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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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2. UNSC Resolutions Potentially Affecting Individuals’ Human Rights

2.1. Introduction

The present chapter will consider the particularities of the international obligation on the one side of the potential norm conflict that may appear before domestic and regional courts. It will deal with the relevant features of obligations that the UNSC may impose upon states. The following chapter will deal with the other side of the norm conflict: states’ obligations under international human rights law.

This chapter will start by explaining why it is justified to speak of individuals being affected by decisions of the UNSC, when in fact states carry out these decisions. To this end, section 2.2 will expound on the legal nature of UNSC resolutions. It will establish a clear link between a UNSC resolution and a potential infringement with an individual’s human rights. Section 2.3 will provide an oversight of the different types of UNSC resolutions included in the research: for example, those imposing sanction measures, or authorising certain state action. In this context, it will also examine the legal nature of decisions by the UNSC Sanctions Committees. After that, section 2.4 will discuss the particularities of UNSC resolutions’ implementation in the domestic legal orders. These resolutions need to be implemented by state authorities in order for them to gain effect in relation to individuals. This section will also consider implementation of UNSC resolutions by the EU.

2.2. The Legal Nature of UNSC Resolutions

The present research is not concerned with domestic regulations adversely affecting individuals’ human rights, but with UNSC resolutions having such effect. However, UNSC resolutions do not directly address individuals. Rather,

they are addressed to UN member states, which need to give effect to these resolutions. For the large part this is due to functional limitations, since the UNSC does not have any means of implementation, and the state is thus an indispensable tool for the effectuation of its decisions. However, while the resolutions are addressed to states, they may directly concern the legal situation of individuals.¹

Two particular features mean that, in the cases considered in the present research, a decision of the UNSC could ultimately be regarded as the cause of an interference with an individual's enjoyment of his human rights. These features are the binding legal force of obligations created by the UNSC, which will be discussed in subsection 2.2.1, and the lack of a scope of discretion for states in implementing that obligation, which will be discussed in subsection 2.2.2. Accordingly, these two elements also constitute the standard for determining which UNSC resolutions are relevant for the research, and to what extent.

2.2.1. The Binding Force of Obligations Created by the UNSC

In order to be able to argue that an individual was indeed affected by measures imposed by the UNSC, it is necessary for the relevant UNSC resolution to have created an obligation upon the state to execute those measures. Otherwise, the individual would be affected by the domestic authorities' own choice of policy. Moreover, a norm conflict may arise with an obligation under an international human rights treaty only when the UNSC has created an international obligation upon states.

Apart from authorizations, the UNSC takes all sanction and other enforcement measures discussed in the present research on the basis of article 41 of the UN

¹ In this regard Goldmann makes a distinction between 'first level addressees' and 'second level addressees' of an IO decision. See M Goldmann 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2008) 9 German Law Journal 1865, 1886. See also H Schermers and N Blokker *International Institutional Law* 5th ed. (Martinus Nijhoff Publishers Leiden 2011) [1331].

Charter.² After having determined the existence of a breach or threat to international peace and security pursuant to article 39 of the UN Charter, the UNSC may, under article 41, take measures, not including the use of force, which it regards as necessary to restore or maintain international peace and security. Authorizations for the use of military force can be given under article 42 of the UN Charter. Decisions under both provisions may create obligations upon states under article 25. This article requires UN member states to carry out the decisions of the UNSC in accordance with the UN Charter.³

Generally, the UNSC does not explicitly refer to article 25 when creating an obligation pursuant to that provision. It does refer to Chapter VII (which comprises articles 41 and 42) when acting within that chapter, but that is in itself not conclusive for the determination of whether a particular provision of a resolution intends to create any obligations. Whether a provision indeed establishes an obligation needs to be inferred primarily from its wording.⁴ In this regard a distinction must be made, for instance, between provisions within a resolution that start with phrases such as the UNSC ‘decides’, as opposed to provisions where it merely ‘calls upon’, ‘urges’ or ‘requests’ member states to take certain measures. The former is of a more mandatory nature than are the latter.

In principle, UNSC decisions that are *ultra vires* cannot be binding.⁵ Following this line of argument, some authors contend that those decisions that are in

² Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter) article 41.

³ *Ibid.* article 25.

⁴ This can be discerned from *Legal Consequences for States of the Continued Presence of South Africa in Namibia* [1971] ICJ Rep 53 [114]. See chapter 5.2.2.

⁵ J Vidmar 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in E de Wet and J Vidmar (eds.) *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press Oxford 2012) 22-77, 35 et seq. UNSC resolutions benefit, however, from a presumption of legality. Thus the binding force persists until that presumption is rebutted in a proper legal discourse. A Peters 'Article 25' in B Simma et al. (eds.) *The Charter of the United Nations: A Commentary* 3rd ed. vol. I (Oxford University Press Oxford 2012) 791-854, 844.

contravention of international human rights law are non-binding.⁶ In support of this argument they rely on the fact that article 25 of the UN Charter requires that the UN's member states accept and carry out the decisions of the UNSC *in accordance with the UN Charter*.⁷ The emphasised element must be read, the argument goes, to mean that the obligation upon member states created by this provision extends only to those decisions which the UNSC has taken in conformity with the UN Charter.⁸ According to the Charter the UNSC 'shall discharge its duties in accordance with the Purposes and Principles of the United Nations.'⁹ This could be read as a limitation of the UNSC's wide discretionary powers.¹⁰ The purposes of the UN also include encouraging respect for human rights and fundamental freedoms.¹¹ The core content of this purpose, the argument continues, is concretized in the human rights treaties that have been concluded within the framework of the UN, such as the ICCPR.¹² From this it follows, the argument concludes, that member states are not under an obligation to accept and carry out decisions by the UNSC which are in violation of the rights laid down in these human rights treaties.¹³ The ECtHR relied on a similar reasoning when it presumed that it did not consider the UNSC to have intended to create obligations upon states that would be in contravention of their obligations under international human rights law.¹⁴ These arguments, however, should be distinguished from the question of whether the UNSC, as such, is bound by international human rights law. That is a different issue, with which the present research is not concerned. Rather, it focuses only on states' international obligations.

⁶ See, for example, E de Wet and A Nollkaemper 'Review of Security Council Decisions by National Courts' (2002) 45 German Yearbook of International Law 166.

⁷ Ibid. 186.

⁸ Ibid. See also Peters 2012 (n 5) 791-854, 807 et seq.

⁹ UN Charter (n 2) article 24 (2).

¹⁰ The UNSC has wide discretionary powers, which are, however, not unlimited. See Peters 2012 (n 5) 811 et seq. and E de Wet *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing Oregon 2004) chapters 4-9.

¹¹ UN Charter (n 2) article 1 (3) in conjunction with articles 55 and 56.

¹² De Wet and Nollkaemper 2002 (n 6) 166, 173.

¹³ Ibid. 187. The authors find this approach confirmed by reference to article 2 (5) of the UN Charter. But see Peters 2012 (n 5) 791-854, 808.

¹⁴ See chapter 5.4.2.

Whether a particular provision of a UNSC resolution indeed creates an obligation is also relevant for the application of article 103 of the UN Charter.¹⁵ This article holds that: ‘In the event of a conflict between the *obligations* of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’¹⁶ Chapter 4.2 will examine the consequences of this article in more detail.

The consequences of not observing the obligations created by the UNSC are not necessarily governed by general international law on state responsibility. The International Law Commission’s (ILC) Articles on State Responsibility are without prejudice to the UN Charter.¹⁷ It could be argued that by concluding the UN Charter states have agreed to contract out of the generally applicable rules on state responsibility, and have left it to the UNSC to determine the consequences of violations of the decisions it adopts vis-à-vis UN member states.¹⁸ This could be understood to mean that individual UN member states cannot unilaterally take action, without the approval of the UNSC, against other member states that are not complying with the obligations created by the UNSC.¹⁹

¹⁵ There is a connection between article 103 and article 25 of the UN Charter. See A Paulus and J Leiss 'Article 103' in B Simma et al. (eds.) *The Charter of the United Nations: A Commentary* 3rd ed. vol. II (Oxford University Press Oxford 2012) 2110-2137, 2124.

¹⁶ UN Charter (n 2) article 103 (emphasis added).

¹⁷ ILC Articles on State Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/56/83 (Articles on State Responsibility) article 59. See also *ibid.* article 55.

