contradicts the 'absolute prohibition of any form of violation [of the norms of *jus cogens*]'.⁵⁸

3. No legal discretion in implementation

Since states have to transpose resolutions into domestic measures, they sometimes benefit from a margin of appreciation at that stage.⁵⁹ If such discretion exists, states must apply their obligations under the UN in a way that allows respect of other obligations and are responsible for their failure to do so.⁶⁰

tion and Expansion of International Law' (2006) para 40. Doctrine and jurisprudence have also used this argument. See Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-03649, para 226; *D c Département fédéral de l'économie*, 2A.785/2006 (23 January 2008) (Swiss Federal Court) paras 7.3-8.4; Karl Doehring, 'Unlawful Resolutions of the Security Council and their Legal Consequences' (1997) 1 MPYUNL 91, 104-105; Gill (n 9) 71; August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 AJIL 851, 859.

⁵⁴ Case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, Separate Opinion of Judge Lauterpacht, 325, 440 para 100. As presented by Birkhäuser (n 17) 12 (emphasis added).

⁵⁵ *Nada gegen SECO* (n 39) para 7.3. In agreement with doctrinal views on the question. See for example Anthony Aust, *Handbook of International Law* (CUP 2005) 11; Erika de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implications in National and International Law' (2004) 15 EJIL 97, 98.

⁵⁶ Indeed, it is not listed under ECHR art 15(2).

⁵⁷ As can be understood from VCLT art 53, a rule of *jus cogens* is a 'norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted'.

⁵⁸ Władysław Czapliński, 'Jus Cogens and the Law of Treaties' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Nijhoff 2006) 81, 87.

⁵⁹ Antonios Tzanakopoulos, 'An Effective Remedy for Josef K: Canadian Judge "Defies" Security Council Sanctions through Interpretation' (EJIL: Talk! 19 June 2009).

⁶⁰ Daniel Frank, 'UNO-Sanktionen gegen Terrorismus und Europäische Menschenrechtskonvention (EMRK)' in Stephen Breitenmoser and others (eds), *Human Rights, Democracy*

With regards to the type of sanctions used, the Swiss Federal Court considered that Switzerland was implementing measures clearly detailed in the relevant resolutions, hence leaving no discretion to the states.⁶¹ The UNSC made clear that all states shall ‘freeze funds and other financial resources’ of a number of people listed⁶² and ‘prevent the entry into or the transit through their territories of these [listed] individuals’.⁶³

As to whom is targeted, the Sanctions Committee maintains the list, so states have no power of their own except through membership in the Committee, or as state of residence or nationality, through petitioning. Switzerland was in none of these positions.

3. Approaches open to the ECtHR

Depending on the weight given by the Court to some of its jurisprudential milestones and to the global judicial debate which surrounds the question of UNSC sanctions, several approaches could realistically have been considered in the *Nada* case. The first one could have been based on the *Behrami and Saramanti* case, with the refusal to look at equivalence of protection (A). The second approach could have been inspired by more recent judgments, whether at the ECJ or the ECtHR; one can consider the interest respectively of a strong dualist approach or a harmonious interpretation angle in the present case (B). The option chosen by the ECtHR, quite promising and partly in line with the judicial trend, is also presented below (C).

A. Equivalence doctrine except for UNSC resolutions

1. Equivalence doctrine

As stated in the *Bosphorus* case, the ECHR regime has no problem with the fact that, for means of cooperation, states enter into international agreements and thus transfer sovereign powers to an international organisation.⁶⁴ However, the contracting party stays responsible under

and the Rule of Law: *Liber amicorum Luzius Wildhaber* (Dike/Nomos 2007) 237, 247; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* App no 45036/98 (ECHR 30 June 2005) para 157.

⁶¹ This sanctions regime is recognised as allowing no margin of appreciation at the difference of the regime under UNSC Res 1373 (2001); Case T-85/09 *Yassin Abdullah Kadi v European Commission* [2010] ECR II-05177 (General Court, *Kadi II*) paras 28-31 and paras 86-88.

⁶² UNSC Res 1267 (1999) para 4b; UNSC Res 1333 (2000) para 8c.

⁶³ UNSC Res 1390 (2002) para 2b.

⁶⁴ *Bosphorus* (n 60) para 152; for an overview of the evolution in the ECtHR declarations of competence regarding the acts of international organisations, see Kathrin Kuhnert, ‘Bos-

the Convention ‘for all acts and omissions of its organs, regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations’.⁶⁵

To decide whether a state’s action benefits from immunity of review by the Court because it flows from an international organisation, the Court usually follows a line of thought based on the ‘equivalence’ argument, quite similar to the *Solange* principle.⁶⁶ If the international organisation from which legal obligations originate protects human rights in a manner equivalent to that of the ECHR, then a presumption of the state’s compliance with the Convention is applied.⁶⁷ Reverse,ly, ‘[p]resumption of equivalence may be rebutted if the protection provided by the other organisation is “manifestly deficient” on the facts of the particular case’.⁶⁸

2. Exception for UNSC resolutions

In its *Behrami and Saramanti* cases, the Court pointed out that the responsibility of the UNSC with regards to peace and security is unique and declared that:

the Convention [ECHR] cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court.⁶⁹

Hence, in past cases, the ECtHR brushed aside its equivalence doctrine and refused to review the legality under the Convention of acts implementing a UNSC resolution, according to the opinion that they are protected by the cover of article 103.

phorus: Double Standards in European Human Rights Protection?’ (2006) 2 Utrecht Law Papers 177.

