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THE UNITED NATIONS SYSTEM AND EUROPEAN CONVENTION ON HUMAN RIGHTS: DIALOGUE OR CONFRONTATION

Master thesis

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LIST OF ABBREVIATIONS

UN Charter - Charter of the United Nations

CFI - Court of First Instance of the European Communities

EC - European Community

ECHR - European Convention on Human Rights

ECtHR - European Court of Human Rights

GA - General Assembly of the United Nations

ICJ - International Court of Justice

ICTY - International Criminal Tribunal for the former Yugoslavia

KFOR - Kosovo Force

MNF - Multinational Force in Iraq

RES - Resolution

UN - United Nations

UNSC or SC - United Nations Security Council

UNAMI - United Nations Assistance Mission for Iraq

UNMIK - United Nations Interim Administration Mission in Kosovo

VCLT - Vienna Convention on the Law of Treaties

«Terrorism is fundamentally the denial and destruction of human rights, and the fight against terrorism will never succeed by perpetuating the same denial and destruction. We must relentlessly fight terrorism to protect human rights. And at the same time, when we protect human rights, we are tackling the root causes of terrorism. For the power of human rights to bond is stronger than the power of terrorism to divide.»

António Guterres,
the Secretary General of the United Nations[1]

[1] António Guterres, "Counter-terrorism and human rights: winning the fight while upholding our values", speech at SOAS, University of London, 16 November 2017, Accessed 5 August 2019, https://www.un.org/sg/en/content/sg/speeches/2017-11-16/speech-soas-university-london-counter-terrorism

INTRODUCTION

The United Nations (hereinafter — the UN) is the most internationally represented intergovernmental organisation in the world with its 193-member states. In 1945 the UN was created as a successor to the ineffective League of Nations created in 1919. It was the first permanent universal organisation, which in principle offered to its members a system of collective security through the participation of the great powers, having a permanent seat in the United Nations Security Council (hereinafter — UNSC).[2] In 2019 it is still considered as one of the major intergovernmental organisations in the world.

However, nowadays the UN faces the highest amount of challenges since the Second World War and terrorism is one of the most considerable. With the development of new technologies, terrorist organisations and followers of their ideas dissolve into society by using social networks in order to achieve their terrible goals. It became easier to spread ideas, terror and, as a consequence, to harm people and societies in the whole. Moreover, terroristic activities lead to the migration crisis, influence the economic well-being of the population impacted, and may cause a humanitarian effect.

António Guterres, the ninth Secretary General of the UN, emphasised that terrorism appeared to be one of the most extreme dangers nowadays:

«Terrorism has always existed, but this form of global terrorism can strike anywhere, anytime, without us understanding why, and for what reason — this new threat is clearly linked to the multiplication of conflicts and to the interconnection between those conflicts».[3]

Terrorism causes a negative impact not only psychologically on people, victims and their families but society as well as damages economic growth, infrastructure, tourism, and trade. Consequently, it affects people's well-being, health, trust to the government and security forces. Since 2004, terrorism has cost the European Union about €5.6 billion in lost lives, injuries, and damage to infrastructure and around €185 billion in lost GDP.[4] According to the Global Terrorism Index 2018, even though, deaths from terrorism decreased by 27 percent from 2016 to

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[2] Franz Cede, and Lilly Sucharipa-Behrmann. *The United Nations : Law and Practice.* (Leiden, The Netherlands: Brill | Nijhoff, 2001), p.7

[3] António Guterres, «Twenty-first century challenges and the enduring wisdom of Dag Hammarskjöld», Annual Dag Hammarskjöld Lecture, Uppsala Castle. 22 April 2018, Accessed on 10 August 2019, https://www.daghammarskjold.se/wp-content/uploads/2018/10/2018_guterres_webb.pdf

[4] Wouter van Ballegooij and Piotr Bakowski, *The fight against terrorism,* European Parliamentary Research Service, May 2018, p.32, Accessed 11 August 2019, https://www.europarl.europa.eu/RegData/etudes/STUD/2018/621817/EPRS_STU(2018)621817_EN.pdf

2017, there were still 18,814 deaths in 2017. Moreover, the estimated economic impact of terrorism in 2017 was US $52 billion.[5]

The UN activities to counter terrorism cover a wide range of actions and sanctions are among them. Firstly, sanctions were applied to the whole country which assumed to constitute a danger in 1990 as a reaction to the Gulf War. The UNSC RES 660 (1990)[6] and subsequent Resolutions were comprehensive: import and export were blocked, funds of the Government of Iraq or any commercial, industrial or public utility were frozen, banned travel on Iraqi transport. Even though, the medical supplies and foodstuffs were exempted from the embargo, however, sanctions, combined with the destruction of much of the Iraqi infrastructure during the conflict, caused widespread suffering. One claims that up to 100,000 children may have died as a result.[7] Another, that 500,000 Iraqi children died as a result of UN comprehensive sanctions itself rang the death knell for the perceived utility of comprehensive measures.[8] These measures were criticised by many different NGOs and Intergovernmental organisations[9] because of causing huge damages not only to the suspects but to the society as a whole. Consequently, the issue of protection of human rights arose.

The UNSC started to think about new possible ways to challenge the spreading of terrorism without harming the community. An effective solution was found — targeted sanctions or smart sanctions. Targeted sanctions are typically applied either as incentives to change behaviour or as preventive measures, as in the case of sanctions against individuals or entities

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[5] Global Terrorism Index 2018: Measuring the impact of terrorism. Institute for Economics & Peace, Sydney, November 2018. p. 1-5. Accessed 10 August 2019, http://visionofhumanity.org/app/uploads/2018/12/Global-Terrorism-Index-2018-1.pdf

[6] UNSC Resolution 660(1990), *Iraq-Kuwait,* S/RES/660(1990) (2 August 1990) available from https://undocs.org/S/RES/660(1990)

[7] M. M. Ali and I. H. Shah, «Sanctions and Childhood Morality in Iraq» (2000) 335 (9218) The Lancet 1851 quoted in Matthew Happold, and Paul Eden. *Economic sanctions and international law.* (Oxford; Portland, Oregon: Hart Publishing, 2016) p.88

[8] Mohamed M. Ali and Shah H. Iqbal, 'Sanctions and childhood mortality in Iraq', The Lancet 355: 9218, 2000, pp. 1851–7. The number was hotly disputed, see Independent Inquiry Commission, 'The impact of the Oil-for-Food Programme on the Iraqi people', 7 Sept. 2005; John Blacker, Mohamed M. Ali and Gareth Jones, 'A response to criticism of our estimates of under-5 mortality in Iraq, 1980–1998', Population Studies 61: 1, 2007. pp. 7–13. Quoted in Francesco Giumelli, «Understanding United Nations targeted sanctions: an empirical analysis» *International Affairs* 91, 6, (2015): p. 1352. https://doi.org/10.1111/1468-2346.12448

[9] See, for example, UNICEF, ''Iraq Watching Briefs – Overview Report'', July 2003, Accessed 10 August 2019, https://www.unicef.org/evaldatabase/index_29697.html;''Iraq sanctions: humanitarian implications and options for the future'', Global Policy Forum, 6 August 2002, Accessed 10 August 2019, https://www.globalpolicy.org/component/content/article/170/41947.html

that facilitate terrorist acts.[10] The idea behind targeted sanctions was twofold: to avoid collateral damage but also to be more effective through striking hard at those whose behaviour was responsible for the situation which the sanctions sought to address. Moreover, such sanctions could be used against non-State actors.[11] The first Resolution that prescribed targeted sanctions was the UNSC RES 917 (1994)[12]. It was applied to all officers of the Haitian military, their families and other people connected with the Regime of General Raoul Cedras and involved different measures such as travel bans and assets freeze.

At first glance, that was the best solution that did not have any side effects. However, it appeared that the system of targeted sanctions is not perfect as well. Such measures, including intelligence cooperation, information exchange, coercive action by law enforcement bodies, and border controls, may adversely affect vide range of fundamental human rights, such as the right to respect for private and family life, prohibition of torture, right to a fair trial, right to liberty and security, etc.

That is where the European Convention on Human Rights (hereinafter - ECHR) comes into play. The ECHR was adopted in 1950 by the 12 Member States of the Council of Europe that was created one year earlier as the reaction to the Second World War Human Rights violations. It fixes the minimum human rights standards, predominately, civil and political rights, which the States have undertaken to respect. Moreover, the ECHR established the procedure through which individuals or States can lodge an application against a Member State regarding claims of violations of the Conventional rights with the special body — the European Court of Human Rights (hereinafter - ECtHR). The Court's main task is to ensure that States respect the rights and guarantees set out in the ECHR.

The ECtHR has been developing its jurisprudence related to counterterrorism measures since its very establishment.[13] The ECtHR's case-law concerns the terrorism-related issues from different perspectives. For instance, the risk of ill-treatment in case of deportation or extradition

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[10] Watson Institute Targeted Sanctions Project, "Strengthening Targeted Sanctions through Fair and Clear Procedures," Watson Institute for International Studies, Brown University, 2006, p.5, Accessed 12 August 2019, https://reliefweb.int/sites/reliefweb.int/files/resources/DA99CE19A6A1F2468525723E005EB2D2-Watson-Sanctions-30mar06.pdf

[11] Matthew Happold, and Paul Eden. *Economic sanctions and international law.* (Oxford; Portland, Oregon: Hart Publishing, 2016) p.88-89

12 UNSC Resolution 917 (1994), Sanctions for restoration of democracy and return of the legitimately elected President to Haiti, S/RES/917 (1994) (6 May 1994), available from http://unscr.com/en/resolutions/doc/917

[13] Factsheet – Terrorism and the ECHR, Accessed 15 August 2019, https://www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf

and prohibition of inhuman or degrading treatment (Art. 3 of the ECHR), existence of reasonable suspicion, indefinite detention (Art. 5§1(c) of the ECHR), interferences with the exercise of the right to respect for private and family life, home and correspondence (Art. 8 of the ECHR), etc.

The most controversial issues arose regarding sanctions imposed by UNSC and States' obligations under the ECHR. Thus, in the *Bosphorus*[14], *Behrami and Saramati* case[15], *Al-Jedda*[16], *Nada*[17], and the most recent *Al-Dulimi*[18] cases the problem of the UNSC sanctions regime was analysed regarding such aspects as the States' jurisdiction under Art 1 of the ECHR, imposition of concrete restrictive measures on applicants following the sanction regime imposed by UNSC RESs.

In the *Al-Jedda* case, the ECtHR confirmed that the UNSC does not intend to impose any obligation on Member States which can be regarded as having an aim to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a UNSC RES, the Court must, therefore, choose the interpretation which is most in harmony with the requirements of the ECHR and which avoids any conflict of the States' obligations under different international instruments.

In the light of the UN' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used where the UNSC to intend States to take particular measures which would conflict with their obligations under international human rights law.[19] In its Grand Chamber judgement in the *Al-Dulimi* case the ECtHR observed that there is no conflict of obligations capable of engaging the primacy rule in Art. 103 of the UN Charter.[20] However, the Court's conclusion created some ambiguities with regard to the real action necessary to be taken by States that must implement properly UNSC sanctions.

Relevance of research.

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[14] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI

[15] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], No. 71412/01, 2 May 2007

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

[17] *Nada v. Switzerland* [GC], No.10593/08, 12 September 2012

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

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

[20] *Al-Dulimi and Montana Management INC. v. Switzerland*, [GC] No. 5809/08, §140, 21 June 2016

Although the ECtHR has clearly stated that there is no normative conflict between the obligations of the States under the UN Charter and the ECHR, the number of scientific researches and opinions supporting the existence of such conflict clearly demonstrates the fact that there are a lot of different approaches to this issue.

Furthermore, a few scholars have expressed some concerns about recent judgements and decisions of the ECtHR, that States review the 'arbitrariness' of listings may create real burdens not only for European States but also for Sanctions Committees and States that initially proposed listings, as European States' courts seek access to the information underpinning listings in order to assess whether they were 'arbitrary'.[21]

The UNSC continues to include people in the Sanction list. On 17 April 2019, the Consolidated List includes 705 individuals and 350 entities and other groups.[22] Consequently, it is not clear how Member States of the Council of Europe should act in order to avoid violations of the provisions of both international instruments — the UN Charter and the ECHR. In the *Al-Dulimi* it was clearly stated that States when implementing obligations from one international treaty (system) should not violate other obligations under another international treaty. Thus, States should implement all international obligations undertaken. Consequently, it is not clear how States should act in the case when their international obligations under the UN Charter (sanction regime) contradict obligations arising from the ECHR, and how they have to conciliate those obligations.

Researched problems.

In this Master Thesis, the problem of normative conflict between the UN Charter and the ECHR will be briefly analysed. Because, as it was mentioned before, in its judgment in the *AL-Dulimi* case the Grand Chamber of the ECtHR has clearly stated that Switzerland was not faced with a real conflict of obligations capable of engaging the primacy rule in Art.103.[23]

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[21] James Cockayne, Rebecca Brubaker, and Nadeshda Jayakody. «FAIRLY CLEAR RISKS: Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures». p. 4, 16 August 2019, https://collections.unu.edu/eserv/UNU:6450/UNU_FairlyClearRisks_FINAL_Web.pdf

[22] United Nations Security Council Consolidated List, Accessed 16 August 2019, https://www.un.org/securitycouncil/content/un-sc-consolidated-list

[23] *Al-Dulimi and Montana Management INC. v. Switzerland*, [GC] No. 5809/08, §149, 21 June 2016

Moreover, scholars Cedric De Koker[24], Lorenzo Gasbarri[25], Alexander Orakhelashvili[26] and judges of the ECtHR Pinto de Albuquerque in his concurring opinion joined by judges Hajiyev, Pejchal, and Dedov, judges Sicilianos, Keller, and Kūris in their concurring opinions and judge Nuβberger in her dissenting opinion analysed the problem of normative conflict from different viewpoints in the Grand Chamber judgement [27], as well as judge Lorenzen in his dissenting opinion joined by judges Raimondi and Jočienė in the Chamber judgement [28].

Consequently, this work will rather be focused on the content of States' obligations under the UN Charter and the ECHR and how States should act in order to fulfil their obligations under the ECHR while implementing UNSC RES.

Scientific novelty.

The research problem, as it was mentioned before, was addressed previously only regarding the issue of existence or non-existence of normative conflict. In this Master Thesis, the problem of implementation of the already existing principles of the ECtHR case-law is being examined. Furthermore, the borderline between the State's obligations under Art. 103 of the UN Charter and under the ECHR will be clarified. Moreover, specific actions that should be taken by States under the ECHR while implementing UNSC RES will be also analysed.

Significance of research.

The practical significance of the thesis is that this work could contribute to the subsequent developments of researches on the UN and the ECHR co-existence. Moreover, academics, law students and human rights defenders can use the results of the research for further studies.

The aims of research are to analyse the legal basis of the UNSC targeted sanctions mechanism, as well as to see how the case-law of the ECtHR has been formed regarding the obligations of States under the ECHR while implementing targeted sanctions imposed by the

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[24] Cedric de Koker. «Al-Dulimi and Montana Management Inc. v. Switzerland: Norm conflict between UNSC Resolution and ECHR?» Strasbourg observers. Accessed 20 August 2019. https://strasbourgobservers.com/2016/09/05/al-dulimi-and-montana-management-inc-v-switzerland-norm-conflict-between-unsc-resolution-and-echr/

[25] Lorenzo Gasbarri, «Al-Dulimi and Competing Concepts of International Organizations», European Papers Vol. 1, No 3, (2016):pp. 1117-1125 http://europeanpapers.eu/en/system/files/pdf_version/EP_EF_2016_I_047_Lorenzo_Gasbarri_0.pdf

[26] Alexander Orakhelashvili. "Al-Dulimi v. Switzerland." *American Journal of International Law* 110, no. 4 (2016): 767–74.

[27] *Al-Dulimi and Montana Management INC. v. Switzerland*, [GC] No. 5809/08, 21 June 2016

[28] *Al-Dulimi and Montana Management INC. v. Switzerland*, No. 5809/08, 26 November 2013

UNSC. Moreover, to analyse the content of States' obligations under the UN Charter and the ECHR and to determine possible actions States could take while implementing UNSC RES in order to fulfil obligations under the ECHR. Finally, to determine whether the UN system and the ECHR system co-exist or confront each other.

In pursuance the identified aim the following **objectives of research** are established:

To analyse the UN legal basis for the collective security system within the framework of the UNSC's sanctions regime: Purposes and Principles of the UN, Chapter VII of the UN Charter, legal limits of the UNSC activity, and obligations under the UN Charter to implement UNSC RES.

To examine the existing case-law of the ECtHR regarding measures undertaken by Member States while implementing the UN sanctions' regime and whether these measures and the way in which they had been enforced were in line with the States' obligations stemming from the ECHR.

To assess States' obligations under both international instruments - Chapter VII of the UN Charter and the ECHR - concerning the enforcement of the sanctions regime.

To identify what measures should be taken by States in order to fulfil obligations under the ECHR while enforcing sanctions imposed by UNSC RES.

Research methodology.

To achieve the aims of the Master thesis, the following methods were used:

1.The historical method and description methods were applied to analyse the origin of the UN and the UN Charter, the main purposes and objectives of the UN as well as the origin, aims and essential elements of the ECHR and the ECtHR.

2.The linguistic method and the logical method were used in order to analyse and interpret the legal provisions of the UN Charter, the ECHR, the case law of the ECtHR, UNSC RESs, and relevant scientific literature.

3.The comparative method was used to compare the responsibilities of different UN organs with regard to the maintenance of international peace and security, to determine the differences between UNSC RESs and their application. Moreover, it was applied to distinguish existing collisions and ambiguities of the UN Charter provisions and UNSC RESs.

4.The systematic method was applied to analyse the interpretation of the UN Charter and relevant UNSC RESs, and relevant judgments of the ECtHR.

5.The analytical method was invoked to describe actions that States should take in order to implement targeted sanctions under UNSC RESs in compliance with the ECHR.

Structure of research.

The research paper is divided into the following parts: introduction, two chapters that are divided into smaller subchapters and sections, conclusions and recommendations, list of bibliography, abstract and summary.

The first chapter of the thesis provides with a short overview of the UN collective security system and is divided into four subchapters. It focuses mainly on the objectives, legal basis, legal limits of the UNSC's activity, and obligations under the UN Charter to implement UNSC RESs. The subchapter «Legal limits of the UNSC Activity» is divided into six sections.

The second chapter consists of three subchapters. The first subchapter is devoted to the ECtHR activities and to the general overview of the legal basis. The second one explores the main judgements of the ECtHR that relate to the States' obligations under the ECHR while implementing UNSC RESs. It is divided into five sections and each of them is focused on a particular judgement of the ECtHR. The third subchapter examines the content of States' obligations under the UN Charter and the ECHR and possible actions that States can perform in order to fulfil obligations under both international treaties.

Defence statement.

The ECtHR has adopted a harmonisation approach concerning obligations of the Sates under the UN Charter and the ECHR and found no normative conflict between both international treaties. Formally, it led to the so-called «dialogue» between these two legal instruments. However, in reality, having in mind all necessary actions that States must take in order to meet obligations under the ECHR, it is difficult to imagine a State that would comply with all obligations under both international treaties simultaneously. Consequently, formally, there is a dialogue between the UN' and the ECHR's legal orders, but, in fact, confrontation still, to some extent, exists.

1. LEGAL BASIS OF THE UNITED NATIONS COLLECTIVE SECURITY SYSTEM

1.1.Creation of the United Nations. Purposes of the United Nations

This chapter of the thesis will be mainly devoted to the general analyses of the UN collective security system. In its work, the UNSC mainly acts under Chapter VII provisions. As it was mentioned in the Introduction, the UNSC sanction mechanism has not long ago evolved into an instrument that influences people and human rights. However, the possibility of imposing sanctions on individuals are not provided directly by the UN Charter. The Charter does not cover all possible situations that may arise while maintaining peace and security and the UNSC authorises many different measures that are not directly mentioned in Chapter VII. The problem appears not only because of the absence of clear provisions but also because of an indeterminate range of influence of UNSC RESs. It often leads to ambiguities in an interpretation and execution of UNSC RESs.

That is why to understand the nature of the sanctions regime it is necessary to begin with an analysis of the Chapter VII provisions. Moreover, it is of high importance to understand the logic of the activity of the UNSC as well as the meaning of the notions provided in Chapter VII of the UN Charter. In that regard it is better to start from answering these questions: “Under which provisions does the SC act while adopting measures aimed at protecting peace and security?” and “What are the limits of such actions of the SC?”

