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

Hollenberg, S.J.

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1. Introduction

1.1. Sketching the Scene

In large parts of the world individuals are legally and judicially protected against decisions taken by their own state authorities. Most states have a national constitution, and a majority of states is party to multiple international human rights treaties.¹ In addition, individuals usually have access to judicial mechanisms for enforcement of (some or all) of these instruments. These legal and judicial guarantees are intended to secure individuals' fundamental and human rights² and to protect them against arbitrary exercises of power by state authorities. Generally these instruments do not directly concern protection against decisions of international organizations (IOs). However, to an increasing extent IOs take decisions that may have a direct adverse effect on the legal position of individuals.³ For the large majority of these decisions, they need to be implemented by states for them to take effect. Yet, under certain circumstances, states have no choice under international law but to implement the measures required by the IO.

¹ The International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), for example, presently has 167 state parties. In addition, many states are parties to regional human rights treaties. The (European) Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221; CETS 5 (ECHR) has 47 state parties; the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 363 (ACHPR) has 53 state parties; and the American Convention on Human Rights (adopted 22 November, entered into force 18 July 1978) OAS Treaty Series No. 36 (ACHR) has 24 state parties.

² The distinction between fundamental and human rights will be elucidated in chapter 3.3.

³ For a variety of examples see: 'The Exercise of Public Authority by International Organizations: A Research Project of the Max Planck Institute for International Law' (2008) 9 German Law Journal (special issue) 1375-2080. See also S Cassese 'Global Administrative Law; Cases, Materials, Issues' (Institute for International Law and Justice; New York University School of Law 2008) <http://www.iilj.org>; and J Alvarez *International Organizations as Law-makers* (Oxford University Press Oxford 2005).

A clear manifestation, and also the most dramatic form, of this newly developed conduct is the imposition of so-called ‘smart sanctions’ or ‘targeted sanctions’.⁴ The United Nations Security Council (UNSC) has, for example, in the combat against international terrorism, designated particular individuals and private entities⁵ with the aim of obliging states to freeze their assets. This practice puts serious limitations on the targeted individuals’ enjoyment of their international human rights. Most problematically, the UNSC does not give those who are targeted an opportunity to be heard, and nor has it established a means for them to obtain an effective remedy. This example is illustrative of a broader development in present-day international law in which IOs are increasingly directly concerned with individuals.⁶

In the international legal order, powers are primarily exercised by (or in close cooperation with) a state’s executive branch. This branch is often represented in the decision-making organs of IOs. Despite the fact that today, decisions of IOs may adversely affect the legal position of individuals, they are not embedded in a system of checks and balances. There is neither an international equivalent of parliamentary power nor an effective judicial institution with general competence to review IO decisions against international human rights treaties. Thus, while the states’ executive branches have found their counterparts or continuances in international law, other domestic institutions essential to the rule of law and democracy are lagging behind.⁷ As a consequence, through their international counterparts, states’ executive branches are able, to some extent, to insulate their policies from parliamentary scrutiny and independent judicial review against international human rights.⁸

⁴ The research will use the term targeted sanctions rather than smart sanctions, because the qualification ‘targeted’ has a more neutral connotation than ‘smart’.

⁵ Hereafter, the research will, for the sake of readability, regularly refer to individuals only and not explicitly also to private entities. Targeted individuals and private entities are to a large extent in a similar position. Chapter 3.4 will discuss the human rights of private entities.

⁶ See *supra* footnote 3.

⁷ See E Benvenisti and G Downs 'Court Cooperation, Executive Accountability and Global Governance' (2009) 41 *New York University Journal of International Law and Politics* 931.

⁸ See *ibid.* 933.

Still, the UNSC, when instituting sanction measures, only creates an international obligation for states to ensure an effective implementation of these measures. It has no power itself to execute them. In order for these measures to become effective, states need to implement them in their domestic legal orders. In this way they are drawn into the domestic legal system, which includes (depending on the particular domestic system) the traditional legal safeguards. Domestic implementation also prompts the involvement of domestic and regional courts. An individual affected by a measure's implementation might bring a case before these courts, which could then be required to decide on a conflict of norms, in that specific instance. A conflict may arise between, on the one hand, an obligation to obey a binding decision of the UNSC – for example, requiring the freezing of individuals' assets – and on the other hand, an obligation to observe international human rights treaties, guaranteeing these individuals the rights to peaceful enjoyment of property, access to court, and an effective remedy. If the UNSC resolution does not leave scope to implement the sanctions in accordance with human rights obligations, states are placed in a position in which they cannot observe both international obligations at the same time. Due to international law's fragmentation, it is very possible that on an abstract level conflicts between norms subsist that cannot be avoided or solved.⁹ However, domestic and regional courts are required to address such a conflict when an adversely affected party brings a specific occurrence before them.