¹⁸ See C Ahlborn ‘The Rules of International Organizations and the Law of International Responsibility’ (2011) 8 *International Organizations Law Review* 397-482, 443. See also Schermers and Blokker 2011 (n 1) [1449].

¹⁹ See V Gowlland-Debbas ‘Responsibility and the United Nations Charter’ in J Crawford et al (eds) *The Law of International Responsibility* (Oxford University Press Oxford 2010) 115-138, 117 and 123-124. See also L Sicilianos ‘Countermeasures in Response to Grave Violations of Obligations Owed to the International Community’ *Ibid.* 1137-1148, 1140-1142.

Hence, in principle, the consequences of non-observance of UNSC resolutions are determined by the UNSC itself.²⁰ It could adopt a resolution determining a state's non-compliance with an obligation under the Charter,²¹ and ultimately, if it regards the situation as constituting a threat to international peace and security, it could even take enforcement measures.²² This is not very likely to occur in situations of states failing to implement sanction measures.²³ The UNSC does on occasion encourage member states to effectively implement such sanctions.²⁴

The situation is different under domestic law. International obligations created by the UNSC do not directly create obligations under domestic law. How international obligations take effect in the domestic legal order is determined in each individual state by its particular constitutional set-up. Section 2.4 will explore this a bit further. However, obligations under national law cannot excuse a state for not observing its international obligations.²⁵

2.2.2. The Scope of Discretion Left for Implementation

The notion 'scope of discretion' is used in the present research to mean the latitude a particular provision of a UNSC resolution leaves for states to implement the measures required. The UN Charter does not specify how states

²⁰ V Gowlland-Debbas 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 *International and Comparative Law Quarterly* 55, 87. See UNSC Resolution 670 (25 September 1990) UN Doc S/Res/670 [12]. See also A Tzanakopoulos *Disobeying the Security Council* (Oxford University Press Oxford 2011) 179, at footnote 187.

²¹ For example, UNSC Res 1441 (8 November 2002) UN Doc S/Res/1441 [1]. Although this did not concern a situation of a state not observing the obligation to implement sanction measures against others.

²² N Krisch 'Article 41' in B Simma et al. (eds.) *The Charter of the United Nations: A Commentary* 3rd ed. vol. II (Oxford University Press Oxford 2012) 1305-1329, 1328. In extremis, see UNSC Res 1973 (17 March 2011) UN Doc S/Res/1973. Although that probably was not only for not observing the resolutions concerned.

²³ But see 'Letter dated 19 December 2000 from the Chairman of the Security Council Committee established pursuant to resolution 1132 (1997) concerning Sierra Leone addressed to the President of the Security Council' S/2000/1195 Annex [272], and Krisch *ibid.* 1305-1329, 1328.

²⁴ See, for example, UNSC Res 1390 (28 January 2002) UN Doc S/Res/1390 [8]. Cf. T Aalberts and W Werner 'Mobilising Uncertainty and the Making of Responsible Sovereigns' (2011) 37 *Review of International Studies* 2183, 2191-2195 and 2197-2198.

²⁵ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) article 27.

should implement UNSC resolutions. It only holds that states have to carry out the obligations contained in these resolutions in accordance with the Charter.²⁶ In addition, UNSC resolutions often contain material obligations requiring a certain result, without specifying the procedure or means by which this result should be achieved. A scope of discretion emanates from what a resolution is silent about. It leaves states certain scope which they could use to implement these resolutions in accordance with their other obligations. Sometimes a UNSC resolution does not leave states any discretion at all. Targeted sanctions, which will be discussed in subsection 2.3.1, are unique in this regard, since they do not leave states any scope of discretion. States can do no more than simply implement the measures the UNSC has taken against particularly designated individuals.

The research uses scope of discretion as a standard to determine which resolutions, or elements thereof, are relevant to include in the research. The extent of scope of discretion left by a resolution indicates how strict a connection is between an individual affected by a domestic implementation and the underlying UNSC resolution. This is important because the research focuses on individuals who are adversely affected by UNSC action, which can only be said to be the case when there is no scope of discretion as to the relevant aspects.²⁷ If there were such scope, it would have been entirely within the states' own powers to implement the requirements imposed by the UNSC in accordance with their other obligations. Hence, in that situation, any adverse effect on individuals' human rights has followed from states' own policy choices, and cannot be related directly to a decision by the UNSC.

Similarly, the extent of scope of discretion provides an indication for the research on whether it would be justified to speak of an indirect review of a UNSC resolution's lawfulness. This notion will be further explained in chapter 6.3. What is important to note for now is that the less scope of discretion a

²⁶ See UN Charter (n 2) articles 25, and 48.

²⁷ See also A Reinisch 'Conclusion' in A Reinisch (ed.) *Challenging Acts of International Organizations before National Courts* (Oxford University Press Oxford 2010) 258-273, 262.

resolution leaves, the more a court, when reviewing the lawfulness of that resolution's domestic implementation, also indirectly reviews the lawfulness of that resolution itself. This effect might even cause some courts to refuse to investigate the lawfulness of such implementing legislation.²⁸

State authorities implementing certain resolutions may have the tendency to deny a resolution's scope of discretion. They might use the argument that they are under a strict international obligation, stemming from a UNSC resolution, as an excuse for, or to underpin, their own domestic policies. Ultimately, when individuals bring a case before a court, it is for that court to determine whether the impugned domestic measure was indeed required by a UNSC resolution leaving states no scope of discretion. Accordingly, the assessment of whether there is a scope of discretion is subject to a court's interpretation.²⁹ Courts may have considerably different views on such a determination.³⁰

Hence it is impossible to establish objectively whether, and to what extent, a resolution leaves states a scope of discretion. For the purpose of the research the assessment of a resolution's scope of discretion is made on the basis of a literal reading of the text. With regard to the scope of discretion the research makes a three level distinction. The first level comprises UNSC resolutions which leave states no discretion at all. Examples of these are the resolutions directly targeting particularly designated individuals. The second level consists of UNSC resolutions which leave a very limited discretion. States are free to establish and qualify the facts of a particular case, but as soon as they have determined that the facts fall within the scope of the relevant resolution, there is no other option then but to implement the measures as required by that resolution. Finally, the third

²⁸ See, for instance, Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities (Kadi I)* [2005] ECR II-3649. See chapter 4.3.3.2.

²⁹ See chapter 5.2.1.

³⁰ Compare Case T-85/09 *Kadi v European Commission (Kadi II)* [2010] ECR II-05177 [116] and Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)* [2008] ECR I-06351 [298].

level is made up of UNSC resolutions which leave states a considerable discretion, in the sense of scope for policy-making. These resolutions require certain measures, but leave it for states to determine in which particular instances and how these measures are to be implemented. This enables states to balance the interests concerned and implement those measures entirely in accordance with their other obligations under national and international law.

The research will deal with cases concerning UNSC resolutions that could be classified under the first and second level. The following subsection will illustrate what types of resolutions these levels entail. A prominent example that could be classified under the third level, and which is thus beyond the research's scope, is UNSC resolution 1373, which obliges states to take certain measures in order to combat terrorism.³¹ This resolution leaves states so much discretion as to its implementation that any interferences with individuals' human rights cannot be said to have been the result of the obligations created by the UNSC. Similar to the 1267 sanctions regime, it requires states to freeze the funds of individuals who are engaged in terrorism. However, an important difference is that there is no Sanctions Committee to designate the individuals who have to be targeted. It is for states to do that themselves. The procedures by which individuals are designated, as well as by which their funds are eventually frozen, are left entirely to the discretion of individual states. Accordingly, there is no genuine link between infringements with these individuals' human rights and UNSC action, and decisions by courts on the lawfulness of these measures do not indirectly pronounce on the lawfulness of the underlying UNSC resolution.³²

³¹ UNSC Res 1373 (28 September 2001) UN Doc S/Res/1373. Despite the fact that this resolution is not directly relevant for the research, it remains a remarkable decision by the UNSC. Some even go as far as to call it the enactment of legislation by the UNSC. S Talmon 'The Security Council as World Legislature' (2005) 99 *American Journal of International Law* 175, 177. Cf. W Werner and B Wolhuis 'World Legislation Perspectives from International law and Political Theory' (2011) 8 *International Organizations Law Review* 197.

³² Chapter 8 does refer to some case law concerning the implementation of this resolution by way of comparison to the implementation of the 1267 regime. UNSC Res 1267 (15 October 1999) UN Doc S/Res/1267.