Firstly, the general overview of the UN creation, main organs and its functions will be described. Furthermore, the importance of the purposes of the UN under Art. 1(1), especially the significance of the purpose “to maintain international peace and security”, will be highlighted. Secondly, the legal basis for the UNSC activity will be analysed, while focusing on the interpretation of the «threat to the peace», «breach of the peace», and «acts of aggression» notions because the existence of danger that might be described as «threat to the peace», «breach of the peace» or «acts of aggression» is a prerequisite for using the UNSC’s measures. Thirdly, because the UNSC is very flexible in interpreting facts, in order to restrain the UNSC from abusing the powers, the legal limits of its activity should be also analysed. At the end, legal basis of obligations to implement measures prescribed by UNSC RESs will be analysed.

The UN was created in 1945 to prevent any disputes between Member States which can evolve into the war. It is supported by the Art. 1 (1) of the UN Charter, where the first part of which describes the essential «Purpose» of the Organisation, namely to maintain international

peace and security, whereas following paragraphs set out means designed to achieve this «Purpose».[29] It indicates wills and intentions of the founders, who attempted to create an international body which could achieve this goal. It comes first in the Art. 1 of the UN Charter for a reason. It means that "to maintain international peace and security" is a precondition for any other purpose of the UN. All other principles, procedures, and methods follow this purpose in order to achieve successfully this aim. Hans Kelsen understood the phrase to mean about the same as the statement of Preamble, namely that the peoples of the UN unite their strength «to maintain international peace and security», thus defining the universal purpose of the Organisation, without implying any specific function.[30]

International security can be accomplished through various policies or measures, one of which is the measure of collective security. The defining characteristic of the concept of collective security is the protection of the members of the system against a possible attack on the part of any other member of the same system. The main legal prerequisite of collective security is the general prohibition of the use of force. [31]

Obviously, it wouldn't be possible to attain all these purposes with no functional bodies. The UN Charter established six principal organs: the General Assembly (GA), the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice (ICJ), and the Secretariat.

The GA is the main deliberative organ of the UN composed of all Member States, each of which has one vote, no matter its size or influence. It may discuss any matter arising under the UN Charter. The UNSC has a primary responsibility under the UN Charter to maintain international peace and security. The Economic and Social Council is the central body for coordinating the economic and social work of the UN and the UN System. The Trusteeship Council was assigned under the UN Charter to supervise the administration of 11 Trust Territories—former colonies or dependent territories—which were placed under the International Trusteeship System. The last Trust Territory to become independent was Palau in 1994, and, as a

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[29] Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p.40

[30] H Kelsen, The Law of the United Nations: a Critical Analysis of its Fundamental Problems(Stevens 1950) p.283 quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 772

[31] Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p.42

result, the Council decided formally to suspend its operation. The ICJ is the UN's main judicial organ, that settles legal disputes between nations, in accordance with international law.[32]

The wording of Art. 1 (1) indicates that three different functions of the UN organs may be distinguished as far as the maintenance of peace and security are concerned. First, the Organisation should insist upon and take measures so that States do not threaten, or cause, a breach of peace. This function is vested primarily in the GA, and to that extent Art 1 (1) refers to Arts. 10, 11, and 13. If a State commits an act of aggression or another breach of peace or threatens to do so, it is, secondly up to the SC to take effective collective measure as provided for in Chapter VII. Thirdly, the Organisation can proceed to find an adjustment or settlement of the dispute or situation, a function entrusted to the GA under Art. 14 and to the SC and the GA under Chapter VI.[33] Therefore, there are only two organs of the UN which have powers related to maintenance of peace and security. And the crucial question arises regarding the distribution of functions between these organs and it will be analysed in the next section.

Thus, as Hans Kelsen noted: «in Art. 1 (1) obvious stress is laid on taking effective collective measures. They are mentioned in the first place. This is highly significant.»[34] Consequently, in case of breach of peace, the crucial role in the collective security system plays the UNSC. Primarily, this role is based on the provision of Art. 24 of the UN Charter. According to this article, Members confer on the UNSC primary responsibility for the maintenance of international peace and security.

1.2.General Provisions of the UNSC activity

Art. 24 of the UN Charter formulates in a general way the powers of the UNSC. It states that: *«in order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.»*

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[32] «Fact Sheet: This is the United Nations. The Six Main Organs». United Nations visitor centre, Accessed 19 August 2019, https://visit.un.org/sites/visit.un.org/files/FS_This_is_the_UN_2013.pdf

[33] Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p.43

[34] Hans Kelsen. *The Law of the United Nations. A critical Analysis of Its Fundamental Problems.* With bound in supplement. (London: Stevens and Sons limited. 1951[i.e. 1964]) p. 13-14

Unlike the Preamble and Art. 1 (1), Art. 24 (1) can be understood as the «operational version of the UN' primary purpose of maintaining international peace and security as laid down in Art. 1 (1).[35] This paragraph grants the UNSC the "primary responsibility for the maintenance of international peace and security".

In 1992, the UNSC held an important meeting on the item of «[t]he responsibility of the Security Council in the maintenance of the peace and security», for the first time at the level of Heads of State and Government. The concluding note of the meeting gave the phrase «international peace and security» a very broad meaning. It stated that «[t]he absence of war and military conflicts amongst States does not itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.»[36]

It should be noted that the SC responsibility is not exclusive, but primary. Moreover, it doesn't concern the allocation of responsibilities between the SC and other actors outside the Organisation, but only among different organs.[37] Thus the main discussions arise with regard to the distribution of responsibility between the GA and the UNSC. In order to divide the roles of these organs of the UN provisions of Arts 11, and 12 should be analysed.

According to the Art. 11 of the UN Charter the GA may:

- consider the general principles of cooperation in the maintenance of international peace and security;
- make recommendations with regard to such principles to the Members or to the Security Council or to both;
- discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the UN, or by the UNSC;
- make recommendations with regard to any such question; and
- call the attention of the Security Council to situations which are likely to endanger international peace and security.

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[35] K Manusama, The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality (Martinus Nijhoff 2006) 32 quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 771

[36] Note by the President of the Security Council UN Doc S/23500 (31 January 1992) quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 772

[37] Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 767

Art. 12 provides: *"While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."*

Consequently, the GA, as it could be seen from the mentioned above, is capable only to make non-binding recommendations and can be involved in a general discussions.

In the Uniting for Peace Resolution 1950 was an attempt to clarify these provisions:

> […]Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.[38]

Although according to the Uniting for Peace Resolution the GA can make a determination, call for provisional measures, and recommend economic, diplomatic and military measures, it still cannot make any obligatory decisions which would be legally binding for all Members.

Furthermore, the ICJ also approved primary role of the UNSC in the maintenance of peace and security in its Advisory Opinion of July 20, 1962 concerning the question whether certain identified expenditures constitute 'expenses of the Organisation' within the meaning of Art. 17§2, of the Charter: *"It is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor."* [39] Therefore, it can be evaluated that the GA has only a subsidiary role in maintaining peace and security.

The decision to grant the SC such broad powers was mainly a reaction to the unsatisfactory experience with the system of sanctions in the League of Nations' framework. The powers of the SC under Chapter VII are extremely far-reaching and subject to very few express

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[38] UN General Assembly, *Uniting for peace*, 3 November 1950, A/RES/377, accessed 2019 August 19, https://www.refworld.org/docid/3b00f08d78.html

[39]Certain expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory opinion of 20 July 1962: ICJ Reports 1962, p.163

limitations - the SC is conceived as a «strong executive».[40] If the SC determines the existence of a threat to the peace, breach of the peace, or act of aggression, it can make recommendations, order provisional measures, or take non-military or military enforcement measures according to the exigencies of the particular situation. That is why it is required to analyse and understand the Chapter VII provisions. [41]

When there is a necessity to react somehow on breach of the peace, the UNSC acts under Chapter VII of the UN Charter. Art. 39 of the UN Charter contains the general prerequisites for the further application of Arts 40 to 42. Art. 39 opens the way for the use of the most powerful instrument of the UN, the adoption of enforcement measures in cases of threats to the peace, breaches of the peace or acts of aggression. Art. 39 has been termed 'the single most important provision of the Charter'.[42] In order to understand in which cases can the SC use its powers under Chapter VII of the UN Charter, the definitions of the «threat to the peace», «breach of the peace», and «acts of aggression» should be analysed more precisely.

The definition of «any threat to the peace» does not exist in the UN Charter. Consequently, this article gives the UNSC wide discretion in determining the existence of a threat to the peace, a breach of the peace, or an act of aggression. Since a determination under Art. 39 is considered a pre-requisite for taking action under Chapter VII (to impose measures under Arts 41 and 42) it is fundamental that the UNSC while interpreting this article acts in conformity with the principles and purposes established in the Charter, so Member States can properly fulfil its obligations.[43]

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[40] R Kolb, An Introduction to the Law of the United Nations (Hart Publishing 2010) p. 79 quoted in Simma, Bruno, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus. *The Charter of the United Nations: a commentary.*Volume II Oxford, United Kingdom: Oxford University Press. 2012 p. 1243

[41] Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume II* (Oxford, United Kingdom: Oxford University Press, 2012), p. 1243

[42]US Secretary of State, Charter of the United Nation: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State (US Govt Printing Office 1945) 90-91 quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume II* (Oxford, United Kingdom: Oxford University Press, 2012), p. 1273

[43] Decision on the defense motion for interlocutory appeal on jurisdiction, (1995) 30, ILM. Prosecutor vs. Tadic. available at http://www.un.org/icty/tadic/appeal/decision-e/51002.htm , paras. 28 and 29 quoted in Mónica Lourdes de la Serna Galván, «Interpretation of Article 39 of the UN Charter (Threat to the Peace) by the Security Council: Is the Security Council a Legislator for the Entire International Community?» *Anuario Mexicano de Derecho Internacional*, vol.11,(2011): p. 165, www.scielo.org.mx/pdf/amdi/v11/v11a6.pdf

«Threat to the peace» is the broadest, most indistinct, but also the most important concept in Art.39. In practice, it is almost the only one used by the SC; the SC usually does not explicitly determine breaches of the peace or acts of aggression. [44]

The term peace can be defined either negatively (narrowly) or positively (widely). In accordance with the negative definition, «peace» is characterised by the absence of armed conflict between states.[45] To constitute a threat to peace, a situation has to have the potential of provoking armed conflicts between states in the short or medium turn.[46] The supporters of positive peace embrace a definition that also includes friendly relations between states and other economic, social, political and environmental conditions which are needed for a lasting, conflict free society.[47]

Furthermore, Jeremy Matam Farrall divides the situation in which the UNSC has determined the existence of threats to the peace warranting the application of sanctions into two categories:

a) those with a clear international or transboundary dimension; and

b) those arising from an internal national crisis.[48]

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[44] Kelsen 727-728, and especially 737: 'threat to peace, breach of the peace allow a highly subjective interpretation' quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume II* (Oxford, United Kingdom: Oxford University Press, 2012), p. 1278

[45] Bernd Martenczuk, Rechtsbildung und Rechtskontrolle des Weltsicherheitsrates 224 ff (Berlin, Dunker&Humbolt, 1996); Jochen A Frowein, «Article 39», in Bruni Simma (ed.), Charter of the United Nations. A commentary 608 (Oxford, Oxford University Press, 1994), Hans Peter Neuhold, «Threat to Peace», III Encyclopedia of Public International Law 937 (1997); Andreas Stein, Der Sicherheitsrat der Vereinten Nationen und die Rule of Law 27 (Baden-Baden, Nomos, 1999) quoted in Erika de Wet. *The Chapter VII Powers of the United Nations Security Council.* (Oxford ; Portland, Or. : Hart Publishing, 2004), p. 138

[46] Martin Lailach, Die Wahrung des Weltfriedens un Der international Sicherheit all Aufgabe des Sicherheitsrates der Vereinten Nationen 195-196 (Berlin, Dunker&Humbolt, 1998); Bernd Martenczuk, Rechtsbildung und Rechtskontrolle des Weltsicherheitsrates 238-239 (Berlin, Dunker&Humbolt, 1996) quoted in Erika de Wet. *The Chapter VII Powers of the United Nations Security Council.* (Oxford ; Portland, Or. : Hart Publishing, 2004), p. 138

[47] Bernd Martenczuk, Rechtsbildung und Rechtskontrolle des Weltsicherheitsrates 224 (Berlin, Dunker&Humbolt, 1996); Martin Lailach, Die Wahrung des Weltfriedens un Der international Sicherheit all Aufgabe des Sicherheitsrates der Vereinten Nationen 32 (Berlin, Dunker&Humbolt, 1998); See Rüdiger Wolfrum «Article 1», in Bruno Simma (ed.), The Charter of the United Nations. A Commentary 50 (Oxford, Oxford University Press, 1994) quoted in Erika de Wet. *The Chapter VII Powers of the United Nations Security Council.* (Oxford ; Portland, Or. : Hart Publishing, 2004), p. 138-139

[48] Jeremy Matam Farrall, "Establishing the Legal Basis for Sanctions: Identifying Threats and Invoking Chapter VII." Chapter. In *United Nations Sanctions and the Rule of Law.* Cambridge Studies in International and Comparative Law. (Cambridge: Cambridge University Press, 2007), p. 85

Threats with a clear international dimension are, for instance, international conflict, interference, proliferation and arms control, and terrorism. The 1373 RES (2001)[49] is the focal point in the cases of interpretation of a 'threat to the peace' because of the continuing growth of terroristic acts around the world. This RES was a reaction of the Security Council on 9/11 terrorist attack in the USA. It was the first time when the SC reaffirmed that "any act of international terrorism" constitutes a threat to international peace and security. By these means, the UNSC created for the first time in its history international rules in abstract situations rather than in concrete cases.[50] That is where the discussions about the UNSC's legislative powers began.

Nowadays many authors consider some measures of the UNSC as the measures with "legislative nature".[51] After RES 1373(2001) on threats to international peace and security caused by terrorist acts there were several more examples of the "legislative" RESs such as RES 1540 (2004)[52] concerning non-proliferation of weapons of mass destruction and RES 2178 (2014)[53] on threats to international peace and security caused by terrorist acts. They - as well as RES 1373 (2001)[54] - imposed general legal obligations on States, regarding prevention of the proliferation of nuclear, chemical or biological weapons and their means of delivery to non-State actors, in particular for terrorist purposes and prevention and suppression of recruiting, organising, transporting or equipping, financing, and travelling of terrorist fighters, respectively.

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[49] UNSC Resolution 1373(2001), *Threats to international peace and security caused by terrorist acts,* S/RES/1373(2001) (28 September 2001), available from https://undocs.org/S/RES/1373(2001)

[50]Mónica Lourdes de la Serna Galván, "Interpretation of Article 39 of the UN Charter (Threat to the Peace) by the Security Council: Is the Security Council a Legislator for the Entire International Community?", *Anuario Mexicano de Derecho Internacional*, vol.11, (2011): p. 178, www.scielo.org.mx/pdf/amdi/v11/v11a6.pdf

[51]see, for instance, Paul C Szasz,. The Security Council Starts Legislating.» *American Journal of International Law* 96, no. 4 (2002): 901–905; Károly Végh, («A legislative power of the UN Security Council?» *Acta Juridica Hungarica*, 49 (3) (2008): 275-295; Stefan Talmon, «The Security Council as World Legislature.» *American Journal of International Law* 99, no. 1 (2005): 175-193.

[52] UNSC Resolution 1540(2004), *Non-proliferation of weapons of mass destruction ,* S/RES/1540 (2004) (28 April 2004), available from https://undocs.org/S/RES/1540(2004)

[53] UNSC Resolution 2178(2014), *Threats to international peace and security caused by terrorist acts,* S/RES/2178(2014) (24 September 2014) available from https://undocs.org/S/RES/2178%20(2014)

[54] UNSC Resolution 1373(2001), *Threats to international peace and security caused by terrorist acts,* S/RES/1373(2001) (28 September 2001), available from https://undocs.org/S/RES/1373(2001)

The Council's law-making powers, insofar as they exist, are limited to the `concrete case` only.[55] However, the scope of the decisions made by the SC is still limited, the possible limits will be analysed below.

As to internal crises, it may be situations of serious humanitarian crises, the violation of minority's fundamental rights, violation of democratic principles, and internal armed conflict.

However, some situations do not fall under this rule. For instance, in the UNSC RES 1816 (2008)[56] the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia were determined as a threat to international peace and security in the region. Moreover, the SC in its RES 2177 (2014)[57] determined *"...that the unprecedented extent of the Ebola outbreak in Africa constitutes a threat to international peace and security"*. That was the first time that the outbreak of disease was deemed by the Council a threat to international peace and security.[58]

Consequently, to the classical security threats may be attributed: proliferation and arms control, terrorism, internal armed conflicts, piracy, violations of Human Rights and Democratic Principles.[59]

The UNSC usually does not refer to the 'breach of the peace' and 'aggression'. However, the UNSC referred to the breach of the peace in its RES 82 (1950)[60] on Complaint of aggression upon the Republic of Korea. Later the notion 'breach of the peace' was used to describe situations between the United Kingdom and Argentina in the RES 502 (3 April 1982)[61]

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[55]Kelsen, 294-295; see also CH Power, 'A Fullerian Analysis of Security Council Legislation' (2011) 8 Intl Org L Rev 205-24 quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume II* (Oxford, United Kingdom: Oxford University Press, 2012), p. 1253

[56] UNSC Resolution 1816(2008), *Somalia,* S/RES/1816 (2008) (2 June 2008) available from https://undocs.org/S/RES/1816(2008)

[57]UNSC Resolution 2177(2014), *Peace and security in Africa,* S/RES/2177(2014) (18 September 2014) available from https://undocs.org/S/RES/2177%20(2014)

[58] Repertoire of the Practice of the Security Council 20th Supplement (2016-2017) Part VII Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression (Chapter VII of the Charter), p. 46. Accessed 19 August 2019. https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/final_webfile_enlish_repertoire_-1-add.19_.pdf#page=309

[59] Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume II* (Oxford, United Kingdom: Oxford University Press, 2012), p. 1280-1288

[60] UNSC Resolution 82(1950), *Complaint of aggression upon the Republic of Korea,* S/RES/82 (25 June 1950), available from https://undocs.org/S/RES/82(1950)

[61] UNSC Resolution 502(1982), *Falkland Islands (Malvinas),* S/RES/502 (3 April 1982), available from https://undocs.org/S/RES/502(1982)

and Iraqi invasion in Kuwait in the RES 660 (2 August 1990)[62]. Furthermore, the reference to the 'act of aggression' was made by the Security Council only once. It was the case of the South Africa sanctions regime (RES 418 (4 November 1977)[63]). With regard to the usage of this notion the problem of interpretation arises, because there is no definition of the term in the UN Charter. However, an attempt to clarify the meaning of 'acts of aggression' was made in the RES 3314 (XXIX) of December 14, 1974 adopted by the GA concerning Definition of Aggression[64]. The non exhaustive list of acts, regardless of a declaration of war, shall qualify as an act of aggression was provided by this RES. The list included, for instance, bombardment, blockade, the invasion or attack by the armed forces etc. However, this RES is not legally binding and allegedly had 'no visible impact' on the subsequent practice of the UNSC.[65]

As it could be seen from the analysis made above, the language which is used by the SC is a crucial point in interpretation of the SC RESs. Moreover, it is very important to understand under which Chapter acts the SC. Consequently, yet it has become standard practice for the SC to state not only a situation "constitutes a threat to peace" but also that the SC is "acting under Chapter VII of the Charter" when taking mandatory measures. Where it does not do so, and where no other clear indications for Chapter VII action are present, resolutions should be interpreted narrowly and should not be regarded as providing for enforcement action. The SC uses the reference to Chapter VII and its provisions very deliberately to create binding obligations, and it should be assumed that resolutions on other bases do not carrying binding force. [66]

As it was mentioned above, Art. 39 of the UN Charter contains only prerequisites for application of further measures within the collective security framework. These measures are provided under Arts 41, 42 of the UN Charter.

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[62] UNSC Resolution 660(1990), *Iraq-Kuwait,* S/RES/660(1990) (2 August 1990) available from https://undocs.org/S/RES/660(1990)

[63] UNSC Resolution 418 (1977), *South Africa,* S/RES/418 (1977) (4 November 1977), available from https://undocs.org/S/RES/418(1977)

[64] General Assembly resolution 3314 (XXIX), *Definition of Aggression*, A/RES/3314(XXIX) (14 December 1974), Accessed 19 August 2019, available from https://undocs.org/en/A/RES/3314(XXIX)

[65]Bassiouni and Ferencz 1999, at 313, 334. On some contemporary aspects of the Definition's impact, see Sayapin 2009, pp. 3–42 quoted in Sergey Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State.* (The Hague: T. M. C. Asser Press, 2014), p. 104

[66]Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume II* (Oxford, United Kingdom: Oxford University Press, 2012), p. 1295

To begin with, Art. 41 gives powers to the SC concerning the measures that do not involve the use of armed force. These measures may include 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.

