



## UvA-DARE (Digital Academic Repository)

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

Hollenberg, S.J.

**Publication date**  
2013

[Link to publication](#)

#### **Citation for published version (APA):**

Hollenberg, S. J. (2013). *Challenges and opportunities for judicial protection of human rights against decisions of the United Nations Security Council*. [Thesis, fully internal, Universiteit van Amsterdam].

#### **General rights**

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

#### **Disclaimer/Complaints regulations**

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

## **4. The Precedence of UNSC Resolutions over International Human Rights Law**

### **4.1. Introduction**

The two preceding chapters set out the research's institutional framework and clarified certain notions that were inferred from relevant case law. The discussion in the present and following chapters is based on an analysis of that case law. As was explained earlier,<sup>1</sup> the research's focus on case law is informed by the fact that in specific situations it will primarily be courts that are asked to protect individuals' enjoyment of their human rights. Moreover, conflicts between the international obligations involved are concretised before courts, and they have to decide upon such conflicts in order to give judgment in a case.

The present chapter will, on the basis of an analysis of case law, discuss in what ways judicial protection of international human rights law could be significantly limited or totally overridden by an obligation created by the UNSC. The research refers to these situations as challenges for judicial protection. The following chapters will examine several approaches by which courts, despite these challenges, have created an opportunity for judicial protection. They have done that either by means of interpretation or by resorting to a dualist approach.

The challenges to judicial protection can be divided generally into two possibilities. The first option, which will be dealt with in section 4.3, is a refusal by a court to engage in a genuine review of a case concerning an individual who is adversely affected by a UNSC decision. This challenge concerns the lack of access to a court or of an effective remedy, as instruments to check on the interferences with (other) human rights. If left unchecked by the judiciary, such

---

<sup>1</sup> See chapter 1.3.

interferences may amount to a situation in which the individual's human rights are effectively inapplicable. Under the second option, which will be discussed in section 4.4, there is a judicial review but the outcome is that the individual's human rights are outbalanced by an obligation created by the UNSC. Such outbalancing goes beyond the lawful limitations allowed for by the rights concerned. These rights are then simply set aside. Before considering these challenges, section 4.2 will first make some preliminary remarks on the balancing of international obligations and the role and character of article 103 of the UN Charter.

## 4.2. The Balancing of International Obligations

International law does not provide a general applicable answer on how to solve norm conflicts.<sup>2</sup> Instead, domestic and regional courts will have to decide on them in individual cases.<sup>3</sup> In those individual cases a conflict of norms between, on the one hand, an obligation under a UNSC resolution, and on the other, an obligation under an international human rights treaty, is *prima facie* solved by article 103 of the UN Charter. This article holds that in the event of a conflict, states' obligations under the UN Charter prevail over their obligations under any other international agreement.<sup>4</sup> In principle, this would also mean that, in the case of conflict, obligations created by UNSC resolutions prevail over obligations stemming from international human rights treaties.<sup>5</sup> Moreover, within

---

<sup>2</sup> J Klabbers *Treaty Conflict and the European Union* (Cambridge University Press Cambridge 2009) 35.

<sup>3</sup> *Ibid.*

<sup>4</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter) article 103.

<sup>5</sup> Article 103 must be considered to generate precedence of obligations under the Charter over obligations under customary international law as well. 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, 33; 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, 2133; and M Milanovic 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke Journal of Comparative & International Law* 69, 78. But see 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, 853.

the context of state responsibility, obligations under the UN Charter are regarded as constituting a circumstance precluding wrongfulness.<sup>6</sup>

It is widely accepted that the term ‘obligations’ in article 103 should not be construed narrowly.<sup>7</sup> It should be understood to include the UNSC’s authorizations for military action.<sup>8</sup> The system of authorizations is a necessary substitute for direct action by the UNSC, since the agreements foreseen under article 43 of the UN Charter have never been concluded.<sup>9</sup> This does not mean that states are forced to take military action when the UNSC gives an authorization thereto,<sup>10</sup> 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.<sup>11</sup>

Article 103 of the UN Charter is not concerned with the consequences under domestic law.<sup>12</sup> It does not require obligations under the Charter to prevail over obligations under domestic regulations: for example, obligations arising under fundamental rights laid down in a domestic constitution. From this perspective article 103, in principle, also does not impinge upon the jurisdiction of domestic courts. Still, as will be illustrated in the discussion below, some courts do seem to have interpreted article 103 to have this effect. Conversely, Chapter 6 will discuss the practice of many other courts actually separating the international from the national legal order. They then engage in a review of the domestic

---

<sup>6</sup> See V Gowlland-Debbas ‘The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance’ (2000) 11 *European Journal of International Law* 361, 368, and Milanovic *ibid.* 77. But see 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, 121-123.

<sup>7</sup> Paulus and Leiss 2012 (n 5) 2122-2123.

<sup>8</sup> *Ibid.* 2122-2123; Milanovic 2009 (n 5) 78.

<sup>9</sup> Paulus and Leiss *ibid.* 2126; and 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, 1355.

<sup>10</sup> 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.

<sup>11</sup> J Frowein and N Krisch ‘Article 39’ in *ibid.* 717-729, 729. See also Paulus and Leiss 2012 (n 5) 2122-2123 and Milanovic 2009 (n 5) 78.

<sup>12</sup> Paulus and Leiss *ibid.* 2133.

implementation of a UNSC resolution against other domestic regulations. In this way they avoid the effect of article 103.

The prevailing effect of UNSC resolutions is considered to apply only to decisions that are *intra vires*. Decisions that are *ultra vires* cannot be binding,<sup>13</sup> and therefore do not prevail over other international obligations.<sup>14</sup> Courts could take this argument into account when engaging in a review of the implementation of an obligation created by the UNSC, especially as international human rights have grown in significance and, possibly, normative weight over the last sixty years.<sup>15</sup> Yet which institution, if any, would actually be competent to authoritatively determine the legality of the UNSC's decisions remains subject to debate.<sup>16</sup>

When two obligations collide there is, in addition to the conflict between norms at the dimension of positive law, a conflict between the interests underlying the norms engaged. In the present instance these interests are, on the one hand, the objective of maintaining international peace and security which the UNSC seeks to pursue, and on the other, the interest of upholding individuals' international human rights. Arguments relating to the interests involved may influence courts' decisions on how to solve the conflict of norms at issue. For example, courts could find the precedence of obligations created by the UNSC pursuant to article 103 of the UN Charter over obligations under international human rights law to be confirmed by the importance of the objectives the UNSC seeks to achieve. This may also incline them to entertain a broad interpretation of the former, as will be discussed in Chapter 5. Conversely, courts could argue that certain

---

<sup>13</sup> See chapter 2.2.1.

<sup>14</sup> Paulus and Leiss 2012 (n 5) 2127; Vidmar 2012 (n 5) 35 et seq.

<sup>15</sup> See *Mothers of Srebrenica v The Netherlands* [2010] LJM: BL8979, ILDC 1760 (NL 2010) [5.5].

<sup>16</sup> E de Wet *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing Oregon 2004) 374; Vidmar 2012 (n 5) 36; J E Alvarez 'Judging the Security Council' (1996) 90 *American Journal of International Law* 01. See also Peters 2012 (n 5) 835-837; and Lord Phillips' suggestion in *HM Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 2 & UKSC 5, ILDC 1533 (UK 2010) (*Ahmed*) [151].

obligations under human rights treaties prevail over obligations under UNSC resolutions, due to their fundamental and overriding importance.<sup>17</sup> This argument could also be entertained to limit the effect of article 103 of the UN Charter, or to employ a narrow interpretation of the obligation created by the UNSC.

Indeed, some courts have been found to rule that obligations under the UN Charter do not prevail over norms with the status of *ius cogens*.<sup>18</sup> This could be seen as an argument based on a perceived hierarchy between the interests involved. Alternatively, it could also be explained as a restriction derived from the institutional limitations placed on the powers of the UNSC,<sup>19</sup> in the sense that decisions by the UNSC that are in violation of norms of *ius cogens* are *ultra vires*.<sup>20</sup>

The present research will not be concerned directly with the concept of normative hierarchy.<sup>21</sup> It will use the term hierarchy in a more neutral sense to mean that one norm prevails over another, without thereby suggesting any implications towards a potential emergence of a general international system of normative hierarchy. It does consider, however, the role that certain fundamental interests may play in influencing a court's decision on the norm conflict at issue.<sup>22</sup>

---

<sup>17</sup> See also Vidmar *ibid.* 37.

<sup>18</sup> 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 [226]; *Youssef Mustapha Nada v Staatssekretariat für Wirtschaft* [2007] 1A.45/2007 [7].

<sup>19</sup> The powers of the UNSC are not unlimited. See Peters 2012 (n 5) 811 *et seq.*

<sup>20</sup> Vidmar 2012 (n 5) 36. Essentially, this follows also from the argument of De Wet, when she holds that the UNSC cannot act in violation with *ius cogens*, because states cannot confer to organs of IOs more powers than they can exercise themselves. De Wet 2004 (n 16) 198.

<sup>21</sup> See E de Wet and J Vidmar (eds.) *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press Oxford 2012).

<sup>22</sup> As will be witnessed in Chapter 5, such interests may also play a role in a court's construction of the meaning of a norm.

### **4.3. No, or Limited, Judicial Protection**

It appears that many courts try to avoid having to rule on a conflict of norms.<sup>23</sup> Thereto, they might resort to dualist or interpretative approaches, which will be discussed in subsequent chapters.<sup>24</sup> These approaches could result in an effective remedy for the individuals affected. In contrast, the approaches that will be discussed in the present section lead courts to conclude that they do not have jurisdiction or competence to engage in a (full) review of the merits. As a result, the complaints of affected individuals are held inadmissible, or are scrutinized only to a very limited extent. This has repercussions on the effectiveness of judicial review by domestic and regional courts as a mechanism for human rights protection. An opportunity for these individuals to bring complaints concerning limitations of their human rights before a competent court constitutes an essential instrument for an effective protection of these rights.

