



UvA-DARE (Digital Academic Repository)

Challenges and opportunities for judicial protection of human rights against decisions of the United Nations Security Council

Hollenberg, S.J.

Publication date
2013

[Link to publication](#)

Citation for published version (APA):

Hollenberg, S. J. (2013). *Challenges and opportunities for judicial protection of human rights against decisions of the United Nations Security Council*.

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Table of Contents

1. Introduction.....	1
1.1. Sketching the Scene.....	1
1.2. Research Questions.....	4
1.3. Methodology.....	6
1.3.1. Research Methods.....	6
1.3.2. Conflict between International Norms.....	9
1.3.3. Judicial Protection.....	11
1.3.4. Domestic and Regional Courts.....	14
1.4. Outline.....	18
1.4.1. Institutional Framework.....	19
1.4.2. Case Law Analysis.....	20
1.4.3. Closing Chapters.....	22
2. UNSC Resolutions Potentially Affecting Individuals' Human Rights.....	24
2.1. Introduction.....	24
2.2. The Legal Nature of UNSC Resolutions.....	24
2.2.1. The Binding Force of Obligations Created by the UNSC.....	25
2.2.2. The Scope of Discretion Left for Implementation.....	29
2.3. Types of UNSC Resolutions Selected for the Research.....	33
2.3.1. Targeted Sanctions.....	33
2.3.2. Selective Sanctions.....	35
2.3.3. UNSC Sanctions Committees.....	36
2.3.4. Other Resolutions Potentially Affecting Individuals.....	39
2.3.4.1. Authorizations.....	39
2.3.4.2. Cooperation with the International Tribunals.....	40
2.3.4.3. International Administration.....	44
2.4. The Implementation of UNSC Resolutions.....	46
2.4.1. The Divide between National and International Law.....	47
2.4.2. The Role of State Organs.....	50
2.4.3. Implementation by the EU.....	53
2.5. Conclusion.....	55
3. The International Human Rights Involved.....	57
3.1. Introduction.....	57
3.2. Sources of the International Human Rights Obligations.....	58
3.3. Distinction from Fundamental Rights.....	59
3.4. Human Rights of Private Entities.....	60
3.5. The Human Rights Norms Concerned.....	62
3.5.1. Respect for Property.....	63
3.5.2. Freedom of Movement.....	65

3.5.3. Liberty and Security.....	66
3.5.4. Private and Family Life	67
3.5.5. Effective Remedy.....	69
3.5.6. Fair Trial and Access to Court.....	71
3.6. Derogation and Limitation.....	77
3.6.1. Derogation.....	77
3.6.2. The System of Limitations.....	79
3.6.3. Proportionality Analysis	83
3.6.4. The Margin of Appreciation	86
3.7. Remedy before the UNSC Sanctions Committee	88
3.7.1. From Diplomatic Protection to the Ombudsperson	90
3.7.2. The Latest Reforms.....	92
3.8. Conclusion	98
4. The Precedence of UNSC Resolutions over International Human Rights Law	101
4.1. Introduction.....	101
4.2. The Balancing of International Obligations.....	102
4.3. No, or Limited, Judicial Protection.....	106
4.3.1. Contestable Attribution of Conduct Resulting in Inadmissibility.....	108
4.3.2. The ECtHR's Refusal to Engage in a Marginal Review of State Conduct under UNSC Auspices.....	116
4.3.2.1. Rejection of the Equivalent Protection Test in the <i>Behrami</i> Case.....	118
4.3.2.2. Further Restriction of the Equivalent Protection Test's Application.....	120
4.3.2.3. The Equivalent Protection Test with regard to Other IOs	126
4.3.2.4. Conclusion	127
4.3.3. UNSC Resolutions Limiting Domestic Courts' Jurisdiction	127
4.3.3.1. Limited Review of Acts of Cooperation with International Tribunals	128
4.3.3.2. Limited Review of Implementation of Sanction Measures Against Individuals	136
4.3.3.3. Conclusion	139
4.3.4. Judicial Protection Only in Regard to <i>Ius Cogens</i>	140
4.4. Courts Addressing the Conflict between International Norms	144
4.4.1. Indications on Hierarchy from International Human Rights Case Law.....	145
4.4.2. Domestic Courts on the International Norm Conflict.....	149