However, these measures are not exclusive, as the UNSC may order any other measure whose purpose is to provide a sanction and which does not involve the use of armed force.[67] In the Decision of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction in Prosecutor v. Duško Tadić case was stated that:

> It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force." It is a negative definition[…]The Article only prescribes what these measures cannot be. Beyond that it does not say or suggest what they have to be.
>
> Moreover, even a simple literal analysis of the Article shows that the first phrase of the first sentence carries a very general prescription which can accommodate both institutional and Member State action. The second phrase can be read as referring particularly to one species of this very large category of measures referred to in the first phrase, but not necessarily the only one, namely, measures undertaken directly by States.[68]

Accordingly, it means Art. 41 allows for a broad interpretation. The UNSC has a right to impose measures it finds necessary to maintain peace and security as long as it remains within the framework of Chapter VII.

During its 45 years existence, the SC imposed sanctions according to the Art.41 only twice, in Southern Rhodesia in RES 232 (1966)[69] and in South Africa in RES 418 (1977)[70].

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[67]Benedetto Conforti, and Carlo Focarelli. *The Law and Practice of the United Nations.* (Leiden, The Netherlands: Brill | Nijhoff, 2010), p. 234 http://search.ebscohost.com.skaitykla.mruni.eu/login.aspx?direct=true&db=e000xww&AN=346112&site=ehost-live.

[68]Prosecutor v. DuskoTadic ICTY Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para 35, http://www.icty.org/x/cases/tadic/acdec/en/51002.htm

[69] UNSC Resolution 232 (1966), *Southern Rhodesia,* S/RES/232 (16 December 1966) available from https://undocs.org/S/RES/232(1966)

[70] UNSC Resolution 418 (1977), *South Africa,* S/RES/418 (1977) (4 November 1977), available from https://undocs.org/S/RES/418(1977)

However, since 1990 and RES 661 (1990) sanctions began to be used more often. The scope of sanctions varied on a case-by-case basis.

Art. 41 does not provide for against whom the measures are directed. Even though these measures shall be applied to lead a certain State or States to put an end to the conduct determined by the SC as threat to the peace in conformity with Art. 39 of the UN Charter.[71] However, sanctions imposed against the whole State might cause significant violations of human rights. For instance, the situation caused by the Security Council's economic sanctions against Iraq provided by the RES 661(1990)[72]. The prevention of the import of products originating in Iraq and the activities promoting export from Iraq caused serious widespread suffering. Indeed, up to 100,000 Iraqi children may have died as a result.[73] And targeted sanctions were a good solution to these problems.

The idea behind targeted sanctions was twofold: to avoid collateral damage but also to be more effective through striking hard at those whose behaviour was responsible for the situation which the sanctions sought to address.[74] Moreover, as it was already mentioned, Art. 41 allows for a broad interpretation. Consequently, the broad scope of action has enabled the SC to act against non-state actors such as rebel groups or mercenaries and against specific individuals which can be individually identified. [75]

Jeremy Matam Farrall broadly divides sanctions into the categories of economic and financial sanctions and non-economic sanctions. [76] There is also a classification based on terms of the modality of application the sanctions. Thus the sanctions may be mandatory and non-

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[71]Mónica Lourdes de la Serna Galván, "Interpretation of Article 39 of the UN Charter (Threat to the Peace) by the Security Council: Is the Security Council a Legislator for the Entire International Community?", *AnuarioMexicano de DerechoInternacional*, vol.11, (2011): p. 152, www.scielo.org.mx/pdf/amdi/v11/v11a6.pdf

[72] UNSC Resolution 661(1990), *Iraq-Kuwait,* S/RES/661(1990) (6 August 1990) available from https://undocs.org/S/RES/661(1990)

[73]M.M. Ali and I.H.Shah, 'Sanctions and Childhood Morality in Iraq' (2000) 335 (9218) The Lancet 1851 quoted in Matthew Happold, and Paul Eden. *Economic sanctions and international law.* (Oxford; Portland, Oregon: Hart Publishing, 2016) p. 88

[74] Matthew Happold, and Paul Eden. *Economic sanctions and international law.* (Oxford; Portland, Oregon: Hart Publishing, 2016), p.89

[75]Eugenia López-Jacoiste, «The UN Collective Security System and its Relationship with Economic Sanctions and Human Rights.» *Max Planck Yearbook of United Nations Law Online* 14, 1(2010): p.285, doi: https://doi.org/10.1163/18757413-90000054,

[76]Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*. Cambridge Studies in International and Comparative Law. (Cambridge: Cambridge University Press. 2007), p.106

binding. By their nature, public international law sanctions may be: without the use of armed force and with use of armed force.[77]

In the Special Research Report of the Security Council Report five types of sanctions were mentioned: diplomatic, travel ban, asset freeze, arms embargo, commodity interdiction.[78] Variation of this classification might be also the one mentioned below, according to which sanctions are divided in:

1. financial, which include asset freezes and blocking financial transactions with designated individuals and entities, and also includes restrictions on specific banks;
2. arms embargoes, which ban the supply of weapons, military-related technology, and other forms of military assistance;
3. commodity sanctions, which prohibit imports or exports of specific materials or goods, such as diamonds, oil, timber, various valuable stones, and metals that generate revenue for sanctioned actors;
4. travel sanctions, which deny visas and ban the travel of designated individuals, or prohibit travel on designated airlines or the use of airspace of targeted regimes;
5. diplomatic sanctions, which deny participation in international events or organisations or withdraw the diplomatic privileges of designated individuals or regimes.[79]

In case the SC considers that measures provided for in Art. 41 would be inadequate or have been proved to be inadequate in particular situation; it may take forcible measures according to the Art. 42 of the UN Charter.

While Art. 41 outlines a non-exhaustive list of non-force measures available to the Council, such as the interruption of economic relations, Art. 42 increases the SC's power to allow the use of force, including blockades. Similar to Art. 41, Art. 42's enumerated list of forceful measures is not exclusive.[80]

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[77]Dumitriţa Florea, and Chirtoacă,Natalia." «Sanctions in the International Public Law.» *The USV Annals of Economics and Public Administration* 13, 1(17) (2013): p. 269, http://www.seap.usv.ro/annals/ojs/index.php/annals/article/viewFile/513/569

[78] Security Council Report, Special Research Report, No. 3. 25 November 2013, Accessed 20 September 2019. https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/special_research_report_sanctions_2013.pdf

[79]GeorgeA.Lopez, «Sanctions» in *«The Oxford Handbook on the United Nations»*, edited by Daws, Sam, and Thomas G. Weiss. (Oxford: Oxford University Press, 2018) p. 447

[80]Vradenburgh, Anna M. «The Chapter VII Powers of the United Nations Charter: Do They Trump Human Rights Law.» *Loyola of Los Angeles International and Comparative Law Review* 14,1 (1991): p. 179 Available at: http://digitalcommons.lmu.edu/ilr/vol14/iss1/6

When the UNSC acts under Chapter VII and uses sanctions under Art. 41 and Art. 42, all UN Members are legally obliged to implement those measures. These legal obligations flow from Art. 25, 103 and 2(5) of the UN Charter. This issue more broadly will be described in this Chapter.

The provision of Art. 48 of the UN Charter also repeats and reaffirms for Chapter VII the obligation of Member States to carry out the decisions of the SC. Moreover, Art. 48 clarifies what would presumably apply even without such a provision, namely that the SC can, according to circumstances, ask not only all Members collectively but also some of them to carry out its decisions.[81]

1.3.Legal Limits of the UNSC Activity

As already mentioned, the SC's powers under Chapter VII of the UN Charter are broad in terms of using non-forcible and forcible measures. The debate about the limits of the UNSC enforcement powers dates back to the Dumbarton Oaks proposals and the *travaux préparatoires* of the UN Charter.[82] There is a widespread view amongst practitioners and scholars of international law that the SC's action under Chapter VII of the UN Charter must be kept within the bounds so as to protect the legitimate interest of individual Member State.[83]

Moreover, the ICTY in the Duško Tadić case emphasised that:

> It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under Article 39. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security

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[81]Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume II* (Oxford, United Kingdom: Oxford University Press, 2012), p.1378

[82]Aristotle Constantinides, "An Overview of Legal Restraints on Security Council Chapter VII Action with a Focus on Post-Conflict Iraq", Paper presented at Inaugural Conference of the European Society of International Law, Florence, May 2004. p. 1. Accessed 21 September 2019, http://esil-sedi.eu/wp-content/uploads/2018/04/Constantinides_0.pdf

[83]Nicolas Angelet, «International Law limits to the Security Council" in the *«United Nations Sanctions and International Law»,* Vera Gowlland-Debbas, Rubio M. Garcia, and Hassiba Hadj-Sahraoui, (The Hague, the Netherlands: Kluwer Law International, 2001) p. 71.

> Council as legibus solutus (unbound by law). […]The Charter thus speaks the language of specific powers, not of absolute fiat.[84]

These boundaries are implicitly prescribed by the UN Charter. Art. 24 (2) in conjunction with Arts 1 and 2, Arts 2(5) and 25 that refer to 'the present Charter', and Art. 1(3) that refers to human rights that can serve as the substantive limits on the UNSC powers.

1.3.1. Purposes and Principles of the UN

Under Art. 24 (2), the SC must act 'in accordance with the Purposes and Principles of the UN'. Purposes and Principles are enshrined in Art. 1 and Art. 2 of the UN Charter respectively.

By pointing to the UN Purposes and Principles, Art. 24 provides a clear indication that the SC's powers are not supposed to be exercised without limits. [85]

The most important purpose of the UN, as already said, is 'to maintain international peace and security'. All other are indicated in Art. 1(1) of the Charter, as to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace, relate to this dominant purpose.

The primary place ascribed to international peace and security is natural, since the fulfilment of the other purposes will be dependent upon the attainment of that basic condition.[86]

Decisions which do not at least aspire to reach the said principles or even obstruct them would be 'not in accordance' with purposes and principles, and therefore inadmissible in terms of Art. 24. Doctrinally, this conclusion can also be based on the more general reasoning that acts

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[84] Prosecutor v. Dusko Tadic ICTY Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para 28, Accessed 20 August 2019, http://www.icty.org/x/cases/tadic/acdec/en/51002.htm

[85] Jeremy Matam Farrall. *United Nations Sanctions and the Rule of Law.* Cambridge Studies in International and Comparative Law. (Cambridge: Cambridge University Press, 2007) p.69

[86] Certain expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory opinion of 20 July 1962: ICJ Reports 1962, p.168

of the Organisation which are not covered by its objectives as stipulated in the founding document are ultra vires. [87]

However, these purposes are abstract and of general nature, so it is hardly assuming that the UNSC could make any decision which cannot be in accordance with these purposes. In Advisory Opinion of July 20, 1962 concerning the question whether certain identified expenditures "constitute 'expenses of the Organisation' within the meaning of Art. 17§2, of the Charter , the ICJ acknowledged that neither Purposes and Principles nor the powers conferred to effectuate them are unlimited under the UN Charter. Save as they have entrusted the Organisation with the attainment of these common ends, Member States retain their freedom of action. But when the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the UN, the presumption is that such action is not ultra vires the Organisation.[88]

1.3.2. The UN Charter

According to Art. 2§5 all Members shall give the UN every assistance in any action it takes in accordance with the present Charter. Art. 25 of the UN Charter provides that the Members of the UN agree to accept and carry out the decisions of the UNSC in accordance with the present Charter. In both these articles drafters used 'in accordance with the present Charter' wording. Consequently, the Charter serves as a legal limit of the activity of the SC. They state that organisations may have obligations towards their members ‘under the rules of organisation’. According to the Art. 10 of the Draft Articles on the Responsibility of International Organisations there is a breach of an international obligation by an international organisation when an act of that international organisation is not in conformity with what is required of it by that obligation, regardless of the origin or character of the obligation concerned. The mentioned above breach includes the breach of any international obligation that may arise for an international organisation towards its members under the rules of the organisation. [89]

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[87]Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 812

[88] Certain expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory opinion of 20 July 1962: ICJ Reports 1962, p.168

[89] Draft articles on the responsibility of international organizations, Yearbook of the International Law Commission (2011), Volume II (Part Two), p. 63, Accessed 15 August 2019, http://legal.un.org/ilc/publications/yearbooks/english/ilc_2011_v2_p2.pdf

The subjection of the SC decisions to the entire Charter is due to the principle that international organisations are generally bound by their internal law, notably by their constituent instrument which is the basis of their existence and which poses 'absolute limits at their action'.[90]

1.3.3. *Jus cogens* norms

Jus cogens, the literal meaning of which is 'compelling law,' is the technical term given to those norms of general international law that are argued as hierarchically superior.[91] It is generally accepted that the UNSC decisions must respect *jus cogens*.

Alexander Orakhelashvili in his work argued that as organisations are based on inter-state agreements, nothing in principle precludes their organs from acting in disregard of ordinary norms of international law (*jus dispositivum*), provided and to the extent that the constituent instrument evidences the intention of Member States to enable an organisation to act in such manner while exercising its functions. But if a relevant norm is peremptory, then states cannot derogate from it, establishing an organisation with the power to act in disregard of *jus cogens*. Therefore, *jus cogens* is an inherent limitation on any organisation's powers.[92] The mere fact that the organisation can act independently from the Member States does not change the fact that the obligations imposed by the organisation result from a treaty and may not therefore not conflict with the norm of *jus cogens*. Thus, where the execution of an obligation under the UN Charter such as binding SC decision would result in a violation of a *jus cogens* norm, Member States would be relieved from giving effect to the obligation in question.[93]

Consequently, the UN SC is not an exemption, thus it is also limited in its decisions by *jus cogens*.

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[90] A Pellet, «Rapport introductif: Peut-on et doit-on controller les actions du Conseil de sécurité?» In Société française pour le droit international (ed), *Le Chapitre VII de la Charte de Nations Unies - Colloque de Rennes* (Paris 1995) 221, 233, 237 quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 815

[91] Wallace, Rebecca M.M. International Law (2nd edn, Sweet and Maxwell 1994)33 quoted in Kamrul Hossain, «The Concept of Jus Cogens and the Obligation Under The U.N. Charter», *Santa Clara Journal of International Law* 3, 1 (2005): p. 73.

[92] Alexander Orakhelashvili. «The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions». *European Journal of International Law*, Vol. 16, Issue 1,(2005): 60

[93] Erika de Wet. *The Chapter VII Powers of the United Nations Security Council.* (Oxford ; Portland, Or. : Hart Publishing, 2004), p. 188

1.3.4. International Customary Law and General Principles of Law

The UN is an international organisation and hence an international legal person which is, generally speaking, ‘bound by any obligation incumbent upon [it] under general rules of international law'.[94]

All international customary rules and the general principles which are, in substance and function, apt to address an international legal subject such as the UN as an obligee, constitute limits to Council action. [95]

Some authors in order to support this statement make reference to Art. 1 (1) of the UN Charter, which provides, as one of the purposes of the UN the settling of international disputes or situations that might lead to a breach of the peace in conformity with the principles of justice and international law. [96] Some other authors mentioned that “justice and international law” are only used in the context of the peaceful settlement of disputes but not in that of collective measures under Chapter VII, concluding that the Council must not comply with general international law when it is acting to maintain or restore international peace and security.[97]

One apt principle of general international law which limits Council decisions is the proportionality principle. It is a part of general international law as well as an inherent legal principle of the Charter. According to this principle the SC's actions must be necessary and appropriate for the accomplishment of its purposes. At the very last, the SC may not take any

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[94] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory opinion) [1980] ICJ Rep 72, para 37 quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 819

[95] Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 820-821

[96] Dapo Akande, ‘The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?’ (1997) 46 International and Comparative Law Quarterly p. 317-321 quoted in Daniel Moeckli, and Raffael Nicolas Fasel. "A Duty to Give Reasons in the Security Council: Making Voting Transparent." *International Organizations Law Review* 14 (2017): 28

[97] Bernd Martenczuk, ‘The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?’ (1999) 10 European Journal of International Law pp. 544–546; Evelyne Lagrange, ‘Le Conseil de sécurité des Nations Unies peut-il violer le droit international?’ (2004) 2 *Revue belge de droit international* pp. 578–582. This argument goes back to Hans Kelsen: Kelsen, Hans Kelsen, The Law of the United Nations: A Critical Analysis of Its Fundamental Problems (Lawbook Exchange, New Jersey, 1951) p. 275., pp. 294–295 quoted in Daniel Moeckli, and Raffael Nicolas Fasel. "A Duty to Give Reasons in the Security Council: Making Voting Transparent." *International Organizations Law Review* 14 (2017): p. 29

action which is unnecessary for the removal of a threat to the peace. [98] Proportionality mostly determines the options of different means in enforcement decisions under Chapter VII.

The problem of proportionality comes up usually while imposing sanctions. With respect to minimising the impact of sanctions upon civilian populations, the SC could ensure that whenever it applies comprehensive sanctions it exempts a core group of items from the regime.[99] These goods could include food, medical supplies.

Moreover, the SC must not abuse its powers. This concept is related to the principle of good faith. The form of 'abuse' is the situation that the Council exercises its competencies for an end different from that, for which the power was given, that is for the purposes outside the UN Charter, to the injury of another legal subject. Other relevant types of abuse are the exercise of competences in an arbitrary manner, or in a way which impedes the enjoyment of other international legal subjects of their own rights.[100]

1.3.5. International Humanitarian Law

IHL is only applicable in armed conflict, it protects not states, but human beings as such during an armed conflict. The basic rules of humanitarian law are peremptory.[101] The Council is bound by those IHL norms which have a customary law status and which thus form part of general international law, notably (but not restricted to) those essential guarantees which rank as *jus cogens*. [102] It means that the SC should comply with IHL every time its forces engaged in hostilities.

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[98] Nicolas Angelet, "International Law limits to the Security Council" in the *«United Nations Sanctions and International Law»,* Vera Gowlland-Debbas, Rubio M. Garcia, and Hassiba Hadj-Sahraoui, (The Hague, the Netherlands: Kluwer Law International, 2001) p. 72.

[99]Jeremy Matam Farrall. *United Nations Sanctions and the Rule of Law.* Cambridge Studies in International and Comparative Law. (Cambridge: Cambridge University Press, 2007), p.239

[100]Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 820-821

[101]Sassoli, 'State Responsibility for Violations of Humanitarian Law', 84 IRCR (2002) 413–414 quoted in Alexander Orakhelashvili. «The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions». *European Journal of International Law*, Vol. 16, Issue 1,(2005): 66-67

[102]Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 827

These rules are provided by the four Geneva Conventions[103] and three Protocols additional to the Geneva Conventions[104]. The First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field protects Members of the armed forces and other persons as prescribed by the art. 13 of this Convention, who are wounded or sick. The Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea protects wounded, sick and shipwrecked members of armed forces at sea. Moreover, a specific protection for hospital ships, coastal rescue craft, medical aircraft and other medical transports at sea, as well as religious, medical and hospital personnel performing their duties in a naval context is provided by the Second Geneva Convention as well. In the Convention (III) relative to the Treatment of Prisoners of War protects prisoners of war during an international armed conflict. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War according to Art. 13 of the Fourth Geneva Convention protects the whole of the populations of the countries in conflict. They specifically protect people who are not taking part in the hostilities (civilians, health workers and aid workers) and those who are no longer participating in the hostilities (wounded, sick and shipwrecked soldiers and prisoners of war).

Additional Protocols strengthen the protection of victims of international (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of

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[103] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Accessed 1 November 2019, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF0C12563CD002D6B0B&action=openDocument

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949. Accessed 1 November 2019, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=2F5AA9B07AB61934C12563CD002D6B25&action=openDocument

Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Accessed 1 November 2019, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=77CB9983BE01D004C12563CD002D6B3E&action=openDocument

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Accessed 1 November 2019, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument

[104] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Accessed 1 November 2019, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Accessed 1 November 2019, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AA0C5BCBAB5C4A85C12563CD002D6D09&action=openDocument

Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005. Accessed 1 November 2019, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=8BC1504B556D2F80C125710F002F4B28&action=openDocument

Victims of International Armed Conflicts) and non-international (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts) armed conflicts and place limits on the way wars are fought. The Third Additional Protocol (Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem)relates to the distinctive emblems, namely the red cross, the red crescent and the red lion and sun.

1.3.6. Human Rights

Mostly Human Rights issues arise concerning sanctions. As it was mentioned above, nowadays, sanctions affect a wide range of individual's personal as well as process rights (freedom of movement, right to possess, and privacy/reputation; access to information, effective remedy, fair hearing, and notification of listing).