Formally, any conflict between an obligation stemming from a UNSC resolution and an obligation under an international human rights treaty is solved in favour of the former, on the basis of article 103 of the Charter of the United Nations

⁹ M Milanovic 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke Journal of Comparative & International Law* 69, 75. On the fragmentation of international law see ILC International Law Commission 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law' UN Doc A/CN.4/L.682.

(UN Charter).¹⁰ In principle, this would leave the affected individuals without effective legal protection from international human rights law against such instances of IO decision-making. Hence, while originally finding themselves in a position of being legally protected vis-à-vis state authorities by international human rights treaties, the affected individuals do not seem to enjoy the same level of protection in regard to the implementation of decisions by the UNSC. In practice, however, many courts attempt to avoid this finding. Thereto, they resort to arguments that may result in a measure of judicial protection for those affected by the implementation of a UNSC resolution, despite the working of article 103 of the UN Charter.

1.2. Research Questions

The central question this research seeks to answer is whether and how domestic and regional courts are able to provide judicial protection to individuals whose international human rights are directly affected by the implementation of UNSC resolutions. An important element in answering this question is how courts deal with potential conflicts between obligations created by the UNSC, which adversely affect the position of individuals, on the one hand, and obligations flowing from these individuals' rights under international human rights treaties, on the other.

Before addressing this element, the research first considers the norms that underlie the possible conflict.¹¹ Which norms exist on both sides of the conflict, and what are their relevant characteristics? Subsequently, the research analyses the challenges and opportunities for judicial protection of international human rights by domestic and regional courts. The research is then guided by the following questions: How do domestic and regional courts deal with instances in which individuals are directly affected by implementations of UNSC resolutions? How do they solve the conflict of norms, and what is the role of

¹⁰ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter) article 103.

¹¹ What the research understands by conflict of norms is explained in section 1.3.2.

article 103 of the UN Charter in solving that conflict? Which international human rights are found to be in conflict with the implementation of UNSC resolutions? To what degree and how do these courts find a way to provide a measure of judicial protection? What are, in that respect, the different arguments and approaches? If providing judicial protection, how closely do these courts scrutinize a UNSC resolution's implementation when reviewing the merits of a case?

Finally, the research assesses whether the opportunities for judicial protection are adequate to counterbalance the challenges. Thus, it evaluates whether domestic and regional courts are able to afford individuals adversely affected by UNSC resolutions a sufficient measure of judicial protection of internationally guaranteed human rights. In addition, the research seeks arguments to determine which judicial approach is to be preferred in order to sufficiently ensure protection of international human rights. These arguments also include reasons for courts to pay appropriate deference to UNSC action.

By answering these questions, the research intends to contribute to the knowledge and understanding of court practice in situations concerning implementation of UNSC resolutions that have an adverse effect on individuals' enjoyment of human rights. The research especially seeks to shed light on the problems in respect of such implementation from an international human rights perspective. This is the first step in finding solutions to those problems. In addition, by analysing examples from case law, the research will provide insights to assist (other) courts dealing with the same subject matter as to the possible approaches and their respective consequences. This may support the process of judicial dialogue, the value of which will be emphasized in the research's conclusion. Moreover, by suggesting improvements to individual remedies against implementation of UNSC resolutions, the research may contribute to enhancing the legal protection of individuals' international human rights.

1.3. Methodology

This section will first explain the methods used in conducting the research (1.3.1). After that it will define what the research understands by the notions ‘norm conflict’ (1.3.2) and ‘judicial protection’ (1.3.3). Finally, this section will account for the choice of focussing on the case law of domestic and regional courts (1.3.4). In that context, it will also explain which courts’ case law is included in the research.

1.3.1. Research Methods

The research starts by exploring both sides of the international norm conflict. On one side there are obligations created by the UNSC, which leave states no or very limited scope of discretion in regard to their implementation. On the other side there are obligations stemming from international human rights law. The research does not intend to exhaustively discuss all aspects of UNSC resolutions or international human rights law. It considers only those elements which, from a first analysis of case law, appear necessary to guide and elucidate further discussion of that case law. With regard to UNSC resolutions, the focus is on their binding legal nature and the different levels of scope of discretion they could leave to states for their implementation. With respect to international human rights law, attention is paid to several human rights norms that are often invoked before courts in the present context, and to the system of limitations. This part of the research is conducted primarily on the basis of an examination and analysis of legal doctrine; primary normative sources, such as the UN Charter, different UNSC resolutions, and international human rights treaties; and the interpretation and application of those treaties by the relevant human rights supervisory bodies.