Moreover, it could be argued that these approaches result in an infringement of the affected individuals' right of access to court and to an effective remedy, especially as there is neither an alternative remedy at the UN<sup>25</sup> nor any court with universal jurisdiction at the international level competent to hear claims of individuals affected by UNSC resolutions. Accordingly, domestic and regional courts are the only judicial mechanisms potentially available to provide judicial protection of individual human rights.

Although constantly present in the background, the discussion in the present section is not about courts' assessment of the lawfulness of the limitations placed on the human rights of access to court and to an effective remedy, as such. Rather, it takes an external perspective on how individuals' enjoyment of these

---

<sup>23</sup> See Milanovic 2009 (n 5) 86; see also Tzanakopoulos 2012 (n 6) 96.

<sup>24</sup> See Chapters 5 and 6.

<sup>25</sup> With regard to the lack of remedies at the UN level in respect of targeted sanctions see the exploration in chapters 3.7. and 7.3. For accountability problems of the UN in general see F Hoffman and F Megret 'Fostering Human Rights Accountability: An Ombudsperson for the United Nations?' (2005) 11 *Global Governance* 43; see also G Verdirame 'Compliance with Human Rights in UN Operations' (2002) 2 *Human Rights Law Review* 265.

rights is balanced against an obligation created by the UNSC. Do the courts at issue provide the individuals concerned with access to court and to an effective remedy by engaging in a review of the merits of a case, or is judicial protection outbalanced by an obligation created by the UNSC? Hence the question is whether these courts operate as a judicial guarantee for the protection of the individuals' human rights.<sup>26</sup>

The present section analyses different approaches that result in some courts not providing judicial protection. It will start, in subsection 4.3.1, by considering courts' approaches towards attribution of conduct, which could lead to the inadmissibility of complaints. As a consequence, the individuals concerned might not find any opportunity for judicial protection. The focus is on the controversial manner in which the ECtHR attributed impugned conduct to the UN in the *Behrami and Saramati* case (hereafter *Behrami case*).<sup>27</sup> After that, subsection 4.3.2 will analyse the ECtHR's refusal to engage in the marginal review of an equivalent protection test in cases concerning decisions of the UN High Representative; orders of the ICTY and the ICTR; and (host-) state action facilitating the operation of these International Tribunals. In this context, it will be argued that the Court, in similar circumstances concerning state conduct in relation to other IOs, did engage in such marginal review of the merits. Subsequently, subsection 4.3.3 will discuss domestic courts' decisions limiting their jurisdiction in respect of complaints regarding the international obligation upon states to cooperate with the International Tribunals. Thereafter, it will focus on the limitations some courts place on their jurisdiction to review domestic implementations of UNSC targeted sanctions. Finally, subsection 4.3.4 will consider whether these courts do engage in a judicial review when the human rights invoked are of a special legal nature.

---

<sup>26</sup> See chapter 1.3.3.

<sup>27</sup> *Behrami v France / Saramati v France, Germany and Norway (Admissibility)* [2007] (71412/01 and 78166/01).

### 4.3.1. Contestable Attribution of Conduct Resulting in Inadmissibility

Contrary to what was originally envisaged by the UN Charter, the UNSC does not have its own military forces at its disposal.<sup>28</sup> Accordingly, if the UNSC deems that military action is necessary, it is dependent on national forces to carry out such action.<sup>29</sup> If then, in that context, individuals are adversely affected, and wish to obtain a remedy, it first must be determined to which actor the conduct complained of can be attributed. Rules on attribution can be found in the ILC's 'Articles on Responsibility of International Organizations' (ARIO).<sup>30</sup> According to these articles, the question of whether the conduct of the national contingents in regard to a specific situation has to be attributed to the UN, or to the troop-contributing states, depends on who exercised 'effective control' over that conduct.<sup>31</sup> The ILC considers this standard to require 'factual control that is exercised over the specific conduct'.<sup>32</sup>

The present discussion does not aim to determine which standard of attribution is to be preferred. Rather, what it intends to do is to illustrate how the standard by which the ECtHR in the *Behrami* case attributed the impugned conduct to the UN deviated from the widely accepted international standard,<sup>33</sup> as developed by the ILC.<sup>34</sup> This raises the suspicion that the Court attempted to dispose of the

---

<sup>28</sup> Krisch 2012 (n 9) 1354.

<sup>29</sup> Ibid. 1355. This can also be done through regional organizations, such as NATO. See UN Charter (n 4) article 53.

<sup>30</sup> ILC International Law Commission 'Report of the Sixty-third Session (Draft Articles on the Responsibility of International Organizations, with Commentaries)' (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10. The GA took note of the articles in UNGA Res 66/100 (9 December 2011) UN Doc A/RES/66/100 (ARIO).

<sup>31</sup> Article 7 ARIO (n 30); ILC Report 2011 *ibid.* 87.

<sup>32</sup> ILC Report *ibid.*

<sup>33</sup> See *ibid.* 87 *et seq.*; and F Messineo 'The House of Lords in *Al-Jedda* and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights' (2009) 56 *Netherlands International Law Review* 35, 42; and A Sari 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* cases' (2008) 8 *Human Rights Law Review* 151, 164. See also M Milanovic and T Papić 'As bad as it gets: The European Court of Human Rights's *Behrami* and *Saramati* Decision and General International Law' (2009) 58 *International and Comparative Law Quarterly* 267, 283.

<sup>34</sup> At the time of the *Behrami* decision the ILC was still in an early phase of drafting. Still, at that time the draft articles already contained 'effective control' as a standard for attribution of

case in order to avoid having to rule on a potentially underlying conflict of norms.<sup>35</sup> While article 103 of the UN Charter was not directly engaged, it could be described as ‘the elephant in the courtroom’.<sup>36</sup>

Whether impugned action is attributed to the UN or to a member state could be decisive for an individual’s opportunity to obtain judicial protection of his human rights. Attributing action solely to the UN only means that it is very difficult for the affected individual to obtain any judicial protection. The UN, as an international organization, has immunity before domestic courts and falls outside the scope of jurisdiction *ratione personae* of the ECtHR, because it is not a party to that convention.<sup>37</sup> Occasionally there are institutions in place at the UN level that may provide for some form of redress. However, these do not guarantee an effective remedy; nor can they in any sense be qualified as judicial.<sup>38</sup> Accordingly, the consequence of the ECtHR’s decision in the *Behrami* case was that it left the individuals concerned without any judicial protection of their international human rights.

The facts leading to the case took place in Kosovo. After the withdrawal of FRY troops from Kosovo, the UNSC established a military security presence (KFOR) and a civil interim administration (UNMIK).<sup>39</sup> The case of *Behrami* concerned the death of a child, and the serious injury of another, after an undetonated

---

conduct. See, for example, article 5 in ILC International Law Commission 'Report on the Fifty-Seventh Session' (2 May-3 June and 11 July-5 August 2005) UN Doc A/60/10, 81.

<sup>35</sup> Milanovic 2009 (n 5) 86.

<sup>36</sup> Milanovic and Papic 2009 (n 33) 274.

<sup>37</sup> The research does not focus on the balance that is struck between protection of an individual’s human rights and general principles of immunity of IOs before domestic courts – nor for that matter the boundaries of the ECtHR’s jurisdiction *ratione personae*. On these equally potentially problematic issues from the perspective of human rights protection, see A Reinisch *International Organizations Before National Courts* (Cambridge University Press Cambridge 2000).

<sup>38</sup> See Hoffman and Megret 2005 (n 25); Verdirame 2002 (n 25). See also Sari 2008 (n 33) 167.

<sup>39</sup> UNSC Res 1244 (10 June 1999) UN Doc S/Res/1244.

cluster bomb unit exploded while they were playing with it.<sup>40</sup> KFOR had been aware of the undetonated cluster bomb but had failed to de-mine the area. Mr Saramati complained about his arrest and detention by UNMIK, by order of the Commander of KFOR.<sup>41</sup> This action was taken on the basis of UNSC resolution 1244,<sup>42</sup> and was argued to be necessary ‘to maintain a safe and secure environment’ and to protect KFOR troops.<sup>43</sup> The complaints of Mr Behrami and Mr Saramati were directed against France and Norway.<sup>44</sup> These are state parties to the ECHR, but they had acted under the flag of the international entities KFOR and UNMIK. Hence the preliminary question that the ECtHR had to answer before it could proceed to the merits of the cases was whether the action (and omission) had to be attributed to the international entities or to the individual member states (alternatively NATO)<sup>45</sup> acting under the flag of these international entities.

Despite referring to the ILC’s rules on attribution,<sup>46</sup> the ECtHR does not seem to have relied on them in deciding the case.<sup>47</sup> Legally, the most controversial issue concerned the attribution of the conduct complained of in relation to the KFOR mission.<sup>48</sup> Instead of applying the rules on attribution, it considered whether the UNSC had lawfully delegated its powers to KFOR.<sup>49</sup> Accordingly, the Court did

---

<sup>40</sup> Mr Behrami invoked a violation of the right to life. (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) article 2.

<sup>41</sup> Mr Saramati claimed violations of the right to liberty and security, the right to an effective remedy, and the right of access to court. Respectively, ECHR *ibid.* articles 5, 13 and 6.

<sup>42</sup> UNSC Res 1244 (1999) (n 39).

<sup>43</sup> This was the assessment of the KFOR Legal Adviser. *Behrami* (n 27) [11].

<sup>44</sup> Initially, Mr Saramati also brought a claim against Germany, which he later withdrew. *Behrami* *ibid.* [64]-[65].

<sup>45</sup> KFOR was a NATO-led multinational force.

<sup>46</sup> See *Behrami* (n 27) [29] *et seq* and [121].

<sup>47</sup> See also *Milanovic and Papic* 2009 (n 33) 283.