The GA in the World Summit outcome Document of 2005 called upon the SC «to ensure fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them…»[105]. The Fassbender study commissioned by the UN Office of Legal Affairs defined the minimum standards for the required 'fair and clear procedures' as comprising four basic elements, namely the right to be informed, the right to be heard, the right to an effective review mechanism, and a periodical review of targeted sanctions by the SC. [106] The Canadian Federal Court stated obiter that the 1267 regime was 'nothing in the listing or de-listing procedure that recognises the principles of natural justice or that provides for basic procedural fairness'.[107]

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[105] General Assembly resolution 60/1, *2005 World Summit Outcome*, A/RES/60/1 (16 September 2005), para 109 Accessed 25 August 2019, available from https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf

[106]B Fassbender, «Targeted sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affaires and Follow-Up Action by the United Nations' reprinted in (2006) 3 IO 437-85 quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p.822

[107] Federal Court of Canada, Abdelrazik v The Minister of Foreign Affairs and the Attorney General of Canada (4 June 2009) 2009 FC 580 para 51 quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p.822

The SC can never be entitled to infringe upon human rights embodied in universal human rights instruments.[108] The Charter itself does not explicitly impose human rights obligations on the UN. However, in the Preamble, the members 'reaffirm faith in fundamental human rights'. Art 1 (3) denotes as one of the purposes of the UN 'promoting and encouraging respect for human rights and for fundamental freedoms'. Art 55 lit (c) mentions that the UN shall promote universal respect for, and observance of, human rights and fundamental freedoms for all.[109]

There are some different opinions on this issue. The first one is that the interpretation of the Charter's provisions mentioned above does not categorically suggest that the UN is obliged to ensure respect for human rights established under customary law or major human rights treaties.While the subsequent practice has developed to provide greater guidance as to how the UN and its organs take into account human rights, the practice does not go so far as to suggest that the organs are formally bound by human rights law.[110]

Frédéric Mégret and Florian Hoffman noted that:

> "Promotion" and "encouragement" refer to efforts at raising public awareness as to the right and procedures for asserting and protecting human rights. Failure to promote or encourage, however, does not lend itself easily to a human rights violations framework. It is quite clear, moreover, that within that conception the United Nations is not the addressee of the obligation to respect human rights, and is merely asked to "assist in the[ir] realization." In fact, failures to sufficiently pursue one's own mandate are above all, technically speaking, violations of the UN internal order. They may also be human rights violation, but that line of thinking provides only poor guidance as to why and how they are so. [111]

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[108]Tomuschat, 'Yugoslavia's Damaged Sovereignty over the Province of Kosovo', in G. Kreijen et al. (eds.), State, Sovereignty and International Governance (2002), 340; Bossuyt, 'The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights' (Working paper), E/CN.4/Sub.2/2000/33, 9; de Wet, 'Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the UN Charter and the Iraqi Sanctions Regime', 14 LJIL (2001) 284, at 286–289. Quoted in Alexander Orakhelashvili. «The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions». *European Journal of International Law*, Vol. 16, Issue 1,(2005): p. 64

[109]Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 822

[110]Machiko Kanetake, «The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions.» *International Organizations Law Review*, Vol. 9 (2), (2012); *Amsterdam Center for International Law* No. 2012-17; *Amsterdam Law School Research* Paper No. 2012-105. p. 12 Available at SSRN: https://ssrn.com/abstract=2188915 or http://dx.doi.org/10.2139/ssrn.2188915

[111]Frédéric Mégret, and Florian Hoffman, 'The UN as a Human Rights Violator - Some Reflections on the United Nations Changing Human Rights Responsibilities' *Human Rights Quarterly* (2003) 25, p. 319

Infringement of the obligation to respect human rights and to ensure human rights, are what is usually assumed as "human rights violations."

To the extent that the UN is not a state, however, it may otherwise be bound to generally abide by the standards contained in international human rights instruments, but it cannot properly be said to violate rights.[112]

The second opinion is that the whole UN system, as well as the SC, are bound by human rights. Such a conclusion emerges from the systematic interpretation of Art. 1(3), Art. 55 lit (c), Art. 2 (5), and Art. 25 of the UN Charter. If the Council would violate the applicable human rights norms it would not be in accordance with the Charter in the sense of Art . 2 (5) and Art. 25, and also not in accordance with the purposes and principles of the UN in the sense of Art. 24(2). [113]

Moreover, Art 31 (3) lit (c) of the Vienna Convention on the Law of Treaties[114] prescribes that the 'relevant rules of international law applicable in relations between the parties' must be taken into account. The human rights obligations which all members have incurred are relevant and applicable international rules, and must hence be taken into account when interpreting the Charter.[115]

Consequently, the UN, in performing its task to promote human rights, must itself fulfil the aims and objectives it promotes.

1.4. Legal obligations to implement measures of the UNSC

As it was already mentioned in Chapter I of this work when the SC acts under Chapter VII and uses sanctions under Art. 41 and Art. 42, all UN Members are legally obliged to implement those measures. These legal obligations flow from Art. 25, 103 and 2(5) of the UN Charter.

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[112]Mégret, Frédéric and Hoffman, Florian 'The UN as a Human Rights Violator - Some Reflections on the United Nations Changing Human Rights Responsibilities' *Human Rights Quarterly* (2003) 25, p. 320

[113]Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 824

[114] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, United Nations Treaty Series, vol. 1155, Accessed 30 October 2019, https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf

[115]Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 822-823

Art. 2 (5) provides with the most general rule in the UN Charter as to the assistance of the Members given to the UN in any action the UN takes in accordance with the UN Charter. Moreover, Member States shall refrain from giving assistance to any state against which the UN is taking preventive or enforcement action.

Art. 25 of the UN Charter is formulated more specifically. It says: «The Members of the UN agree to accept and carry out the decisions of the SC in accordance with the present Charter.» It is contained in Chapter V of the UN Charter that covers functions and powers of the SC. The ICJ in its Advisory Opinion to the case of Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council RES 276 (1970) concluded that: «…Art. 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter.»[116] Consequently, obligations stemming from this article covers not only resolutions under Chapter VII, but resolutions whose legal basis are in Chapter VI as well.

A more interesting issue arises about the binding character of acts of subsidiary organs, which can be created by the UNSC according to the Art.29 of the UN Charter. This becomes relevant when subsidiary organs, for instance, the 1267 Committee, targets individuals. Such a delegation of powers from the UNSC to a subsidiary organ is lawful only when seven conditions are fulfilled:

- The UNSC must act within its mandate.
- The UNSC can delegate powers which it possesses.
- The Subsidiary organ must act within its mandate as defined by the UNSC.
- The composition of the subsidiary organ must reflect the composition of the UNSC itself.
- The decision making procedure must accommodate the veto right of the P5 which is a functional corollary of the decision's binding force.
- The UNSC must retain a sufficient degree of authority an effective overall control over the subsidiary organ, and the right to change or revoke the decisions taken by the organs.
- Certain core decisions cannot be delegated, such as the determination of an existence of a threat to the peace.[117]

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[116] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p.16 para 113

[117] Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume I* (Oxford, United Kingdom: Oxford University Press, 2012), p. 796-797

The most significant article within the framework of this research is Art. 103 of the UN Charter. It reads as follows: "In the event of a conflict between the obligations of the Members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The first prerequisite to apply this norm is «the event of a conflict». The scope *ratione personae* requires two States to be parties to the Charter and another international agreement or at least one party must be necessarily bound by both rules. [118] The *ratione materiae* scope requires that the rules in question relate to the «same subject matter». It is the case when provisions of the Charter and rules of the other international agreement are to be applied to one single set of facts and come to contradictory results.[119]

Art. 103 prioritises «obligations of the Members of the UN under the present Charter». It covers all obligations stemming directly from the Charter. Moreover, obligations under secondary norms derived from the Charter are also covered by Art. 103.[120] This approach was supported by the ICJ in the Lockerbie case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie. The ICJ stated that the «…Members of the UN, are obliged to accept and carry out the decisions of the Security Council in accordance with Art. 25 of the Charter…» and that «…in accordance with Art. 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement…»[121]

One should understand that Art. 103 is residual in its nature. It means that before Art. 103 is used, conflict solution and conflict avoidance techniques need to be applied to avoid

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[118]H Kelsen, «Conflicts between Obligations under the Charter of the United Nations and Obligations under other International Agreements: An Analysis of Article 103 of the Charter» (1948-49) 10 University of Pittsburgh Law Review 284, 285; Aufricht (n 40) 655f; Pauwelyn (n 46) 165 quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume II* (Oxford, United Kingdom: Oxford University Press, 2012), p.2121

[119] cf EW Vierdag, «The time of the «Conclusion» of a MultilateralTreaty: Article 30 of the Vienna Convention the Law of Treaties and Related Provisions» (1988) 59 BYIL 57,75; Lindroos (n 32) 45; ILC Fragmentation Report (n 32) 18, para 23 quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume II* (Oxford, United Kingdom: Oxford University Press, 2012), p. 2122

[120] Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume II* (Oxford, United Kingdom: Oxford University Press, 2012), p. 2123-2124

[121]Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992,p. 3, para. 39; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, 1.C.J.Reports 1992, p. 114, para 42

incompatibilities between Charter law and other international agreements. These techniques include the principles of *lex specialis*, *lex posterior*, harmonisation and systematic integration, presumption of compatibility.[122]

The *lex specialis* principle means that in case of two conflicting norms the more specific one prevails. This principle is not codified in the VCLT and reflects customary international law. This principle is superseded in a case when a special rule is incompatible with obligations under the Charter and a conflict occurs. In such circumstances an incompatibility between this principle and the UN Charter is resolved by Art.103 in favour of the latter.[123]

According to the *lex posterior* principle, in case of two conflicting rules the later one in time prevails. It is codified in Art. 30 of the VCLT and, as the *lex specialis* principle, reflects customary law. The *lex specialis* and *lex posterior* principles are the rules of conflict solution. They presuppose the existence of a conflict between two obligations in question. Where a subsequent treaty can be interpreted in accordance with the Charter, no such conflict arises. [124]

The next two techniques of systematic integration and presumption of compatibility are used to avoid a conflict. Art. 31 (3) (c) of the VCLT prescribed the principle of systematic integration and it reads as follows: «There shall be taken into account, together with the context […] any relevant rules of international law applicable in the relations between the parties.» It means that the preference is given to the interpretation that allows for a maximum effect of both norms, thereby upholding the coherence of the legal order. [125]

With regard to the presumption of compatibility technique, the ICJ in the Right of Passage case, concerning the right of passage over Indian territory, stated that: «It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.»[126] In other words, it is to be presumed that parties do not want to create contradictory

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[122] Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume II* (Oxford, United Kingdom: Oxford University Press, 2012), p. 2120

[123] ibid. p.2116-2117

[124] ibid. p. 2118

[125] cf Pauwelyn (n 46) 240 f; ME Villiger, «Article 30» Commentary on the 1969 Vienna Convention on the Law of Treaties (nijhoff 2009) 403 MN 7; N Matz-Lück, «Treaties, Conflicts between» MPEPIL (online edition, OUP 2011) MN 20,27 quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume II* (Oxford, United Kingdom: Oxford University Press, 2012), p.2118

[126] "Case concerning right of passage over Indian territory (Preliminary Objections), Judgment of November 26th, 1957: I.C. J. Reports I957, p. 125, p. 142"

norms. Thus, the contradiction should only be assumed when norms stand in clear conflict with each other or in the case that the contradictory intent is clearly expressed. [127]

Consequently, obligations imposed on Member States of the UN stemming from UNSC RESs have a solid legal background in the UN Charter. First of all, it is the fact that all resolutions aim to maintain international peace and security. Secondly, it is the conferment on the UNSC primary responsibility for the maintenance of international peace and security. Thus, the SC is the most important body of the UN that possesses rights that enable the SC to take measures necessary to react on breach of the peace. Moreover, Chapter VII of the UN Charter forms a legal basis of the UNSC's activity. It prescribes possible measures of the SC which can be used in order to maintain international peace and security. Even though the wording used in Chapter VII might be ambiguous and powers under this Chapter are broad in terms, the UNSC acts under legal limits. These limits are Purposes and Principles of the UN, Charter of the UN, *Jus Cogens* norms, International Customary Law and General Principles of Law, International Humanitarian Law, Human Rights. Consequently, they put the SC in the position where it should take into account all the limits while acting under Chapter VII and carefully balance between responsibility for the maintenance of international peace and security and following international law principles mentioned above. Furthermore, because of the importance of the UNSC function to maintain peace and security all UN Members are legally obliged to implement measures under UNSC RESs.

However, obligations stemming from the UN Charter sometimes overlap with obligations stemming from the regional international agreements. One of such regional international agreements is the ECHR. How the ECtHR has been developing its case-law concerning the obligations of Member States to the ECHR while implementing the UNSC's resolutions will be the topic of consideration in the next Chapter.

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[127] cf Jenks (n 32) 429; Pauwelyn (n 46) 240f and 245f; CJ Borgen, «Resolving Treaty Conflicts» George Washington Intl. L.Rev 37 (2005) 573, 639. Pauwelyn distinguishes between «apparent» and «genuine» norm conflicts ((n 46) 178). See also M Milanović, «Norm Conflict in International Law: Whither Human Rights?» (2009) 20 Duke J Comp & Intl L. 69, 73: «[a]n apparent conflict is one where the content of the two norms is at first glance contradictory, yet the conflict can be avoided, most often by interpretative means». Accordingly a genuine conflict exists in case «all techniques of conflict avoidance will fail». According to Pauwelyn «[i]nterpretation may solve apparent conflicts; it cannot solve genuine conflicts»((n 46) 272) quoted in Bruno Simma et al., *The Charter of the United Nations: a commentary.Volume II* (Oxford, United Kingdom: Oxford University Press, 2012), p. 2118-2119

2. THE EUROPEAN CONVENTION ON HUMAN RIGHTS' MECHANISM

2.1.General overview of the European Convention on Human Rights' mechanism

The ECHR is a product of the Council of Europe, which was established immediately after Word War II by the Statute of the Council of Europe in 1949 with the aim of enhancing the cultural, social and political life of Europe and promoting human rights, democracy and the rule of law. The creation and early work of the Council of Europe was in part a reaction to the serious human rights violations encountered in Europe during World War II. There were originally 10 Member States (Belgium, France, Luxembourg, The Netherlands, the UK, Ireland, Denmark, Italy, Norway, and Sweden) and there are now 47 Members.[128] A basic condition of membership, elaborated in Art. 3 of the Statute of the Council of Europe, was that: «Every member of the Council of Europe must accept the principles of the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms…»[129] Later, on the 4th November 1950, in Rome, the Member States of the Council of Europe decided: «to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration»[130] and created the Convention for the Protection of Human Rights and Fundamental Freedoms.

The ECHR represents the minimum human rights standards which could be agreed by European States about 70 years ago. The ECHR has also been extraordinarily influential on the development of legislation and policy in the human rights field throughout Europe. The ECHR is considered being one of the most successful human rights system in the world, particularly because of its enforcement mechanism and its membership: it was described by Rolv Ryssdal, the former President of the European Court, as «the Basic Law of Europe».[131]

The ECHR guarantees, mostly, civil and political rights. Section I of the ECHR spells out, in more detailed form, most of the basic civil and political rights contained in the Universal Declaration, while the First, Fourth, Sixth, Seventh, Twelfth, and Thirteens Protocols guarantee

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[128] Philip Leach, *Taking a Case to the European Court of Human Rights*., 3d ed., (Oxford: Oxford University Press, 2011), p.1

[129]Alastair Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights*. 3d ed., (Oxford, Oxford University Press, 2012), p.2

[130] Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4 November 1950, Accessed 30 October 2019, https://www.echr.coe.int/Documents/Convention_ENG.pdf

[131] Philip Leach, *Taking a Case to the European Court of Human Rights*., 3d ed., (Oxford: Oxford University Press, 2011), p.6

certain additional rights and freedoms. The remaining Protocols amended procedural provisions of the ECHR.[132]

Initially, the European Commission of Human Rights and the European Court of Human Rights were created in order «to ensure the observance of the engagements undertaken by the High Contracting Parties»[133]. However, Protocol 11 amended the ECHR to make provision for a new wholly judicial system of determination of applications. The Commission and the Court were replaced from 1 November 1998 by a new permanent Court, which handles both the admissibility and merits phases of application.[134] Dr Ed Bates has identified four stages in the development of the ECHR. First, the «genesis» of the ECHR, between 1948-1950. Secondly, the «formative phase», from 1950-1974, when the Strasbourg enforcement mechanisms were established and began to determine the small number of complaints brought under the ECHR. Thirdly, the «judicial phase», between 1974-1998, when the original Court started to deliver significant judgements and the ECHR evolved into a «European Bill of Rights». Finally, the era of the permanent Court since 1998.[135] Consequently, now it is only the Court that deals with applications.

Moreover, Protocol No. 14 [136] that entered into force in 2010, amended significantly the system of the Convention in order to manage the ECtHR's case-load. The Protocol No. 14 introduced a single-judge formations and changed functions of committees of three judges. Furthermore, the procedure of friendly settlement was established. The new admissibility criterion, introduced by this Protocol, encouraged the ECtHR to declare inadmissible applications that do not raise serious human rights questions or demonstrate substantial harm suffered by applicants.[137] Protocol No. 14 considerably improved the Court's efficiency.

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[132] Bernadette Rainey, Elizabeth Wicks, and Clare Ovey. *Jacobs, White, and Ovey: The European Convention on Human Rights*. 7th ed. (Oxford: Oxford University Press, 2017), p. 7

[133] Former Art. 19 ECHR

[134] Bernadette Rainey, Elizabeth Wicks, and Clare Ovey. *Jacobs, White, and Ovey: The European Convention on Human Rights*. 7th ed. (Oxford: Oxford University Press, 2017), p. 9

[135] E. Bates, The Evolution of the European Convention on Human Rights., Oxford: Oxford University Press, 2010. Quoted in Alastair Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights.* 3d ed., (Oxford, Oxford University Press, 2012), p.9

[136] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Strasbourg, 13 May 2004, Accessed 13 November 2019, https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/rms/0900001680083711

[137] Protocol 14: How it Works, The Open Society Justice Initiative, February 2012, Accessed 13 November 2019, https://www.justiceinitiative.org/uploads/4d7dcfc0-ff44-45bb-951f-5047b529148d/echr2-protocol14-20120227.pdf

However, the ECHR, even with its Protocols, is a relatively short document. To be effective, it requires interpretation. According to Art. 32 (1) of the ECHR the role of the Court is to interpret and apply the Convention. Furthermore, the ECHR is considered as a «living instrument». This has resulted in an interpretation which seeks to ensure that the requirements of the ECHR are interpreted in a present day context and not locked into a moment in history following the Second World war. [138] The first time the Court mentioned its «living» powers in the *Tyrer v. United Kingdom* case: «The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions…»[139]

The Court treats the ECHR as a living instrument by looking for common values and emerging consensus in international law. In doing so, it often raises the human rights standard above what most contracting states currently offer. It reasons mainly by focusing on the substance of the case and by placing the burden on the respondent states to provide weighty reasons for interfering with core aspects of Convention rights.[140]

The Court referred to the «Convention as a living instrument» doctrine a lot in its case-law. For instance, in the case *Christine Goodwin v. the United Kingdom*[141] the ECtHR stated:

> …[S]ince the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved[142]…

According to Art. 19 of the ECHR, the Court was set up «…to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto…» Moreover, it's principal role is to pronounce on applications, brought by individuals and States, under the ECHR. Its judgements are legally binding on respondent States and are declaratory in nature: that is the Court can announce that the facts of the application disclose a

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[138] Bernadette Rainey, Elizabeth Wicks, and Clare Ovey. *Jacobs, White, and Ovey: The European Convention on Human Rights*. 7th ed. (Oxford: Oxford University Press, 2017), p. 4

[139] *Tyrer v. the United Kingdom*, 25 April 1978, Series A no. 26, para 31

[140] George Letsas, «The ECHR as a Living Instrument: Its Meaning and its Legitimacy.» (March 14, 2012), p. 12 http://dx.doi.org/10.2139/ssrn.2021836

[141] *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95,§74, ECHR 2002-VI

[142] See, amongst other authorities, the *Cossey v. the United Kingdom*, 27 September 1990,§35, Series A no. 184, p. 14, and *Stafford v. the United Kingdom* [GC], no. 46295/99, judgment of 28 May 2002, §§ 67-68, ECHR 2002-IV

violation of one or more Articles of the ECHR, and, under Art. 41 of the ECHR, it can award monetary compensation to an individual victim of any such violation.[143] Furthermore, even thought, there is no legal obligation to assign internal effect to the ECHR nor to afford it prevalence over national law, the majority of Contracting States have provided for internal effect; many also accept that the ECHR prevails over national legislation.[144]

Compared to other international human rights treaties, the ECHR has very strong enforcement mechanisms. It is provided for both state and individual applications. Under Art. 33, any party may bring an application alleging a breach of the ECHR by another party that has ratified it.[145] Thus not only individuals, groups of people, companies or NGOs may lodge an application, but States as well. This type of application is called "inter-State application". There have been 24 inter-State cases since the European Convention entered into force in 1953. The first one was *Greece v. the United Kingdom*[146], lodged in 1957, concerning alleged violations of the ECHR in Cyprus.[147] Currently, there are 8 inter-State cases pending before the Court.