2.3. Types of UNSC Resolutions Selected for the Research

The research distinguishes between several types of UNSC resolutions. These types may affect individuals' enjoyment of human rights in different ways. Moreover, as will appear from the discussion in the following chapters, their distinctive elements have a bearing on the research's analysis. Subsection 2.3.1 will discuss targeted sanctions. Then subsection 2.3.2 will consider selective sanctions. After that, subsection 2.3.3 will consider the role that Sanctions Committees play in the imposition and execution of these sanctions. Finally, subsection 2.3.4 will deal with some miscellaneous decisions which will be discussed under the heading of other UNSC resolutions.

2.3.1. Targeted Sanctions

For the present research, targeted sanctions mean those sanctions for which the individual concerned has been specifically designated by the UNSC or a Sanctions Committee. In this regard, these sanctions do not leave states any scope of discretion. States are required to do no other than implement the enumerated measures against the individuals designated. The measures imposed include sanctions such as the freezing of assets and the imposition of travel bans.

Targeted sanctions were developed after the humanitarian debacle caused by the general restrictive measures taken by the UNSC against Iraq in the early 1990s.³³ The major advantage of targeted sanctions over general economic sanctions is that they do not affect the whole civil population of a country, but only those individuals to whom the sanctions are specifically aimed. The first occurrence of this phenomenon can be found in UNSC resolution 1127 (1997).³⁴ In that resolution a travel ban was instituted against 'senior officials of UNITA and [...] adult members of their immediate families', as designated by the relevant

³³ See R Normand 'A Human Rights Assessment of Sanctions: The Case of Iraq, 1990-1997' in W van Genugten and G de Groot (eds.) *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights* (Intersentia Antwerpen 1999) 19-33; and G Hufbauer and B Oegg 'Targeted Sanctions: A Policy Alternative' (2000) 32 *Law and Policy in International Business* 11.

³⁴ UNSC Res 1127 (28 August 1997) UN Doc S/Res/1127.

Sanctions Committee.³⁵ In some more recent resolutions the UNSC not only ascribes to such Sanctions Committee the task of designating individuals that have to be targeted, but also designates certain individuals itself.³⁶ Other resolutions contain an annex directly listing the individuals and entities that have to be targeted.³⁷

Probably the most well-known example of a targeted sanctions regime is the one imposed by UNSC resolutions 1267 (1999),³⁸ 1333 (2000),³⁹ and 1390 (2002),⁴⁰ and the following resolutions.⁴¹ This regime, which originally had the clear aim of persuading the Taliban to hand over Usama bin Laden and to prevent Afghan territory from being used for terrorist training, turned after September 11, 2001 into a hallmark for the global war on terrorism. Presently, the category of individuals who can be targeted by this sanctions regime is virtually open-ended; there is no longer any connection with a state's territory or government.⁴² This brings in a new dimension. The question of whether the maintenance of international peace and security requires that a particular government should be targeted is primarily a political one.⁴³ The members of that government will usually be publicly known. Moreover, membership in itself may be sufficient.⁴⁴ The same might be said in relation to targeting Al Qaida, and Usama bin Laden in particular.⁴⁵ In principle, it could be legitimate to sanction a government or terrorist group and its leaders. Ultimately, in most legal systems it is not for the

³⁵ Ibid. [4] and [11].

³⁶ See UNSC Res 1718 (14 October 2006) UN Doc S/Res/1718 [8] and [12]; and UNSC Res 1737 (23 December 2006) UN Doc S/Res/1737 [10], [12] and [18].

³⁷ UNSC Res 1737 (2006) *ibid*; UNSC Res 1747 (24 March 2007) UN Doc S/Res/1747; and UNSC Res 1803 (3 March 2008) UN Doc S/Res/1803.

³⁸ UNSC Res 1267 (1999) (n 32).

³⁹ UNSC Res 1333 (19 December 2000) UN Doc S/Res/1333.

⁴⁰ UNSC Res 1390 (2002) (n 24).

⁴¹ Recently adopted resolutions separated the regime into two sanctions regimes. See UNSC Res 1988 (17 June 2011) UN Doc S/Res/1988 and UNSC Res 1989 (17 June 2011) UN Doc S/Res/1989. For further detail see chapter 3.7.

⁴² As from UNSC Res 1333 (2000) (n 39).

⁴³ See Lord Mance in *HM Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 2 & UKSC 5, ILDC 1533 (UK 2010) (*Ahmed*) [246]-[247].

⁴⁴ See, for example, Case T-181/08 *Pye Phyto Tay Za v Council* [2010] ECR II-01965 [121]-[123].

⁴⁵ *Ahmed* (n 43) [247].

judiciary to assess the essentially political decision to sanction these groups and individuals.

The situation is entirely different, however, for individuals allegedly associated with a terrorist group. Since, they live in relative anonymity there is the problem of identifying correctly those individuals that fall within the group that needs to be targeted, both as to whether the targeted individual is actually the person concerned, as well as whether there is a genuine link between that individual and the terrorist organization. This requires a more intricate assessment, which could very well be amenable to judicial review – rather than, for example, the determination of who is the president of a particular state.⁴⁶ However, the information on the basis of which someone is designated usually stems from intelligence agencies, and is therefore largely confidential.⁴⁷ Accordingly, serious infringements with due process guarantees may emerge.

2.3.2. Selective Sanctions

These sanctions target certain circumscribed groups of individuals, objects, or actions, without particularly designating them. They might, for instance, prohibit the trade of timber with a certain state in order to put economic pressure on that state;⁴⁸ or they may prohibit individuals of a certain nationality from following proliferation-sensitive studies, in order to prevent the state concerned from developing nuclear weapons.⁴⁹ These resolutions leave states certain latitude to determine how the sanctions should be implemented, and to establish whether

⁴⁶ Yet measures against a particular government could also potentially target an exceptionally broad group of people. See for example the sanctions against Iraq established by UNSC Res 1483 (22 May 2003) UN Doc S/Res/1483. The individuals that had to be designated were, in addition to government leaders, inter alia the heads and senior members of state-owned / state controlled enterprises (banks, transport services, industries, utilities, media, insurance agencies etc.), senior members of the Baath Party, officials of a lower rank but performing crucial functions such as certain accountants, buyers, technical experts etc.; as well as their immediate family members, which includes parents, spouses, children, and siblings of the senior official but also other relatives as appropriate. See ‘Non-Paper on the Implementation of Paragraph 23 of Resolution 1483 (2003)’ available at: <http://www.un.org/sc/committees/1518/pdf/Non-paper.pdf>.

⁴⁷ See Chapter 8.

⁴⁸ UNSC Res 1478 (6 May 2003) UN Doc S/Res/1478 [17].

⁴⁹ UNSC Res 1737 (2006) (n 37) [17].

they are applicable to a specific situation. For example, domestic authorities have discretion in determining which studies should qualify as proliferation-sensitive studies. Alternatively, they may be required to determine whether a particular aircraft owned by an undertaking operating from the targeted state, but leased to a company from another state, is amenable to the sanctions against the former state.⁵⁰ However, as soon as such a determination is made in the affirmative, there is no other option than to apply the sanctions as prescribed by the relevant resolution.

In the early 1990s, selective sanctions were often part of a broader comprehensive sanctions regime against particular states, including general restrictions on trade.⁵¹ The UNSC has applied such wide-ranging economic sanctions, for instance, against Iraq and the Federal Republic of Yugoslavia (FRY).⁵² These sanctions resulted in almost complete economic isolation.⁵³ As a result the whole population of the targeted states suffered severely from the negative consequences.⁵⁴ In response to strong criticism, the UNSC started to apply more limited trade restrictions, and eventually also the targeted sanctions discussed above.

2.3.3. UNSC Sanctions Committees

Usually, sanction regimes have their own Sanctions Committee, consisting of representatives of the members of the UNSC.⁵⁵ Their role varies per regime. With regard to some of them, like the one against Iraq, the relevant Committee

⁵⁰ See UNSC Res 820 (17 April 1993) UN Doc S/Res/820 [24], and Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* [1996] ECR I-3953.

⁵¹ See Schermers and Blokker 2011 (n 1) [1483].

⁵² Krisch 2012 (n 22) 1305-1329, 1312.

⁵³ See Schermers and Blokker 2011 (n 1) [1483].