⁶⁵ *Bosphorus* (n 60) para 153.

⁶⁶ Antonios Tzanakopoulos, ‘Kadi II: The 1267 Sanctions Regime (Back) Before the General Court of EU’ (EJIL: Talk! 16 November 2010). Indeed, if the higher level of jurisdiction adopts similar safeguards than the lower level would provide (here respectively the UNSC and ECHR), then the lower level presumes conformity and desists (*Solange II*). However, if the higher level of jurisdiction fails to do so, then the lower level has a right of review (*Solange I*).

⁶⁷ *Bosphorus* (n 60) paras 154-155.

⁶⁸ David John Harris, Michael O’Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (Butterworths 2009) 29.

⁶⁹ *Behrami & Behrami v France* and *Saramanti v France, Germany and Norway* App no 71412/01 and 78166/01 (ECHR 2 May 2007) paras 148-149.

B. Recent judicial trends

1. *Kadi* and strong dualism

Another possibility would have been, in a *Kadi* type of reasoning, for the ECtHR to decide to verify the conformity of the national measures with the ECHR, based on the idea that such a 'task remains unaffected by whether the State in question is acting in conformity with its other obligations including obligations under the United Nations Charter'.⁷⁰

In the *Kadi* case, the ECJ reaffirmed the primacy of UNSC resolutions, but also acknowledged its competence to review whether the EC Regulation implementing the UNSC resolutions⁷¹ respected the fundamental rights which are part of the constitutional guarantees found in the EC Treaty.⁷² It stated that it only reviews the conformity of the implementation acts with fundamental rights, not with the UNSC resolutions themselves.⁷³ This judgment affirmed the existence of a European separate legal order with constitutional rules which must be respected in all EC Regulations. The ECJ has the responsibility to verify this conformity in any case, whatever international obligations the Regulations are implementing.⁷⁴

Aside from the substantive criticism formulated against this judgment,⁷⁵ it is possible that the ECtHR has seen this line of reasoning as unfit to apply to the present case because of differences in the legal orders.⁷⁶ The ECJ declared that it could verify the implementing Regulation's compatibility with fundamental rights as found under EU law because the European legal order is special and 'autonomous';⁷⁷ respect

⁷⁰ Dapo Akande, 'ECHR Grand Chamber to Hear Case Challenging Legality of UN Security Council Sanctions' (EJIL: Talk! 24 October 2010).

⁷¹ Council Regulation (EC) 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, OJ L139/9.

⁷² ECJ, *Kadi* (n 5) paras 288, 326.

⁷³ ECJ, *Kadi* (n 5) paras 286-287.

⁷⁴ ECJ, *Kadi* (n 5) Summary paras 4, 304, 326.

⁷⁵ Mainly that the ECJ is doing exactly what it declared it would not do, ie attacking the supremacy of the UNSC Resolutions. The ECJ indeed questions the obligation to - by discussing the states' right to - implement the Resolutions. General Court, *Kadi II* (n 61) paras 115, 121; Albert Posch, 'The *Kadi* Case: Rethinking the Relationship Between EU Law and International Law' (2009) 15 Columbia Journal of European Law Online <http://www.cjel.net/online/15_2-posch/> accessed 28 September 2012.

⁷⁶ Antonios Tzanakopoulos, 'Stepping Up the (Dualist?) Resistance: The English High Court Quashes Domestic Measures Implementing UN Sanctions' (EJIL: Talk! 9 October 2009).

⁷⁷ ECJ, *Kadi* (n 5) paras 281-284, 316.

for rules of a constitutional nature is needed for international law to pierce the veil. Some commentators expressed doubts that the ECtHR could use this argument because 'it is difficult to see that the legal order within which the ECtHR operates is one which is independent of general law including the UN Charter'.⁷⁸ Dualism is based on the existence of a legal order separate from the international one.

However, one could imagine that the ECtHR wanted to reaffirm its quasi-constitutional role for Europe. Indeed, while the ECHR does not create a single legal order for the states parties to it, it is said to be a Constitution for Europe.⁷⁹ If the ECJ affirmed that the Regulation was to be annulled because 'it violated the basic constitutional Charter of the EU',⁸⁰ the ECtHR arguably could have reviewed whether a Swiss ordinance and its application breached the constitutional order of the larger European area.⁸¹

2. *Al-Jedda and systemic interpretation*

The approach taken in the more recent *Al-Jedda* judgment, in which the ECtHR demonstrated a strong willingness to find a harmonious solution to *prima facie* conflicting obligations, is also relevant in the *Nada* case. It indeed shows another trend developed by the ECtHR in its dealing with acts taken to implement a UNSC resolution.