Under Art. 34 all parties accept the right «of any person, non-governmental organisation or group of individuals», regardless of nationality, claiming to be a victim of a breach of the ECHR to bring an application against it. The right of individual application is now «a key component of the machinery for protecting the rights and freedoms set forth in the Convention»[148].

The Court decides whether the application should be admitted for consideration on the merits. If it is admitted, the Court decides in a judgement that is binding in international law whether there has been a breach of the ECHR. The execution by parties of Court judgements

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[143] Bernadette Rainey, Elizabeth Wicks, and Clare Ovey. *Jacobs, White, and Ovey: The European Convention on Human Rights*. 7th ed. (Oxford: Oxford University Press, 2017), p. 17

[144] Pieter van Dijk et al., *Theory and Practice of the European Convention on Human Rights.* 4th ed. (Antwerp/Oxford: Intersentia Publishers, 2006) p.28

[145] David Harris et al., *Law of the European Convention on Human Rights*, 3d ed., (Oxford: Oxford University Press, 2014), p.6

[146] *Greece v. United Kingdom (I)*, Application No. 176/56, Decision of the European Commission of Human Rights of June 2, 1956; *Greece v. United Kingdom (II)*, Application No. 299/57, Decision of the European Commission of Human Rights of October 12, 1967

[147] Q & A on Inter-State Cases, Press Unit of the European Court of Human Rights, 12 June 2019, Accessed 13 November 2019, https://www.echr.coe.int/Documents/Press_Q_A_Inter-State_cases_ENG.pdf

[148] *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99,§122, ECHR 2005-I

against them is monitored by the Committee of Ministers of the Council of Europe, which is composed of government representatives of all the Member States.[149]

The ECHR is a powerful instrument for protection of human rights in Europe which, with the help of the Court, develops and evolves according to present-day conditions. In case *Scoppola v. Italy* the ECtHR emphasised that:

> It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.[150]

The Court often deals with cases that raise questions never raised before. It is of high importance to understand that the Court creates common, for the whole Europe, standards in human rights protection.

In the Court's *Ireland v. the United Kingdom* judgment was observed that:

> …Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a 'collective enforcement. [151]

Moreover, as it was stated by the Court in the *Konstantin Markin v. Russia* case: « The mission of the system set up by the ECHR is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States.»[152]

Consequently, the Court plays a vital role in forming shared principles of human rights protection in Europe. The Court's analyses of obligations of Member States under the ECHR while implementing UNSC RESs concerning targeted sanctions substantially contributed to the development of protection of human rights. However, there is still no unanimity within scholars and practitioners as to the extent of Member States' obligations. That is why in the next Chapter all case-law of the ECtHR related to this issue will be analysed.

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[149] David Harris et al., *Law of the European Convention on Human Rights*, 3d ed., (Oxford: Oxford University Press, 2014), p.6-7

[150] *Scoppola v. Italy (no. 2)* [GC], no. 10249/03,§104, 17 September 2009

[151] *Ireland v. the United Kingdom,* no. 5310/71, §239, 18 January 1978, Series A no. 25

[152] *Konstantin Markin v. Russia* [GC],§89, no. 30078/06, ECHR 2012

2.2. The case-law of the ECtHR concerning States' obligations under the ECHR while implementing sanctions under UNSC Resolutions

The common feature of all cases that will be analysed below is that the Court's main task was to reach a conclusion on whether the States fulfilled their obligations under the ECHR while they were implementing sanctions under UNSC RESs. However, while considering the alleged violations of the ECHR the Court was asked to examine a lot of closely related issues such as: equivalent protection doctrine, attribution of acts of States to the UN, jurisdiction *ratione personae* of the ECtHR, and hierarchy of international legal orders. In this Part of the Master thesis all the case-law of the Court connected to this issue and the argumentation of the ECtHR and its reasoning will be examined.

2.2.1. Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland

The first case where the Court was asked to analyse whether Ireland while implementing sanctions under UNSC RES acted in compliance with the ECHR was the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*[153] (hereinafter - *Bosphorus* case). The case concerned the seizure of an aircraft leased by "Bosphorus Airways", an airline charter company registered in Turkey (the applicant), from Yugoslav Airlines ("JAT") by the Irish authorities. It had been in Ireland for maintenance by TEAM Aer Lingus, a company owned by the Irish State, and was seized on the basis of Regulation (EEC) No 990/93 of the European Community[154], which implemented the SC RES 820 (1993) concerning the imposition of sanctions against the former Yugoslavia. According to this RES UN Member States were under an obligation to impound all «aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro)».[155] As a result, it was impossible for the applicant company to commercially exploit the aircraft for three out of the four years of the lease. Before the Court the applicant company complained that the manner in which Ireland had implemented

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[153] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI

[154] Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), Accessed 15 September 2019, https://op.europa.eu/en/publication-detail/-/publication/fee1c622-7f5a-4fa2-855f-c9ab2ec59f87/language-en

[155] UNSC Resolution 820 (1993), *Bosnia and Herzegovina,* S/RES/820 (1993) (17 April 1993), para 24. Available from https://undocs.org/S/RES/820(1993)

the sanctions regime to impound its aircraft had been a discretionary decision which had been violated Art.1 of Protocol No.1 of the ECHR.

The ECtHR found that the impugned interference had not been the result of an exercise of discretion by the Irish authorities, either under EC or Irish law, but rather had amounted to compliance by the Irish State with its legal obligations flowing from EC law and, in particular, Art. 8 of EC Regulation 990/93.

Consequently, it invoked the doctrine of equivalent protection in respect of the EU legal order and the *Bosphorus* case is considered as the one that illustrates the contours of the equivalent protection doctrine.[156] That conclusion allowed the Court to avoid ruling on the legality of the UNSC RES in respect of the ECHR standards.[157] Even though, this case, as stated above, did not make comprehensible the relationship between the UN and the ECHR legal orders, the doctrine of the equivalent protection should be analysed more precisely. Because the later one was applied by the Court to transfer of powers to various international organisations.[158] Furthermore, this doctrine was used in the *Al-Dulimi and Montana Management Inc. v. Switzerland* case [159], one of the most significant cases concerning the implementation measures of the UNSC sanctions, that will be discussed further.

In general, the Strasbourg institutions consider the transfer of powers from Member States to international organisations permissible. The first time the Strasbourg institution introduced the notion of "equivalent protection" was in the case *M. and Co. v Germany*,[160] where the European Commission of Human rights stated: «the transfer of powers to an international

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[156] Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*., (Boston: Brill Nijhoff, 2017), p. 264

[157] Milanovic, M., «Norm Conflict in International Law, vol. 20, 2009, pp. 69-131, p.123; Eckes, C., «Does the European Court of Human Rights Provide Protection from the European Community? - The Case of Bosphorus Airways», European Public Law, vol.13, 2007,pp.47 et seq., p.61. quoted in Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*., (Boston: Brill Nijhoff, 2017), p. 267

[158] *M.&Co. v Germany*, Decision of the European Commission of Human rights of 9 February 1990, No. 13258/87, Decisions and Reports, vol. 64 (concerning the European Community); *Karl Eckar Heinz v Contracting States Parties to the European Patent Convention*, decision of the European Commission of Human Rights of 10 January 1994, No. 21090/92, Decisions and Reports, vol. 76-B, pp.125 et seq. (concerning the European Patent Office); *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I (concerning the European Space Agency), and *Beer and Regan v. Germany* [GC], no. 28934/95, 18 February 1999 (concerning the European Space Agency).

[159] *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, 26 November 2013

[160] *M.&Co. v Germany*, Decision of the European Commission of Human rights of 9 February 1990, No. 13258/87, Decisions and Reports, vol. 64, p.153

organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection.»

However, the general rules were formulated in the leading *Bosphorus* case:

> 155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides. By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.
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> 156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a "constitutional instrument of European public order" in the field of human rights.[161]

In order to understand whether there was a presumption of ECHR compliance at the relevant time, the Court analysed, first of all, substantive guarantees of fundamental rights prescribed by the EC treaties. Secondly, the mechanisms of control in place to ensure rights and guarantees' observance. Finally, the Court held that the EC system offered equivalent protection. The presumption arose that Ireland had not departed from the requirements of the ECHR when it implemented legal obligations flowing from its membership of the EC. [162]

The Court was severely criticised because through the application of the equivalent protection doctrine to weight the contrasting public interest of human rights protection and

[161] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no.45036/98, §§155-156, ECHR 2005-VI

[162] ibid. §§159-165

international cooperation;[163] it has followed an overtly lofty attitude in its appreciation of the protection of fundamental rights in the Community legal order.[164]

Thus, in the case scenario the EU regulation enforcing the economic sanctions imposed by SC acts as a kind of screen. And the question of the responsibility of the States Parties to the ECHR in the implementation of resolutions imposing economic sanctions will be addressed differently according to whether or not the respondent State is a member of the EU. The criterion of 'equivalent protection' is only applicable in the former scenario.[165]

Consequently, the *Bosphorus* case legacy is not very helpful regarding the relationship between the UN and the ECHR legal orders, because the ECtHR did not rule out the possibility of controlling the legality of a SC RES vis-à-vis the ECHR.[166]

2.2.2.Behrami and Behrami v. France and Saramati v. France, Germany and Norway

Behrami and Saramati cases followed the *Bosphorus* one. Although the *Behrami and Saramati* case did not concern the imposition of targeted sanctions by the UNSC, the contribution of this case to the Court's case law is very significant. The two Behrami brothers were playing with unexploded cluster bombs; one exploded, killing one brother and seriously injuring the other. The father of the boys complained that the death and injuries had been caused by the failure of French KFOR troops to mark or defuse unexploded cluster bombs when they knew of their existence. Saramati's complaints related to his detention as a threat to the security

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[163] See the observations of Conforti, B., «Le Principe d'equivalence et le contrôle sur les actes communautaires dans la jurisprudence de la Cour européenne des droit de l'homme», in Breitenmoser, M., et al.(eds.),Human Rights, Democracy and the Rule of Law. Menschenrechte, Demokratie und Rechtsstaat.Droit de l'homme, démocratie et état de droit. Liber Amicorum Luzius Wildhaber, Zürich, Nomos, 2007, pp.173-182 quoted in Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*., (Boston: Brill Nijhoff, 2017), p. 267

[164] Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*., (Boston: Brill Nijhoff, 2017), p. 267

[165] Linos-Alexander Sicilianos. «The European Court of Human Rights facing the Security Council: towards systematic harmonization.» *International and Comparative Law Quarterly* 66, no. 4 (2017): 804

[166] See. The relevant observations in Kadi v. The Council of the European Union and Commission of the European Community, Court of Justice of the European Communities, Case C-402/05 P, Opinion of the Advocate General M.M. Poiares Maduro delivered on 16 January 2008, EU:C:2008:11 (Kadi, Opinion of the Advocate General), para 36 quoted in Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*., (Boston: Brill Nijhoff, 2017), p. 268

of KFOR. His claims were made against France, Germany, and Norway as the relevant participating countries in KFOR. [167]

In these cases, the ECtHR mainly dealt with the question of whether the applicants fell within the extra-territorial "jurisdiction" of the respondent States within the meaning of Art. 1 of the ECHR, especially, the compatibility *ratione personae* of the applicants' complaints with the provisions of the ECHR.[168]

In the end, the Court has found, UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective, and so the acts were outside of the Court's competence *ratione personae*.[169]

The ECtHR also distinguished this case from the *Bosphorus*. The reasoning was based on the fact that the impugned act (seizure of the applicant's leased aircraft) had been carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers. The Court did not therefore consider that any question arose as to its competence, notably *ratione personae*, vis-à-vis the respondent State despite the fact that the source of the impugned seizure was an EC Council Regulation which, in turn, applied a UNSC RES. In the *Behrami and Saramati* cases, the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities.[170]

While discussing the problems mentioned before, the Court analysed, more generally, the relationship between the ECHR and the UN acting under Chapter VII of UN Charter. Having in mind problems raised by the Master thesis, it is more relevant to analyse the Court's findings on the relationship between these two international instruments.

First of all, the Court recalled that one of the aims of the ECHR according to its preamble is the collective enforcement of rights in the Universal Declaration of Human Rights of the GA of the UN. After it emphasised that the ECHR has to be interpreted in the light of any

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[167] Bernadette Rainey, Elizabeth Wicks, and Clare Ovey. *Jacobs, White, and Ovey: The European Convention on Human Rights*. 7th ed. (Oxford: Oxford University Press, 2017), p. 96

[168] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], No. 71412/01, §§ 66-72, 2 May 2007

[169] ibid. §§ 144-152

[170] ibid.§ 151

relevant rules and principles of international law applicable in relations between its Contracting Parties. Therefore, it had regard to two complementary provisions of the Charter, Arts. 25 and 103, as interpreted by the ICJ.[171]

Secondly, the Court stressed on the imperative nature of the maintenance of international peace and security aim of the UN and, consequently, of the powers accorded to the UNSC under Chapter VII to fulfil that aim. The ECtHR also stated that: «While it is equally clear that ensuring respect for human rights represents an important contribution to achieving international peace, the fact remains that the UNSC has primary responsibility, as well as extensive means under Chapter VII, to fulfil this objective, notably through the use of coercive measures.»[172]

The Court went further in its observations and said that the ECHR cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC RESs as well as voluntary acts of the respondent States and the contribution of troops to the security mission, that remained crucial to the effective fulfilment by the UNSC of its Chapter VII mandate. To do so would be to interfere with the fulfilment of the UN's key mission in the field of the maintenance of international peace and security. It would also be tantamount to imposing conditions on the implementation of a UNSC RES which were not provided for in the text of the RES itself. [173]

One can see that by such interpretation the ECtHR gave supremacy to the UN legal order and its aim to maintain peace and security.

This approach was analysed by many scholars. For instance, Machiko Kanetake assumed that the Court made these remarks presumably to indicate the relative weight of the SC's mandate in comparison to the protection of human rights, and supposedly to explain why the Strasbourg Court deferred to the UN organ and its imperative mandate.[174]

Furthermore, Laurence Boisson de Chazournes found the Court's line of argumentation not very persuasive and the reasoning on the question of the legal primacy of the Charter vis-à-vis the ECHR not very elaborated. She argued that the SC RES is presented as an impenetrable

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[171] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], No. 71412/01,§147, 2 May 2007

[172] ibid.§148

[173] ibid.§149

[174] Machiko Kanetake, «Subsidiarity in the Maintenance of International Peace and Security.» *Law and Contemporary Problems*, Vol. 79, No. 2 (2016): 170 . Available at SSRN: https://ssrn.com/abstract=2800809

barrier[175] for regionalism and gives paramount importance to universalism in the field of international peace and security.[176]

Interesting fact is that the Court only briefly mentioned Art. 25 and Art. 103 of the UN Charter without its own analyses but with the reference to the ICJ and CFI jurisprudence.[177] In a nutshell, the Court does not seem to have taken fully into account the complexity of the legal relationships between the UN and regional organisation to use force based on Chapter VII and VIII of the UN Charter and the practice thereunder.[178]

The absence of detailed elaboration on the application of Art. 103 has led some authors to suggest that the Court was consciously trying to avoid dealing with the effect of unconditional legal subordination to the UN Charter.[179] However, in Laurence Boisson de Chazournes opinion, even this passing reference is enough for embedding a feeling of normative hierarchy between the Charter and the ECHR.[180]

Moreover, in the decision in the *Stichting Mothers of Srebrenica and Others v. The Netherlands* case, the Court upheld the UN immunity in front of the Dutch Courts for the massacre in Srebrenica almost in the same way as it had done in *Behrami and Saramati* cases by stating that:

> […]since operations established by United Nations Security Council resolutions under Chapter VII of the United Nations Charter are fundamental to the mission of the United Nations to secure international peace and security, the Convention

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[175] Dubout, E., Touzé, S., «La fonction des droits fondamentaux dans les rapports entre ordres et systèmes juridiques», in Dubout, E., Touzé, S. (eds.), op cit., pp. 11-35, p. 30, speaks of «résolution écran» quoted in Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*., (Boston: Brill Nijhoff, 2017), p. 275

[176] Sari, A., op cit., p.169 quoted in Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*., (Boston: Brill Nijhoff, 2017), p. 275

[177] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], No. 71412/01, §27, 2 May 2007

[178] Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*., (Boston: Brill Nijhoff, 2017), p. 220

[179] Milanović, M., Papić, T., «As Bad as It Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law», ICLQ, vol. 58, 2009, pp. 267-296, p. 274 quoted in Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*., (Boston: Brill Nijhoff, 2017), p. 277

[180] Knoll, B., The Legal Status of Territories Subject to Administration by International Organizations, Cambridge, Cambridge University Press, 2008, p. 445; Messineo, F., «The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights»,NILR, vol. 56, 2009, pp. 35-62,p.48; Kadi CFI, op cit., para 181; Al-Jedda (HL) case, op cit., para 35: «Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in article 103 to «any other international agreement» leaves no room for any excepted category» quoted in Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*., (Boston: Brill Nijhoff, 2017), p. 277

> cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations. To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfilment of the key mission of the United Nations in this field, including the effective conduct of its operations.[181]

One can assume that at that time the Court was not ready to make such a strong conclusion as to existence or absence of normative hierarchy. Thus, it devoted to this problem only several paragraphs with a very limited explanation and avoided clear phrasing. By doing so, the Court only opened new doors for the further discussion.

2.2.3.Al-Jedda v. the United Kingdom

The *Al-Jedda* case dealt with the detention of Mr Hilal Abdul-Razzaq Ali Al-Jedda, who was arrested on suspicion of involvement in terrorism and subsequently detained for over three years at a detention facility in Basra (Iraq) run by British troops, operating as part of the Multinational Force in Iraq (MNF). In this case the Court discussed two main problems.

The first issue is jurisdiction, mainly, whether the acts run by British armed forces on the territory of Iraq were attributable to the UK or to the UN that had authorised the continuing presence of the occupation forces in Iraq.

In March 2003 a United States of America-led coalition, including British armed forces, invaded Iraq. Major combat operations in Iraq were declared complete in May 2003. As from that date, the United Kingdom became an occupying power under the relevant provisions of the regulations annexed to the 1907 Hague Convention and the 1949 Fourth Geneva Convention. A United Nations Assistance Mission for Iraq (UNAMI) was established. In its RES 1511 (2003) and 1546 (2004), the UNSC described the role of UNAMI, reaffirmed its authorisation for the multinational force under unified command and decided "that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq".[182] In RES 1546, adopted on 8 June 2004, some four months before the applicant was taken into detention, the UNSC had reaffirmed the authorisation for the MNF, but there was no indication that it had intended to assume any greater degree of control or command over the force than it had exercised previously. Moreover, the fact that the UN Secretary General

[181] *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), no. 65542/12, §154, 11 June 2013

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

and UNAMI had repeatedly protested about the extent to which security internment was being used by the MNF made it difficult to conceive that the applicant's detention was attributable to the UN. In sum, the SC had neither effective control nor ultimate authority and control over the acts and omissions of troops within the MNF. The applicant's detention was therefore not attributable to the UN.[183]

The internment had taken place within a detention facility controlled exclusively by British forces, and the applicant had thus been within the authority and control of the United Kingdom throughout. The British officer in command of the detention facility had taken the decision to hold him in internment. The fact that his detention was subject to reviews by committees including Iraqi officials and non-United Kingdom representatives from the MNF did not prevent it from being attributable to the United Kingdom. The applicant thus fell within the jurisdiction of the United Kingdom for the purposes of Art. 1 of the ECHR.[184]

The second problem raised was concerning the alleged breach of Art. 5§1 (Right to liberty and security) of the ECHR by the UK concerning the detention of the applicant. The applicant was detained in a British military facility for over three years. He was able to make written submissions to the reviewing UK's authorities but there was no provision for an oral hearing. The internment was authorised "for imperative reasons of security". At no point during the internment was it intended to bring criminal charges against the applicant. [185]

According to the British government, the situation under review was identical from the point of view of the questions of attribution and jurisdiction to that of the *Behrami and Saramati* case. The Government claimed that the British troops were not exercising the sovereign authority of the United Kingdom but the international authority of the MNF, acting pursuant to the binding decision of the UNSC.[186] They argued that the United Kingdom's duties under Art. 5§1 were displaced by the obligations created by UNSC RES 1546. They contended that, as a result of the operation of Art. 103 of the UN Charter, the obligations under the UNSC RES prevailed over those under the ECHR. Consequently, Art. 5 was not compatible with the UN legal regime.[187]

Having in mind all the circumstances of the case, the Court's line of thinking should be analysed. First of all, the Court determined whether there was a conflict between the United

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[183] *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, §§74 - 84, 7 July 2011

[184] ibid.§ 85-86

[185] ibid.§98

[186] ibid.§§64-68

[187] ibid.§§ 87-92

Kingdom's obligations under UNSC RES 1546 and its obligations under Art. 5§1 of the ECHR before it can consider whether Art. 103 had any application in the case.[188]

The ECtHR started with the brief analyses of the purposes and principles of the UN prescribed under the Art. 1 of the UN Charter. As in the *Behrami and Saramati* cases, [189] the Court emphasised on the purpose of maintaining international peace and security. However, further it highlighted the third sub-paragraph provides that the UN was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms" and Art 24§2 of the UN Charter that requires the SC, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the UN". Based on these findings:

> …[T]he Court considers 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 […] In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law. [190]

The broadening of the Court's vision on the UN objectives by means of the inclusion of human rights protection served as a springboard for introducing the presumption of harmonious interpretation in its reasoning.[191] It stated: «…the Court must therefore choose the interpretation which is most in harmony with the requirements of the ECHR and which avoids any conflict of obligations.» [192]

In this situation, the interpretation of UNSC RESs is especially significant. Before going into details of the Court's assessment, it is relevant to compare UNSC RESs' wording that were assessed by the Court in the *Behrami and Saramati* case and the *Al-Jedda* case. In both these cases the Court faced the problem of attribution of acts of the Member States to the UN. However, as it will be shown further the Court reached a different conclusion.