<sup>48</sup> In relation to UNMIK the ECtHR, in just a brief consideration, found the fact that UNMIK was a subsidiary organ of the UNSC to be conclusive for the attribution of its conduct to the UN. *Behrami* (n 27) [142]. It remained, however, controversial whether UNMIK actually exercised any control over the impugned conduct. The applicants argued that only KFOR was the relevant responsible organisation in both cases. *Ibid.* [73].

<sup>49</sup> *Ibid.* [132]-[141]. This in itself is akin to an incidental review of the powers exercised by the UNSC.

not rely on the general international law on responsibility of IOs. Rather, it proceeded on the basis of the rules of delegation as part of the institutional law of IOs.<sup>50</sup> The ‘key question’ the Court then sought to answer was ‘whether the UNSC retained *ultimate authority and control* so that operational command only was delegated.’<sup>51</sup> It arrived at the conclusion that it did. As a result, the Court found that the impugned action was, in principle, attributable to the UN,<sup>52</sup> and therewith it considered it to fall outside its jurisdiction *ratione personae*.<sup>53</sup>

The Court’s approach was influenced by a delegation-means-attribution model, which follows from an analogy with the rules on state responsibility.<sup>54</sup> This, however, does not fit well with the reality of IOs, and is also not the approach the ILC has chosen in the ARIO.<sup>55</sup> Moreover, the delegation argument resulted in a standard of ‘ultimate authority and control’. This standard is considerably more abstract than that of ‘effective control’ over the specific conduct,<sup>56</sup> which the ILC applies in its ARIO. The more abstract standard results in a broader group of actions being attributable to the UN, with the consequence that they fall outside the Court’s jurisdiction.

Shortly after the ECtHR’s decision in the *Behrami* case, the House of Lords was confronted with a similar question of attribution of conduct in the *Al-Jedda* case.<sup>57</sup> Before the lower courts, the UK government had not argued in that case

---

<sup>50</sup> Milanovic and Papic 2009 (n 33) 281.

<sup>51</sup> *Behrami* (n 27) [133] (emphasis added).

<sup>52</sup> *Ibid.* [141].

<sup>53</sup> *Ibid.* [152].

<sup>54</sup> Milanovic and Papic 2009 (n 33) 284-285.

<sup>55</sup> *Ibid.* The ILC fashioned its article 7 ARIO (n 30) to article 6 Articles on State Responsibility, instead of article 5. See ILC Report 2011 (n 30) 86. See also G Gaja ILC ‘Seventh Report on Responsibility of International Organizations’ (27/03/2009) UN Doc A/CN.4/610 [26]; and European Commission for Democracy through Law (Venice Commission), Opinion on Human Rights in Kosovo: Possible establishment of review mechanisms, 11 October 2004, No 280/2004, CDL-Ad (2004) 033, 18 [79] per Milanovic and Papic *ibid.* 287.

<sup>56</sup> Milanovic and Papic *ibid.* 286.

<sup>57</sup> *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, ILDC 832 (UK 2007) (*Al-Jedda*).

that the impugned conduct of its forces in Iraq had to be attributed to the UN.<sup>58</sup> What is more, in an earlier case concerning individual accountability arising from the actions of UK forces operating within KFOR in Kosovo, a British court considered itself competent to engage in a review of the merits.<sup>59</sup> Thereto, it did not consider at all the issue of attribution of the impugned conduct. However, after the ECtHR's decision in the *Behrami* case, the UK government found reason to argue before the House of Lords in the *Al-Jedda* case that the conduct of its forces in Iraq had to be attributed to the UN.

Mr Al-Jedda was interned in Iraq, like Mr Saramati, for imperative reasons of security. This was done by UK forces acting as a Multi-National Force (MNF) on the basis of a UNSC resolution.<sup>60</sup> While the case bore as to the facts many similarities to the case of Mr Saramati, the majority of the House of Lords arrived at a different result. The Lords distinguished their case from the *Behrami* case without explicitly critiquing the ECtHR's approach. Lord Bingham, writing the leading opinion, expounded on the difference between the concepts of delegation and authorization. He held that the UNSC had, in contrast to the situation pertaining to KFOR, not delegated its powers to the United Kingdom. Instead, it had authorised the United Kingdom to carry out functions it could not perform itself.<sup>61</sup> Accordingly, he did not reject the delegation-means-attribution model applied by the ECtHR, but merely distinguished the two cases on the facts. Subsequently, he relied on the ILC's standard for attribution when he held that the UK forces were not under the 'effective command and control' of the UNSC.<sup>62</sup>

---

<sup>58</sup> See *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence* [2005] EWHC 1809 (Admin); and *The Queen (On the Application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327.

<sup>59</sup> *Bici v Ministry of Defence* [2004] EWHC 786 (QB), ILDC 100 (UK 2004).

<sup>60</sup> UNSC Res 1546 (8 June 2004) UN Doc S/Res/1546. See the annexed letter of US Secretary of State, Mr Powell.

<sup>61</sup> *Al-Jedda* (UKHL) (n 57) [23]. With regard to this conceptual difference see *Behrami* (n 27) [43].

<sup>62</sup> *Al-Jedda* *ibid.* [23].

One of the reasons employed by the House of Lords to argue that the action by the MNF was authorized and not delegated by the relevant UNSC resolution was that the relevant resolution was adopted long after the UK and US forces arrived in Iraq.<sup>63</sup> Moreover, despite their duty to report, the UN did not exercise ‘effective command and control’ over the MNF.<sup>64</sup> Lord Bingham concluded that no analogy at all could be made with the situation in Kosovo.<sup>65</sup>

Still, the distinction between the two cases did not convince everyone.<sup>66</sup> Lord Rodger of Earlsferry, for example, disagreed with the majority on this point. He considered that the legal basis for the arrest and internment of Mr Al-Jedda was very similar to that of Mr Saramati.<sup>67</sup> This led him to the conclusion that if the reasoning in the ECtHR’s decision in *Behrami* was applied consistently in respect of the case of *Al-Jedda*, the UNSC did not merely authorize the conduct of the MNF, but indeed delegated its powers to the MNF, like it had done to KFOR.<sup>68</sup> With regard to the moment of adoption of the UNSC resolution, Lord Rodger held that the UNSC resolution at issue was adopted before Mr Al-Jedda was detained. He found it, therefore, not relevant that the coalition forces were present in Iraq before the adoption of that resolution. What was relevant, according to him, was that the resolution regulated the legal position at the time of Mr Al-Jedda’s detention.<sup>69</sup>

The result of the approach of the House of Lords’ majority was that they found they had jurisdiction. Subsequently, they thus needed to decide on the norm conflict between, on the one hand, an obligation under the UN Charter, and on the other, an obligation under the ECHR. Essentially, the Court decided that the obligation under the UN Charter prevailed, pursuant to article 103 of the

---

<sup>63</sup> See *ibid.*

<sup>64</sup> *Ibid.* [24].

<sup>65</sup> *Ibid.*

<sup>66</sup> See also *Milanovic and Papić* 2009 (n 33) 191-192, and *Messineo* 2009 (n 33) 45.

<sup>67</sup> *Al-Jedda* (UKHL) (n 57) [58]-[100].

<sup>68</sup> *Ibid.* [91].

<sup>69</sup> *Ibid.* [61].

Charter.<sup>70</sup> Presumably this was exactly the outcome the ECtHR sought to avoid.<sup>71</sup> It probably would have been difficult for that court, as ‘the ultimate guardian’ of the ECHR, to accept that that ‘constitutional instrument’ could be overruled by fifteen states making up the UNSC.<sup>72</sup> Moreover, for a human rights court to acknowledge that obligations created by the UNSC could take precedence over international human rights norms might have diminished the urgency within the UNSC to take these rights into account when deciding on which action to take.<sup>73</sup> On the other hand, it would also hardly have been feasible for the Court to openly disregard the UNSC or to interfere with the UN Charter system of primacy of obligations.<sup>74</sup> Therefore, possibly in order to conveniently dispose of the case and to avoid having to rule on a conflict of norms, the ECtHR resorted to an unconvincing attribution of conduct, which was not in line with generally accepted standards of attribution of conduct to IOs.

However, therewith, the ECtHR effectively put itself out of action as an instrument for human rights protection. The consequence of this approach is that individuals affected by action under UNSC auspices do not have even a minimum of effective judicial protection of their international human rights. In contrast, the approach of the House of Lords led to some measure of review. That court upheld, at least, the mechanism of judicial protection. It was thus in a position to consider that the affected individual’s rights could not be infringed to any greater extent than was required under the UNSC resolution.<sup>75</sup>

Eventually, when the *Al-Jedda* case was brought before the ECtHR, the Court appeared to have amended its approach.<sup>76</sup> It found that case to be admissible, and it even left open the possibility of dual attribution. The Court did not wish to

---

<sup>70</sup> Subsection 4.4.2.1 will analyse in further detail how the House of Lords arrived at this result.

<sup>71</sup> Milanovic 2009 (n 5) 86.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> See *infra* subsection 4.4.2.1.

<sup>76</sup> *Al-Jedda v The United Kingdom* [2011] ECHR 1092

swing around explicitly on its *Behrami* findings.<sup>77</sup> Instead, it followed the distinction on the facts made by the House of Lords.<sup>78</sup> In addition, it applied simultaneously the ILC's standard of 'effective control' and its earlier standard of 'ultimate authority and control', without making any distinction between them.<sup>79</sup> It merely found the UNSC to have neither of these. As a consequence, the acts could not be attributed to the UN. Unfortunately, however, the Court left undecided which standard it considers should apply when, and why.<sup>80</sup>

After that, the Court concluded that Mr Al-Jedda was imprisoned within the 'authority and control' of the United Kingdom.<sup>81</sup> This meant, according to the Court, that the acts complained of could be attributed to the United Kingdom, and that Mr Al-Jedda was within that state's jurisdiction for the purpose of guaranteeing Convention rights.<sup>82</sup> Accordingly, the Court found itself competent to decide on the complaint.<sup>83</sup> Therewith it recovered some of its position as a judicial guarantee for the protection of international human rights.