In *Al-Jedda*, it is interesting to note that the Court did not follow the *Kadi* line of strong dualism. It rather developed an innovative approach based on systemic interpretation. It announced that 'in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights'.⁸² Without asserting that human rights obligations could ignore obligations under the UNC and article 103, the Court made it clear that, as far as legally possible, it would interpret the relevant UNSC resolution in a way that would allow respect

⁷⁸ Akande (n 70).

⁷⁹ Jean-François Flauss, 'La Cour Européenne des droits de l'homme est-elle une cour constitutionnelle ?' (1999) 36 *Revue Française du Droit Constitutionnel* 711, 721; Steven Greer, 'What's Wrong with the European Convention on Human Rights?' (2008) 30 *Human Rights Quarterly* 680, 684.

⁸⁰ Devika Hovell, 'A House of Kadis? Recent Challenges to the UN Sanctions Regime and the Continuing Response to the ECJ Decision in *Kadi*' (EJIL: Talk! 7 July 2009).

⁸¹ *Loizidou v Turkey* App no 15318/89 (1995) Series A no 310 (preliminary objections) para 75; Vera Gowlland-Debbas, 'Implementing Sanctions Resolutions in Domestic Law' in Vera Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study* (Nijhoff 2004) 33, 59.

⁸² *Al-Jedda* (n 8) para 102.

of human rights.⁸³ In practice, it looked at the legal nature in the resolution of the authorisation/obligation to use internments. The Court found that, in its resolution, the UNSC did not create an obligation to use this method, which was (only) mentioned in an annexed letter.⁸⁴ To reach such a conclusion, it interpreted the resolution taking into account other sources, for example objections by the UN Secretary General to the use of internments.⁸⁵

C. Approach in the *Nada* case

The Court explained that it had jurisdiction on the basis of a double reasoning, related to the competence *ratione personae* and *ratione materiae*. While it assessed the former in the preliminary objections, it examined the latter together with the merits of the alleged violation of article 8. In this section, after presenting the arguments that the ECtHR considered valid for both aspects (1-2), some remarks are made regarding the basis of competence chosen, where it places this judgment in the recent judicial trend and considers what its downsides may be (3).

1. Ratione personae

Under this first assessment of competence, the Court examined whether the measures on which the applicant based his claim were attributable to Switzerland. Rejecting the respondent state's argument that since it was implementing a UNSC resolution it could not be held responsible, the ECtHR judged that it was asked to review the national implementation of UNSC resolutions. 'The alleged violations of the Convention are thus attributable to Switzerland'.⁸⁶

To reach this conclusion, it highlighted the factual differences between this case and the *Behrami and Saramanti* cases to which the French government, as a third-party intervener, made reference. Whereas in these latter cases the entities concerned were UNMIK and KFOR,⁸⁷ two subsidiary organs of the UNSC whose 'actions were directly attributable to the UN',⁸⁸ the former and present case focused on the implemen-

⁸³ *Al-Jedda* (n 8) para 102.

⁸⁴ *Al-Jedda* (n 8) paras 103-105.

⁸⁵ *Al-Jedda* (n 8) paras 40-41; Report of the Secretary General pursuant to paragraph 30 of Resolution 1546 (2004) (7 June 2005) S/2005/373, para 72; Report of the Secretary General pursuant to paragraph 30 of Resolution 1546 (2004) (3 March 2006) S/2006/137, para 54.

⁸⁶ *Nada v Switzerland* (n 38) paras 102, 104, 121.

⁸⁷ *Behrami and Saramanti* (n 69) para 130; UNMIK was the entity responsible for civil administration in Kosovo, and KFOR for security powers in Kosovo.

⁸⁸ *Behrami and Saramanti* (n 69) para 151.

tation of UNSC resolutions at the national level as was required by these documents.

The Court further noted the parallels with the *Bosphorus* case,⁸⁹ where the seizure of an aircraft took place on Irish territory, following the decision of a minister and carried out by state officials.⁹⁰ In *Nada*, the acts reproached by the applicant are those of a member state, carried out by state officials, implementing a Swiss decision;⁹¹ they are hence attributable to the Swiss authorities, not to the UN.

2. *Ratione materiae*

This second assessment of competence focused on the measures for which the respondent government was reproached - ie the entry and travel ban implemented by Switzerland in application of the relevant UNSC resolutions. The Court implicitly examined whether article 103 was to be applied because of a conflict of obligations and concluded that it was not necessary.

It started by reaffirming that a presumption exists that states do not enter into new obligations that contradict older ones.⁹² However, in the present case, it appeared that this presumption was proven wrong, since the relevant resolutions impose in 'clear and explicit language [...] an obligation to take measures *capable* of breaching human rights'.⁹³ By making reference to such measures as capable of but not automatically breaching human rights, the Court left the door open for a *volte-face*, allowing verification of the implementation measures chosen by Switzerland.

