The question:

Back to consistency? The relationship between UNSC resolutions and the ECHR after the Grand Chamber's decision in *Al-Dulimi II*

Introduced by Maurizio Arcari

On 21 June 2016 the Grand Chamber of the European Court of Human Rights (ECtHR) handed down its definitive judgment in the case of *Al-Dulimi v Switzerland*,[1] addressing the legality under the European Convention on Human Rights (ECHR) of confiscation of asset measures imposed on an Iraqi national by Swiss authorities acting under United Nations Security Council (UNSC) resolution 1483 (2003). On the same issue, a decision was previously rendered by a Chamber (Second Section) of the Court in 2013, which applied the *Bosphorus* test of equivalent protection[2] and concluded that Switzerland was unable to escape its responsibilities under the ECHR, insofar as the UNSC system of blacklists and targeted sanctions failed to offer to individual rights a protection equivalent to that provided by the Convention.[3]

While the Grand Chamber judgment confirmed the conclusion that there had been a violation of Article 6 ECHR by Switzerland, it ostensibly reversed the reasoning at the core of the previous 2013 decision. In particular, the Grand Chamber set aside the equivalent protection test and preferred to approach the issue in light of the previous case law developed in the *Al-Jedda* and *Nada* cases,[4] which were both premised on a presumption of consistency between UNSC decisions and States' obligations under the ECHR.

[1] *Al-Dulimi and Montana Management Inc v Switzerland* App no 5809/08 (ECtHR, 21 June 2016) [hereinafter *Al-Dulimi II*].

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

[3] *Al-Dulimi and Montana Management Inc v Switzerland* App no 5809/08 (ECtHR, 26 November 2013) [*Al-Dulimi I*] para 114-122. On this decision, see the contributions gathered in QIL Zoom-in 6 (2014).

[4] *Al-Jedda v The United Kingdom* App no 27021/08 (ECtHR, 7 July 2011); *Nada v Switzerland* App no 10593/08 (ECtHR, 12 September 2012).

The Grand Chamber held that UNSC 1483 (2003) did 'not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken [at domestic level] for its implementation' and therefore left room for the courts of the respondent State 'to exercise sufficient scrutiny so that any arbitrariness [in the listing of Mr Al-Dulimi] can be avoided'.[5] According to the Grand Chamber, those circumstances were sufficient to maintain that 'Switzerland was not faced in the present case with a real conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter'. This finding made it unnecessary for the Court 'to determine the question of the hierarchy between the obligations of the States Parties to the Convention … and those arising from the UN Charter' and at the same time rendered 'nugatory the question whether the equivalent protection test should be applied'.[6] As the respondent State could not legitimately confine itself to reliance on the binding nature of UNSC resolutions and failed to persuade the Court that it had taken all measures possible to adapt the sanctions regime to the individual situation of the applicant (at least guaranteeing it adequate protection against arbitrariness), the finding of a violation of Article 6 ECHR inescapably followed.

The choice of the Grand Chamber to return to the 'harmonising approach' to frame the relationship between UNSC decisions and ECHR obligations prompts a number of controversial questions.

First, as suggested in the concurring opinion of Judge Keller annexed to the judgment, there is room to argue that, in the case in hand, the possibilities of a harmonised interpretation have been stretched far 'beyond the plain text and the general understanding of the relevant Security Council Resolution'.[7] This is especially true if one considers that the Grand Chamber eventually grounded the responsibility of Switzerland on the assumption that the relevant UNSC resolution did not explicitly preclude domestic courts from exercising judicial scrutiny of the measures taken to implement it.[8] This may sound like a rather implausible (if not truly absurd) requirement to be expected from a Security Council decision.

[5] *Al-Dulimi II* para 146.
[6] ibid para 149.
[7] Concurring Opinion of Judge Keller para 4.
[8] *Al-Dulimi II* para 148.

Second, the Grand Chamber is beyond doubt praiseworthy for its statement that 'one of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of such a principle'.[9] At the same time, this reasoning is also disquieting as it appears to assume that the protection that States are bound to provide under Article 6 of the ECHR when they implement UNSC targeted sanctions has to be confined to the arbitrariness test.[10] As a matter of fact, human rights shortcomings affecting UN blacklists and targeted sanctions are manifold, and involve structural deficiencies going beyond the threshold of arbitrariness, especially insofar as the right to a fair trial is involved.

Third, it could be argued that with the above reasoning on arbitrariness the Grand Chamber has intended to suggest that a special test has to be applied to UNSC decisions. However, the Grand Chamber itself has forthrightly precluded any recourse to the 'equivalent protection' discourse in the case in hand. In this respect, it can be questioned whether the peremptory conclusion of the Grand Chamber about the lack of any real conflict between UNSC decisions and ECHR obligations, with the consequent irrelevance of Article 103 UN Charter, can suffice to discard the application of the equivalent protection test. In this regard, doubts seem justified considering that equivalent protection, as a principle premised on the balancing of interests, is often seen not as a tool intended to solve conflicts between norms, but rather as one aimed at promoting the coordination or integration between different legal orders or values at stake.

Finally, as vividly suggested by four Judges of the Court in their concurring opinion annexed to the judgment, there are also broader and profound constitutional implications associated with *Al-Dulimi II*.[11] In this respect, one can comfortably agree with the view expressed by one commentator that two competing constitutionalisms were at stake in the present case.[12] However, the question is open as to whether the principled

[9] ibid para 145.

[10] See in this regard the Concurring Opinion of Judge Keller para 23.

[11] See especially the Concurring Opinion of Judge Pinto De Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov, paras 59-50.

[12] See A Peters, 'The New Arbitrariness and Competing Constitutionalism: Remarks on ECtHR Grand Chamber Al-Dulimi' (30 June 2016) EJILTalk! <www.ejiltalk.org/the-

effort of the Grand Chamber to promote the harmonized interpretation of the legal obligations entangled in the case was also successful in providing criteria suitable for solving the underlying critical constitutional issues and what, if any, would be the contribution of *Al-Dulimi II* to the issue of constitutionalization of the international legal order.

QIL asked Vassilis Tzevelekos and Iris Canor, two scholars who have extensively written about the principles of systemic integration and equivalent protection as applied and interpreted in the ECtHR case law, to consider some of the above controversial questions. The answers they provide suggest that the subject of the clash between UNSC decisions and ECHR human rights obligations is far from definitively settled after *Al-Dulimi II*.

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