⁵⁴ See, for example M Reisman and D Stevick 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes' (1998) 9 *European Journal of International Law* 86; and W v Genugten and G d Groot (eds.) *United Nations Sanctions: Effectiveness and Effects, Especially in the Field of Human Rights* (Intersentia Antwerpen 1999).

⁵⁵ See for an overview of the presently operative and previously terminated Sanctions Committees: <http://www.un.org/sc/committees/> (last visited 4 February 2013).

mainly had the task of gathering information and examining reports from states on sanction implementation.⁵⁶ In other sanction regimes Committees may have a more proactive role. The Committee established in relation to the sanctions imposed on the FRY, for instance, had the task of authorizing transshipments of commodities on the Danube.⁵⁷ With regard to the sanctions against Libya, the relevant Committee had to 'recommend appropriate measures in response to violations of the measures imposed [on Libya by the UNSC]'.⁵⁸ The scope of activities of some Committees may in practice extend beyond the tasks formally assigned to them. For example, states started to ask the Iraq and Yugoslavia Sanctions Committees for interpretations of certain provisions of the UNSC resolutions establishing the sanction regimes against those countries.⁵⁹ The Committees responded to those questions without having an explicit legal basis to interpret the sanction resolutions. Nonetheless, states regarded their interpretations as binding, or at least as highly authoritative.⁶⁰ Today, several Committees are explicitly given tasks such as drawing up guidelines for implementation of sanctions, granting humanitarian exemptions, and ultimately even designating individuals who have to be targeted by sanctions measures.⁶¹

The shift towards the practice of assigning to a Sanctions Committee the task of designating those individuals that have to be targeted developed gradually. In 1993 a Committee was given the task of identifying and reporting to the UNSC persons or entities that were reported to be engaged in violations of the relevant

⁵⁶ See for instance, UNSC Res 661 (6 August 1990) UN Doc S/Res/661 [6].

⁵⁷ UNSC Res 820 (1993) (n 50) [15].

⁵⁸ UNSC Res 748 (31 March 1992) UN Doc S/Res/748 [9 (d)].

⁵⁹ See chapter 5.2.3.

⁶⁰ See Conlon 'Lessons From Iraq: The Functions of the Iraq Sanctions Committee as a Source of Sanctions implementation Authority and Practice' (1995) 35 *Virginia Journal of International Law* 633, 653. See also V Gowlland-Debbas 'Implementing Sanctions Resolutions in Domestic Law' in V Gowlland-Debbas (ed.) *National Implementation of United Nations Sanctions, A Comparative Study* (Martinus Nijhoff Publishers Leiden 2004) 33-78, 52, and M Scharf and J Dorosin 'Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee' (1993) 19 *Brooklyn Journal of International Law* 771, 773.

⁶¹ The latter occurred for the first time in resolution 1127 (1997) (n 34) targeting UNITA officials, and is most known in relation to UNSC Res 1267 (1999) (n 32).

sanction measures.⁶² In a subsequent resolution, that Committee was given the task of maintaining an updated list of individuals who fell within the provision of the resolution that instituted a travel ban, based on information provided by states and regional organizations.⁶³ Accordingly, over the course of time this Committee developed from a more or less passive body for coordination of state information to an active instrument of sanction effectuation.

The legal nature of a Sanctions Committee's decisions depends on what powers the UNSC has delegated to the particular Committee. When the UNSC regards it necessary for the maintenance of international peace and security, it may delegate to a Sanctions Committee its power of taking binding decisions.⁶⁴ Where the UNSC has explicitly done so, the decisions of the Sanctions Committee concerned will bind all UN member states to the extent provided for in the relevant UNSC resolution.⁶⁵ In principle, the designations of individuals for the purpose of the targeted sanctions should be considered of the same legally binding nature as the decisions of the UNSC itself.⁶⁶ The same counts for the discretionary power of approving requests for exemptions from sanction measures.⁶⁷ However, the legal nature of Sanctions Committees' interpretations, where no such power thereto is explicitly delegated, is different. Chapter 5.2.3 will consider the legal effects of these interpretations.

⁶² UNSC Res 841 (16 June 1993) UN Doc S/Res/841 [10].

⁶³ See UNSC Res 917 (6 May 1994) UN Doc S/Res/917 [3].

⁶⁴ D Sarooshi *The United Nations and the Developments of Collective Security, the delegation by the UN Security Council of its chapter VII powers* (Clarendon Press Oxford 1999) 107. See also Peters 2012 (n 5) 791-854, 796.

⁶⁵ M Wood 'The Interpretation of Security Council Resolutions' (1998) 2 Max Planck Yearbook of United Nations Law 73, 84.

⁶⁶ However, some seem to regard them as of a different normative weight. Lord Mance appeared to regard it as a relevant distinction that some individuals were listed by the UNSC, and others by a Sanctions Committee. *Ahmed* (n 43) [247].

⁶⁷ See, for example, UNSC Res 757 (30 May 1992) UN Doc S/Res/757 [7a]; UNSC Res 820 (1993) (n 50) [22] and [23]; and UNSC Res 1452 (20 December 2002) UN Doc S/Res/1452 [1b]. See Reisman and Stevick 1998 (n 54) 101 and 112; Sarooshi 1999 (n 64) 100 at footnote 65.

2.3.4. Other Resolutions Potentially Affecting Individuals

Obligations created under other UNSC resolutions that do not impose sanction measures can adversely affect individuals in the enjoyment of their human rights as well. The present subsection will consider, consecutively, obligations stemming from UNSC resolutions that authorize states to take certain action; UNSC resolutions that require states to cooperate with the international criminal tribunals; and UNSC resolutions that establish and endorse the powers of High Representatives temporarily administrating certain territory.

2.3.4.1. Authorizations

Originally it was foreseen that the UNSC would have its own military forces at its disposal. The UN Charter contains a provision on agreements states had to conclude on making available such forces to the UNSC.⁶⁸ These agreements have never been concluded.⁶⁹ Instead, a system of authorizations developed in practice. When the UNSC considers military action to be necessary in order to restore or maintain international peace and security, it may authorize UN member states to use ‘all necessary means’, which is code for military action.⁷⁰ This does not mean that states are forced to take military action when the UNSC gives an authorization thereto,⁷¹ but if states choose to act pursuant to an UNSC authorization such acts cannot be opposed on the basis of these states’ conflicting international obligations.⁷² The House of Lords even argued that as soon as a state chooses to contribute to the authorized military action, it becomes bound by an obligation under the Charter to carry out the decisions of the UNSC.⁷³ It found

⁶⁸ UN Charter (n 2) article 43.

⁶⁹ N Krisch 'Article 43' in B Simma et al. (eds.) *The Charter of the United Nations: A Commentary* 3rd ed. vol. II (Oxford University Press Oxford 2012) 1351-1356, 1354.

⁷⁰ UN Charter (n 2) article 42. See also Schermers and Blokker 2011 (n 1) [1493]-[1495].

⁷¹ J Delbrück 'Article 25' in B Simma et al (eds.) *The Charter of the United Nations: A Commentary* 2nd ed. vol. I (Oxford University Press Oxford 2002) 452-464, 463.

⁷² J Frowein and N Krisch 'Article 39' Ibid. 717-729, 729. See also Paulus and J Leiss 2012 (n 15) 2110-2137, 2122-2123 and M Milanovic 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke Journal of Comparative & International Law* 69, 78.

⁷³ *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, ILDC 832 (UK 2007) (*Al-Jedda*) [34].

this obligation to be covered by the application of article 103 of the UN Charter.⁷⁴

2.3.4.2. Cooperation with the International Tribunals

In response to the mass atrocities committed in the former Yugoslavia and Rwanda, the UNSC established the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) (together, the International Tribunals).⁷⁵ These *ad hoc* tribunals were instituted as enforcement measures contributing to the restoration and maintenance of international peace and security.⁷⁶ Like most international institutions, they depend on state cooperation for effective operation. States, for example, need to surrender to the International Tribunals the individuals accused by the Tribunals' prosecutors. To this end, the UNSC created an obligation under Chapter VII to cooperate with the Tribunals,⁷⁷ and it delegated to them its power to issue binding decisions upon states.⁷⁸ These binding decisions are in effect decisions of the UNSC.⁷⁹ Therefore, they benefit from the provision in article 103 of the UN Charter.⁸⁰ Accordingly, the Tribunals have the power to issue binding decisions upon UN member states that will prevail over these states' obligations under any other international agreement.⁸¹

The power to issue binding orders on states needs to be distinguished from the Tribunals' exercise of jurisdiction over individuals. The International Tribunals cannot exercise jurisdiction over states, and the issuing of binding orders needs

⁷⁴ See chapter 5.3.