Indeed, the Court then examined whether Switzerland had any latitude in implementing its obligations stemming from the UNSC resolutions, latitude which would allow it also to meet its obligations under the ECHR.⁹⁴

The opinion of many instances and of the United Kingdom in its third-party intervention is that Switzerland was implementing measures clearly detailed in the relevant resolutions, hence leaving no discretion

⁸⁹ *Nada v Switzerland* (n 38) para 121.

⁹⁰ *Behrami and Saramanti* (n 69) para 151; *Bosphorus* (n 60) para 137. In the latter case, measures were taken on the basis of an EC Regulation, itself implementing a UNSC sanctions regime against Yugoslavia. See Frank Schorkopf, 'The European Court of Human Rights Judgement in the Case of *Bosphorus Hava Yollari Turizm v Ireland*' (2005) 6 German Law Journal 1255, 1256.

⁹¹ Harris (n 68) 790.

⁹² *Nada v Switzerland* (n 38) para 170.

⁹³ *Nada v Switzerland* (n 38) para 172 (emphasis added).

⁹⁴ *Nada v Switzerland* (n 38) para 175.

to the states.⁹⁵ The resolutions were unambiguous that all states had to freeze funds⁹⁶ and implement an entry and transit ban⁹⁷ towards the people on the list maintained by the Sanctions Committee.

Nevertheless, the ECtHR considered that some limited but existing margin of manoeuvre was left for Switzerland in its implementation of the UNSC resolutions.⁹⁸ In particular, it noted that the ban did 'not apply where entry or transit [was] *necessary* for the fulfilment of a judicial process...';⁹⁹ the term 'necessary' providing some flexibility.¹⁰⁰ Also, the UNSC

[urged] all States to take immediate steps to enforce and strengthen through legislative enactments or administrative measures, *where appropriate*, the measures imposed under domestic laws or regulations against their nationals and other individuals or entities operating on their territory¹⁰¹

In the view of the ECtHR, the use of 'where appropriate' also offered some room for manoeuvre.¹⁰² Finally, mention was made of some latitude recently taken in Switzerland with regards to sanctions.¹⁰³ Indeed, it appears that following a Parliament motion, sanctions have not been applied since the end of 2010 against individuals where a certain number of conditions are met.¹⁰⁴

Hence, the Court judged that Switzerland had some margin of appreciation to implement the UNSC resolutions and went on to assess the proportionality of the interference with Mr Nada's right to liberty.¹⁰⁵

⁹⁵ This sanctions regime is recognised in several opinions as allowing no margin of appreciation for a difference of regime under UNSC Res 1373 (2001): General Court, *Kadi II* (n 61) paras 28-31 and 86-88; *Nada v Switzerland* (n 38) para 111.

⁹⁶ UNSC Res 1267 (1999) para 4b; UNSC Res 1333 (2000) para 8c.

⁹⁷ UNSC Res 1390 (2002) para 2b.

⁹⁸ *Nada v Switzerland* (n 38) para 180.

⁹⁹ UNSC Res 1390 (2002) para 2b as quoted in *Nada v Switzerland* (n 38) para 177 (emphasis added).

¹⁰⁰ *Nada v Switzerland* (n 38) para 177.

¹⁰¹ UNSC Res 1390 (2002) para 8 as quoted in *Nada v Switzerland* (n 38) para 178 (emphasis added).

¹⁰² *Nada v Switzerland* (n 38) para 178.

¹⁰³ *Nada v Switzerland* (n 38) para 179.

¹⁰⁴ Parliamentary Assembly - Committee on Legal Affairs and Human Rights, 'Information note: Compatibility of UN Security Council and EU [terrorist] Black Lists with European Convention on Human Rights Requirements' (7 December 2010) AS/Jur/Inf (2010) 95 6-7. The Permanent Representative of Switzerland to the UN in New York informed the Sanctions Committee of this political decision. The cumulative conditions are: to have been blacklisted for 3 years or more; not to have been brought before a court yet; that no possibility be offered for an international appeal; that no charges be brought by a judicial authority; and that no new evidence be provided since blacklisting.

¹⁰⁵ See part 4A for further developments.

3. Analysis

The approach followed by the ECtHR in the *Nada* case is promising and follows quite successfully the current trend of judgments which challenge the national implementation of targeted sanctions, without addressing the source of these human rights violations.

The Court reviewed carefully the measures taken by Switzerland, acknowledging that they stemmed from UNSC resolutions, but in practice found a way, through determining some latitude in implementation, to avoid applying the hierarchy of norms. The ECtHR managed to adapt the approach it took in the *Al Jedda* case to a situation where all other instances had judged that no margin for manoeuvre existed for the states. It hence reinforced its case law which promotes the systemic interpretation of norms and the harmonious implementation of measures.