Another development potentially favourable to judicial protection of human rights in the ECtHR's decision in the *Al-Jedda* case is that the Court no longer seemed to exclude the possibility of dual attribution.<sup>84</sup> This means that the fact that certain conduct is attributed to the UN does not affect the possibility of the same conduct being attributed to a state.<sup>85</sup> In the *Behrami* case the ECtHR had

---

<sup>77</sup> For critique on the Court's evasiveness see M Milanovic 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 European Journal of International Law 121, 137.

<sup>78</sup> *Al-Jedda* (ECtHR) (n 76) [83].

<sup>79</sup> *Ibid.* [84].

<sup>80</sup> See also Milanovic 2012 (n 77) 137.

<sup>81</sup> *Al-Jedda* (ECtHR) (n 76) [85].

<sup>82</sup> *Ibid.* [86]. On the intricacies of the Court's extra-territorial jurisdiction see Milanovic 2012 (n 77) 125 et seqq. Similar to the attribution of conduct, this concept also seems a very suitable means for the Court to create latitude in the acceptance of cases.

<sup>83</sup> On how the Court decided the case, see *infra* subsection 4.4.1, and chapter 5.4.2.

<sup>84</sup> See *Al-Jedda* (ECtHR) (n 76) [80]; see also *Nuhanovic v The Netherlands* [2011] LJN: BR5388, ILDC 1742 (NL 2011) [5.9]; and A Nollkaemper 'Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica' (2011) 9 Journal of International Criminal Justice 1143, 1153.

<sup>85</sup> Nollkaemper *ibid.* 1154.

rejected, or at least not entertained, this possibility.<sup>86</sup> While it is debatable whether dual attribution is generally accepted,<sup>87</sup> it has been explicitly recognized by the ILC.<sup>88</sup> In any case, acknowledging this possibility enhances the opportunities for individuals affected by implementations of UNSC action to find a court competent to review their case. Accordingly, if the ECtHR were indeed willing to accept this concept, it could be assessed as increasing the judicial protection of international human rights in situations concerning individuals adversely affected by actions attributable (not only) to the UNSC.

#### **4.3.2. The ECtHR's Refusal to Engage in a Marginal Review of State Conduct under UNSC Auspices**

As was considered above, acts that are attributed to the UNSC remain beyond the jurisdiction of the ECtHR. The same is essentially true for acts of organs of other IOs. Like the UN, these IOs are not party to the Convention, and therefore do not fall within the Court's jurisdiction *ratione personae*. An important difference is that the ECtHR has in relation to other IOs adopted the practice of engaging in a marginal review when states undertake action to comply with the obligations arising from their membership of these IOs. Such action by member states, which is often indispensable for an IO to operate effectively, may bring the allegedly wrongful conduct within the jurisdiction of the Court. Taking account of the growing importance of international cooperation,<sup>89</sup> the Court has adopted in these circumstances a technique resulting in a marginal review. If the Court is asked to review a state's conduct that was required by that state's membership of an IO, it presumes that the state did not act in contravention with the ECHR if the IO in question protects human rights in a manner that is at least equivalent to the protection offered by the Convention.<sup>90</sup> From the discussion in the present section it appears that the Court does not apply this equivalent protection test

---

<sup>86</sup> Ibid. 1153.

<sup>87</sup> See *Nuhanovic* (appeal) (n 84) [5.9]; and Nollkaemper *ibid.* 1153.

<sup>88</sup> ILC Report 2011 (n 30), 83; see also articles 19 and 63 ARIIO (n 30); and Nollkaemper *ibid.* 1152-1153.

<sup>89</sup> *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* [2005] 42 EHRR 1 [150].

<sup>90</sup> *Bosphorus* *ibid.* [155]. See also *M & Co v Germany* (App 13258/87) (1990) 64 DR 138.

when the conduct states have engaged in has followed from obligations under the UN Charter, which are underpinned by a Chapter VII UNSC resolution.

This subsection does not seek to argue, generally, in favour of an equivalent protection test. In practice, it often constitutes a rather superficial test.<sup>91</sup> A violation will be found only when in a particular instance protection of an individual's Convention rights provided by the IO concerned was 'manifestly deficient'.<sup>92</sup> The Court has until now never established any such violation.<sup>93</sup> Yet, while providing a low level of scrutiny, an equivalent protection test offers the individuals affected at least some measure of judicial review – however marginal. The Court, in any case, assumes jurisdiction and assesses the lawfulness of the limitations placed on the individual human rights invoked. It does not totally desist from its function as a judicial mechanism for international human rights protection. This situation is to be preferred to a situation in which the Court declares a case merely inadmissible, due to a lack of jurisdiction *ratione personae*.

The present discussion will focus on the Court's refusal to apply an equivalent protection test in situations that arguably might have fallen within the criteria it had established in earlier cases. The Court seems to have broadened the circumstances under which it determines itself not to have jurisdiction *ratione personae*, at the expense of a possible application of an equivalent protection test, in cases concerning state conduct under UNSC auspices. As a consequence, an increasing number of alleged Convention violations remains without any measure of review.

---

<sup>91</sup> See also the concurring opinion by Judge Ress in *Bosphorus* *ibid.* joint concurring opinion [4].

<sup>92</sup> *Bosphorus* *ibid.* [156].

<sup>93</sup> C Ryngaert 'The European Court of Human Right's Approach to the Responsibility of Member States in Connection with Acts of International Organizations' (2011) 60 *International and Comparative Law Quarterly* 997, 1012.

#### 4.3.2.1. Rejection of the Equivalent Protection Test in the *Behrami* Case

The *Bosphorus* case is probably the most well-known case in which the Court applied an equivalent protection test.<sup>94</sup> The case concerned the impoundment by Irish authorities of an aircraft owned by a Yugoslav company. This action was required by EU regulations implementing the UNSC's sanction regime against the former Yugoslavia.<sup>95</sup> Like the UN, the EU was also (at that time) not a party to the ECHR.<sup>96</sup> In order to determine whether Ireland could be presumed not to have violated the Convention, the ECtHR rather superficially reviewed whether the EU protected human rights in a manner that could be considered at least equivalent to the protection offered by the Convention.<sup>97</sup> Eventually, the Court confirmed that the protection provided by the EU was not 'manifestly deficient'.<sup>98</sup> Hence the presumed compliance by Ireland with its obligations under the Convention was not rebutted in the present case.

The ECtHR held that it was not possible to engage in a similar assessment in the subsequent *Behrami* case.<sup>99</sup> It considered that in contrast to the situation in the *Bosphorus* case, the conduct complained of in the *Behrami* case could not be attributed to a state party to the Convention, and it also did not take place on the territory of such a state party.<sup>100</sup> Moreover, it added that the nature of the UN as an international organization of 'universal jurisdiction fulfilling its imperative

---

<sup>94</sup> *Bosphorus* (ECtHR) (n 89).

<sup>95</sup> The ECtHR considered the EU implementation (Regulation 990/1993) of the UNSC resolution to be the legal basis of the impoundment and not the UNSC resolution itself, because the UNSC resolution, according to the Court, did not form part of the Irish domestic law. *Ibid.* [145].

<sup>96</sup> This may change in the future. See Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 13 May 2004, entered into force 1 June 2010) CETS 194 (14th Protocol to the ECHR) and article 6 (2) The Treaty on the European Union (as amended by the Lisbon Treaty) (Adopted 13 December 2007, entered into force on 1 December 2009) OJ: C 83/13 (TEU). Cf. L. Besselink 'The European Union and the European Convention on Human Rights after the Lisbon Treaty: From *Bosphorus* sovereign immunity to full scrutiny?' (13 January 2008). Available at SSRN: <http://ssrn.com/abstract=1132788> or <http://dx.doi.org/10.2139/ssrn.1132788>.

<sup>97</sup> *Bosphorus* (ECtHR) (n 89) [155].

<sup>98</sup> *Ibid.* [166].

<sup>99</sup> *Behrami* (n 27) [145].

<sup>100</sup> *Ibid.* [151].

collective security objective' is fundamentally different from that of the EU.<sup>101</sup> The Court, therefore, concluded that it did not have jurisdiction *ratione personae*.<sup>102</sup> As a consequence, it had to declare the complaints inadmissible.

Hence, the Court suggested that one of the criteria for applying an equivalent protection test is that the conduct complained of has to be attributed to the respondent state. In subsequent cases concerning IOs other than the UN, the Court broadened this criterion to the effect that it accepted jurisdiction not only when the conduct could be attributed to a state party, but also when a state party was somehow involved in the IO's operation leading to that conduct.<sup>103</sup> In the cases discussed below, concerning the UNSC and its subsidiary organs, the Court indeed applied this lower threshold to the criterion of the respondent state's involvement. It considered that a total lack of any such involvement distinguished these cases from the *Bosphorus* case, and therefore it refused to engage in a marginal review.<sup>104</sup> It is important to highlight this broadening of the criterion of state involvement, because with its subsequent decisions in the cases of *Al-Jedda* and *Nada* the Court adopted a different approach towards complaints concerning conduct that has to be attributed to the respondent state.<sup>105</sup> This means that the relevance of the present section's argument is limited to situations in which a state was somehow involved in the interference with an individual's human rights, but the impugned conduct cannot be attributed to that state.

It is clear that the Court now relies on the interpretative technique of presumption of compliance when the conduct complained of is required by the UNSC, but attributable to member states. That is with regard to situations identical to those in the *Bosphorus* case, except for the obligation then stemming

---

<sup>101</sup> Ibid. In the *Bosphorus* case the ECtHR acknowledged the underlying UNSC resolution but proceeded from the standpoint that only the EC regulation constituted part of Irish law.

<sup>102</sup> Ibid. [152].

<sup>103</sup> See subsection 4.3.2.3 for a brief overview of the Court's application of this test with regard to complaints involving IOs other than the UN.

<sup>104</sup> See for example *Beric and others v Bosnia and Herzegovina (Admissibility)* [2007] (36357/04 and others) [29].