⁷⁵ The ICTY is established by UNSC Res 827 (25 May 1993) UN Doc S/Res/827, and the ICTR by UNSC Res 955 (8 November 1994) UN Doc S/Res/955.

⁷⁶ *Prosecutor v Dusko Tadic (Jurisdiction)* [1995] IT-94-1-AR72 [38]. See also 'Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) [22]-[23].

⁷⁷ With regard to the ICTY see UNSC Res 827 (1993) (n 75) [4] and with regard to the ICTR see UNSC Res 955 (1994) (n 75) [2]. This obligation is also laid down in the Tribunals' Statutes, which form part of the UNSC resolutions establishing the Tribunals and have the same binding force.

⁷⁸ Sarooshi 1999 (n 64) 107.

⁷⁹ *Ibid.* 107. See Report of the Secretary General (1993) (n 76) [126]. See also G Sluiter *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Intersentia Antwerpen 2002) 37.

⁸⁰ UN Charter (n 2) article 103.

⁸¹ Sarooshi 1999 (n 64) 109.

to be seen as an exercise of ancillary (or incidental) mandatory power.⁸² The Tribunals need this power to carry out their primary task. The effect of the exercise of this power is to a certain extent comparable to the decisions of the Sanctions Committees. As a consequence, domestic and regional courts may equally be confronted with an international obligation that claims to prevail over particular individuals' international human rights, and that leaves no scope of discretion. In addition, courts (especially those of the Tribunals' host-states) may be asked to decide upon claims concerning alleged flaws in the Tribunals' proceedings.

In the *Blaskic Subpoena* case, the Appeals Chamber of the ICTY confirmed the binding legal nature of the requests and orders issued by the Tribunal.⁸³ It considered that the drafters of the ICTY Statute imposed upon all states an obligation to cooperate with the Tribunal.⁸⁴ The Appeals Chamber derived the binding force of this obligation from the provisions of Chapter VII and article 25 of the UN Charter, and from the relevant UNSC resolutions.⁸⁵

In this sense, the ICTY and ICTR differ from other international criminal courts and tribunals established in cooperation with the UN, such as the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia. These judicial bodies were not established by the UNSC under Chapter VII, and do not benefit from the provisions in articles 25 and 103 of the UN Charter.⁸⁶ In contrast, the Special Tribunal for Lebanon was established by the UNSC (in agreement with the Lebanese government). However, an

⁸² *Prosecutor v Tihomir Blaskic (Judgement on the Request of the Republic of Croatia)* [1997] ICTY-95-14-AR108 *bis* [28].

⁸³ *Ibid.* There is according to Sluiter no difference in binding effect between the Tribunals' requests and orders. Sluiter 2002 (n 79) 148. But see also *Ntakirutimana v Reno* [1999] 184 F.3d 419 (5th Cir) WL 98-41597, 19.

⁸⁴ *Blaskic* [1997] (n 82) [26].

⁸⁵ *Ibid.* [26].

⁸⁶ However, see also C Jalloh 'The Contribution of the Special Court for Sierra Leone to the Development of International Law' (2007) 15 African Journal of International and Comparative Law 165, 199; and *Blaskic* [1997] (n 82) [31].

obligation to cooperate was adopted only with regard to Lebanon.⁸⁷ The UNSC did not decide upon a universal obligation to cooperate with this tribunal.⁸⁸ In addition, the obligation for state parties to cooperate with the International Criminal Court (ICC) is also of a different legal nature. This obligation arises from an international agreement.⁸⁹ In case of a referral by the UNSC, a non-state party's obligation to cooperate must be grounded directly on the resolution that refers the situation to the prosecutor of the ICC, and not on the Court's Statute.⁹⁰

The International Tribunals do not themselves have any means to enforce their binding orders.⁹¹ If a state does not comply with such an order, a Tribunal can only make a judicial finding that the state failed to comply and report this finding to the UNSC.⁹² It is then for the UNSC to decide on enforcement measures. The Tribunals have reported several such findings, but the UNSC has thereupon only issued calls for cooperation and mere confirmations that states are under a general obligation to cooperate. It has never taken any enforcement measures.⁹³

⁸⁷ UNSC Res 1757 (30 May 2007) UN Doc S/Res/1757, Annex: Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, article 15.

⁸⁸ See also L Korecki 'Procedural Tools for Ensuring Cooperation of States with the Special Tribunal for Lebanon' (2009) 7 *Journal of International Criminal Justice* 927, 929.

⁸⁹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/Conf.183/9 (ICC Statute), articles 86 and 98.

⁹⁰ D Akande 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10 *Journal of International Criminal Justice* 299, 305-306.

⁹¹ See also *Blaskic* [1997] (n 82) [25].

⁹² ICTY 'Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia' (consolidated version 10 December 2009) UN Doc IT/32/Rev.44 (Rules of Procedure ICTY), rules 59 and 61, and ICTR 'Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda' (consolidated version of 14 March 2008) UN Doc ITR/3/Rev.17 (Rules of Procedure ICTR), rules 59 and 61. See also *ibid.* [33]; and *Tadic (Jurisdiction)* (n 76) [1995] [51].

⁹³ S Williams and L Sherif 'The Arrest Warrant for President Al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court' (2009) 14 *Journal of Conflict & Security Law* 71, 85 at footnote 81. See also on the possibility of issuing an international arrest warrant as a response to non-cooperation by a state B Swart 'Arrest and Surrender' in A Cassese (ed.) *The Rome Statute of the International Criminal Court: a Commentary* (Oxford University Press Oxford 2002) 1658-1674.

Of all required acts of cooperation, the Tribunals' requests for surrender are the most likely to raise human rights concerns, and are also the most often challenged requests before domestic and regional courts.⁹⁴ The Statutes of the International Tribunals purposely avoid the term 'extradition' and instead use the terms 'surrender' and 'transfer'.⁹⁵ This to indicate that transfer to the Tribunals is not supposed to trigger the same procedural requirements and human rights guarantees as transfer to the national courts of another state.⁹⁶

The different terminology is not only meant to induce larger and unqualified state cooperation; it indeed also marks fundamental differences between inter-state extradition and surrender to an International Tribunal. The Appeals Chamber of the ICTY made, in this respect, a distinction between horizontal inter-state relationships and the vertical relationship that exists between states and the International Tribunals.⁹⁷ One major difference is that states are not under a general international obligation to extradite individuals to other states. Obligations to extradite arise only from voluntarily agreed bi- and multi-lateral treaties, which may incorporate certain conditions to such extradition.⁹⁸ Moreover, extradition treaties do not create an automatic process of transfer of

⁹⁴ See J d' Aspremont and C Brölmann 'Challenging International Criminal Tribunals Before Domestic Courts' in A Reinisch (ed.) *Challenging Acts of International Organizations before National Courts* (Oxford University Press Oxford 2010) 111-136. States have an obligation hereto pursuant to article 29 (2) (e) of the ICTY Statute UNSC Res 827 (1993) (n 75) and article 28 (2) (e) of the ICTR Statute UNSC Res 955 (1994) (n 75). But other requests and orders by the Tribunals may also affect individuals' enjoyment of human rights. See G Sluiter 'Naleving van de Rechten van de Mens door Internationale Straftribunalen' (2002) 27 NJCM-Bulletin 699, 700.

⁹⁵ The research will use the term transfer in a neutral meaning, the term extradition for a transfer of an individual between two states and surrender for a transfer of an individual from a state to an International Tribunal.

⁹⁶ See also Rules of Procedure ICTR (n 92) rule 58, and Rules of Procedure ICTY (n 92) rule 58.

⁹⁷ *Blaskic* [1997] (n 82) [47].