After that, the research formulates answers to the research questions, primarily on the basis of an inductive analysis of relevant case law from domestic and regional courts. A traditional method of legal interpretation is employed here. Central to this method is the appraisal of legal arguments as to their applicability

and validity. In this regard, it is important to acknowledge that cases are usually decided on the basis of the arguments raised by the parties before the court.¹² Moreover, courts write their decisions from the perspective of their own constitutional rules and traditions. Hence these decisions cannot be perceived as having been reached in a vacuum. This necessitates a restrictive approach in drawing conclusions from the analysis of case law. Prudence in drawing general conclusions is also called for due to the relatively small number of cases included in the research. While the research is conducted on the basis of all relevant case law available to the author, the number of cases remains modest, and does not represent an equal geographical distribution.

The cases selected for the research are those in which domestic and regional courts were confronted with a norm conflict between an obligation created by the UNSC, which left states no scope of discretion as to the relevant aspects,¹³ and an obligation under international human rights law. Subsection 1.3.2 will explain what the research understands by the notion of ‘norm conflict’.

The research’s inclusive approach leads to it containing what may seem to be a scattered pattern of cases, coming from various legal systems. The research does not start from the assumption that these cases are somehow part of one single legal order. Still, they have enough in common to justify including them in one single overall analysis. Despite coming from different legal orders, these cases can be tied together by the fact that they concern an identical, or at least very similar, conflict between two international obligations. With due respect for all the differences in the (constitutional) set-up of the various legal orders, certain arguments employed by different courts appear to be equally applicable to other cases included in the research.

¹² See on this also A Tzanakopoulos 'Collective Security and Human Rights' in E de Wet and J Vidmar (eds.) *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press Oxford 2012) 78-132, 99.

¹³ See chapter 2.2.2.

The research does not confine itself to decisions of the highest instances. Decisions of lower courts are analysed as well, even if higher courts have overruled those decisions. This is justified by the fact that the research does not attempt to establish what the law is in a particular state, at a certain moment in time. It intends only to discern a wide array of legal arguments available, and to assess the relative force of these arguments in one or the other direction.

The research is structured along the lines of argumentation followed by the courts, instead of on the particularities of different legal systems or of individual cases. These lines of argumentation are induced from an analysis of the case law concerned. This approach necessitates a fragmented discussion of the judgments. Different elements of a case are discussed under different headings, whereas similar elements of totally different cases are discussed under the same heading. An attempt is made to find a balance between, on the one hand, describing the relevant circumstances of each case every time an element thereof is mentioned, in order to sufficiently inform the reader, and on the other hand avoiding overtly repeating particularities which are not immediately relevant to the discussion at issue.

The research aims to make an overall evaluation of present practice, and will suggest certain improvements. It will critically assess courts' decisions against the standard of human rights protection applicable in situations where no UNSC decision is engaged. This will be explained further in subsection 1.3.3. Suggestions for improvements mainly concern the approaches courts should take in providing individuals affected by UNSC resolutions a measure of judicial protection. These approaches should be the result of a careful balance drawn between the importance of protecting international human rights, and that of ensuring the effective operation of the UNSC. In addition, Chapter 8 will contain a suggestion for improving the system of designating individuals for the imposition of targeted sanctions. This suggestion is intended to mitigate the most

problematic and persevering problem that arises with the use of that type of sanction, which is the lack of access to relevant information.

1.3.2. Conflict between International Norms

The norm conflict under consideration is between an obligation created by a UNSC resolution and an obligation under international human rights law.¹⁴ Such conflict may arise, for example, when a UNSC resolution obliges states to freeze particular individuals' assets and an international human rights treaty obliges states to guarantee those individuals certain procedural rights, including the rights to a fair trial and to an effective remedy. If the UNSC resolution does not leave states any scope to implement the obligation in accordance with these human rights, and there is no alternative effective remedy at the UN level, a conflict of norms will emerge. States are unable to observe both international obligations at the same time.

There are different understandings of the notion 'norm conflict'. Many authors make a distinction between narrow and broad definitions.¹⁵ The above example would fall within the narrow definition. Under this definition, a norm conflict is generally understood to describe 'those situations in which giving effect to one international obligation unavoidably leads to the breach of another.'¹⁶ On the broad definition of norm conflict the views differ. Pauwelyn and Milanovic, for example, understand a broad definition to mean 'not only cases of incompatibility of two obligations, but also conflicts between obligations and permissive norms.'¹⁷ De Wet and Vidmar use a broad definition to refer 'to situations where compliance with an obligation under international law does not necessarily lead to a breach of another norm – which can give rise to either a

¹⁴ These two sources are an important part of the normative framework of the research and will be further elaborated on in Chapters 2 and 3.

¹⁵ See J Pauwelyn *Conflict of norms in public international law: How WTO law relates to other rules of international law* (Cambridge University Press Cambridge 2003); E de Wet and J Vidmar 'Introduction' in E de Wet and J Vidmar (eds.) *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press Oxford 2012) 2; Milanovic 2009 (n 9).