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[188] *Al-Jedda v. the United Kingdom* [GC], no. 27021/08,§101, 7 July 2011

[189] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], No. 71412/01, §148, 2 May 2007

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

[191] Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*., (Boston: Brill Nijhoff, 2017), p. 295

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

Thus, in the *Behrami and Saramati* case the ECtHR, while examining the question of whether the action of the UK can be attributed to KFOR or UNMIK, analysed the UNSC RES. 1244 (1999). It concerned the establishing of the international civil and security presence in Kosovo. The main indicative parts read as follows:

> 5.Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the [FRY] to such presences;
>
> 6. Requests the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner;
>
> 7. Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities under paragraph 9 below;
>
> […]
>
> 9. Decides that the responsibilities of the international security presence to be deployed and acting in Kosovo will include:
>
> […]
>
> 10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the [FRY], and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;
>
> 11. Decides that the main responsibilities of the international civil presence will include…[193]

First of all, the SC used a clear wording «*under United Nations auspices*». Secondly, the Secretary-General was responsible for appointing and instructing a Special Representative. Moreover, the SC authorised the Secretary-General together with the relevant international organisation to establish an international civil presence. Furthermore, through this Resolution the

[193] UNSC Resolution 1244 (1999), Kosovo, S/RES/1244(1999) (10 June 1999), available from https://undocs.org/S/RES/1244(1999)

SC clearly defines responsibilities of the both civil and security presences. Wordings which mostly used in RES 1244 (1999) are «*authorizes*», «*requests*», «*demands*».

Concerning this issue, the ECtHR found that UNMIK was a subsidiary organ of the UN institutionally directly and fully answerable to the UNSC. While UNMIK comprised four pillars (three of which were at the time led by UNHCR, the OSCE and the EU), each pillar was under the authority of a Deputy SRSG, who reported to the SRSG who in turn reported to the UNSC (Art. 20 of UNSC RES 1244). With regard to KFOR the Court found that the UNSC retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO.[194]

In the *Al-Jedda* case there are two the most important RESs that were analysed by the Court. The UNSC RES. 1511 (2003) is a legal basis for establishing a multinational force. The principal paragraphs read as follows:

> 13. [The UNSC] authorizes a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure;
>
> 14. Urges Member States to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13 above. [195]

The language of the RES 1511(2003) slightly differs from the RES 1244(1999). However, this distinction is very important. Thus, one can see that expressions «*request*», «*decides*», «*determines*» are used in both resolutions. Nevertheless, unlike in the RES. 1244, in the RES. 1511 (2003) the UNSC used the term «*authorises*» only once, with regard to a multinational force. Furthermore, in the RES. 1511 (2003) the main operative terms were «*calls upon*» and «*urges*». Moreover, the indication of the UN's guidance, which was used in the RES. 1244 (1999) as the expression «*under United Nations auspices*», was absent in the RES. 1511 (2003).

The Strasbourg Court:

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[194] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (dec.) [GC], No. 71412/01, §§132-142, 2 May 2007

[195] UNSC Resolution 1511 (2003), The situation between Iraq and Kuwait, S/RES/1511 (2003), (16 October 2003) available from http://unscr.com/en/resolutions/doc/1511

> […] did not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multinational Force became attributable to the United Nations or ceased to be attributable to the troop-contributing nations. The Multinational Force had been present in Iraq since the invasion and had been recognised already in Resolution 1483, which welcomed the willingness of member States to contribute personnel. The unified command structure over the Force, established from the start of the invasion by the United States of America and the United Kingdom, was not changed as a result of Resolution 1511. […] Although the United States of America was requested to report periodically to the Security Council about the activities of the Multinational Force, the United Nations did not, thereby, assume any degree of control over either the Force or any other of the executive functions of the CPA.[196]

As for the UNSC RES 1546 (2004) the Court stated that it reaffirmed the authorisation for the MNF established under RES 1511 (2003). There is no indication in RES 1546 that the SC intended to assume any greater degree of control or command over the MNF than it had exercised previously.[197]

As to the Court's evaluation of the UK's obligations, the Court considered that UNSC RES 1546, in paragraph 10, authorised the United Kingdom to take measures to contribute to the maintenance of security and stability in Iraq. However, neither RES 1546 nor any other UNSC RES explicitly or implicitly required the United Kingdom to place an individual whom its authorities considered to constitute a risk to the security of Iraq in indefinite detention without charge.[198] In paragraph 10, the SC decides that the MNF shall have authority "to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed", which, *inter alia*, set out the MNF's tasks. Internment is listed in US Secretary of State Powell's letter, as an example of the "broad range of tasks" which the MNF stood ready to undertake. In the Court's view, the terminology of the Resolution appears to leave the choice of the means to achieve this end to the Member States within the MNF. Moreover, in the Preamble, the commitment of all forces to act in accordance with international law is noted. It is clear that the ECHR forms part of international law, as the Court has frequently observed. In the absence of clear provision to the contrary, the presumption must be that the SC intended States within the MNF to contribute towards the maintenance of security

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[196] *Al-Jedda v. the United Kingdom* [GC], no. 27021/08,§80, 7 July 2011

[197] ibid.§81

[198] ibid.§109

in Iraq while complying with their obligations under international human rights law.[199] Consequently, the conclusion of the Court was that there was no conflict between the United Kingdom's obligations under the UN Charter and its obligations under Art. 5§1 of the ECHR. By using these arguments the Court avoided further discussion on Art. 103 of the UN Charter.

Laurence Boisson de Chazournes thinks that the Court departs in the *Al-Jedda* case from its *Behrami and Saramati* decision in two important respects. First, it qualifies its views on the UN purposes thus coupling the maintenance of peace and security with the respect for human rights and freedoms. The reference to human rights protection as one of the UN's purposes serves as a clear reminder that the UN, and the SC in particular, are not above the law.[200] Secondly, the Court indirectly assesses the SC resolution by interpreting it in harmony with European human rights standards.[201]

Consequently, the Court avoided again any ruling on the problem of the relationship between the UN Charter, particularly Art. 103, and the ECHR as the regional treaty. However, it is the first time the ECtHR tried to harmonise obligations under the UN Charter and the ECHR. Moreover, the Court's interpretation of the UNSC's actions as actions that do not intend to impose any obligation on Member States to breach fundamental principles of human rights is of considerable significance.

2.2.4.Nada v. Switzerland

The *Nada* case concerned the addition of the applicant's name to the Federal Taliban Ordinance and the resulting ban on international travel. As the applicant resided in the small enclave of Campione d'Italia, his inability to travel to, or through, surrounding Switzerland meant that he was confined to an area about 1.6 square kilometers. UNSC RESs required an entry and transit ban in respect of individuals referred to in a list of individuals and entities associated with Osama bin Laden and al-Qaeda.[202] The applicant complained that these measures

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[199] *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, §105, 7 July 2011

[200] Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*, (Boston: Brill Nijhoff, 2017), p. 296

[201] Milanović, M., «Norm Conflict…», pp. 97-102. But see, the Court's cautious caveat that it «is mindful of the fact that it is not its role to seek to define authoritatively the meaning of provisions of the United Nations Charter and other international instruments»; Al-Jedda ECtHR, ibid., para 76. Quoted in Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*, (Boston: Brill Nijhoff, 2017), p. 296

[202] Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. *Jacobs, White, and Ovey: The European Convention on Human Rights*. 7th ed. (Oxford: Oxford University Press, 2017), p. 105

had breached his right to respect for his private life, including his professional life, and his family life. He contended that this ban had prevented him from seeing his doctors in Italy or in Switzerland and from visiting his friends and family. He further claimed that the addition of his name to the list annexed to the Taliban Ordinance had impugned his honour and reputation.[203]

The respondent Government argued that the application was incompatible *ratione personae* and *ratione materiae* with the ECHR, that the applicant did not have "victim" status, and that the applicant had failed to exhaust domestic remedies. The Court joined consideration of the issue of compatibility *ratione materiae* to the merits. Regarding the remaining preliminary objections, it dismissed them unanimously. While examining *ratione personae* issue, the Court clearly distinguished the *Nada* case from the *Behrami and Saramati* one. It emphasised that in the present case the relevant UNSC RESs required States to act in their own names and to implement them at a national level. Moreover, the measures imposed by UNSC RESs were implemented at national level by an Ordinance of the Federal Council, and the Swiss authorities rejected the applicant's requests for exemption from the ban on entry into Swiss territory. The acts in question therefore related to the national implementation of UNSC RESs.[204] Consequently, the Court found that the alleged violations of the ECHR were attributable to Switzerland.

While examining the alleged violations of Art. 8, the ECtHR used a classic formula: firstly, the Court determined whether the applicant's claim falls within the scope of Art. 8; secondly, the Court examined whether there has been an interference with that right; next, the Court analysed whether an interference was "in accordance with the law", pursued one or more of the legitimate aims and was "necessary in a democratic society" to achieve such aims.

Concerning the first two steps of the test the Court found that the impugned measures constituted an interference with the applicant's rights to private life and family life, because these measures had left the applicant in a confined area for at least six years and had prevented him, or at least made it more difficult for him, to consult his doctors in Italy or Switzerland or to visit his friends and family. Furthermore, the measures had a sufficient legal basis and pursued the legitimate aims of preventing crime and contributing to national security and public safety.[205]

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[203] *Nada v. Switzerland* [GC], No.10593/08,§149 , 12 September 2012

[204] ibid.§§ 117-123

[205] *Nada v. Switzerland* [GC], No.10593/08, §§ 163-167, 12 September 2012

While examining the last "necessary in a democratic society" element the Court, firstly, analysed the relevant resolutions in order to determine whether they left States any freedom in their implementation and, in particular, whether they allowed the Swiss authorities to take into account the very specific nature of the applicant's situation and therefore to meet the requirements of Art. 8 of the ECHR.

While assessing the UN Charter and UNSC RESs the Court made a conclusion that:

> […]the United Nations Charter does not impose on States a particular model for the implementation of the resolutions adopted by the Security Council under Chapter VII. Without prejudice to the binding nature of such resolutions, the Charter in principle leaves to United Nations member States a free choice among the various possible models for transposition of those resolutions into their domestic legal order. The Charter thus imposes on States an obligation of result, leaving them to choose the means by which they give effect to the resolutions. [206]

Secondly, the Court went into the wording of the RES 1390 (2002). It emphasised, that:

> 177. Whilst paragraph 2(b) of that Resolution required States to take such measures, it stated that the ban did "not apply where entry or transit [was] necessary for the fulfilment of a judicial process …". In the Court's view, the term "necessary" was to be construed on a case-by-case basis.
>
> 178. In addition, in paragraph 8 of Resolution 1390 (2002), the Security Council "[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 territory ...". The wording "where appropriate" also had the effect of affording the national authorities a certain flexibility in the mode of implementation of the Resolution.[207]

Consequently, the Court found that Switzerland enjoyed some latitude, which was limited but nevertheless real, in implementing the relevant binding resolutions of the UNSC.

Regarding the proportionality of interference, the Court found that the Swiss authorities did not sufficiently take into account the realities of the case, especially the unique geographical situation of Campione d'Italia, the considerable duration of the measures imposed or the applicant's nationality, age and health. Moreover, the possibility of deciding how the relevant SC resolutions were to be implemented in the domestic legal order should have allowed some alleviation of the sanctions regime applicable to the applicant, having regard to those realities, in order to avoid interference with his private and family life, without however circumventing the binding nature of the relevant resolutions or compliance with the sanctions provided for therein.

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[206] *ibid.*§176

[207] *ibid.* §§ 177-178

The Court emphasised the investigations conducted by the Swiss and Italian authorities concluded that the suspicions about the applicant's participation in activities related to international terrorism were clearly unfounded. Even though, the State which had conducted the investigations and criminal proceedings could not itself proceed with the deletion, but it could at least transmit the results of its investigations to the Sanctions Committee. However, the Swiss authorities did not inform the Sanctions Committee until 2 September 2009 of the conclusions of investigations closed on 31 May 2005.[208] Thus the ECtHR stated that the Swiss authorities 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.

By stating that the Court decided that it was not relevant anymore to determine the question of the hierarchy between the obligations of the States Parties to the ECHR under that instrument, on the one hand, and those arising from the UN Charter, on the other. And one more time it stressed out that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations they regarded as divergent. [209]

Concerning the alleged violation of Art. 13 of the ECHR, the Court equally found Switzerland in breach of its obligations, since the Swiss authorities had not examined on the merits Mr Nada's request for delisting from the Swiss list and had not annulled his delisting for reasons of human rights violations. In a clear message towards the SC, and citing the Kadi ECJ judgement, the Court observed that «there was nothing in the SC resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those Resolutions» and, thus, a review of the internal lawfulness of the relevant Swiss ordinance in light of the ECHR could have taken place.[210]

One can find both negative and positive features in this case. As to the negative aspects, first of all, it is the consideration of the Court on the real latitude Switzerland had in implementing the resolutions.[211] In *Nada*, unlike in *Al-Jedda*, the UN had authorised the human rights infringement, but because it left room for implementation, the Contracting States should have implemented it with their ECHR obligations in mind. Such harmonisation may prove to be

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[208] *Nada v. Switzerland* [GC], No.10593/08, §§ 187-188, 12 September 2012

[209] *ibid.* §§ 195-197

[210] *Nada v. Switzerland* [GC], No.10593/08, §212, 12 September 2012 quoted in Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*, (Boston: Brill Nijhoff, 2017), p. 300

[211] Solène Guggisberg, «The Nada case in front of the ECtHR – A new milestone in the European debate on Security Council targeted sanctions and human rights obligations.» *Croatian Yearbook on European Law and Policy* 8, (2012): p. 434

a tough challenge for some Contracting States. [212] The Court, by making such a conclusion, created an obligation of conduct: whatever is not prohibited explicitly by the SC resolution should be undertaken in order to alleviate the harsh consequences of the sanctions on Mr. Nada. Thus, the Court took a further step towards testing or perhaps even indirectly challenging the authority of SC RESs by insisting that UN Member States have a margin of appreciation in the implementation of the sanctions regime that stretches so far as to allow the introduction of mechanisms for the review of the internal (substantive) lawfulness of the national measures, even if these measures in reality only transpose word for word in the domestic legal order or the relevant SC RESs.[213] Consequently, the Swiss authorities had to harmonise its commitments under both international instruments UNSC RESs (UN Charter) and the ECHR.

Moreover, it can also be regretted that no mention of equivalence was made. The Court by focusing on the domestic implementation measures and the Swiss failures, applies a *de facto* dualism that allows it to overlook the UN measures, the question of their conformity with human rights and their legal effects on the domestic legal order per Art. 103 of the UN Charter.[214] Finally, due to the mild approach taken, the Court was at risk of criticism.[215]

Thus, in the joint concurring opinion of Judges Bratza, Nicolaou and Yudkivska and concurring opinion of Judge Malinverni they argued that the reasoning of the Court about the latitude enjoyed by the respondent State is not convincing. Consequently, Judges Bratza, Nicolaou and Yudkivska concluded that:

> Like the Swiss Federal Court, we accordingly consider that States enjoyed no latitude in their obligation to implement the sanctions imposed by the relevant Security Council regulations and that Switzerland was debarred from deciding of its own motion whether or not sanctions should continue to be imposed on a person or organisation appearing on the Sanctions Committee list.»[216]

Findings on this issue of Judge Malinverni were:

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[212] Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. *Jacobs, White, and Ovey: The European Convention on Human Rights*. 7th ed. (Oxford: Oxford University Press, 2017), p.105-106

[213] Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*, (Boston: Brill Nijhoff, 2017), p. 300

[214] ibid. p. 300-301

[215] Solène Guggisberg, «The Nada case in front of the ECtHR – A new milestone in the European debate on Security Council targeted sanctions and human rights obligations.» *Croatian Yearbook on European Law and Policy* 8, (2012): 434

[216] Joint concurring opinion of Judges Bratza, Nicolaou and Yudkivska in *Nada v. Switzerland* [GC], No.10593/08, 12 September 2012, §8

> […]it is difficult, in my opinion, to sustain the argument that Switzerland had any room for manoeuvre in the present case. The situation here was undeniably one of mandatory power and not one of discretionary power[…][217]

However, Solène Guggisberg in her research on the *Nada* case also found some positive aspects in harmonious interpretation and implementation of international obligations in the *Nada* case. Thus, she claimed that the ECtHR showed a strong willingness in the *Al-Jedda* case to find an innovative way to overcome the negative consequences of a fragmented legal order and the Court confirmed this approach 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.[218] Consequently, the *Nada* case was a second step of the ECtHR towards implementation of the ECHR obligations in line with the obligations arising from the UN Charter.

2.2.5.Al-Dulimi and Montana Management Inc. v. Switzerland

The most recent case concerning the implementation measures of the UNSC RES by States Parties to the ECHR is the *Al-Dulimi* case. Because in its previous case-law the ECtHR avoided the issue of Art. 103 of the UN Charter and the ECHR hierarchy, many scholars hoped that in this case the Court finally will clarify its position on this matter.

The case related to imposition of economic sanctions on Iraqi national by the UNSC RES. Mr Al-Dulimi (the first applicant), a resident of Jordan, was alleged to have been the head of finance for Saddam Hussein's Iraqi secret service. His assets, and those of a company of which he was formerly the managing director (Montana Management Inc (the second applicant)), were frozen by Switzerland from 7 August 1990, implementing UNSC RES 661, and became liable to confiscation by Switzerland from 18 May 2004 in its implementation of the

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[217] Concurring opinion of Judge Malinverni in *Nada v. Switzerland* [GC], No.10593/08, 12 September 2012, §10

[218] Solène Guggisberg, «The Nada case in front of the ECtHR – A new milestone in the European debate on Security Council targeted sanctions and human rights obligations.» *Croatian Yearbook on European Law and Policy* 8, (2012): p. 434

listing of Mr Al-Dulimi and the company by the 1518 Sanctions Committee.[219] The applicants alleged that the confiscation of their assets had not been accompanied by a procedure complying with Art. 6§1 of the ECHR.

Because of the case's great significance and in order to understand better the Court's line of argumentation both Chamber and Grand Chamber judgements of the ECtHR should be analysed.