<sup>105</sup> *Al-Jedda* (ECtHR) (n 76), and *Nada v Switzerland* [2012] ECHR 1691.

directly from a UNSC resolution instead of an EU regulation. In such situations the Court presumes that the UNSC did not intend to create an obligation upon states that was in conflict with international human rights law. This presumption can be rebutted, however, when the UNSC uses clear and explicit language to set aside contrasting international obligations.<sup>106</sup>

The aim of the present section is to highlight how the ECtHR, after the rejection in the *Behrami* case, appears to have continuously changed the criteria for refusing an equivalent protection test with regard to complaints of individuals who were somehow affected by the operation of UNSC resolutions. The Court refused to accept jurisdiction in relation to complaints concerning conduct of the UNSC, or one of its subsidiary organs, while a state party to the Convention was somehow involved in the impugned conduct, and that conduct took place within the territory of that state. By this approach the Court increased the instances in which it rejected jurisdiction, and decreased its own role in providing such individuals even a minimum of judicial protection of their international human rights. Accordingly, for the Court, the importance of deference to UNSC action seemed to outweigh the importance of having access to a judicial remedy.

#### **4.3.2.2. Further Restriction of the Equivalent Protection Test's Application**

As opposed to the conditions the ECtHR established in the *Behrami* case, it refused to apply an equivalent protection test in cases where the impugned conduct did take place within the territory of a state party and the domestic authorities could be argued to have interfered in the situation resulting in that conduct. Examples are the cases of *Beric* and *Kanlinic and Bilbija* against Bosnia and Herzegovina (BiH).<sup>107</sup> The circumstances leading to these cases were that after the war in the former Yugoslavia a High Representative was instituted

---

<sup>106</sup> This interpretative technique will be considered more elaborately in chapter 5.4.2.

<sup>107</sup> *Beric* (n 104), and *Kalinic and Bilbija v Bosnia and Herzegovina (Admissibility)* [2008] 45541/04 and 16587/07.

in BiH, who had to ensure the implementation of the Dayton Peace Agreement.<sup>108</sup> This international administrator was given extensive administrative powers<sup>109</sup> which were endorsed by the UNSC.<sup>110</sup>

Mr Beric, Mr Kalinic, and Mr Bilbija regarded themselves as adversely affected by certain decisions of the High Representative and wanted to challenge these decisions.<sup>111</sup> The High Representative had already, in a vigorous response to the BiH Constitutional Court's decision,<sup>112</sup> issued regulations declaring any review of his decisions by the courts of BiH as contrary to his international mandate.<sup>113</sup> There was also no other possibility within the domestic legal order to challenge the High Representative's decisions.<sup>114</sup>

Relying on a *Behrami* approach, the ECtHR declared the complaints inadmissible, despite the fact that, in contrast to the situation in the *Behrami* case, the circumstances leading to the complaints in the BiH cases took place squarely within the territory of a state party to the Convention. The Court started by considering that 'the High Representative was exercising lawfully delegated UNSC Chapter VII powers.'<sup>115</sup> Therefore the impugned action was, according to the Court, in principle attributable to the UN.<sup>116</sup> Moreover it found that 'the measures complained of did not require any further procedural steps to be taken

---

<sup>108</sup> 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].

<sup>109</sup> Annex 10 to Dayton Peace Agreement sets out the mandate of the High Representative.

<sup>110</sup> The High Representative's powers are referred to as the 'Bonn Powers' resulting from the Bonn Peace Implementation Conference. These powers were endorsed by UNSC Res 1144 (19 December 1997) UN Doc S/Res/1144.

<sup>111</sup> Mr Kalinic, Mr Bilbija, Mr Beric, and 25 others were removed by the High Representative from their official public and political-party positions; they were also barred from holding any such positions in the future, and from running for election. See *Kalinic and Bilbija* (n 107) and *Beric* (n 104).

<sup>112</sup> *Bilbija et al v Bosnia Herzegovina* [2006] AP-953/05.

<sup>113</sup> *Beric* (n 104) [19].

<sup>114</sup> *Bilbija* (n 112) [76]. Cf., Verdirame 2002 (n 25) 281; and Hoffman and Megret 2005 (n 25) 56.

<sup>115</sup> *Beric* (n 104) [28].

<sup>116</sup> *Ibid.* [28].

by the domestic authorities'.<sup>117</sup> Accordingly, the relevant criterion for applying an equivalent protection test was not whether the conduct complained of took place within the territory of the respondent state, but only whether that state needed to act to effectuate the IO's impugned decision.<sup>118</sup>

However, it could be argued that the alleged violation of the applicants' right to an effective remedy resulted, at least in part, from conduct by domestic authorities. Before the complaints were brought to the ECtHR, BiH's Constitutional Court had already considered, upon an appeal lodged by Mr Kalinic and Mr Bilbija, that there was no effective remedy against the individual decisions of the High Representative.<sup>119</sup> While the Constitutional Court concluded that this situation constituted a violation of the individuals' right to an effective remedy<sup>120</sup> and that BiH was under a positive obligation to guarantee such remedy,<sup>121</sup> it was itself also not able to provide it. This omission by the Constitutional Court and other BiH authorities to provide an effective remedy has to be attributed to BiH. On the basis of this interference by a state party to the Convention in the operation of the IO concerned resulting in the impugned conduct, the ECtHR could have applied an equivalent protection test.<sup>122</sup>

However, the BiH authorities are in this regard closely intertwined with the international administration, and only have a very limited possibility to independently guarantee an effective remedy. As was mentioned, the High Representative, for example, removed any practical effect from the Constitutional Court's decision.<sup>123</sup> Under these circumstances it is, of course,

---

<sup>117</sup> Ibid. [29].

<sup>118</sup> See also the insightful analysis of ECtHR case law in T Lock 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations Under the European Convention on Human Rights' (2010) Human Rights Law Review 529, 531-533.

<sup>119</sup> *Bilbija* (n 112) [40].

<sup>120</sup> *Bilbija* (n 112) [76].

<sup>121</sup> Ibid. [72].

<sup>122</sup> An argument to this effect seems to have also been made by the applicants in *Beric* (n 104) [22].

<sup>123</sup> Ibid. [19].

difficult to hold BiH fully responsible for this category of violations of the ECHR.<sup>124</sup>

The situation in the subsequently decided cases of *Galic* and *Blagojevic* was significantly different from that in the BiH cases. It could be argued that in these cases the respondent state was independent in its influence on the acts complained of. Still, the ECtHR refused to apply an equivalent protection test. The cases concerned complaints against the Netherlands brought by Mr Galic and Mr Blagojevic, who were both sentenced by the ICTY.<sup>125</sup> They claimed violations of their right to a fair trial.<sup>126</sup> The ECtHR started by drawing a parallel between the ICTY and UNMIK. According to the Court, both were subsidiary bodies of the UNSC. Therefore the acts of the ICTY, like those of UNMIK,<sup>127</sup> had to be attributed to the UN.<sup>128</sup> Consequently, since the UN is not a party to the ECHR, the ECtHR decided that it had no jurisdiction *ratione personae* to hear the complaints.<sup>129</sup>

However the conduct complained of took place within Dutch territory, squarely within the Convention's geographical scope. Moreover, it could not have come about without the assistance of Dutch authorities. For example, they accepted the presence of the Tribunal within Dutch territory; thereto they signed a headquarters agreement; and they needed to actively facilitate the functioning of

---

<sup>124</sup> In another case the Constitutional Court referred to the 'functional duality' of the High Representative, by which it meant that some of the representative's acts can be acts of an IO and acts of a national authority at the same time. See Verdirame 2002 (n 25) 283.

<sup>125</sup> This tribunal was established by the UNSC in response to the mass atrocities committed in the former Yugoslavia. UNSC Res 827 (25 May 1993) UN Doc S/Res/827. Later, the UNSC established a similar tribunal for the crimes committed in Rwanda (ICTR). UNSC Res 955 (8 November 1994) UN Doc S/Res/955.

<sup>126</sup> *Galic v The Netherlands* [2009] 22617/07, and on the same day *Blagojevic v The Netherlands* [2009] 49032/07. Part of Mr Galic's complaint was aimed directly at the Netherlands. He argued that the Netherlands had violated his right to a fair trial because the Headquarters Agreement it concluded allowed for a denial of access to the ECtHR. See *Galic* *ibid.* [28]. Mr Blagojevic's complaint of a violation of the right to a fair trial was directly addressed against the ICTY proceedings themselves. See *Blagojevic* *ibid.* [28].

<sup>127</sup> See *supra* footnote 48.

<sup>128</sup> *Galic* (n 126) [34]-[35]; *Blagojevic* (n 126) [34]-[35].

<sup>129</sup> *Galic* *ibid.* [36]; *Blagojevic* *ibid.* [36].

the International Tribunal.<sup>130</sup> The Court rejected these arguments for exercising jurisdiction by emphasising the imperative nature of the aim of the UN, and the importance of the (voluntary) support of member states to achieve that aim.<sup>131</sup> Such support, according to the Court, includes the acceptance on its territory of an international criminal tribunal.<sup>132</sup> With regard to the headquarters agreement between the UN and the Netherlands, the Court concluded that it was clearly ‘no more than a document intended to give practical effect to actions of the Security Council and subject to its approval; it cannot therefore be considered in isolation.’<sup>133</sup>

Moreover, the Court argued that practice and case law had shown that there are exceptions to the rule that presence on the territory of a state party will automatically engage liability of that state under the Convention.<sup>134</sup> It found that in the current circumstances the presence of the Tribunal on Dutch territory was not sufficient ground to attribute the matters complained of to the Netherlands.<sup>135</sup> These circumstances included the fact that, according to the Court, the procedures before the Tribunal were established with the intention to provide the individuals concerned with ‘all appropriate guarantees’.<sup>136</sup> The availability of such procedural guarantees constitutes, of course, an important difference from the total lack of remedy against the decisions of the High Representative in BiH, considered above. Yet by this consideration, the ECtHR merely echoed an equivalent protection test. It did not actually engage in any assessment of the level of protection provided by the procedures available at the ICTY.