¹⁶ De Wet and Vidmar *ibid.*; Pauwelyn 2003 *ibid.* 170.

¹⁷ Milanovic 2009 (n 9) 73.

right or an obligation – but rather to its limitation, or even a limitation of all the rights and/or obligations at stake.¹⁸ The latter notion of a broad conflict includes what others would call apparent (as opposed to genuine) conflicts.¹⁹ The present research adopts the broad notion of norm conflict as set out by De Wet and Vidmar. Hence, in addition to the above-mentioned example, a conflict relevant to the research may also arise when an obligation under a UNSC resolution results in a mere limitation of an individual's human rights. This would, for instance, concern a limitation of an individual's right to peaceful enjoyment of property.

The choice of this broad definition of norm conflict is informed by the fact that a judicial assessment of a limitation's lawfulness depends on the reasons for that limitation. In the present instance, these reasons would include the existence of an obligation created by the UNSC. The limitation of the human right concerned is a result of the implementation of another international obligation. Hence the interaction between both norms includes not only those instances in which the human right is violated, but also those in which it is merely limited. It is then for the courts to determine whether a particular infringement constitutes a breach or a lawful limitation. Alternatively, a court could consider the human right to be set aside completely by a countervailing obligation created by the UNSC. This judicial assessment is exactly what the research is exploring. Therefore, these instances are also included in the research.

Formally, a norm conflict can only occur between two norms applicable in the same legal system.²⁰ From this perspective a conflict is possible between an obligation under a UNSC resolution and an obligation stemming from

¹⁸ De Wet and Vidmar 2012 (n 15) 2.

¹⁹ Ibid. See, for example, Pauwelyn and Milanovic's distinction between apparent and genuine conflicts of norms. They hold that true norm conflicts cannot be avoided, for example by means of consistent interpretation, but have to be resolved somehow.

²⁰ Milanovic 2009 (n 9) 102. Pauwelyn would refer to this as a horizontal conflict, which he distinguishes from vertical conflicts (between national law and international law). Pauwelyn 2003 (n 15) 10-11.

international human rights law, but not between the former and a prescription under a domestic constitution. It could exist, however, between the domestic implementation of a UNSC resolution and the domestic constitution, or international human rights law directly applicable in the domestic legal order. The research uses the term ‘norm conflict’ only to describe the conflict between international norms, i.e. between those emanating from UNSC resolutions and international human rights law.

1.3.3. Judicial Protection

The research investigates whether, in a situation of norm conflict, adversely affected individuals obtain a measure of judicial protection of their international human rights. The research regards judicial protection by domestic and regional courts as essential for guaranteeing individuals’ human rights in specific instances.²¹ This is especially true in a situation concerning the implementation of decisions that are taken at an international level beyond any of the traditional rule of law guarantees. Judicial protection by domestic and regional courts is then effectively the only procedure operating as a counterbalance against the power of international (executive) decision-making.

By judicial protection, the research means that a court assesses the lawfulness of alleged interferences with individuals’ human rights, from the perspective of the international human rights system.²² To a certain extent, the notion of judicial protection coincides with the right of access to court and the right to an effective remedy, which will be expounded in Chapter 3. For the present purposes, it is sufficient to mention that the research discerns two components in these rights. On the one hand, they are part of the human rights catalogue, protected by several international human rights treaties;²³ on the other hand, they are also tools

²¹ See similarly in regard to constitutional rights: T Allan *Constitutional Justice* (Oxford University Press Oxford 2001) 161. See also A Stone Sweet and J Mathews 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72, 86.

²² For the system of limitations see chapter 3.6.2.

²³ See chapter 3.5.

to secure the protection of individuals' human rights in particular instances. It is this second instrumental aspect that the notion judicial protection seeks to cover.

As will be explained in Chapter 3, the rights of access to court and to an effective remedy are not absolute and can be limited under several circumstances. One of those circumstances could be the existence of an obligation created by the UNSC. Similarly, when a court finds a case to be inadmissible, that does not necessarily constitute an interference with, or an unlawful limitation of, an individual's right of access to court. That individual has had the opportunity to bring his or her²⁴ case before a court, and the court, after considering that case, has determined it to be inadmissible, due to whatever circumstances. However, if an individual's case is found to be inadmissible, or is reviewed to a very limited extent only, due to the involvement of the UNSC in the act complained of, it constitutes a decrease in the judicial protection of that individual's human rights. In similar situations, but without the involvement of the UNSC, the court would probably have engaged in a review. In this sense, regardless of whether that court itself found the obligation created by the UNSC to constitute a lawful limitation of the individual's rights as guaranteed by international human rights law, the individual has experienced a decrease in the judicial protection of his human rights, solely for the reason of the UNSC being involved in the action complained of. As a result, the alleged interferences with the human rights of which that individual sought scrutiny were not reviewed by that court. This may lead to a situation in which the individual's human rights are effectively inapplicable.