Nevertheless, the conclusion that Switzerland had some flexibility in its implementation has been criticised. In concurring opinions, four judges pointed out that 'where appropriate' referred to the choice between a legislative and an administrative measure, and hence did not give the states much latitude.¹⁰⁶ It was also remarked that the use of 'necessary' was only made in reference to an exemption.¹⁰⁷ Finally, the freedoms taken by Switzerland¹⁰⁸ with regards to implementing UNSC resolutions do not create a legal margin for manoeuvre in addition to that of exemptions, as was pointed out by three judges.¹⁰⁹

¹⁰⁶ *Nada v Switzerland* (n 38) Joint Concurring Opinion of Judges Bratza, Nicolaou and Yudkivska, para 6; Concurring Opinion of Judge Malinverni, part I, para 4.

¹⁰⁷ *Nada v Switzerland* (n 38) Concurring Opinion of Judge Malinverni, part I, para 3.

¹⁰⁸ In addition to the suspension of the ban announced by the Parliament, some liberties had been taken in the past. Such liberties included granting non-planned exemptions to individuals with regard to their frozen accounts, to solve the problem of living costs ('Second Report of the Monitoring Group Established Pursuant to Security Council Resolution 1363 (2001) and Extended by UNSC Res 1390 (2002)' (20 September 2002) S/2002/1050 para 42 as presented in Birkhäuser (n 17) 6. This led the UNSC to create some exemptions to the assets freezing sanction (UNSC Res 1452 (20 December 2002)). Similarly, Switzerland used to give access to the court to targeted people whose frozen funds were to be transferred to the Development Fund for Iraq in order to comment on the freezing sanction or to ask for an exemption ('Verordnung über die Einziehung eingefrorener irakischer Gelder und wirtschaftlicher Ressourcen und deren Überweisung an den Development Fund for Iraq' (18 May 2004) 946.206.1 art 2(2), art 3-4. Birkhäuser (n 17) 9-10). It justified this by its human rights obligations and by the fact that the measure was of a definite character. See the commentary of the Swiss State Secretariat for Economic Affairs on the Implementation of the Sanctions against Iraq, as presented in Birkhäuser (n 17) 9-10. Most of these liberties were taken before Switzerland joined the UN and thus when it benefited from a margin of appreciation in its implementation. See Krafft (n 31) 539-540.

¹⁰⁹ *Nada v Switzerland* (n 38) Joint Concurring Opinion of Judges Bratza, Nicolaou and Yudkivska, para 7.

In a way, the approach taken by the ECtHR in this judgment appears milder than that of the HRC in the *Vinck and Sayadi* case and of the ECJ in *Kadi*. Indeed, while the HRC stated that ‘whatever the arguments [of the defendant state on the primacy of UNSC resolutions], it is competent to consider the compatibility with the Covenant of the national measures taken to implement a resolution of the [UNSC],’¹¹⁰ the ECtHR took notice of article 103 but made sure to avoid a conflict of norms before having to apply this provision. It also did not adopt a strong dualist view and made clear that ‘the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law.’¹¹¹ It hence acknowledged the ECHR position within international law rather than outside it.

In *Nada*, the ECtHR did not discuss at all the targeted sanctions regime, which it could have done through an equivalence test. However, taking such an approach would have meant criticising the sanctions regime directly, which the Court preferred not to do. If equivalence had been assessed, it would have probably been a review of whether the UNSC provides equivalent protection of substantive and procedural human rights *in abstracto* and *in concreto*.¹¹² Beside the controversial question of substantive rights,¹¹³ there are obviously no satisfactory procedural guarantees with regard to the delisting mechanisms available.¹¹⁴ Even though these mechanisms have been improved, they do not amount to an effective review: the Ombudsperson¹¹⁵ cannot revoke the Sanctions Committee decisions on (de)listing,¹¹⁶ an independent and impartial body is still missing at the UNSC level to determine whether a listing is justified and to take the consequent measures of delisting,¹¹⁷ and the Sanctions Committee is not an impartial organ - the same institution is responsible for inclusion on, just as it is for removal from, the list¹¹⁸ - but rather a politically non-transparent body.¹¹⁹ Hence, human

¹¹⁰ *Sayadi and Vinck* (n 7) para 10.6.

¹¹¹ *Nada v Switzerland* (n 38) para 169.

¹¹² *Bosphorus* (n 60) paras 155-156.

¹¹³ Whether the UNSC respects substantive human rights in theory and practice is not settled, but note that the simple pledge for respect of human rights is not sufficient (*Bosphorus* (n 60) para 160).

¹¹⁴ Bardo Fassbender, ‘Targeted Sanctions and Due Process’ Study commissioned by the United Nations Office of Legal Affairs (2006) 6.

¹¹⁵ UNSC Res 1904 (2009).

¹¹⁶ Courts have still found these measures to be below the appropriate guarantees, for example in General Court, *Kadi II* (n 61); Ginkel (n 9) 392.

¹¹⁷ Fassbender (n 114) 8, 31.

¹¹⁸ Dewulf and Pacquée (n 4) 626.

¹¹⁹ Dewulf and Pacquée (n 4) 619, 625; Ginkel (n 9) 392; ECJ, *Kadi* (n 5) para 323; General Court, *Kadi II* (n 61) para 128.

rights protection in the international sanctions regime is not equivalent to that under the ECHR.