4.4.2.1. Reconciling International Obligations in <i>Al-Jedda</i> (House of Lords).....	150
4.4.2.2. Subsequent Interpretations of <i>Al-Jedda</i> (House of Lords)	153
4.4.2.3. Other Domestic Courts' Perspectives on the International Norm Conflict	158
4.5. Conclusion	160
5. Broad and Narrow Interpretations	165
5.1. Introduction.....	165
5.2. Interpretation of UNSC Resolutions by Domestic and Regional Courts.....	166
5.2.1. Courts' Latitude Following from the Need for Interpretation	168
5.2.2. Methods of Interpretation of UNSC Resolutions.....	171
5.2.3. The Role of the Interpretations by the UNSC Sanctions Committees	178
5.3. Emphasis on the Interest of Maintaining International Peace and Security	183
5.4. Creating an Opportunity for Judicial Protection through Interpretation.....	194
5.4.1. Narrow Interpretation of UNSC Resolutions.....	196
5.4.2. Presumption of Compliance.....	206
5.4.3. Beyond Interpretation?.....	211
5.5. Conclusion	215
6. The Dualist Approach and Indirect Review.....	220
6.1. Introduction.....	220
6.2. The Dualist Approach as an Avoidance Technique.....	221
6.3. Indirect Review of a UNSC Resolution's Lawfulness	225
6.3.1. Direct Application of International Human Rights Law.....	227
6.3.2. A Clear Reference to International Human Rights Law	233
6.3.3. A Connection with International Human Rights Law Cannot be Ascertained.....	237
6.3.4. Appraisal	242
6.4. Review Against Entirely Separate Domestic Prescriptions	243
6.4.1. Domestic Division of Competences.....	244
6.4.2. Requirements for Extradition.....	248
6.4.3. Appraisal	254
6.5. A Need for Judicial Dialogue	255
6.6. Conclusion	257

7. Proportionality and Alternative Remedy Review	261
7.1. Introduction.....	261
7.2. Indirect Assessment of a UNSC Resolution’s Proportionality	262
7.2.1. The Right to Property.....	263
7.2.1.1. Less Restrictive Alternative Means	267
7.2.1.2. Review of the Balance Drawn between the Interests at Stake.....	274
7.2.2. The Right to Effective Judicial Protection.....	280
7.2.3. Appraisal.....	282
7.3. Assessing the Alternative Remedy at the UN Level.....	286
7.3.1. The Alternative Remedy Test.....	286
7.3.2. Domestic Courts’ Review of the Remedy before the UNSC Sanctions Committee	288
7.4. Conclusion	294
8. Judicial Review of the Grounds and Evidence Underlying the Imposition of Targeted Sanctions	297
8.1. Introduction.....	297
8.2. The Right to a Fair Trial and the Obligation to State Reasons	299
8.3. Counterbalancing the Limitation on Access to Information.....	303
8.3.1. The Special Advocates Procedure	304
8.3.1.1. The Minimum Level of Disclosure of Information	307
8.3.1.2. Fairness of the Special Advocates Procedure	309
8.3.2. The Lack of a Special Advocates Procedure in Relation to Targeted Sanctions.....	312
8.3.2.1. Disclosure of Information to the Individual Concerned	312
8.3.2.2. Disclosure of Information to the Judiciary	316
8.3.3. Domestic Authorities not Possessing all Relevant Information	318
8.4. A Solution: Decentralization of Designations	320
8.5. The Standard and Intensity of Review of the Grounds and Evidence	326
8.5.1. The Criteria of Review under the 1373 Regime Applied to the 1267 Regime	326
8.5.2. Progressive Intensity of Review	329
8.6. Conclusion	332
9. Conclusion: Challenges, Opportunities, and a Suggestion for Improvement.....	337
9.1. Introduction.....	337
9.2. The Research.....	338
9.3. Analysis of Case Law	340

9.3.1. Application and Influence of Article 103 of the UN Charter	340
9.3.2. Possibilities Emanating from the Need for Interpretation	342
9.3.3. Opportunities Following from a Dualist Approach and Indirect Review	345
9.4. Assessment of the Challenges and Opportunities	350
9.5. The Approach to be Followed.....	353
 Case Law.....	 360
 Bibliography	 367
 Summary	 383
 Samenvatting.....	 386