²⁴ For reasons of readability the thesis will hereafter when necessary use the male pronoun only. This choice in no way reflects the writer's perspective on gender emancipation. An exception is made in relation to the Ombudsperson discussed in chapter 3.7.1 since that office is currently held by a woman.

For the purpose of the research, judicial protection does not only entail a judicial review.²⁵ It also requires that such review be made from the perspective of international human rights law, including the system of lawful limitations. This perspective is justified by the fact that individuals in circumstances not involving a UNSC resolution enjoy protection of their human rights against decisions of domestic authorities. These rights can be limited only in accordance with the system of limitations. Apart from the possibility of derogation,²⁶ state authorities cannot simply set human rights aside, or hold them inapplicable in a particular situation. It is the additional element of a UNSC resolution that enables a measure to prevail over international human rights law. The research will investigate whether, despite that element, courts still find an opportunity to provide judicial protection of individuals' human rights; in other words, whether they find a possibility to assess an impugned measure's lawfulness from the perspective of the international human rights law system.

The research will use judicial protection as a standard against which courts' decisions can be measured. The assessment of whether a court provided judicial protection answers the question of whether it scrutinised the alleged interferences with an individual's human rights, and therewith operated as an instrument of human rights protection. The research makes such an assessment independently from the court's own determinations on the rights of access to court and to an effective remedy. It assesses whether the court itself granted access and provided an effective remedy.

The fact that a court engages in a judicial review, however, does not in itself say anything about the result. It may very well arrive at the conclusion that the individual's human rights were not interfered with, or that the limitations were lawful. Hence judicial protection does not mean that the adversely affected

²⁵ Judicial review for the purpose of this research is not understood in the narrow sense of judicial constitutional review. Rather, it intends to describe the act courts engage in when assessing the lawfulness of a measure against any (other) legal instrument.

²⁶ See chapter 3.6.1.

individual wins the case; it means only that the limitations on his human rights were genuinely reviewed within the context of international human rights law.

1.3.4. Domestic and Regional Courts

The research is conducted primarily on the basis of decisions by domestic and regional courts. These courts are at the centres of their legal systems.²⁷ This is where, in individual cases, a motivated decision has to be taken on how to solve the norm conflicts at issue. Moreover, they are the only venue to which individuals who are adversely affected by the implementation of UNSC resolutions can turn for a measure of judicial protection.

The domestic courts included in the research are multiple national courts and the Court of Justice of the European Union (CJEU). The CJEU consists of the Court of Justice and the General Court.²⁸ The research contains case law of only one regional court, which is the European Court of Human Rights (ECtHR). Other examples of regional courts are the African Court of Human Rights (ACtHR) and the Inter-American Court of Human Rights (IACtHR). However, due to a lack of relevant case law from these courts, the ECtHR is the sole provider of the case law from regional courts for the research.

It must be acknowledged that in the distinction between domestic and regional courts, the CJEU is of an ambiguous nature. On the one hand, it is a court established by treaty, and in principle it does not have general jurisdiction. The scope of its jurisdiction is inherently limited to the scope of (most of) the European Union's competences.²⁹ On the other hand, the EU constitutes an independent legal order bearing many similarities to a domestic legal order.

²⁷ A Fischer-Lescano 'Die Emergenz der Globalverfassung' (2003) 63 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* 717, 737.

²⁸ In addition there are also specialised courts which are not relevant for the research. See Treaty on the European Union, as amended by the Treaty of Lisbon, Official Journal C83 of 30.3.2010 (TEU) article 19.

²⁹ Some of the EU's competences are excluded from the Court's jurisdiction, such as those on the common foreign and security policy. See Treaty on the Functioning of the European Union, Official Journal C83 of 30.3.2010 (TFEU) article 275.

European law can have direct effect in the national legal orders and can prevail over national legislation.³⁰ The effect of decisions of the CJEU is in many instances comparable to that of domestic courts. In addition, the scope of subjects within its competence is continuously expanding. Therefore, on the basis of the Court's characteristics that are most relevant for the analysis, it will be considered a domestic court for the purpose of the research.

In general, some important distinctions must be made between domestic and regional courts. First it must be noted that individuals need to exhaust local remedies before being able to bring a complaint before a regional court.³¹ In addition, regional courts do not function as a third or fourth instance of appeal from domestic courts. They have no jurisdiction to reopen national proceedings, nor can they substitute findings of facts or application of national law for that of the domestic courts.³²

Furthermore, there is, of course, the difference in territorial scope of domestic and regional courts' respective jurisdictions. In principle, decisions by domestic courts have effect only within the territory of a single state, while decisions by regional courts have repercussions within the territories of multiple state parties. In addition, a broader territorial scope may add to the persuasive legal authority of regional courts' decisions. However, the consequences of the difference in territorial jurisdiction are mainly of a practical nature and do not necessitate a distinction in the research's analysis.