⁹⁸ In the context of extradition treaties conditions regarding the observance of human rights have played a role since WWII. J Dugard and C Van den Wyngaert 'Reconciling Extradition with Human Rights' (1998) 92 *American Journal of International Law* 187, 192.

the requested individual. They only create a formal procedure. States retain autonomy, which may result in a refusal to extradite.⁹⁹

In contrast, the obligation to surrender was created by the UNSC, and was unilaterally imposed on all states, without the possibility for individual states to negotiate on any exceptions acknowledged in extradition law. Although the UNSC only created a general obligation to cooperate with the Tribunals, requests for surrender of certain individuals do not leave states any scope of discretion as to the implementation.¹⁰⁰

2.3.4.3. International Administration

On several occasions the UNSC has taken coercive measures to establish or endorse the establishment of an international administration to temporarily administer territory in post-conflict situations.¹⁰¹ The UNSC took these measures with a view to maintaining international peace and security.¹⁰² With regard to their legal basis, an analogy could be made with the UNSC resolutions instituting the International Tribunals. Both are measures not explicitly provided for in the UN Charter, but they could be implied in the UNSC's power to adopt coercive non-military measures for the restoration of international peace and security.¹⁰³

An example, which will be discussed in the research, is the High Representative appointed after the war in Bosnia and Herzegovina (BiH) to ensure the

⁹⁹ The requesting state does not have a right to extradition. P Langford 'Extradition and Fundamental Rights: The Perspective of the European Court of Human Rights' (2009) 13 *The International Journal of Human Rights* 512, 512-513.

¹⁰⁰ Sluiter 2002 (n 79) 77. See also Simma who considered the obligations stemming from a Tribunal's order to constitute obligations of result. *Blaskic* [1997] (n 82) *Amicus Curiae* Brief submitted by Bruno Simma, 14-15.

¹⁰¹ For example, in Kosovo, BiH, East Timor. See E de Wet 'The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law' (2004) 8 *Max Planck Yearbook of United Nations Law* 291, 314-315.

¹⁰² *Ibid.* 315.

¹⁰³ UN Charter (n 2) article 41. De Wet 2004 (n 101) 291, 316-317.

implementation of the Dayton Peace Agreement.¹⁰⁴ The UNSC authorized the High Representative's extensive administrative powers.¹⁰⁵ His decisions have a dual character.¹⁰⁶ On the one hand, they are decisions of a subsidiary organ of the UNSC, and in this sense part of the international UN legal order. On the other hand, however, they are automatically part of the domestic legal order that the High Representative is authorized to administer. Accordingly, in contrast to the common situation, these (international) decisions do not have to be implemented by state authorities in order to gain effect within the domestic legal order. As a consequence, there is no domestic implementation by state authorities against which an affected individual could bring a complaint before a court.

In this regard, the present situation is somewhat different from those discussed above. The research focuses on norm conflicts that may emerge when states are confronted with two international obligations which they are unable to observe at the same time: on the one hand, an obligation under the UN Charter, and on the other hand, an obligation under an international human rights treaty. It is not directly concerned with international obligations under human rights law upon the UN, the UNSC, or its subsidiary organs. Accordingly, cases concerning complaints against decisions of a High Representative administering certain territory are only partly relevant to the research. That is when a situation arises in which the state in which the administration operates cannot observe one of its own obligations under international human rights law due to an exercise of powers by the administration's High Representative. For example, the decisions of the High Representative in BiH cannot be challenged before a domestic court.

¹⁰⁴ The Dayton Peace Agreement, signed in Paris on 14 December 1995, formally ended the war in Bosnia. The institution of a High Representative was endorsed by UNSC Res 1031 (15 December 1995) UN Doc S/Res/1031 [26].

¹⁰⁵ UNSC Res 1144 (19 December 1997) UN Doc S/Res/1144. See also De Wet 2004 (n 101) 291, 315. The High Representative's powers are referred to as the 'Bonn Powers' resulting from the Bonn Peace Implementation Conference. Annex 10 to the Dayton Peace Agreement sets out the mandate of the High Representative. The endorsement by the UNSC gave it 'some independence from the parties' will.' J Frowein and N Krisch 'Article 41' in B Simma et al. (eds.) *The Charter of the United Nations: A Commentary* 2nd ed. vol. I (Oxford University Press Oxford 2002) 735-749, 744.

¹⁰⁶ See De Wet 2004 (n 101) 291, 331.

Nor can the BiH's Commission on Human Rights, which was also established by the Dayton Peace Agreement, hear complaints against the international administration.¹⁰⁷ This only leaves open the possibility of bringing a complaint against the domestic authorities for not guaranteeing within their jurisdiction an effective remedy against the High Representative's decisions. Accordingly, this omission might engage the responsibility of the state in which the High Representative operates. From this perspective these cases are included in the research.

2.4. The Implementation of UNSC Resolutions

UNSC resolutions are usually addressed to member states. If these resolutions are to gain any effect within domestic legal orders, they need to be implemented or executed by those states.¹⁰⁸ Neither the UN Charter, nor general international law prescribes how states should implement UNSC resolutions, or for that matter international law in general.¹⁰⁹ It is for individual states to determine how international norms are effectuated within the domestic legal order. Accordingly, there is a wide diversity of systems of implementation. This may have an impact on how individuals in different states are affected by UNSC resolutions, and on how they are able to defend themselves against the implementation of such resolutions before domestic courts.

¹⁰⁷ The Commission on Human Rights was established under Annex 6 to the Dayton Peace Agreement. Initially, it existed of an Office of the Ombudsman and a Human Rights Chamber. The former was later renamed Office of the Human Rights Ombudsperson, and the latter was after the termination of its mandate renamed the Human Rights Commission. See: <http://www.ombudsmen.gov.ba/> and <http://www.hrc.ba/commission/eng/default.htm> (last visited 15 February 2012). See also G Verdirame 'Compliance with Human Rights in UN Operations' (2002) 2 Human Rights Law Review 265, 281; and F Hoffman and F Megret 'Fostering Human Rights Accountability: An Ombudsperson for the United Nations?' (2005) 11 Global Governance 43, 56.

¹⁰⁸ Note that some UNSC decisions do not require national implementation: for example, 'decisions which declare or establish a legal status with objective effect, like territorial decisions, or admission to membership'. C Schreuer 'The Relevance of United Nations Decisions in Domestic Legislation' (1978) 27 International and Comparative Law Quarterly 1, 12.

¹⁰⁹ Article 48 of the UN Charter, for example, only obliges states to take the action required to carry out the decisions of the UNSC; it does not prescribe how states should do that. UN Charter (n 2) article 48.

The present section will pay attention to some general aspects related to the implementation of UNSC resolutions in domestic legal orders. First, subsection 2.4.1 will start by providing a general exposition of the traditional concepts of monism and dualism, and will question its explanatory value in relation to the cases considered in the present research. Thereafter, subsection 2.4.2 will discuss the role of the different organs of the state in implementing UNSC resolutions. Finally, subsection 2.4.3 will deal with the effect of implementation by the European Union (EU).

2.4.1. The Divide between National and International Law

In legal theory a general distinction is made between dualist and monist (orientated) states. The former regard national and international law as being two separate legal orders. Hence international law needs to be transformed into national law to become applicable in the domestic legal order. This transformation takes place through the enactment of national implementing legislation. Accordingly, it is not the original provision of international law that is applicable in the national legal order, but its translation into national law. As a consequence, the status of those international law provisions, once transformed into the national legal order, is equal to that of other national legislation, which also means that they can be amended or repealed by subsequent legislation. The opposing theory is the monist theory. This theory does not require the transformation of international provisions into national law, since it regards national and international law as being part of one unified legal order. Consequently international law is, in principle, directly applicable in the domestic legal order.

It must be emphasised that both concepts are scholarly attempts to explain the different approaches taken by states.¹¹⁰ Moreover, the distinction between these

¹¹⁰ A Aust *Modern Treaty Law and Practice* (Cambridge University Press Cambridge 2000) 145.

two theoretical constructions seems more clear-cut than it is in reality.¹¹¹ In practice, and to a certain extent also in theory, there is a wide spectrum of different variations of those two concepts. Sometimes it is even hard to determine whether a certain national legal order is particularly monistic or dualistic. In addition, states may also change their position over time from one system to the other.¹¹²

What is more, in relation to individuals challenging the implementation of UNSC resolutions, the distinction is almost deprived of any practical effect. The possibility of direct application of international law under the monist theory usually concerns only self-executing provisions. The notion 'self-executing' means that because the international rule is sufficiently precise and clear, it is able to create rights and obligations for its addressees in the national legal order.¹¹³ Hence the international obligation can be executed, by organs of the state, directly on the basis of the international norm without the need for national implementing legislation.¹¹⁴ It is also possible for individuals to claim rights, before domestic courts, directly on the basis of such provisions of international law.¹¹⁵

UNSC resolutions are usually too abstract for state organs to be able to carry them out directly in relation to a particular national situation.¹¹⁶ Therefore in most states they are not considered to be self-executing.¹¹⁷ In addition, it is generally

¹¹¹ Cf. J Nijman and A Nollkaemper (eds.) *New Perspectives on the Divide between National and International Law* (Oxford University Press Oxford 2007) 2.