It is worth noting that while examining the case on the merits the Chamber started to analyse it in the light of the equivalent protection criterion, while avoiding the issue raised under Art.103 of the UN Charter. The Court distinguished this case from the *Nada* because in the *Al-Dulimi* case the relevant SC RESs, especially paragraph 23 of RES 1483 (2003), reads as follows:

> The Security Council
> […]
> Decides that all Member States in which there are:
> (a) funds or other financial assets[…]
> (b) […]
> shall freeze without delay those funds or other financial assets or economic resources…[220]

Such a wording, in Court's view, did not confer on the States concerned any discretion in the implementation of the obligations arising thereunder.[221] As a result, no possibility of harmonious interpretation (like in *Al-Jedda*) or of harmonious implementation (like in *Nada*) existed.[222]

Afterwards the ECtHR continued with the evaluation of the UN «Focal Point» for the deletion of names from the SC lists and found that it did not provide a level of protection that is equivalent to that required by the ECHR. Moreover, the Federal Court had refused to examine the merits of the impugned measures, that is why the procedural shortcomings in the sanctions regime could not be regarded as compensated for by domestic human rights protection

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[219] Matthew Stubbs «Human Rights obligations as a collateral limit on the powers of the Security Council» In *Imagining Law: Essays in Conversation with Judith Gardam*, edited by Stephens Dale and Babie Paul, (South Australia: University of Adelaide Press, 2016), p. 87 Stable URL: https://www.jstor.org/stable/10.20851/j.ctt1sq5x0z.8

[220] UNSC Resolution 1483(2003), The situation between Iraq and Kuwait, S/RES/1483(2003), (22 May 2003), available from http://unscr.com/en/resolutions/doc/1483

[221] *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08,§117, 26 November 2013

[222] Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*, (Boston: Brill Nijhoff, 2017), p. 317

mechanisms.[223] That is why the Court proceeded with the examination of the complaint concerning the right of access to a court.

The Chamber found that, even though the decision of the domestic courts to confine themselves to verifying that the applicants' names actually appeared on the lists drawn up by the Sanctions Committee and that the assets concerned belonged to them had pursued a legitimate aim, namely to ensure effective domestic implementation of the obligations arising from the SC RES, there was no reasonable relationship of proportionality between that aim and the means employed, the applicants' inability to challenge the confiscation measure for several years being difficult to accept in a democratic society.[224]

By prioritising the analysis on equivalent protection, it gives precedence to the regional human rights standards, against which it controls the UN sanctions regime.[225] The Court in the *Al-Dulimi* case adheres to a logic of normative hierarchy. But, as Laurence Boisson de Chazournes mentioned, this logic does not stem from the application of Art. 103 of the UN Charter, as one would have expected, but from the doctrine of equivalent protection. In other words, the Court indirectly concludes that in case of normative conflict between UN and ECHR obligations, the latter prevail over the former.[226]

In their dissenting opinion, Judge Lorenzen joined by Judges Raimondi and Jočienė argued that the Court should have followed another line of reasoning. Mainly, about the impact of Art. 103 of the UN Charter, under which the obligations of the Member States of the UN prevail in case of a conflict with other international instruments. Furthermore, that the Swiss authorities could not be judged on the merits in national court proceedings, as the outcome of such proceedings might have had the effect of setting aside the obligations imposed on Member States by the UNSC RES.[227]

Moreover, Judge Sajó in his partly dissenting opinion argued that:

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[223] *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08,§§ 118-122, 26 November 2013

[224] ibid.§§ 129-135

[225] Marchegianni, M.,op cit., p. 11; Arcari, M., op cit., pp.39-40: «The real issue is no longer to search for a fair balance between the competing interests at stake, but to affirm that certain (minimum) standards of HR protection are intransgressible and must be prioritized over and above security concerns» quoted in Laurence Boisson de Chazournes, *Interactions between Regional and Universal Organizations: a legal perspective*, (Boston: Brill Nijhoff, 2017), p. 318

[226] Laurence Boisson de Chazournes, I*nteractions between Regional and Universal Organizations: a legal perspective,* (Boston: Brill Nijhoff, 2017), p. 318

[227] Dissenting opinion of Judge Lorenzen joined by Judges Raimondi and Jočienė in *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08,§117, 26 November 2013

> …under Articles 25, 48, and 103 of the United Nations (UN) Charter, the obligations set forth in Security Council Resolution 1483 are binding and prevail over any other international agreement. Moreover, the provisions of the Resolution provide little room for interpretation or flexibility with regard to State implementation measures. Consequently, I believe this case should have been declared inadmissible *ratione personae*…[228]

Consequently, even though 4 judges out of 7 found a violation of Art. 6§1 of the ECHR, only 3 judges out of 7 agreed with the reasoning of the final decision.

Three years later the Grand Chamber of the ECtHR passed the judgement where it clarified the position of the Court.

Concerning the compatibility *ratione personae* and *ratione materiae* the Grand Chamber adopted the same approach as the Chamber of the ECtHR and found that the Court had jurisdiction in the case. Consequently, it continued with the merits.

The ECtHR firstly examined whether there had been a limitation on the right of access to a court and the existence of a legitimate aim. Regarding a limitation on the right of access to a court the Grand Chamber of the ECtHR found that the Swiss Federal Court refused o examine the applicants' allegations concerning the compatibility of the procedure followed for the confiscation of their assets with the fundamental procedural safeguards enshrined in Art. 6§1 of the ECHR because of the absolute primacy of obligations stemming from the UN Charter and decisions taken by the UNSC and absence of any discretion. [229] Consequently, the ECtHR found that that the applicants' right of access to a court, under Art. 6§1 of the ECHR, was clearly restricted.

As to the legitimate aim the Court accepted the argument of the respondent Government that the refusal by the domestic courts to examine on the merits the applicants' complaints about the confiscation of their assets could be explained by their concern to ensure the efficient implementation, at domestic level, of the obligations stemming from the Resolution. Thus, the refusal pursued a legitimate aim, namely to maintain international peace and security.[230]

The most crucial topics were raised while the Court was analysing the proportionality of the limitation mentioned above. Firstly, the Grand Chamber examined the international normative context, because the applicants argued that the procedural safeguards enshrined in Art.

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[228] Partly dissenting opinion of Judge Sajó in *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08,§117, 26 November 2013

[229] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08,§131, 21 June 2016

[230] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, §§ 132-133, 21 June 2016

14 of the ICCPR and Art. 6 of the ECHR constituted a norm of *jus cogens* as a result of which RES 1483 (2003) lost its binding effect. In spite of their importance, the Court did not consider the guarantees of a fair trial, and in particular the right of access to a court under Art. 6§1, to be *jus cogens* norms in the current state of international law. [231]

Secondly, the Grand Chamber went to the allegation of a conflict of obligation. The problem of alleged existence of a conflict of obligation between the UN Charter and the ECHR was raised by many judges of the ECtHR in previous cases. [232]

As it was already mentioned in Chapter I of this work when the SC acts under Chapter VII and uses sanctions under Art. 41 and Art. 42, all UN Members are legally obliged to implement those measures. These legal obligations flow from Arts. 25, 48, 49, 103, and 2(5) of the UN Charter. The ECtHR stated that where a State relies on the need to apply a SC RES in order to justify a limitation on the rights guaranteed by the ECHR, it is necessary for the Court to examine the wording and scope of the text of the RES. Furthermore, the ECtHR must also take into account the purposes for which the UN was created. In this connection, the Court found:[233]

> 140. Consequently, 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 (ibid.). In the event of any ambiguity in the terms of a UN Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law (ibid.). Accordingly, where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures are compatible with the Convention. In other words, in such cases, in a spirit of systemic harmonisation, it will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter.

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[231] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, §§ 134-136, 21 June 2016, Information Note on the Court's case-law 197

[232] Partly Dissenting Opinion Of Judge Poalelungi In *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016; Concurring Opinion of Judge Malinverni in *Nada v. Switzerland* [GC], No.10593/08, 12 September 2012; Partly dissenting opinion of Judge Sajó and the dissenting opinion of Judge Lorenzen joined by Judges Raimondi and Jočienė in *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, 26 November 2013

[233] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, §§139-140, 21 June 2016

Consequently, one can see that the ECtHR preferred the technique of harmonisation and systematic integration to avoid incompatibilities between the UN Charter and the ECHR and declined the existence of a conflict of obligations between these international legal instruments.

After the Court compared the wording of the UNSC RESs relevant in the *Al-Jedda* and *Nada* cases.[234] The ECtHR continued with the analysis of the RES 1483 (2003) relevant in the *Al-Dulimi* case, mainly paragraph 23, where there was an obligation: «… to "freeze without delay" the financial assets or economic resources of the former Iraqi government or of certain individuals or entities presumed to be connected therewith – unless the assets or resources had been the subject of a prior judicial, administrative or arbitral lien or judgment – and to ensure their immediate transfer to the Development Fund for Iraq…»

The ECtHR emphasised that its task in this case was to examine whether appropriate judicial supervision guaranteed by the Art. 6§1 of the ECHR was available to the applicants. It found that there was nothing in paragraph 23 or any other provision of RES 1483 (2003), or in RES 1518 (2003) that explicitly prevented the Swiss courts from reviewing, in terms of human rights protection, the measures taken at national level pursuant to the first of those Resolutions and RES 1483 did not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation. Moreover, the Court did not detect any other legal factor that could legitimise such a restrictive interpretation and thus demonstrate the existence of any such impediment. The ECtHR further noted that any State Party whose authorities give legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing is not arbitrary will engage its responsibility under Art 6 of the ECHR. Consequently, it found the respondent State cannot validly confine itself to relying on the binding nature of SC resolutions, but should persuade the Court that it has taken – or at least has attempted to take – all possible measures to adapt the sanctions regime to the individual situation of the applicants, at least guaranteeing them adequate protection against arbitrariness.[235]

Indeed, the UN Charter does not specifically provide for determinations of the SC to be made vis-a-vis individuals. The system presupposes that under Chapter VII orders may be issued

[234] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08,§141, 21 June 2016

[235] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08,§§143-149, 21 June 2016

to states which then are required to implement those orders by enacting decisions under national law on the basis of the relevant national instruments.[236]

The last part of the Court's reasoning was devoted to the extent of the respondent State's obligations. The Court noted that the Swiss authorities had taken certain practical measures to improve the applicants' situation. However, those measures were insufficient in the light of the above-mentioned obligations on Switzerland under Art 6§1 of the ECHR. Consequently, the Court found a violation of Art. 6§1 of the ECHR in the Al-Dulimi case.

To summarise, the ECtHR clearly followed the way of harmonisation of the obligations undertaken by the States under both the UN Charter and the ECHR. The reasoning in the Court's last, *Al-Dulimi* case, resulted from this line of thinking supported by the previous *Al-Jedda* and *Nada* judgements.

2.3. The content of States' obligations under the UN Charter and the ECHR

The content of States' obligations under the UN Charter was analysed in the Chapter I of this work. They are prescribed by Arts. 2(5), 25, 48, and 103 of the UN Charter. Briefly saying, the Members to the UN Charter agree to accept and carry out the decisions of the SC as well as its subsidiary organs that were lawfully established. In case such decisions and obligations stemming from resolutions are in conflict with the obligations under any other international agreement, the first obligations shall prevail.

The ECtHR in its last *Al-Dulimi* case clearly stated that there was no conflict of States' obligation between the UN Charter and the ECHR. Thus, the Court applied the technique of a conflict avoidance, particularly harmonisation and systematic integration. In the concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov to the *Al-Dulimi* case, even though Judge Pinto de Albuquerque did not subscribe to a substantial part of their reasoning for *Al-Dulimi* finding, he made a good point at the way the Court created three means to harmonise Charter and ECHR obligations.

The first is the *Behrami* approach. It consists of an examination of whether the impugned act or omission can be attributed to the UN, and consequently whether the Court has jurisdiction *ratione personae* to review any such action or omission found to be attributable to the UN; and in concluding that the impugned act or omission cannot be attributed to the

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[236] Christian Tomuschat. "The European Court of Human Rights and the United Nations." Chapter. In *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, edited by Andreas Føllesdal, Birgit Peters, and Geir Ulfstein. Studies on Human Rights Conventions. (Cambridge: Cambridge University Press, 2013), p. 335

respondent State because the ultimate authority and control over them belonged to the SC and therefore the Court does not have jurisdiction *ratione personae*.

The second is the *Al-Jedda* approach that involves an interpretation of the text of the SC Resolution in such a manner as to make the obligations coexist, either by finding that the impugned measure taken by the respondent State was not in reality required by the SC or, as in the third - *Nada* - approach, by finding that, in the implementation of the resolution, the respondent State had some latitude – perhaps limited but nevertheless real – and that the alleged violation stemmed from the insufficient use of that room for manœuvre by the respondent State. [237]

Moreover, Judge Sicilianos in his concurring opinion to the *Al-Dulimi* case and later in his article «The European Court of Human Rights Facing the Security Council: Towards Systemic Harmonization»[238] supported the ECtHR's approach towards harmonisation. He found a common patter of reasoning in the *Al-Jedda*, *Nada* and *Al-Dulimi* judgments, which may be summarised as follows[239]:

First of all, «non-existence of a normative conflict in the abstract». The ECtHR main guideline was the International Law Commission (ILC) on the "Fragmentation of international law", which, under the heading "Harmonization – Systemic integration", states in general terms that "[i]n international law, there is a strong presumption against normative conflict".[240] Furthermore, it comes from the ECtHR's statement that the UN is based on the values of human rights, pointing out that the purposes of the universal organisation, as stated in Art 1 of its Charter, include 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. [241]

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[237] Concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov in *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016 ;

[238] Linos-Alexander Sicilianos, «The European Court of Human Rights facing the Security Council: towards systematic harmonization.» *International and Comparative Law Quarterly* 66, no. 4 (2017): 798; concurring opinion of judge Sicilianos in *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016

[239] Linos-Alexander Sicilianos, «The European Court of Human Rights facing the Security Council: towards systematic harmonization.» *International and Comparative Law Quarterly* 66, no. 4 (2017): 798-803

[240] ILC, 'Fragmentation of International Law: difficulties arising from the diversification and expansion of international law', Report of the Study Group of the International Law Commission, finalized by M Koskenniemi, UN Doc A/CN.4/L. 682 (13 April 2006) para 37 quoted in Linos-Alexander Sicilianos, «The European Court of Human Rights facing the Security Council: towards systematic harmonization.» *International and Comparative Law Quarterly* 66, no. 4 (2017):798

[241] Linos-Alexander Sicilianos, «The European Court of Human Rights facing the Security Council: towards systematic harmonization.» *International and Comparative Law Quarterly* 66, no. 4 (2017): 798-799

It leads directly to the second feature is «Interpretation of Security Council resolutions in terms of human rights». [242] This idea was used in *Nada* and has been developed in the *Al-Dulimi* judgment. It reads as follows: when resolutions are interpreted 'there must be a presumption that the SC does not intend to impose any obligation on Member States to breach fundamental principles of human rights' and that '[i]n the event of any ambiguity in the terms of a UNSC resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the ECHR and which avoids any conflict of obligations'.

Concerning the «Interpretation of the Resolutions underlying the dispute in Al-Dulimi»[243] the ECtHR found that paragraph 23 of RES 1483 (2003) while using prescriptive language, cannot be regarded as unconditional in nature. It is, moreover, noteworthy that the Swiss authorities have taken certain practical decisions, which show that it was indeed possible to apply RES 1483 (2003) with some flexibility.[244] Such latitude—'admittedly limited but nevertheless real'[245]—may enable States to find the appropriate solutions in order to harmonise their various obligations.Furthermore, these resolutions did not expressly prohibit access to a court. However, given the nature and purpose of the measures provided for by RES 1483 (2003), the ECtHR circumscribes the extent of the judicial scrutiny under Art. 6 of the ECHR.

Furthermore, Judge Sicilianos continued with the «arbitrariness test».

That is where it is necessary to start with the ECtHR's analyses to understand better what the Swiss government did wrong.

First of all, the Court emphasised that : «…the Swiss authorities had a duty to ensure that the listing was not arbitrary. The applicants should, on the contrary, have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary.»

The Court further noted that the Swiss authorities have taken certain practical measures with a view to improving the applicants' situation, thus showing that RES 1483 (2003) could be applied with a degree of flexibility. However, those measures were insufficient in the light of the above-mentioned obligations on Switzerland under Art. 6§1 of the ECHR.[246]

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[242] ibid. pp. 799-801

[243] ibid. pp. 801-802

[244] see, for example, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08,§§ 31, 32 and 34, 21 June 2016

[245] *Nada v. Switzerland* [GC], No.10593/08, §180, 12 September 2012

[246] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, §§ 150-155, 21 June 2016

In Judge Sicilianos opinion, the scrutiny intended by the ECtHR does not seem to place an excessive burden on the national judicial authorities, while taking into account, in a balanced manner, the imperatives of the protection of international peace and security—and, accordingly, the responsibilities of the SC under the Charter, on the one hand, and the rights at the heart of the Convention system, on the other.[247] Consequently, he absolutely supported this way of thinking.

Thus one can argue that the ECtHR did a lot of progress in harmonising obligations under the UN Charter and the ECHR and in creating a dialogue between them.

However, one can also claim that such way of interpretation put burden of balance between the UN Charter and the ECHR on Member States. The approach, confirmed by the *Al-Dulimi* judgement, raised a lot of concerns about actual behaviour in such circumstances of the States Parties to both international agreements. Problems might appear in case when States do not have any latitude in implementation of the UNSC RESs. Or when Member States proceed to conduct domestic reviews and their courts find that there is, in any given case, an inadequate basis for the imposition of restrictive measures on a person or entity that the SC has decided to list, those States may be left with a very difficult choice: they will either violate their UN Charter obligations by refusing to implement the listing of that person, or violate their ECHR obligations by discharging the implementation anyway. [248] As the judge Keller argued in his concurring opinion in the *Al-Dulimi* case:

> 27. The crucial question in this case concerns the actions required of a State facing a strict international obligation that conflicts with its human rights obligations. In answering this question, the Court – as a human rights body charged with upholding the rights and freedoms enshrined in the Convention – would be failing in its duty if it did not require member States to intervene where applicants are blatantly deprived of human rights protection. With the present judgment, the Court has missed an opportunity to clarify to States what is required of them when they have no discretion in the application of a Security Council resolution that is incompatible with the ECHR system. By skirting round the issue, it has instead given States no additional guidance – zero, zilch, Nada – on how to proceed in such situations.[249]

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[247] Linos-Alexander Sicilianos, «The European Court of Human Rights facing the Security Council: towards systematic harmonization.» *International and Comparative Law Quarterly* 66, no. 4 (2017): 803

[248] James Cockayne, Rebecca Brubaker, and Nadeshda Jayakody. «FAIRLY CLEAR RISKS: Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures». p. 4 Accessed 20 October 2019, https://collections.unu.edu/eserv/UNU:6450/UNU_FairlyClearRisks_FINAL_Web.pdf

[249] Concurring Opinion of judge Keller in *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016

Thus to understand better the actions required by a State under the ECHR while applying measures under UNSC RES it is necessary to examine measures adopted by the Swiss authorities in *Nada* and *Al-Dulimi* cases.

In the *Nada* case:

1) The Swiss Federal Prosecutor opened an investigation in respect of the applicant. When it was found that the accusations against the applicant were unsubstantiated, the investigation in respect of the applicant was closed.[250]

2) Furthermore, the Swiss Government actively worked since becoming a member of the UN on 10 September 2002 to improve the fairness of the listing and delisting procedure and the legal situation of the persons concerned. Thus, in the summer of 2005, it had launched with Sweden and Germany a new initiative to ensure that fundamental rights would be given more weight in the sanctions procedure. Pursuing its initiative, Switzerland had submitted to the SC in 2008, together with Denmark, Germany, Liechtenstein, the Netherlands and Sweden, concrete proposals for the setting-up of an advisory panel of independent experts authorised to submit delisting proposals to the Sanctions Committee. Moreover, in the autumn of 2009 Switzerland had worked intensively with its partners to ensure that the Resolution on the renewal of the sanctions regime against al-Qaeda and the Taliban, scheduled for adoption in December, met that need. In the meantime Switzerland had supported the publication in October 2009 of a report proposing, as an option for an advisory review mechanism, the creation of an ombudsperson. On 17 December 2009 the UNSC adopted RES 1904 (2009), setting up the office of ombudsperson to receive complaints from individuals affected by the UNSC counterterrorism sanctions. Lastly, Switzerland had called on many occasions, before the UNSC and the GA, for an improvement in the procedural rights of the persons concerned by the sanctions.[251]

3) The applicant asked the Swiss Government for exemption from the entry-and-transit ban several times due to serious health problems. It was granted by the authority only in the two cases, however, only for one and two days. [252]

Having in mind all actions taken by the Government, the Court still found that the Government had not taken all possible measures. First of all, a more prompt communication of

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[250] *Nada v. Switzerland* [GC], No.10593/08, §§ 19-28, 12 September 2012

[251] *ibid.*§ 64

[252] *Nada v. Switzerland* [GC], No.10593/08,§192, 12 September 2012

the investigative authorities' conclusions might have led to the deletion of the applicant's name from the UN list at an earlier stage.[253]

Secondly, the Court emphasised, in the applicant's case Switzerland was neither his State of citizenship nor his State of residence, and the Swiss authorities were not therefore competent to approach the Sanctions Committee for the purposes of the delisting procedure. However, it did not appear that Switzerland ever sought to encourage Italy to undertake such action or to offer it assistance for that purpose. [254]

Moreover, as to the requests for exemption from the entry-and-transit ban made by the applicant. The Court found that the Sanctions Committee was entitled to grant exemptions in specific cases, especially for medical, humanitarian or religious reasons. A representative of the Federal Department of Foreign Affairs indicated that the applicant could request the Sanctions Committee to grant a broader exemption in view of his particular situation. However, the Swiss authorities did not offer him any assistance. [255]

Consequently, the Court was not persuaded that the Government had taken – or at least had attempted to take – all possible measures to adapt the sanctions regime to the applicant's individual situation.