---

<sup>130</sup> With regard to the latter, the Netherlands, for example, is involved in the transfer and security of individuals’ surrender to the ICTY. See *Milosevic v The Netherlands* [2001] KG 01/975 [3.1].

<sup>131</sup> *Galic* (n 126) [37] and *Blagojevic* (n 126) [37]. There it cited paragraph [149] from *Behrami* (n 27).

<sup>132</sup> *Galic* *ibid.* [39]; *Blagojevic* *ibid.* [39]. See similarly *Beric* (n 104) [30].

<sup>133</sup> *Galic* *ibid.* [48].

<sup>134</sup> *Ibid.* [43], and *Blagojevic* (n 126) [43].

<sup>135</sup> This issue of attribution, however, was not the only matter. The question was also whether the Netherlands engaged responsibility for its own acts. At least part of Mr Galic’s complaint was that the Netherlands itself was responsible for excluding the possibility of access to court by concluding the Headquarters Agreement.

<sup>136</sup> *Galic* (n 126) [46]; *Blagojevic* (n 126) [46].

The Court's consideration was reminiscent of its finding in the earlier *Naletilic* case,<sup>137</sup> to which it did not refer. This case was decided long before the *Behrami* case. The ECtHR, in that case, seemed to have been engaged in some form of marginal review of the ICTY's proceedings. Still, it merely stated that the Tribunal, 'in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence.'<sup>138</sup> It, therefore, held the applicant's complaint under article 6 of the ECHR to be manifestly ill-founded, and declared the case inadmissible. Hence, here also the Court hinted at, but did not genuinely engage in, an equivalent protection test. It arrived at its conclusion merely on the basis of the content of the ICTY's Statute and Rules of Procedure, without any explicit examination into the merits of the particular case. This constitutes a remarkably superficial test. It is difficult to see how the ECtHR can establish, only on the basis of the ICTY Statute saying so, that the International Tribunal is indeed impartial.<sup>139</sup> From this decision it follows that the Court regards the ICTY as never able to violate the ECHR in any future case it will ever deal with.<sup>140</sup>

Accordingly, the ECtHR did not apply an equivalent protection test even in these cases in which the conduct complained of clearly took place within the territory of a state party to the ECHR, and the authorities of the respondent state had interfered in the operation of the IO complained of. This seems to have broadened the original scope of application of the *Behrami* approach, at the expense of the possibility of a marginal review.

---

<sup>137</sup> *Naletilic v Croatia* [2000] 51891/99.

<sup>138</sup> *Ibid.* [1b].

<sup>139</sup> A Klip 'Request to Release Milosevic Refused' (2001) 17 *International Enforcement Law Reporter* 485, 486.

<sup>140</sup> *Ibid.* See also H Fox 'The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal' (1997) 46 *International and Comparative Law Quarterly* 434, 437. However, doubt could be cast on whether indubitable faith in the International Tribunals is justified. See the proceedings by the ICTR in the *Barayagwiza* case. W Schabas 'Barayagwiza v. Prosecutor (Decision, and Decision (Prosecutor's Request for Review or Reconsideration)) Case No. ICTR-97-19-AR72' (2000) 94 *American Journal of International Law* 563.

#### 4.3.2.3. The Equivalent Protection Test with regard to Other IOs

In cases concerning IOs other than the UN, the Court rather seems to have expanded the circumstances in which it applies an equivalent protection test.<sup>141</sup> In the cases of *Boivin* and *Connolly*, concerning the Council of Europe and the EU respectively, the ECtHR still clearly required a state's interference in the impugned IOs' operation for it to have jurisdiction.<sup>142</sup> These cases concerned complaints against the IOs themselves, via all their member states.<sup>143</sup> Since IOs are considered to constitute independent legal entities separate from their member states, the Court's requirement does not seem to be without merit.<sup>144</sup>

The Court, however, gradually relaxed this requirement.<sup>145</sup> In the subsequent *Kokkelvisserij* case it was satisfied with a very low level of state intervention.<sup>146</sup> In that case the mere referral by a domestic court of a case to the Court of Justice for a preliminary ruling was sufficient for the ECtHR to trigger the application of an equivalent protection test. According to the ECtHR, this referral meant that the respondent state could not be found to be in no way involved.<sup>147</sup> What is more, in the *Gasparini* case the Court did not even require that.<sup>148</sup> It engaged in a review of equivalent protection even when there was no state action. It merely based its competence on an alleged structural deficit in the relevant IO's (NATO) internal mechanism for conflict resolution.<sup>149</sup>

It could be argued that, if ever subjected to such assessment, the UN is very likely to be found to suffer from a structural deficit in its internal mechanism for

---

<sup>141</sup> Ryngaert 2011 (n 93) 1003.

<sup>142</sup> *Boivin v 34 State Members of the Council of Europe* [2008] 73250/01; and *Connolly v 15 State Members of the European Union* [2008] 73274/01. See Lock 2010 (n 118) 533.

<sup>143</sup> Therefore, they should be distinguished from the cases in which the ECtHR applied a reasonable alternative means test. See *Waite and Kennedy v Germany* [2000] 30 EHHR 261.

<sup>144</sup> Ryngaert 2011 (n 93) 1003-1004.

<sup>145</sup> *Ibid.* 1003.

<sup>146</sup> *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij v The Netherlands* [2009] 13645/05.

<sup>147</sup> Ryngaert 2011 (n 93) 1004.

<sup>148</sup> *Gasparini v Italy and Belgium* [2009] 10750/03. See Lock 2010 (n 118) 535.

<sup>149</sup> Lock *ibid.*

conflict resolution.<sup>150</sup> This deficit may be especially urgent in regard to the decisions by the UN's High Representative in BiH.<sup>151</sup> However, the result of a strict analogous reasoning is quite tenuous, since the *Gasparini* case concerned an internal labour conflict,<sup>152</sup> which constitutes a fundamentally different situation from that in which UNSC resolutions are usually operative.

#### **4.3.2.4. Conclusion**

It appears that the ECtHR finds the nature of the UN, as an IO of universal jurisdiction seeking to fulfil imperative security objectives, to be the decisive criterion for not engaging in an assessment of equivalent protection. It does not accept jurisdiction when a complaint against a respondent state concerns conduct that took place within that state's territory, and in which that state interfered – voluntarily or obligatorily – pursuant to a decision by the UNSC under Chapter VII. Accordingly, the ECtHR seems to consider that an effective implementation of the objectives the UNSC seeks to achieve outbalances the judicial protection of individuals' international human rights.

#### **4.3.3. UNSC Resolutions Limiting Domestic Courts' Jurisdiction**

Not only the ECtHR but also domestic courts have occasionally proved to be reluctant to engage in a full review of the merits of a case due to an obligation created by the UNSC. However, unlike the ECtHR, these courts find the basis for their competence not in international law, but in domestic (constitutional) law. While, in principle, article 103 of the UN Charter does not require precedence of obligations under the Charter over domestic prescriptions, some domestic courts have still found a limitation upon their jurisdiction. In this way, the role of domestic courts as potential judicial guardians of international human rights is reduced by domestic implementations of UNSC resolutions.

---

<sup>150</sup> See discussion in chapter 3.7. See also Verdirame 2002 (n 25); Hoffman and Megret 2005 (n 25); and Special Rapporteur 'Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (26 September 2012) UN Doc A/67/396 [15].

<sup>151</sup> See *supra* footnote 114.

<sup>152</sup> In contrast to *Waite and Kennedy* (n 143), which also concerned a labour conflict with an IO, the complaint was not directed against a member state for granting immunity to that IO. See *supra* footnote 143.

First, subsection 4.3.3.1 will consider domestic courts' limited review of states' acts of cooperation with the International Tribunals. The UNSC established an obligation upon all UN member states to cooperate with these Tribunals.<sup>153</sup> Acts of cooperation comprise, for example, surrendering indicted individuals. After that, subsection 4.3.3.2 will discuss cases concerning individuals who are targeted by UNSC sanctions. Several courts have found severe limitations on their jurisdiction to review domestic regulations implementing those sanctions.

#### **4.3.3.1. Limited Review of Acts of Cooperation with International Tribunals**

As was discussed earlier, the ECtHR did not entertain an equivalent protection test in cases concerning complaints brought against the Netherlands regarding the fairness of the ICTY's proceedings.<sup>154</sup> The Court merely stated that the ICTY 'offers all the necessary guarantees including those of impartiality and independence'.<sup>155</sup> Dutch courts have adopted comparable deferential approaches when confronted with similar complaints. An early example thereof can be found in the *Opacic* case, decided by a Dutch District Court.<sup>156</sup> However, in contrast to the ECtHR, the Dutch Court did not declare itself incompetent to engage in a review.<sup>157</sup> Rather, it made an assessment akin to an equivalent protection test.<sup>158</sup>

The *Opacic* case concerned a witness who was detained and transferred to the ICTY by BiH. The ICTY had given BiH the guarantee that the witness would be returned to BiH after he had delivered a witness statement. While in the Netherlands, however, Mr Opacic argued before a Dutch District Court that the Netherlands would violate its obligations under the ECHR if it were to cooperate

---

<sup>153</sup> See further on the nature of this obligation chapter 2.3.4.2.

<sup>154</sup> *Galic* (n 126), and *Blagojevic* (n 126). See *supra* subsection 4.3.2.

<sup>155</sup> *Naletilic* (ECtHR) (n 137). In the *Galic* case the Court similarly stated: 'the basic legal provisions governing [the] tribunal's organisation and procedure are purposely designed to provide those indicted before it with all appropriate guarantees.' *Galic* *ibid.* [46].

<sup>156</sup> *Opacic v The Netherlands* [1997] No 97/742.

<sup>157</sup> *Ibid.* See Klip 2001 (n 139).