The more relevant distinction for the analysis lies in the difference in subject matter jurisdiction. Domestic courts are of general jurisdiction and regional courts are of specialized jurisdiction. The jurisdiction of domestic courts finds its

³⁰ See Case 26/62 *Van Gend en Loos* [1963] ECR 1 en Case 6/64 *Costa / ENEL* [1964] ECR 1201.

³¹ ECHR (n 1) article 35 (1).

³² R White and C Ovey *The European Convention on Human Rights* 5th ed. (Oxford University Press Oxford 2010) 243.

primary limitation in requirements as to the links to the state's territory, and is in principle not limited to particular subjects.³³ It has the general task of dispute settlement within a broader set of norms, applicable within a certain territory. In contrast, regional courts have the special task of observing a particular treaty, which for the court included in the research is a human rights treaty. In this regard, the analysis of the research must take into account a potential bias towards the treaty which these special courts are designed to observe. It is the foundation of their existence, and the point of departure for every single decision. On the other hand, the level of human rights protection by regional courts reflects a minimum standard only.³⁴ Domestic legal systems may afford additional protection.

The distinction between domestic and regional courts has other consequences for the research's analysis as well. As was mentioned, regional courts take their treaty as the primary basis on which they decide all cases. This leads Dugard and Van den Wyngaert to write that '[t]he problem of choosing between conflicting treaty obligations is one that does not confront international human rights courts [...] as they apply the treaty to which they owe their existence.'³⁵ From a formal perspective, that is correct. Still, in practice, regional courts cannot pretend that their treaty exists in a legal vacuum. In this regard, the ECtHR has held that the European Convention on Human Rights (ECHR) must be interpreted and applied in the context of general international law.³⁶ Accordingly, these courts, too, will have to argue to a certain extent how a norm under their treaty relates to a conflicting international obligation.

³³ A notable exception is the interpretation of EU law applicable within the legal orders of the member states. Under certain circumstances national courts within these member states are obliged to refer a matter of interpretation of EU law to the EU judiciary. See TFEU (n 29) article 267.

³⁴ T Tridimas 'Terrorism and the ECJ: empowerment and democracy in the EC legal order' (2009) 34 *European Law Review* 103, 112.

³⁵ J Dugard and C Van den Wyngaert 'Reconciling Extradition with Human Rights' (1998) 92 *American Journal of International Law* 187, 195.

³⁶ *Behrami v France / Saramati v France, Germany and Norway (Admissibility)* [2007] (71412/01 and 78166/01) [122]. The Court added that 'it must remain mindful of the Convention's special character as a human rights treaty.'

However, because of the multiplicity of normative sources in a domestic legal order, a conflict of norms is more likely to arise before domestic courts. These courts of general jurisdiction will often have the opportunity, but also the duty, to choose between norms (originally) stemming from several normative sources. Yet, they have the opportunity to separate their domestic from the international legal order, and in that way, to avoid having to rule on a conflict of norms.³⁷ Regional courts do not have that option, since they are inherently part of the same legal order as the norms that potentially contradict obligations under their treaty. On the other hand, due to their limited jurisdiction, chances are higher that an individual's complaint simply falls outside that jurisdiction.

Another relevant difference is that domestic courts are organs of states.³⁸ Hence they represent those states in choosing which of the two international obligations prevails. Their decisions contribute to state practice and *opinio iuris*. This gives the examined case law certain norm-setting value within international law, as a contribution to the emergence of customary international law.³⁹ Moreover, domestic courts, as organs of states, can engage their states' international responsibility when acting in violation of an international obligation.⁴⁰

In addition to case law of domestic and regional courts the research will, by way of comparison, occasionally also consider views from the UN Human Rights Committee (HRC).⁴¹ This is not a court in the true sense of the word, and its views in individual cases do not create binding obligations upon states. However,

³⁷ See on the conflict of norms and the dualist approach as an avoidance technique the subsequent subsection, and also chapter 6.2 for a more elaborate consideration.

³⁸ For another consequence of that see chapter 2.4.2.

³⁹ In addition, under article 38(1) (d) ICJ Statute judicial decisions are regarded as a subsidiary source of international law. Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355 (ICJ Statute) article 38(1) (d).

⁴⁰ See chapter 2.4.2.