As to the specific actions that might have been taken by the Government, first of all, it is a better communication between the Swiss authorities and the Sanctions Committee. Secondly, it is better cooperation with the third States (State of citizenship or residence) that might influence and improve applicant's situation. Moreover, it is a necessity to take into consideration a specific and particular situation of a person listed in the UNSC RES.

However, there is an opinion that the «remedies» that could be provided by a domestic court are restricted to those that would be compatible with the State's ongoing commitments under Chapter VII. [256]

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[253] ibid.§ 188

[254] ibid.§ 194

[255] ibid.§ 193

[256] Leary, David. "Balancing Liberty and the Security Council: Judicial Responses to the Conflict between Chapter VII Resolutions and Human Rights Law under the Council's Targeted Sanctions Regime". In *Adjudicating International Human Rights : essays in honour of Sandy Ghandhi*, edited by James A. Green, and Christopher P.M. Waters..(Leiden, The Netherlands: Brill | Nijhoff, 2015) p. 97

As it was mentioned before, the ECtHR in *Al-Dulimi* case found that before taking the the freezing of the assets and property measures, the Swiss authorities had a duty to ensure that the listing was not arbitrary. The steps taken by the Swiss government were the follows:

1) The Swiss Government, through their Permanent Representative to the UN, supported the applicant's application to the 1518 Sanctions Committee for the removal of his name from the list by sending a letter to the Chair of the Committee. However, there was no action taken further, and the applicant sought the continuation of the confiscation procedure in Switzerland. [257]

2) While deciding on the conditions in which the sums would be transferred the Swiss Federal Department for Economic Affairs also observed that the applicants had discontinued their discussions with the Sanctions Committee. It showed that an administrative-law appeal could be lodged with the Federal Court against its decisions.

3) The applicants lodged separate administrative-law appeals with the Federal Court against each of the Federal Department's three decisions. However, in three almost identical judgments, the Federal Court dismissed the appeals, confining itself to verifying that the applicants' names actually appeared on the lists drawn up by the Sanctions Committee and that the assets concerned belonged to them. [258]

4) The Federal Court had expressly asked the Federal Department for Economic Affairs to allow the applicants further time in order to submit a delisting request before the assets were transferred to the Development Fund for Iraq. Furthermore, the State Secretariat for Economic Affairs had authorised the release of certain sums from among the frozen assets to allow the applicants to pay for the costs of their defence.[259]

Consequently, as it was mentioned before the Court found those measures were insufficient in the light of the above-mentioned obligations on Switzerland under Art. 6§1 of the ECHR.[260] The Court noted that «the refusal of a court to examine allegations by individuals concerning the compatibility of a particular procedure with the fundamental procedural safeguards of a fair trial restricts their access to a court»[261]; «…the Swiss authorities had a duty to ensure that the listing was not arbitrary…»; «…[t]he applicants should, on the contrary, have

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[257] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, §§20 - 21, 21 June 2016

[258] ibid.§§26-29

[259] ibid. §30, §116

[260] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08,§150-155, 21 June 2016

[261] ibid.§131

been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary.» [262]

The ECtHR noted that if «where a resolution such as that in the present case, namely Res 1483, does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided.»[263]

In such cases, in the event of a dispute over a decision to add a person to the list or to refuse delisting, the domestic courts must be able to obtain – if need be by a procedure ensuring an appropriate level of confidentiality, depending on the circumstances – sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation made by listed persons to the effect that their listing is arbitrary.Accordingly, any State Party whose authorities give legal effect to the addition of a person – whether an individual or a legal entity – to a sanctions list, without first ensuring – or being able to ensure – that the listing is not arbitrary will engage its responsibility under Art. 6 of the ECHR.[264]

These are the only hints made by the Court concerning possible actions of States in such circumstances. It gives reasons to believe that the requirements of the Court are to carry out investigation and check the legality of being included in the sanctions list under the procedural legislation of the country in which the sanctions are or will be executed. The judgment does not spell out in detail what that really means. The Court only demands that review should “at least” verify that the inclusion on the sanctions list was not arbitrary.[265] However, there is an opinion that even if a domestic judge were to hold a particular listing arbitrary, the executive branch would still find itself in a bind – whether to comply with the SC listing decision, or a decision of its own judiciary buttressed by the authority of Strasbourg.[266] Moreover, it is difficult to see how one could reconcile the domestic review of the implementation of the sanctions with the required

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[262] ibid. §§150 - 151

[263] ibid.§ 146

[264] ibid.§ 147

[265] Stefan Kadelbach, “Al-Dulimi and Montana Management Inc. v. Switzerland (Eur. Ct. H.R.).” *International Legal Materials* 55, no. 6 (2016): 1023–1125.

[266] Marko Milanovic, «Grand Chamber Judgment in Al-Dulimi v. Switzerland», EJIL: Talk!. Accessed 30 October 2019. https://www.ejiltalk.org/grand-chamber-judgment-in-al-dulimi-v-switzerland/

promptness of the confiscation procedure, as judicial review – even when limited to conducting an arbitrariness-test – inevitably lengthens the entire process. [267]

Nevertheless, there are statements that support that outcome, for instance, Alexander Orakhelashvili argued that the principal outcome of *Al-Dulimi* is the defeat of the respondent's and intervening governments' litigation strategy to have the Art 6 rights superseded by anything less than stipulated by the SC expressly, and then in full compliance with the letter of the Charter, as well as its object and purpose.[268]

Consequently, it brigs to the general analyses of «right to access to a court» under Art. 6§1 of the ECHR. A right of access to a court is not provided explicitly under the ECHR. It was defined for the first time in *Golder v the United Kingdom* case. In the case the Court stated that the fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.[269] Everyone has the right to have any claim relating to his "civil rights and obligations" brought before a court or tribunal. In this way Art. 6§1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect[270].

Art. 6§1 may therefore be relied on by anyone who considers that an interference with the exercise of one of his or her civil rights is unlawful and complains that he or she has not had the possibility of submitting that claim to a tribunal meeting the requirements of Art. 6§1.

The right of access to a court must be "practical and effective"[271]. For the right of access to be effective, an individual must "have a clear, practical opportunity to challenge an act that is an interference with his rights."[272]

Moreover, legal certainty and proper administration are also components of a right to access to a court. Thus the right of access to a court is impaired when the rules cease to serve the

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[267] Cedric De Koker, «Al-Dulimi and Montana Management Inc. v. Switzerland: Norm conflict between UNSC Resolution and ECHR?» Strasbourg observers. Accessed 30 October 2019. https://strasbourgobservers.com/2016/09/05/al-dulimi-and-montana-management-inc-v-switzerland-norm-conflict-between-unsc-resolution-and-echr/

[268] Alexander Orakhelashvili, "Al-Dulimi v. Switzerland." *American Journal of International Law* 110, no. 4 (2016): p. 773

[269] *Golder v. the United Kingdom*, 21 February 1975,§35, Series A no. 18

[270] *Golder v. the United Kingdom*, 21 February 1975,§36, Series A no. 18; *Naït-Liman v. Switzerland* [GC], no. 51357/07,§113, 15 March 2018 ,

[271]*Cudak v. Lithuania* [GC], no. 15869/02,§58, ECHR 2010; *Zubac v. Croatia* [GC], no. 40160/12,§§76-79,5 April 2018

[272] *Bellet v. France*, 4 December 1995,§36, Series A no. 333-B; *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11,§86, 29 November 2016

aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court. [273]

Consequently, all these requirements should be fulfilled by States while implementing sanctions imposed by UNSC RESs. However, it is very difficult to imagine how, for instance, in the case of implementing sanctions under UNSC RESs, the whole procedure of reviewing the inclusion on the sanctions list was not arbitrary under the national law of a State, might be considered «without delay». According to European Commission for the Efficiency of Justice report, the procedural phases (before bodies and levels of jurisdiction) of a case deemed to comply with the reasonable time requirement generally last shorter than 2 years.[274] Thus, it might be during up to 2 years while States can verify that the inclusion on the sanctions list was not arbitrary and the ECtHR would not find any violations. Such a duration probably would not comply with a «without delay» requirement to implement sanctions prescribed under UNSC RES.

Furthermore, it should be noted that at the time of national procedures in the *Al-Dulimi* case the UNSC adopted RES 1730 (2006) of 19 December 2006, establishing the Focal Point for De-listing procedure. The applicants lodged an application to the Focal point, however, it was rejected. [275]

According to the Annex to RES 1730 (2006) the Focal Point:

> 5. Forward the request, for their information and possible comments to the designating government(s) and to the government(s) of citizenship and residence. Those governments are encouraged to consult with the designating government(s) before recommending de-listing. To this end, they may approach the focal point, which, if the designating state(s) so agree(s), will put them in contact with the designating state(s).[276]

Consequently, one can see that the government(s) of citizenship and residence can play a significant role in de-listing procedure by submitting information collected in the respected

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[273] see, for instance, *Kart v. Turkey* [GC], no. 8917/05,§79 *in fine*, ECHR 2009 (extracts); see also *Efstathiou and Others v. Greece*, no. 36998/02,§24 *in fine*, 27 July 2006, and *Eşim v. Turkey*, no. 59601/09,§21, 17 September 2013

[274] Ms Françoise Calvez, and Nicolas Regis, Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights, CEPEJ(2018)26, p. 73, Accessed on 20 November 2019, https://rm.coe.int/cepej-2018-26-en-rapport-calvez-regis-en-length-of-court-proceedings-e/16808ffc7b

[275] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08,§30, 21 June 2016

[276] UNSC Resolution 1730 (2006), General issues relating to sanctions, S/RES/1730 (2006), (19 December 2006), available from http://unscr.com/en/resolutions/doc/1730

country. Moreover, the government(s) of citizenship and residence can cooperate with the government(s) that submitted the application for listing. Of course this is the case when there are the government(s) of citizenship and residence. In *Al-Dulimi* it was not the case.

However, as one can see from the case itself, the Government in the very beginning of the procedure of confiscation submitted a letter, through their Permanent Representative to the UN, that supported the applicant's application for the removal of his name from the list.[277] This fact shows that the government is not limited in its ability to enter communication with the Committee even if this government is not a government of citizenship and residence. Therefore, if the Swiss government had found evidences that supported de-listing procedure, the government would have had an opportunity to submit it to the Committee through its Permanent Representative to the UN. However, there is no evidence in the ECtHR's decision that the Swiss Government tried to co-operate with the Focal Point for De-listing procedure.

Consequently, as to the specific actions must be taken by the Government, first of all, it is a prompt communication between the Government and the Sanctions Committee, the Focal Point for De-listing procedure, or Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee. Secondly, it is a cooperation with the third States (State of citizenship or residence) that might influence and improve applicant's situation. Furthermore, the authorities must ensure – or must be able to ensure – that the listing is not arbitrary. Moreover, it is a necessity to take into consideration a specific and particular situation of a person listed in the UNSC RES, for instance, medical, humanitarian, religious aspects.

Having in mind all the necessary actions States obliged to take while implementing targeted sanctions imposed by UNSC RESs, it appears to be impossible to meet practically obligations stemming from the UN Charter and the ECHR simultaneously. Consequently, *de facto* the UN collective security system and the ECHR still confront each other.

[277] *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08,§20, 21 June 2016

CONCLUSIONS AND RECOMMENDATIONS

1.The aims of the research have been achieved, the objectives have been fulfilled and the defence statement formulated in the Introduction has been proven to be correct. It is supported by the following conclusions and recommendations.

2.The main purpose of the UN that comes first in the Art. 1 of the UN Charter is «to maintain international peace and security» and the UNSC is the organ of the UN that possesses "primary responsibility for the maintenance of international peace and security". It acts under Chapter VII of the UN Charter while fighting with terrorism.

3.The wording used in Chapter VII might be ambiguous and powers under this Chapter are broad in terms. Analyses of UNSC's practice and legal doctrine showed that fighting with terrorism is covered by Art. 39 «threat to the peace» concept. Consequently, it makes "any act of international terrorism" a prerequisite for further application of either Art. 41 or Art. 42 measures.

4.The measures taken by the UNSC to fight terrorism, such as targeted sanctions, are also not directly prescribed by the Charter. However, the legal analysis of Art. 41 of the UN Charter allows for a broad interpretation and its broad scope of action has enabled the SC to act against people which can be individually identified. Consequently, targeted sanctions are covered by Art. 41 of the UN Charter. Therefore, the UNSC has a right to impose measures it finds necessary to maintain peace and security as long as it remains within the framework of Chapter VII and takes into consideration legal limits of its actions.

5.These limits are Purposes and Principles of the UN, the UN Charter, *jus cogens* norms, International Customary Law and General Principles of Law, International Humanitarian Law, Human Rights. Consequently, the UNSC is in the position where it should take into account all the limits while acting under Chapter VII and carefully balance between responsibility for the maintenance of international peace and security and legal limits mentioned above.

6.Because of the importance of the UNSC function to maintain peace and security all UN Members are legally obliged to implement measures under UNSC RESs. It flows from Art. 2(5), 25, and, especially, 103 of the UN Charter. Art. 103 prioritises «obligations of the Members of the UN under the present Charter». Before Art. 103 is used, conflict solution and conflict avoidance techniques need to be applied to avoid incompatibilities between Charter law and

other international agreements. These techniques include the principles of *lex specialis*, *lex posterior*, harmonisation and systematic integration, presumption of compatibility.

7.The ECtHR plays a crucial role in forming shared principles of human rights protection in Europe. The Court's analyses of obligations of Member States under the ECHR while implementing the UNSC RESs concerning targeted sanctions substantially contributed to the development of protection of human rights. The ECtHR during examination of State's obligations under the ECHR while implementing targeted sanctions imposed by the UNSC used the technique of a conflict avoidance, particularly the harmonisation and systematic integration technique.

8.The common pattern of the ECtHR's explanation might be seen from the *Al-Jedda* and *Nada* cases. The approach used in these cases was confirmed and developed in the Court's last *Al-Dulimi* [GC] judgment. The Court in this case clearly stated that there was no conflict of States' obligation between the UN Charter and the ECHR. Consequently, the ECtHR formally by using harmonisation technique, has created a dialogue between two legal orders, universal and regional i.e. the UN Charter and the ECHR.

9.However, at the same time, the ECtHR put the burden of balance between the UN Charter and the ECHR on the States Parties to the ECHR. By doing that, the Court did not spell out in detail the required steps a State should take. The ECtHR only mentioned necessity to carry out investigation and check the legality of being included in the sanctions list in accordance with the procedural legislation of the particular country in which the sanctions are or will be executed. Having in mind general requirements of Art. 6 of the ECHR, it seems to be impossible to follow all of them while implementing the UNSC RESs with an unconditional obligation to act on the States Parties to the ECHR.

10.Moreover, in addition to the mentioned above requirements, these are the specific actions which must be taken by the State that implements sanctions: to communicate between the Government and the Sanctions Committee, the Focal Point for De-listing procedure, or Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee; to cooperate with the third States (State of citizenship or residence) that might influence and improve applicant's situation; to take into consideration a specific and particular situation of a person listed in a UNSC RES, for instance, medical, humanitarian, religious aspects.

11.Consequently, *de facto*, States Parties to the ECHR are required to give priority to one of the two legal instruments. Because of all the necessary actions States obliged to take

while implementing targeted sanctions imposed by UNSC Resolutions, it appears to be impossible to meet practically obligations stemming from the UN Charter and the ECHR simultaneously. Thus, it leads to a confrontation between the ECHR and the UN security system in reality.

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ABSTRACT

The Master Thesis is devoted to the study of the content of States' obligations stemming from the UN Charter and the ECHR while implementing targeted sanctions imposed by UNSC RESs.

The main objectives of the Master Thesis were to analyse the provisions of the UN Charter, the ECHR and the ECtHR's case law and to find out whether it is possible to meet obligations simultaneously under both international legal orders while implementing targeted sanctions; and to establish whether the UN security system and the ECHR have a dialogue or confront each other.

The research has shown that Member States to the UN Charter are obliged to implement UNSC RESs concerning targeted sanctions. Moreover, Art. 103 of the UN Charter prioritises «obligations of the Members of the United Nations under the present Charter».The ECtHR, while analysing obligations of States' under ECHR when they implemented targeted sanctions in the *Al-Jedda, Nada*, and *Al-Dulimi* cases clearly avoided a conflict between legal orders of the UN and the ECHR by using a harmonisation technique. By doing so, the Court created a dialogue between two international legal instruments. However, at the same time, the ECtHR put the burden of balance between the UN Charter and the ECHR on States Parties to the ECHR. Resolutions concerning targeted sanctions usually impose an unconditional obligation on Member States. The actions that States are required to take while implementing UNSC targeted sanctions resolutions are time consuming and *de facto* States Parties to the ECHR are required to give priority to one of the two legal instruments. Thus, it leads to a confrontation between the ECHR and the UN security system in reality.

Key words: Charter of the United Nations, United Nations Security Council, European Convention on Human Rights, European Court of Human Rights, targeted sanctions, Al-Dulimi and Montana Management Inc. v. Switzerland

SUMMARY

The Master Thesis is focused on the content of States' obligations under the UN Charter and the ECHR and the way the States should act and fulfil their obligations under the ECHR while implementing UNSC RESs.

The aims of research are to analyse the legal basis of the UNSC targeted sanctions mechanism, as well as to see how the case-law of the ECtHR has been formed regarding the obligations of States under the ECHR while implementing targeted sanctions imposed by UNSC. Moreover, to analyse the content of States' obligations under the UN Charter and the ECHR and to determine possible actions States could take while implementing UNSC RESs in order to fulfil obligations under the ECHR. Finally, to determine whether the UN system and the ECHR system co-exist or confront each other. In pursuance the identified aims the following objectives of research are established: to analyse the UN legal basis for the collective security system within the framework of the UNSC's sanctions regime: Purposes and Principles of the UN, Chapter VII of the UN Charter provisions, legal limits of the UNSC activity, and obligations under the UN Charter to implement UNSC RESs; to examine the existing case-law of the ECtHR regarding the measures undertaken by the Member States while implementing the UN sanctions' regime and whether these measures and the way in which they had been enforced were in line with the States' obligations stemming from the ECHR; to assess States' obligations under both international instruments - Chapter VII of the UN Charter and the ECHR - concerning the enforcement of the sanctions regime; to identify what measures should be taken by States in order to fulfil obligations under the ECHR while enforcing sanctions imposed by UNSC RESs.

The research consists of two chapters. The first one is devoted to a short overview of the UN collective security system and focuses mainly on the objectives, legal basis, legal limits of the UNSC's activity, and obligations under the UN Charter to implement UNSC RESs. The second chapter is devoted to the ECtHR activities and to the general overview of the ECHR. It explores the main judgements of the ECtHR that relate to the States' obligations under the Convention while implementing UNSC RESs, the content of States' obligations under the UN Charter and the ECHR and possible actions that States can perform in order to fulfil obligations under both international treaties.

The research has shown that the ECtHR used a harmonisation technique while analysing obligations of States' under the ECHR and the UN Charter. By doing so it formally

created a dialogue between two legal orders, the UN Charter and the ECHR. However, at the same time, the ECtHR put the burden of balance between the UN Charter and the ECHR on States Parties to the ECHR. The Court did not spell out in detail the required steps a State should take. It only mentioned necessity to carry out investigation and check the legality of being included in the sanctions list in accordance with the procedural legislation of the country in which the sanctions are or will be executed. Consequently, *de facto,* States Parties to the ECHR are required to give priority to one of the two legal instruments. Thus, it leads to a confrontation between the ECHR and the UN security system in reality.

HONESTY DECLARATION

09/12/2019

Vilnius

I, Yevgeniya Molkina, student of

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Mykolas Romeris University (hereinafter referred to University),

Mykolas Romeris Law School, International and European Union Law Institute,

International Law

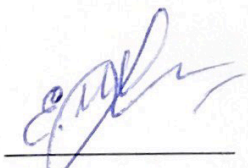
(Faculty /Institute, Programme title)

confirm that the Master thesis titled

"The United Nations System and European Convention on Human Rights: Dialogue or Confrontation":

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.



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