¹¹² Gowlland-Debbas 2004 (n 60) 33-78, 38.

¹¹³ It is, however, difficult to come up with one single specific definition of what is meant by 'self-executing', since it is a question of domestic law and this question will therefore be answered differently in different states. T Buergenthal 'Self-Executing and Non-Self-Executing Treaties' (1992) 235 *Recueil de Cours Académie de Droit International* 307, 319-321, 368.

¹¹⁴ It is for the courts to determine whether a certain provision of international law can be regarded as self-executing. See *ibid.* 353, 393.

¹¹⁵ This depends also on whether the drafters of the international obligation had the intention to create rights for individuals. See *infra* footnote 118.

¹¹⁶ But see Peters 2012 (n 5) 791-854, 806.

¹¹⁷ See Gowlland-Debbas 2004 (n 60) 33-78, 40.

denied that UNSC resolutions are directly applicable in domestic legal orders, since they have been drafted as obligations for states.¹¹⁸ Hence, in order to apply the measures envisaged in a UNSC resolution, the relevant state organs need to adopt implementing legislation.¹¹⁹ Also under a monist system a national court accordingly cannot rely directly on the provisions of a UNSC resolution.¹²⁰ Thus, in practice, there is no difference that would be relevant for the research between the two concepts in regard to the implementation of UNSC resolutions.¹²¹

Thus the conceptual distinction between monism and dualism might not be very apt for explaining the situation of giving effect to UNSC resolutions within a domestic legal order. However, it might be relevant in relation to the implementation of international human rights treaties. In monist states, individuals can directly rely on the self-executing provisions contained in these treaties.¹²² In some of these states, such as the Netherlands, the Constitution even grants precedence to these provisions over domestic law.¹²³ Hence, when a domestic implementation of a UNSC resolution is in conflict with an individual's international human rights, in principle the latter prevails on the basis of the

¹¹⁸ Schermers and Blokker 2011 (n 1) [1543]. For conceptual clarity, the notion 'self-executing' should be distinguished from the notion 'directly applicable'. The former refers to a national law concept, which sees to the power or competence of national courts to engage an international law obligation, and the latter refers to an international law concept, which sees to the question of whether the drafters of the treaty had the intention to create an international obligation for the state parties to give (all or some) provisions of the treaty the status of domestic law. Buergenthal 1992 (n 113) 307, 320.

¹¹⁹ Krisch 2012 (n 22) 1305-1329, 1325. See also on this issue below on the role of (the organs of) the state in effectuating IO decisions.

¹²⁰ Gowlland-Debbas 2004 (n 60). But see also the potential exceptions at *ibid.* 40, and *supra* footnote 116.

¹²¹ This is in concurrence with Reinisch 2010 (n 27) 258-273, 262. See also d'Aspremont and Brölmann 2010 (n 94) 111-136, 134. Note, however, that despite the fact that non-self-executing treaties in monist states do not establish rights or obligations in a specific case, they do form a source of law in the national legal order. Accordingly, with regard to their normative status, they cannot be equated with (non-self-executing) treaties in a dualist state. See Buergenthal 1992 (n 113) 307, 318.

¹²² See *supra* footnote 118. Note that direct applicability is likely to be accepted 'more readily in relation rights granted to individuals than in relation to obligations imposed upon them.' Schermers and Blokker 2011 (n 1) [1543].

¹²³ Dutch Constitution (1982) article 94.

national Constitution.¹²⁴ In practice this would only be the case, however, if the court deciding upon the conflict separated the domestic implementation from the underlying international obligation created by a UNSC resolution, and thus negated the effect of article 103 of the UN Charter.¹²⁵

2.4.2. The Role of State Organs

In order for UNSC resolutions to gain effect within the national legal orders of member states, they need to be implemented by the relevant organs of those states.¹²⁶ The powers of the UNSC to effectuate its own decisions are very limited. The present subsection will first discuss implementation by the executive and the legislature, and will then pay attention to review of those implementations by the judiciary.

Since UNSC resolutions are usually not considered to be self-executing, many states' constitutions will require the legislative organ to enact implementing legislation before the executive organs can take decisions or enforcement action to execute the measures contained in such resolution. In some states, the legislature has enacted prior general framework legislation on the basis of which the executive is able to implement successive UNSC resolutions relatively speedily.¹²⁷ For instance, the Dutch legislator has enacted the Sanctions Act 1977 to enable, among others, the implementation of decisions by the UNSC.¹²⁸ On the basis of that legislation, UNSC resolutions can be implemented by the executive through a Sanction Order or a Sanction Decree.¹²⁹ The United Kingdom implements UNSC sanctions on the basis of the United Nations Act 1946.¹³⁰ By

¹²⁴ See chapter 6.3.1.

¹²⁵ See chapter 6.2.

¹²⁶ See Schermers and Blokker 2011 (n 1) [1518]-[1519].

¹²⁷ Where such framework legislation is in place the time lag between adoption of the IO decision by the IO and the domestic implementation of that decision may be two or three months, whereas passage of new (ad hoc) legislation may take two or three years. See Gowlland-Debbas 2004 (n 60) 33-78, 41.

¹²⁸ Sanctiewet 1977 (15 februari 1980) Staatsblad 2008, 287 article 2. This legislation authorizes the implementation of decisions and recommendations by any IO concerning the maintenance or restoration of international peace and security and the fight against terrorism.

¹²⁹ Ibid. articles 6 and 7.

¹³⁰ United Nations Act 1946, c 45 9 and 10 Geo 6 (enacted 15 April 1946).

this Act, Parliament gave the government the power to take those measures which are ‘necessary and expedient’ for the effective application of UNSC sanctions.¹³¹ In the majority of states, however, there is no specific prior framework legislation. In those states, UNSC resolutions are implemented on the basis of other pre-existing legislation (not designed for the implementation of IO decisions) or on the basis of *ad hoc* legislation specially adopted *post-facto* for the implementation of a particular UNSC resolution.¹³²

In principle, in many states the courts are able to review the executive’s measures taken on the basis of the implementing legislation as to their content, as well as to whether they are adopted in accordance with that legislation. The present research includes several cases in which courts have annulled domestic implementations on these grounds.¹³³ Whether a court actually finds itself competent to engage in such review, and to what extent, may depend on whether it separates the domestic implementation from the underlying UNSC resolution, or whether it maintains a connection between the two.

The different methods for achieving such separation are discussed in Chapters 5 and 6. Courts could either entertain a narrow interpretation of the UNSC resolution concerned, or adopt a dualist approach. The latter means that a court does not take into account the international obligation under the UN Charter underlying the domestic implementation. This dualist approach does not necessarily have to concur with that court’s legal system’s conception on the divide between national and international law. Even in a monist state, such as the Netherlands, courts may entirely separate the domestic implementation from the relevant UNSC resolution, and the international obligation under article 103 of the UN Charter.¹³⁴ This is feasible, of course, due to the non-self-executing character of UNSC resolutions. Conversely, in a dualist state, such as the United

¹³¹ Ibid. Section 1.

¹³² Gowlland-Debbas 2004 (n 60) 33-78, 43-45.

¹³³ See chapter 6.4.1.

¹³⁴ See *The Netherlands v A and Others* [2011] LJN: BQ4781 (*Iranian Nationals*) [5.5].

Kingdom, courts can decide a case wholly within the context of international law. They may find themselves balancing an obligation under a UNSC resolution directly against an obligation under an international human rights treaty.¹³⁵

By separating the domestic implementation from the relevant UNSC resolution, a court cannot release the state, of which it itself is an organ, from being bound by an international obligation created by that resolution. This gives courts a double role in the cases concerned. On the one hand, they need to render a decision in the case lying before them; on the other hand, they are themselves presumed not to make a decision that is in violation of the international obligations upon the state. Thus the court is not only an independent arbiter; it also has a position itself on the issue. While according to the black-box theory international law binds states, but not directly their organs,¹³⁶ the acts of state organs are attributed to the state. Thus, from the perspective of the law of state responsibility, a violation of a state's international obligations by a court is attributed to that state and may lead to it incurring international responsibility.¹³⁷ In this regard, courts are required not to act in breach of any of the state's international obligations. Moreover, indications can be found that there is currently a growing challenge to the black-box theory, and that state organs might themselves be bound directly by the international obligations upon the state.¹³⁸

Some scholars argue that domestic courts have a dual role in another aspect as well. They consider a domestic court effectively to act as an international

¹³⁵ See *Al-Jedda* (UKHL) (n 73) [55].