4. Alleged infringements of human rights

Before the ECtHR, Mr Nada alleged that the right to liberty and security, the right to respect for private life and family, freedom of religion, the prohibition of torture and the right to an effective remedy - to complain about the violations of articles 3, 5, 8 and 9 - had been breached. The Court could have decided to examine other possible breaches of the ECHR. However, here, the right to property and freedom of movement are not applicable because Switzerland has never ratified Protocols 1 and 4, and a fair trial is not directly relevant.¹²⁰

The fact that Mr Nada was delisted after the case had been lodged was argued by Switzerland as a reason to strike it out, on the basis that 'the matter has been resolved'.¹²¹ However, the ECtHR sees the loss of victim status as still requiring the recognition of a violation and some redress,¹²² and neither has been provided to Mr Nada. Indeed Switzerland has not acknowledged a breach of its obligations or offered any redress.¹²³ Even though it did not mention it in the present case, it is also worth noting that the Court tends not to be opposed to giving decisions of principle, having stated several times that 'its judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention'.¹²⁴

A. Right to private and family life - Article 8

Mr Nada argued that the ban of entry and transit through Switzerland violated his right to private life, including family life and professional life.¹²⁵ Then he focused on two particular aspects, the first being that because he could not transit through Switzerland, he was not able to go to meet his family.¹²⁶ Second, he declared that his honour and

¹²⁰ If the measures taken against Mr Nada had been civil or criminal charges, he would have benefited from all procedural rights encompassed in the concept of fair trial. Mr Nada did not mention this provision in his application, probably because the national act imposing sanctions against him is of administrative nature; sanctions were not the consequence of civil or criminal charges. He appealed against the measures to Swiss Courts and fair trial rights were respected in these procedures.

¹²¹ *Nada v Switzerland* (n 38) para 126; ECHR art 37(1)(b).

¹²² *Nada v Switzerland* (n 38) para 128.

¹²³ *Nada v Switzerland* (n 38) para 129.

¹²⁴ *Konstantin Markin v Russia* App no 30078/06 (ECHR 7 October 2010) para 39.

¹²⁵ *Nada v Switzerland* (n 38) para 149.

¹²⁶ *Nada v Switzerland* (n 38) para 156.

reputation had been damaged by the addition of his name on the list annexed to the Swiss ordinance.¹²⁷ No further mentions were made of his professional life.

The Court judged that Switzerland violated article 8 with regard to Mr Nada's private life. It first evaluated that, in view of the particular circumstances of Campione, the ban on entry into or transit through Switzerland made it difficult for the applicant to stay in contact with friends and family living elsewhere and constituted an interference with Mr Nada's right to respect for his private and family life.¹²⁸

Having acknowledged that the restrictions imposed were pursuing legitimate aims - to prevent crime and contribute to national security¹²⁹ - the Court then examined whether such interference was justified and in particular necessary in a democratic society. Taking into account the particulars of the case - the nature of Campione as an enclave, the duration of the measures, the age and health of Mr Nada - the ECtHR considered that Switzerland had not done all it could have done to harmonise its obligations under the UNC and under the ECHR. In particular, it was criticised for its refusals of exemption, the lack of assistance offered to Mr Nada to apply for exemptions decided by the Sanctions Committee, the lack of contact taken to encourage Italy to request a delisting and the fact that it did not inform the Sanctions Committee, for over 4 years, that an investigation about Mr Nada had been closed because it had been found inconclusive.¹³⁰ In the words of the Court:

the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court that it had taken - or at least had attempted to take - all possible measures to adapt the sanctions regime to the applicant's individual situation.¹³¹

It is generally accepted that the right to have one's reputation protected is part of the right to private life,¹³² also when the authority behind the publication of certain information is the state.¹³³ That the inclusion of Mr Nada's name on the Swiss ordinance had negative effects on his reputation is very likely, as it made him a suspected terrorist.¹³⁴ However,

¹²⁷ *Nada v Switzerland* (n 38) para 157.

¹²⁸ *Nada v Switzerland* (n 38) paras 165-166.

¹²⁹ *Nada v Switzerland* (n 38) para 174.

¹³⁰ *Nada v Switzerland* (n 38) paras 188-195.

¹³¹ *Nada v Switzerland* (n 38) para 196.

¹³² *Pfeifer v Austria* App no 12556/03 (ECHR 15 November 2007) para 35.

¹³³ *Z v Finland* App no 22009/93 (ECHR 25 February 1997).