⁴¹ The decisions of the Committee in individual cases pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (First Protocol) are called views.

the Committee's views follow a judicial pattern.⁴² Moreover, they could be regarded as authoritative interpretations of states parties' obligations under the International Covenant on Civil and Political Rights (ICCPR).⁴³ What is more, according to the Committee, a determination that there has been a violation of the ICCPR would necessitate action by the state party, on the basis of the right to an effective remedy.⁴⁴ This would imply, however, that state parties are indeed bound by the HRC's views,⁴⁵ which is hard to maintain when having regard to the intention of the state parties and dominant state practice.⁴⁶ Whatever could be said of that, in practice the Committee's views are a relevant interpretative source for many domestic and regional courts.⁴⁷ In addition, it could be argued that state parties must give due consideration to these views and cannot simply ignore them.⁴⁸

1.4. Outline

The research consists of three parts. Chapters 2 and 3 constitute the first part, which will set out the research's analytical and institutional framework. The second part comprises Chapters 4 to 7. That part will determine the challenges and opportunities for judicial protection of international human rights on the basis of an analysis of relevant case law from domestic and regional courts. Finally, the third part consists of Chapters 8 and 9. The former will assess the

⁴² M Scheinin 'The Human Rights Committee's Pronouncements on the Right to an Effective Remedy - An Illustration of the Legal Nature of the Committee's Work under the Optional Protocol' in N Ando (ed.) *Towards Implementing Universal Human Rights: Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee* (Martinus Nijhoff Publishers Leiden 2004) 104.

⁴³ UN Human Rights Committee 'General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (5 November 2008) UN Doc CCPR/C/GC/33 (General Comment 33) [13]. H Steiner, P Alston and R Goodman *International Human Rights in Context* 3rd edn (Oxford University Press Oxford 2007) 915. See also Scheinin *ibid.* 104-106.

⁴⁴ General Comment 33 *ibid.* [14]. See also Steiner et al. *ibid.* 916.

⁴⁵ R v Alebeek and A Nollkaemper 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in H Keller and G Ulfstein (eds.) *UN Human Rights Treaty Bodies* (Cambridge University Press Cambridge 2012) 356-413, 383.

⁴⁶ *Ibid.* 385.

⁴⁷ *Ibid.* 357; and O De Schutter *International Human Rights Law* (Cambridge University Press Cambridge 2010) 840.

⁴⁸ Van Alebeek and Nollkaemper *ibid.* 385-386.

particularly pressing problem of using confidential information in regard to the imposition of targeted sanctions. The latter will provide an overarching analysis, and will draw the final conclusions.

1.4.1. Institutional Framework

The first part of the research elucidates the type of norms on both sides of the potential norm conflict. On the one side, there are the obligations created by UNSC resolutions, and on the other side, there are the obligations under international human rights law. Chapter 2 will start by examining the relevant characteristics of obligations created by the UNSC. Important for the research's analysis is that obligations stemming from UNSC resolutions are binding upon states and prevail over their obligations under other international agreements. In addition, this chapter will explore the differences in the scope of discretion left by the different provisions in the resolutions, and will explain why the research deals only with those provisions that leave no scope of discretion as to the relevant aspects. It will also make a division between the different types of resolutions involved: those that institute targeted sanctions; those that institute selective sanctions; and resolutions that affect individuals in another manner.

After that, Chapter 3 will introduce the international human rights norms relevant to the cases analysed. It will focus on the provisions contained in the ICCPR and the ECHR. It will also explain the system of lawful limitations. In this context, it will pay special attention to the method of proportionality analysis. In addition, this chapter will argue that the remedy presently available at the UN level for individuals directly targeted by UNSC sanctions is not sufficient to justify a limitation on their right of access to a court. Such determination is relevant for the research's analysis since, as will be explained, certain limitations on the right of access to court could be regarded as lawful when alternative remedies are found to exist.

1.4.2. Case Law Analysis

The second part of the research will be based primarily on the examination of case law. It will comprise an elaborate analysis of cases concerning individuals or private entities adversely affected by the implementation of UNSC resolutions. The research discerns two directions in this case law. It will refer to them, respectively, as challenges and opportunities for judicial protection of international human rights by domestic and regional courts. First, Chapter 4 will explore the challenges to judicial protection. These challenges may result in eventually leaving the individuals concerned without any effective remedy. The chapter will start by considering courts not engaging in a judicial review of domestic implementations of UNSC action. They either place a limitation on their jurisdiction, or employ other reasons arguably to avoid such a review. These approaches could lead to an interference with the rights of access to court and to an effective remedy, especially if there are no alternative remedies available at the UN level. Thereafter, this chapter will consider cases in which courts have confirmed the precedence of obligations under UNSC resolutions over obligations under international human rights law. As a consequence, adversely affected individuals' international human rights are held inapplicable in a situation concerning the implementation of a UNSC resolution.