<sup>158</sup> *Opacic* (n 156).

with his re-surrender.<sup>159</sup> Thereupon, the Court considered that the Netherlands was under an international obligation to respect the ICTY's decisions and to carry out its orders.<sup>160</sup> It noted that the ICTY, 'as an independent and impartial judge', had already considered Mr Opacic's complaint and found that re-surrender to BiH would not lead to (future) violations of human rights.<sup>161</sup> Therefore, the District Court concluded that there was no conflict between the obligation to re-surrender and the obligations under the ECHR.<sup>162</sup> It found that, since the Tribunal offered sufficient guarantees and applied the same standard of review, it could not re-assess the Tribunal's finding.<sup>163</sup> Hence the Court essentially left the assessment of whether there was a risk of future violations of Mr Opacic's human rights to the ICTY. It merely accepted, without further investigation, that the Tribunal provided equivalent protection. Accordingly, the District Court did not declare the case inadmissible, but neither did it engage in a full review.

In the *Milosevic* case, decided later, the District Court took a different approach.<sup>164</sup> There it found its competence to engage in a review to have been superseded by the prevailing nature of the obligation created by the UNSC.<sup>165</sup> The Court was asked to review Mr Milosevic's claim for release by the ICTY brought against the Netherlands, as the ICTY's host state. First, the Court confirmed the Tribunal's legal validity, including its independence and

---

<sup>159</sup> He invoked articles, 2, 3, 5 and 6 of the ECHR (n 40).

<sup>160</sup> *Opacic* (n 156) [3.2]. Pursuant to UNSC Res 827 (1993) (n 125) and article 9 of the ICTY Statute.

<sup>161</sup> *Opacic* *ibid.* [3.3]. In fact, however, the Trial Chamber of the ICTY, which considered Mr Opacic's complaint, merely stated its 'full confidence' that 'the Republic of Bosnia and Herzegovina will observe at all times the principle that "no person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment"'. See ICTY Press release 'Tadic Case: Update' CC/PIO/207-E, 2 June 1997. Accordingly, the Dutch court relied on the 'full confidence' of the ICTY that Bosnia would be able to guarantee the observance of Mr Opacic's fundamental rights.

<sup>162</sup> *Opacic* *ibid.* [3.3].

<sup>163</sup> *Ibid.* [3.4]

<sup>164</sup> See Klip 2001 (n 139).

<sup>165</sup> *Milosevic* (NL) (n 130).

impartiality.<sup>166</sup> In this regard it relied on the ECtHR's earlier mentioned statement in the *Naletilic* case,<sup>167</sup> which echoed an application of an equivalent protection test.

Eventually, the Court decided the case by referring to the obligations arising from both the headquarters agreement and the UN Charter.<sup>168</sup> It considered that the Netherlands, by concluding a headquarters agreement, had transferred jurisdiction to hear claims for release to the Tribunal, which has, according to its Statute, primacy of jurisdiction.<sup>169</sup> The Court found this arrangement to prevail over all other regulations due to the workings of article 103 of the UN Charter.<sup>170</sup> Apparently the Court held this to include the domestic regulations on its jurisdiction. Accordingly, it considered the headquarters agreement, in combination with the relevant UNSC resolution, in effect, to put a limitation on the individual's access to court.<sup>171</sup> Mr Milosevic initially appealed the District Court's decision but withdrew that appeal later and directly complained to the ECtHR. He was probably under the impression that there was no effective remedy available in the Dutch legal order.<sup>172</sup> The ECtHR, however, declared his claim inadmissible for non-exhaustion of domestic remedies.<sup>173</sup>

Accordingly, the Dutch courts assumed the ICTY to have sufficiently fair procedures. Herewith they followed the assessment of the ECtHR. However, none of these courts actually reviewed whether the level of protection was equivalent, and whether there were circumstances in the particular instances that would rebut a presumed compliance with international human rights standards.

---

<sup>166</sup> Ibid. [3.3]-[3.4].

<sup>167</sup> *Naletilic* (ECtHR) (n 137).

<sup>168</sup> *Milosevic* (NL) (n 130) [3.5].

<sup>169</sup> On the basis of article 9 of the Statute of the ICTY, adopted by UNSC Res 827 (1993) (n 125).

<sup>170</sup> *Milosevic* (NL) (n 130) [3.5].

<sup>171</sup> This is similar to what the ECtHR would later hold in *Galic* (n 126) [48].

<sup>172</sup> H Lammers 'Challenging the Establishment of the ICTY before the Dutch Courts: The Case of Slobodan Milosevic v The Netherlands' in E d Wet and A Nollkaemper (eds.) *Review of the Security Council by Member States* (Intersentia Antwerpen 2003) 107-111, 111.

<sup>173</sup> *Milosevic v The Netherlands* [2002] 77631/01.

Hence the courts put a large amount of blind confidence in the Tribunal's proceedings.<sup>174</sup> This may erode individuals' judicial protection of international human rights.

In addition to the specific obligations upon host-states, the UNSC also created a general obligation upon all UN member states to cooperate with the International Tribunals. The UNSC decided that all states shall comply with requests for assistance and orders issued by the Trial Chambers.<sup>175</sup> Of all the requests and orders the Tribunals can make, those most likely to raise human rights concerns, and which are also most often challenged by individuals before domestic courts, are those which require a state to surrender an individual.<sup>176</sup> The Statutes of the International Tribunals purposely avoid the term extradition and instead use the terms surrender and transfer.<sup>177</sup> This is to indicate that surrender to the Tribunals is not supposed to trigger the same procedural requirements and human rights guarantees as does extradition to the national courts of another state.<sup>178</sup>

Traditionally, many domestic courts have regarded decisions on extradition, and therewith the assessment of human rights guarantees, to be best left to the

---

<sup>174</sup> This confidence might not necessarily be justified. See *infra* footnote 196.

<sup>175</sup> With regard to the ICTY see UNSC Res 827 (1993) (n 125) [4] and with regard to the ICTR see UNSC Res 955 (1994) (n 125) [2].

<sup>176</sup> States have an obligation hereto pursuant to article 29 (2) (e) of the ICTY Statute UNSC Res 827 (1993) (n 125) and article 28 (2) (e) of the ICTR Statute UNSC Res 955 (1994) (n 125). But also other requests and orders by the Tribunals may 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; and 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.

<sup>177</sup> 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.

<sup>178</sup> See 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) rule 58, and 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) rule 58.

executive.<sup>179</sup> These courts resorted in their review of requests for extradition to the rule of non-inquiry.<sup>180</sup> However, today, especially since the ECtHR's judgment in the *Soering* case,<sup>181</sup> courts have started to engage in some form of review of human rights guarantees when asked to assess requests for extradition.<sup>182</sup> The question is whether domestic courts also review the strict obligation created by International Tribunals' requests for surrender against international human rights.<sup>183</sup> The human rights most likely to be invoked by individuals for whom a request for surrender is made are the rights to due process and to a fair trial.<sup>184</sup> Occasionally they also invoke concerns regarding their personal safety.<sup>185</sup>

Croatian courts have found themselves not competent to engage in any meaningful review of requests for surrender against human rights. Croatia's Supreme Court, in its decision in the *Naletilic* case, assumed only very limited jurisdiction to review a request for surrender by the ICTY. It concluded that Croatia had an obligation to cooperate with the ICTY.<sup>186</sup> Therefore Croatian courts were only competent to establish the identity of the person whose surrender was requested and whether the crimes of which that person was

---

<sup>179</sup> Scharf makes an analogy with the 'act of state' doctrine. M Scharf 'Foreign Courts on Trial: Why U.S. Courts Should Avoid Applying the Inquiry Provisions of the Supplementary U.S.-U.K. Extradition Treaty' (1989) 25 *Stanford Journal of International Law* 257, 270 et seqq.

<sup>180</sup> Although many states know such a rule, the extent of its application differs greatly per state. J Dugard and C Van den Wyngaert 'Reconciling Extradition with Human Rights' (1998) 92 *American Journal of International Law* 187, 189. See, for example, M Murchison 'Extradition's Paradox: Duty, Discretion, and Rights in the World of Non-Inquiry' (2007) 43 *Stanford Journal of International Law* 295, 300.

<sup>181</sup> *Soering v The United Kingdom* [1989] 14038/88.

<sup>182</sup> Dugard and Van den Wyngaert 2007 (n 180) 311.

<sup>183</sup> See G Sluiter *International Criminal Adjudication and the Collection of Evidence: Obligations of States* (Intersentia Antwerpen 2002) 144.

<sup>184</sup> Transfer of an individual to a Tribunal and eventually possibly to a foreign detention unit will, most likely, have consequences also for that individual's private and family life. See also Sluiter 2002 (n 176) 700.

<sup>185</sup> See BVerfG, 2 BvR 460/08 (*Ngirabatware*) [2008] [3], and *Milan Lukic and Sredoje Lukic (Decision on Referral of Case Pursuant to Rule 11 bis)* [2007] IT-98-32/1-PT [63] et seqq.

<sup>186</sup> This obligation is implemented in the national legal order by the ICTY cooperation act. See *Croatia v Naletilic-Tuta* [1999] IKz 690/1999-4, ILDC 384 (HR 1999) [A1].

accused fell within the jurisdiction of the Tribunal.<sup>187</sup> Also, Croatia's Constitutional Court, in its report on the ICTY's order for surrender of General Bobetko,<sup>188</sup> considered itself not to have jurisdiction to engage in a review of individual decisions of the UN and its bodies in proceedings pertaining to the protection of human rights and fundamental freedoms.<sup>189</sup>

The German Constitutional Court took a similar deferential approach. In a case before that court, Mr Ngirabatware, whose surrender was sought by the ICTR, argued that the Tribunal could not secure his personal safety.<sup>190</sup> He feared that due to the Tribunal's completion strategy, he would eventually be transferred to the national courts of Rwanda.<sup>191</sup> The Rwandan judiciary could not, according to Mr Ngirabatware, guarantee an independent and fair trial, and nor could it ensure that he would not be submitted to torture or other inhumane treatment.<sup>192</sup> Accordingly, he claimed that Germany should not surrender him to the ICTR.