¹³⁴ *Cameron* (n 23) 188; *Ginkel* (n 9) 325.

the Court decided not to consider the damages to Mr Nada's honour as a separate complaint regarding the violation of article 8.¹³⁵

This has been criticised by four judges in two concurring opinions. Judges Rozakis, Spielmann and Berro-Lefevre declared that this aspect should have been assessed in the general discussion on the violation of article 8 since the damage to Mr Nada's honour and reputation was part of the complainant's main arguments.¹³⁶ The approach chosen by the Court leads to the unsatisfactory conclusion that honour and reputation 'do not necessarily belong to the hard core of the constitutive parts of private life'.¹³⁷ As for Judge Malinverni, he was of the opinion that the decision of the Court was unsatisfactory and that a separate examination with regard to honour and reputation would have been needed. He pointed out that, while the alleged breach examined by the Court was based on the particulars of Campione, the examination of the damage to Mr Nada's honour and reputation would have been more general,¹³⁸ and hence perhaps the source of a complex but interesting discussion on the impact of a listing on honour and reputation.¹³⁹

B. Effective remedy - article 13

The characteristics of an effective remedy is that it must be effective in both law and practice,¹⁴⁰ 'effectiveness encompassing a remedy that can prevent the alleged violation or its continuation, or one which can provide adequate redress for any violation that has already occurred'.¹⁴¹ This provision is not an autonomous article; it has to be combined with other rights as the effective remedy is linked to the potential violation of a right under the Convention. However, allegation of another violation of a right only needs to be reasonably defensible for article 13 to come into play.¹⁴²

In the present case, since a violation of article 8 has been found, the complaint under article 13 is arguable.¹⁴³ Mr Nada was given neither

¹³⁵ *Nada v Switzerland* (n 38) para 199.

¹³⁶ *Nada v Switzerland* (n 38) Concurring Opinion of Judge Rozakis joined by Judges Spielmann and Berro-Lefevre.

¹³⁷ *Nada v Switzerland* (n 38) Concurring Opinion of Judge Rozakis joined by Judges Spielmann and Berro-Lefevre.

¹³⁸ *Nada v Switzerland* (n 38) Concurring Opinion of Judge Malinverni, part V paras 28-29.

¹³⁹ As was found in *Sayadi and Vinck* (n 7) para 10.12.

¹⁴⁰ *Kudla v Poland* App no 30210/96 (ECHR 26 October 2000) para 157.

¹⁴¹ Harris (n 68) 562 restating *Kudla v Poland* (n 140) para 158.

¹⁴² *Boyle and Rice v UK* App no 9659-8/82 (1988) Series A no 131 para 53.

¹⁴³ *Nada v Switzerland* (n 38) para 209.

the opportunity nor the forum to have the substance of his case reviewed.¹⁴⁴ Swiss tribunals did look at his case, but only to conclude that they could go no further than to state the primacy of UNSC resolutions and to verify, in the case of the Federal Court, *jus cogens* and margin of appreciation. Consequently, at the Swiss level, review options were open, but not efficient, since no institution found itself competent to challenge the sanctions. The Court further declared ‘that there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions.’¹⁴⁵

C. Right to liberty and security - Article 5 paras 1 and 4

Mr Nada asserted that, because of the ban on entry into or transit through Switzerland, he was not able to leave Campione, an Italian enclave of 1.6 km² within Switzerland, and thus was deprived of his liberty, a right guaranteed under Article 5 of the ECHR.¹⁴⁶

The aspects usually examined by the Court include ‘the type, duration, effects and manner of implementation of the measure in question’.¹⁴⁷ This was acknowledged in the present case and the Court considered that while the restrictions were applied for a long period of time and that Campione is a small territory, Mr Nada’s right to liberty was not breached.¹⁴⁸ Indeed, the territory into which he could not enter was that of a third state, which had every right to control its borders.¹⁴⁹ Also, Mr Nada had decided to live in Campione¹⁵⁰ which was his choice of residence,¹⁵¹ he lived in his own home and was free to move within the limits of the territory. In addition, he had no report to make to the police, was

¹⁴⁴ *Nada v Switzerland* (n 38) para 210.

¹⁴⁵ *Nada v Switzerland* (n 38) para 212.

¹⁴⁶ *Nada v Switzerland* (n 38) para 215.

¹⁴⁷ *Guzzardi v Italy* App no 7367/76 (1980) Series A no 39 para 92; Harris (n 68) 123. These criteria are then weighed on a case-by-case basis: ie in *Guzzardi* the applicant’s right to liberty was breached because he had to spend 16 months on a small island, reporting twice per day. In *Raimondo v Italy* App no 12954/87 (1994) Series A no 281A, the measures decided by the state, including a couvre-feu, notifying the police when leaving home and reporting on some days, were only seen as a restriction to the freedom of movement.

¹⁴⁸ *Nada v Switzerland* (n 38) paras 226, 229, 230, 233.

¹⁴⁹ *Nada v Switzerland* (n 38) para 229.

¹⁵⁰ The particularity of Campione as an enclave had already been addressed by the Commission which considered that someone who lives in such a territory and is not allowed to enter into the bordering country is not deprived of their liberty. See Jean-Loup Charrier, *Code de la Convention européenne des droits de l’homme* (Litec2005) 60 concerning *SF v Switzerland* App no 16360/90 (2 March 1994) 76B DR 13 (decision on admissibility).

¹⁵¹ *Nada v Switzerland* (n 38) para 229.

not under surveillance and was able to receive visits.¹⁵² Finally, the possibility existed in the sanctions regime that exemptions be granted.¹⁵³ Hence, the ECtHR concluded that Mr Nada was not deprived of his liberty.