¹³⁶ W Ferdinandusse 'Out of the Black-Box? The International Obligations of State Organs' (2003) 29 *Brooklyn Journal of International Law* 45, 53.

¹³⁷ ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/56/83 (Articles on State Responsibility), article 4.

¹³⁸ Ferdinandusse 2003 (n 136) 101. He illustrates this tendency by referring to the *LaGrand* judgment, and the *Cumaraswamy* Advisory Opinion of the ICJ. Ibid. 65-73. But see *José Ernesto Medellín v Texas* [2008] 552 US Supreme Court 06-984, ILDC 947 (US 2008).

decision-maker when it applies international law.¹³⁹ It is even contended, under this idea of *dédoublement fonctionnel*, that domestic courts should apply international law by virtue of its own authority, and not only because of a transformation into domestic law.¹⁴⁰ It is then for domestic courts to determine whether and how in a specific case international law should be applied in the domestic legal order.¹⁴¹ Also, others see domestic courts as ‘enforcers’ of international law.¹⁴² However from the present research it appears that in practice many courts, by resorting to a strictly dualist approach in regard to the implementation of UNSC resolutions, have a tendency to deny such an international role.¹⁴³

2.4.3. Implementation by the EU

The EU is for many purposes classified in this research as being sufficiently similar to a domestic legal order for it to be referred to by that term. However, the EU is not a member of the UN. It could be argued, therefore, that it is not bound by the international obligations created by the UNSC upon its member states. Nonetheless, the General Court has construed such an obligation – not on the basis of the UN Charter, but on the basis of the treaties establishing the EU.¹⁴⁴ Subsequently, the Court of Justice in the same case did not confirm this finding, but neither did it explicitly deny it. Rather, it appeared to have avoided a ruling on this issue. On the one hand, it seemed to acknowledge the existence of an international obligation.¹⁴⁵ On the other hand, however, it merely held that the EU must take *due account* of the terms and objectives of the resolution

¹³⁹ C Schreuer *Decisions of International Institutions Before Domestic Courts* (Oceana Publications, Inc. London 1981) 166-167. See also J Nijman and A Nollkaemper 'Beyond the Divide' in Nijman and Nollkaemper 2007 (n 111) 341-360, 350; and Kooijmans *Internationaal Publiekrecht in Vogelvlucht* (Kluwer Deventer 2002) 86.

¹⁴⁰ Schreuer *ibid* 166.

¹⁴¹ *Ibid.* 167.

¹⁴² A Tzanakopoulos 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 133, 145 et seqq.

¹⁴³ See Chapter 6.

¹⁴⁴ *Kadi I* (first instance) (n 28) [207].

¹⁴⁵ See *Kadi I* (appeal) (n 30) [285].

concerned and of the relevant obligations under the UN Charter,¹⁴⁶ which implies a negation of any real obligation upon the EU.

Whatever can be said of that, the EU does implement certain UNSC resolutions, in order to ensure a uniform application throughout the EU. By this implementation it changes the legal nature of the resolutions concerned for EU member states.¹⁴⁷ From then on these resolutions benefit from the supremacy and direct effect of EU law in the national legal orders. Accordingly, no longer do national legal systems decide themselves on how UNSC resolutions are implemented, and which rank they have in the national legal order.¹⁴⁸ Instead, the EU legal order ‘supersedes and thus replaces this function of the national legal orders.’¹⁴⁹ However, despite the fact that regulations are directly applicable in EU member states, many of them continue to enact parallel domestic implementing measures.¹⁵⁰ This not only leads to unnecessary extra layers of legislation, but is – according to long-standing case law of the Court of Justice – also in breach of European law.¹⁵¹ Moreover, for an individual designated under the targeted sanctions regime, the double implementation may create an extra hurdle towards relief. After having successfully challenged the sanction regime’s national implementation, he may still be confronted with the direct application of the same regime under European law,¹⁵² and vice versa.

¹⁴⁶ Ibid. [296].

¹⁴⁷ See N Lavranos *Decisions of International Organizations in the European and Domestic Legal Orders of Selected Member States* (Europa Law Publishing 2004).

¹⁴⁸ Ibid. 5.

¹⁴⁹ Ibid.

¹⁵⁰ P Kuijper ‘Implementation of Binding Security Council Resolutions by the EU/EC’ in E de Wet and A Nollkaemper (eds.) *Review of the Security Council by Member States* (Intersentia Antwerpen 2003) 39-55, 47. In the *Ahmed* case the UK Supreme Court determined that sixteen out of twenty-seven EU member states adopted their own legislative measures, which ran in parallel with the EU Regulation implementing the 1267 regime. *Ahmed* (n 43) [22].

¹⁵¹ Kuijper *ibid.* 39-55, 47. See Case 50/76 *Amsterdam Bulb BV v Produktschap voor Siergewassen* [1977] ECR-00137 [5], [7].

¹⁵² See the UK which after the partial annulment of the national implementation of the UNSC Res 1267 (1999) (n 32) regime in *Ahmed* (n 43) relied on the relevant EU regulation to fill the gap. See B Smith ‘Report on Terrorist Asset Freezing (Temporary Provisions) Bill’ House of Commons Library (5 February 2010), SN/IA/5325, 11. The implementation of European Regulations is facilitated by: The Al-Qaida and Taliban (Asset-Freezing) Regulations 2010 No 1197; and The Al-Qaida (Asset-Freezing) Regulations 2011 No 2742.

2.5. Conclusion

The present chapter has discussed several aspects of the obligations created by the UNSC. These obligations constitute one side of the international norm conflict that could arise before courts in the type of cases examined in the research. The next chapter will consider the other side of this conflict: obligations emanating from international human rights law. Under certain circumstances, norms from both sources may collide in individual cases. Since states need to implement UNSC resolutions for most of them to gain effect, these circumstances need to be set to filter states' own decisions from UNSC action. To this end, the present chapter has considered the binding effect of the obligations created by UNSC resolutions and the scope of discretion they leave states for their implementation. From this it appears that when states implement an obligation created by the UNSC, which leaves them no scope of discretion, it would be justifiable to consider the infringements with individuals' human rights resulting from such implementation to be caused, in effect, by the UNSC.

This chapter has distinguished several types of UNSC resolutions that are able to have such an effect. Primary attention in the present research is paid to the unique situation created by the imposition of targeted sanctions. These sanctions are taken against individuals specifically designated by the UNSC or a Sanctions Committee. Another important category is that of selective sanctions, which are imposed against particularly circumscribed groups of individuals, objects, or actions. In principle, they leave it for states to qualify the facts. However, as soon as such a determination is made, there is no scope of discretion as to the application of the measures. Moreover, in regard to these determinations state authorities regularly inquire as to the views of the relevant Sanctions Committees. In addition, the UNSC may take other decisions potentially affecting individuals' enjoyment of their human rights. It may authorize states to take certain action, which, if engaged in, arguably falls within the working of article 103 of the UN Charter. On two occasions the UNSC has established International Tribunals, the orders of which have the same legally binding effect

upon states as the obligations created by the UNSC. The UNSC has also taken on the power to institute temporary international administrations, which have the task of governing certain territory in post-conflict situations. This is somewhat of a borderline category for the purposes of the present research. It is included, however, to the extent that under certain circumstances an omission by the state on which territory such administration operates may lead to that state violating its obligations under international human rights law.

Finally, this chapter has considered the issue of implementation. To be able to apply the measures imposed by the UNSC against individuals, they need to be implemented by state authorities. In this regard, it does not matter whether a state has a dualist or monist conception of the relationship between international and national law. Since UNSC resolutions are not regarded as self-executing by most states, in both instances domestic regulations would have to be adopted before the measures can be applied. Such domestic implementation can be challenged before domestic and regional courts by individuals adversely affected by the measures. Also, the EU implements UNSC resolutions. This changes the nature of the legal obligation for EU member states. By such implementation these resolutions are granted the supremacy and direct effect of EU law in the national legal orders.