Chapter 5 will take an intermediate position between judicial protection's challenges and opportunities. It will deal with broad and narrow constructions of the meaning of obligations created by the UNSC. Courts could resort to a broad construction in order to ensure an effective implementation of a particular resolution. This approach may follow from a court's emphasis on the importance of maintaining international peace and security. A broad interpretation, however, may contribute to the emergence of a norm conflict. As a consequence, it is likely to add to the challenge of judicial protection. In this sense, it is a counterpart of the subsequently discussed interpretative approaches leading to narrow constructions of UNSC resolutions, which may result in an opportunity for judicial protection. Courts could, by means of interpretation, avoid the

situation of a particular individual being affected by certain measures imposed by a resolution. A limited reading of the scope of a resolution may result in a de facto measure of relief for the individual concerned. In addition, courts could use the method of consistent interpretation or presumption of compliance to avoid having to rule on a conflict of norms.

Subsequently, Chapter 6 will examine courts' other approaches that result in opportunities for judicial protection. It will start by explaining the possibilities of a dualist approach, which is a simple and very effective method for courts to avoid having to rule on an international norm conflict.⁴⁹ By disconnecting the international from the domestic legal order, courts do not have to consider the issue of precedence of UNSC resolutions on the basis of article 103 of the UN Charter.⁵⁰ Thereby, this approach may result in an effective remedy for the individuals concerned. After discussing the dualist approach, the chapter will pay attention to instances of indirect review of lawfulness. When a court reviews an implementation of a UNSC resolution, which leaves states no scope of discretion, against domestic fundamental rights that have a counterpart in international human rights law, it could be argued that it indirectly reviews the UNSC resolution's lawfulness against international human rights. In addition to providing an effective remedy, at least within its own legal order, such a review may also offer useful indications as to that court's perception on how the international norm conflict would be solved in the absence of the rule of precedence laid down in article 103 of the UN Charter. Thereafter, the chapter will deal with domestic courts reviewing implementations of UNSC resolutions against entirely domestic regulations. What is relevant is that the individual affected obtained a form of judicial protection. Yet the domestic courts' findings do not have broader repercussions beyond the domestic legal order, other than the mere fact that apparently, in the view of these courts, implementation of UNSC resolutions could be subjected to judicial review against certain domestic

⁴⁹ Milanovic 2009 (n 9) 102.

⁵⁰ UN Charter (n 10) article 103. See chapter 4.2.

prescriptions. Finally, the chapter will suggest how the drawbacks of a widely adopted dualist approach could be mitigated, while at the same time enhancing the opportunities for a universally accepted standard of human rights protection in cases concerning the implementation of obligations created by the UNSC.

After that, Chapter 7 will analyse courts' application of proportionality analyses. This mechanism of judicial review takes into account the human rights of the affected individuals and grants an active role to the judiciary. Precedence – in the sense of determining whether a limitation is justified – in a particular case is in part determined on the basis of the interests underlying the norms invoked. Relevant for the research is that the lawfulness of domestic implementations of UNSC resolutions is then assessed in a human rights framework. Moreover, courts may engage in an indirect review of underlying UNSC resolutions. The outcome of such assessment could be relevant for (judicial and non-judicial) institutions in other legal systems, because the principle of proportionality has a wide-spread application in many international and national legal orders. Subsequently, this chapter will explore domestic courts' assessments of whether there is an alternative remedy available at the UN level for individuals affected by UNSC targeted sanctions, which could be part of drawing a fair balance in relation to the limitations placed on individuals' right of access to court.

1.4.3. Closing Chapters

Before arriving at the conclusion of the research it will be necessary to explore a fundamental problem for courts in providing judicial protection to individuals affected by targeted sanctions. These sanctions deserve some special attention in the present research because they are a unique phenomenon in the context of IO decision-making. UN Sanctions Committees are able to designate directly individuals whom they consider need to be targeted. States have no scope of discretion, and can do no other than implement the sanctions against those who are designated. A major problem with the imposition of these sanctions is that the grounds and evidence on the basis of which individuals are designated remain, for an important part, confidential. This information is not shared with

the implementing states, nor with the reviewing courts, let alone with the targeted individuals. Chapter 8 will analyse how domestic and regional courts assess the limitations on individuals' human rights following from the impossibility to engage in a review of the facts and evidence. What is the consequence of that assessment? What do courts consider to be the minimum level of information that needs to be communicated in order for the measure to be in accordance with international human rights law? In addition, this chapter will suggest a solution that could mitigate this problem.

Finally, Chapter 9 will provide an overall analysis of the challenges and opportunities for judicial protection of international human rights that could be discerned from the relevant case law. In addition, it will determine whether courts' approaches resulting in opportunities for judicial protection might be sufficient to counterbalance the challenges thereto. Moreover, it will argue which approaches are to be preferred, from the perspective of effectively securing international human rights protection against UNSC action directly affecting individuals. It will also explain why it is relevant in this evaluation to take sufficient account of the need for the UNSC to operate effectively.