D. Freedom of religion - article 9

Mr Nada further alleged a breach of article 9. Freedom of religion includes the freedom to 'manifest one's religion alone and in private or in community with others'.¹⁵⁴ Mr Nada could not do the latter because there was no mosque in Campione.

Mr Nada also alleged that he was treated in a manner violating article 3. For actions to amount to degrading treatment, they must 'humiliate or debase an individual showing a lack of respect for, or diminishing, his or her human dignity and arouse a feeling of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.¹⁵⁵

The Court did not address the substance of these allegations and concluded that they were ill-founded.¹⁵⁶

5. Conclusion

The *Nada* case arrived before the ECtHR after several other related cases on obligations stemming from UNSC resolutions. It was the first occurrence for this Court to examine targeted sanctions and their impact on the human rights of listed individuals. It is certainly a milestone, showing not only the trend favoured by the ECtHR in this complex matter but also reinforcing its systemic interpretation approach in dealing with fragmentation in international law.

The ECtHR declared that it was competent to review the national implementation of UNSC resolutions. Considering that Switzerland had some latitude in implementation, the Court judged that the respondent state could have found ways to mitigate the encroachment on human rights. Indeed, due to the very intrusive measures taken against Mr Nada, the Swiss authorities should have applied the existing exemptions as generously as possible. Also, Switzerland should have transmitted the lack of findings of its investigation to the Sanctions Committee

¹⁵² *Nada v Switzerland* (n 38) para 231.

¹⁵³ *Nada v Switzerland* (n 38) para 232.

¹⁵⁴ *Religionsgemeinschaft der Zeugen Jehovas and others v Austria* App no 40825/98 (ECHR 31 July 2008) para 61.

¹⁵⁵ *Pretty v UK* App no 2346/02 (ECHR 29 April 2002) para 52.

¹⁵⁶ *Nada v Switzerland* (n 38) para 237.

and should have supported Mr Nada in his undertakings.¹⁵⁷ Hence, the Court found that the entry and transit ban as implemented by Switzerland violated Mr Nada's right to private and family life. The right to an effective remedy was also breached, on account of the lack of review mechanism able or willing to examine the substance of Mr Nada's allegations.

Some aspects of the judgment or silences therein can be questioned, such as the real latitude Switzerland had in implementing the resolutions. It can also be regretted that no mention of equivalence was made. Finally, due to the mild approach taken, the Court is at risk of criticism, such as that made by Judge Malinverni when he asked:

should the Court, as guarantor of respect for human rights in Europe, not be more audacious than the European Court of Justice or the Human Rights Committee when it comes to addressing and settling the sensitive issue of conflict of norms that underlies the present case?¹⁵⁸

Rather than pointing out what the Court has not achieved, one could also look at what it has done. It is indeed positive that, even though the reasoning of the ECtHR and that of the HRC or the ECJ differ, their conclusions tend to coincide. In Europe, currently, issuing contradictory judgments in similar cases would cause issues of consistency. It is true that the ECtHR is under no obligation to follow the ECJ case law - the reverse might also be true once the EU accedes to the ECtHR.¹⁵⁹ However, in the meanwhile, a non-opposing body of jurisprudence is quite crucial,¹⁶⁰ not only for future EU accession to the ECHR, but also for the coherence of overlapping legal orders.¹⁶¹

Moreover, the ECtHR showed strong willingness in the *Al-Jedda* case to find an innovative way to overcome the negative consequences of a fragmented legal order. It confirmed this approach of harmonious in-

¹⁵⁷ The conclusions reached by the ECtHR and the Swiss Federal Court differ, but the national court did comment on the need to forward the results of the national investigation to the Sanctions Committee and, in view of the intrusiveness of the measures, to apply exemptions generously. See *Nada gegen SECO* (n 39) paras 9.2 and 10.2 as presented in *Nada v Switzerland* (n 38) paras 51-52.

¹⁵⁸ *Nada v Switzerland* (n 38) Concurring Opinion of Judge Malinverni, part III para 20.

¹⁵⁹ Lisbon Treaty art 6 II; ECHR art 59(2) (as modified by Protocol 14).

¹⁶⁰ It is true that the ECJ could reverse its jurisprudence, but for the time being ECJ, *Kadi* (n 5) has already served as a precedent (Case T-318/01 *Omar Mohammed Othman Foundation v Council and Commission*, 11 June 2009, OJ C180/37; see Hovell (n 80)).

¹⁶¹ Switzerland is only member of the CoE; it would thus not face any problems if the two highest courts of the European area disagreed. This would be more complicated for members of the EU.

terpretation and implementation of international obligations in the *Nada* case. It is a sign that a middle ground between complete submission to the UNSC and questioning the hierarchical role given to the UNSC can be found in order to ensure the protection of human rights. Ultimately, systemic interpretation is a workable solution to face the more general issue of fragmentation and as such is a positive tool in balancing rights and obligations that national and international courts are increasingly asked to perform.