However, similar to what Croatia's Supreme Court had held, the German Constitutional Court concluded that there was an international obligation upon Germany to cooperate with the ICTR.<sup>193</sup> Therefore it found that German courts

---

<sup>187</sup> Ibid. [9]. See also the decision of the Croatian Constitutional Court: *Naletilic v Croatia* [1999] U-III / 854/ 1999. That court concluded that all the rights guaranteed by the constitution and invoked by Mr Naletilic were not applicable to the proceedings for granting an ICTY request. Although not mentioning article 103 UN Charter (n 4), the Court endorsed the supremacy of obligations arising from the ICTY's orders. See also d' Aspremont and Brölmann 2010 (n 176) 121.

<sup>188</sup> The government of Croatia had, upon an order by the ICTY for surrender of General Bobetko, filed with the Constitutional Court an application for review of its obligation to surrender to the ICTY. *Bobetko Report, Review of Constitutionality and Legality* [2002] U-X-2271/2002; ILDC 383 (HR 2002).

<sup>189</sup> Ibid. [3], and [A3]. In this particular instance it did not have jurisdiction also because the application for review did not concern a constitutional complaint against a final judicial decision. Ibid. [88].

<sup>190</sup> *Ngirabatware* (n 185) [3].

<sup>191</sup> Ibid. He argued that the Tribunal is planning on finalizing all cases before the Trial Chambers at the end of 2008 and those before the Appeals Chambers at the end of 2010. As a consequence, Mr Ngirabatware argued, in his case in 2008, that the ICTR will never be able to complete his case before the set time limits.

<sup>192</sup> Ibid.

<sup>193</sup> It derived this obligation from article 25 of the UN Charter (n 4); UNSC Res 955 (1994) (n 125); and article 28 of ICTR's Statute. Ibid. [14]. Eventually, the Court declared the

could review a request for surrender only as to the questions of whether the charges in the indictment constituted crimes that would fall within the ICTR's jurisdiction, and whether the person who was intended to be surrendered actually was the person indicted by the ICTR.<sup>194</sup> The Court found no room for a review against the standard of the German *ordre public*.<sup>195</sup>

The issue here is not whether the ICTR could indeed not guarantee the human rights invoked by the individual.<sup>196</sup> Rather, the issue is that German courts are not competent to engage in a review of the merits of a complaint due to the obligation upon Germany to cooperate with the ICTR, created by the UNSC. Accordingly, that obligation apparently outweighs judicial protection by German courts of the individual's human rights.

However, even if the German Constitutional Court had ordered as a condition for surrender that Mr Ngirabatware would not be transferred, eventually, to the Rwandan judicial authorities, it would most likely not have had that effect. This appears from the *Lukic* case. In deciding on the ICTY's request for surrender of Mr Lukic, an Argentinean court required that he was not going to be transferred to another state without Argentina's prior authorization.<sup>197</sup> Mr Lukic particularly did not want to be transmitted to BiH because of his concerns regarding the possibility of a fair trial and threats to his personal safety.<sup>198</sup> Nonetheless, after

---

complaint inadmissible. It should be noted, however, that the German Constitutional Court has certain scope of discretion in deciding on whether it will deal with a particular constitutional complaint.

<sup>194</sup> *Ngirabatware* *ibid*.

<sup>195</sup> *Ibid*.

<sup>196</sup> Albeit, even if Mr Ngirabatware would not be transferred eventually to the Rwandan judiciary, it is not beyond doubt whether the ICTR would itself be able to guarantee him a fair hearing. See Hoffman and Megret 2005 (n 25) 45. See also Schabas 2000 (n 140).

<sup>197</sup> If such transfer would be 'in connection with facts that were prior to and different from those that constitute the offences for which his surrender is sought' *Re International Arrest Warrant (Lukic), Decision on arrest, surrender and extradition* [2006] Case No 11807/05; ILDC 1083 (AR 2006) [76]. This requirement follows from the rule of speciality.

<sup>198</sup> See *Milan Lukic and Sredoje Lukic* (n 185) [65]-[66].

his surrender to the ICTY, the Tribunal's prosecutor sought referral of his case to BiH, without seeking any prior authorization from Argentina.<sup>199</sup>

The Referral Bench of the ICTY held that because of the primacy of the Tribunal over national courts and states' obligation to cooperate with the Tribunal, the ordinary principles of extradition law, such as the rule of speciality,<sup>200</sup> the prohibition to re-extradite, and the non-transfer of nationals, did not apply.<sup>201</sup> In complying with the duty to surrender, states may not place any conditions on a transfer to the Tribunal.<sup>202</sup> Moreover, the Tribunal is not bound by the requirements imposed by the state that surrendered the individual.<sup>203</sup> The Tribunal's decision to transfer a case to a third state is not based on agreement, but derives from the Tribunal's power pursuant to its Statute to refer cases to national courts.<sup>204</sup> This power is supported by two UNSC resolutions issued under Chapter VII.<sup>205</sup> Accordingly, the Tribunals do not acknowledge any possibility of imposing conditions on an individual's surrender.

It could be argued that in this type of case, at least, there might be an alternative measure of protection available before the International Tribunals themselves. However, this can only be presumed, since no court has actually engaged in an assessment of the equivalence of protection. Still, the issue of non-review becomes even more pressing when it is abundantly clear that no alternative remedy exists. This is the situation in respect of the individuals who are directly targeted by UNSC sanction measures, which will be discussed in the following subsection.

---

<sup>199</sup> Ibid. This decision was later revoked by the Tribunal's Referral Bench, *Milan Lukic (Decision on Milan Lukic' Appeal Regarding Referral)* IT-98-32/1-AR11bis.1 (20 July 2007).

<sup>200</sup> See *supra* footnote 197.

<sup>201</sup> *Milan Lukic* (appeal) (n 199) [111], [114].

<sup>202</sup> Ibid. [112].

<sup>203</sup> Ibid. [113], [115].

<sup>204</sup> UNSC Res 827 (1993) (n 125) Annex, (ICTY Statute) article 9. The Referral Bench needs to take into account two criteria only before it may sanction such a referral. It must be satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. Ibid. [114]. See Rules of Procedure ICTY (n 178), Rule 11bis (b).

<sup>205</sup> *Milan Lukic and Sredoje Lukic* (n 185) [114].

#### 4.3.3.2. Limited Review of Implementation of Sanction Measures Against Individuals

Individuals affected by the implementation of UNSC targeted sanctions have no opportunity for an alternative measure of review at the UN level. Even so, in these situations several domestic courts have also found serious limitations on their jurisdiction. A prime and well-known example of a court that has applied such a deferential approach is the General Court. It regarded itself as not authorized to review the EU's implementation of the UNSC 1267 targeted sanction regime.<sup>206</sup>

The General Court has had several cases regarding the effects of such implementation.<sup>207</sup> One of those cases involved Mr Kadi.<sup>208</sup> He was blacklisted by the UNSC Sanctions Committee. Before the General Court, he challenged the EU regulations implementing the targeted sanctions. The Court, after having considered the relationship between 'the international legal order under the United Nations' and the European legal order,<sup>209</sup> found that the EU was bound by the obligations under the UN Charter.<sup>210</sup> Moreover, the Court considered that UNSC resolutions imposing targeted sanctions leave the EU institutions no autonomous discretion for their implementation.<sup>211</sup> The UNSC, or a Sanctions Committee, designates those who they consider need to be targeted. States can do nothing but directly execute the sanctions in respect of the listed individuals. This meant, according to the Court, that if it were to engage in a review of the lawfulness of the domestic implementation it would, at the same time, also

---

<sup>206</sup> UNSC Res 1267 (15 October 1999) UN Doc S/Res/1267 and subsequent resolutions. See chapter 2.3.1.

<sup>207</sup> Amongst others: *Kadi I* (first instance) (n 18); Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3353; Case T-253/02 *Chafiq Ayadi v Council of the European Union* [2006] ECR II-2139; and Case T-49/04 *Faraj Hassan v Council of the European Union and Commission of the European Communities* [2006] ECR II-52.

<sup>208</sup> *Kadi I* *ibid.*

<sup>209</sup> *Ibid.* [178]. The Court considered in particular the role of articles 25 and 103 of the UN Charter (n 4); article 27 Vienna Convention on the Law of Treaties (VCLT); and articles 297 and 307 of the EC Treaty.

<sup>210</sup> *Kadi I* *ibid.* [193].

<sup>211</sup> *Ibid.* [214].

indirectly review the lawfulness of the underlying UNSC resolution.<sup>212</sup> The Court did not consider itself competent to engage in such an indirect review, and therefore refused to assess the legality of the implementing legislation.<sup>213</sup> Thus the special legal nature of the UNSC resolution underlying the contested norm, and the lack of scope of discretion, led the General Court to place a severe restriction on its own jurisdiction.

In the appeal of the *Kadi I* case the Court of Justice took a fundamentally different approach. It started from the basic assumption that it must be able to review all EU acts against the fundamental rights guaranteed in the EU legal order.<sup>214</sup> It considered that this constitutional principle could not be affected by any obligation under an international agreement.<sup>215</sup> Hence the Court of Justice in effect separated the international from the European legal order. With this approach, it created scope for a judicial review.<sup>216</sup>

However, in the meantime, the decision of the General Court had a significant influence on decisions by other courts on the same issue. For example, a UK High Court, in the *M* case,<sup>217</sup> followed the General Court's limitation on judicial review of the implementation of sanction measures against principles of common law and international human rights.<sup>218</sup> A Swiss Federal Court, in the *Nada* case, also showed itself to be heavily inspired by the General Court's *Kadi I* decision,<sup>219</sup> even though Switzerland is not a member of the EU. The Court

---

<sup>212</sup> *Ibid.* [215].

<sup>213</sup> The Court accorded the norms implementing UNSC targeted sanctions a form of immunity. This is a rather uncommon use of the concept of immunity.

<sup>214</sup> 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 [285].

<sup>215</sup> *Ibid.*

<sup>216</sup> This will be discussed further in Chapter 6 on 'The Dualist Approach and Indirect Review'.

<sup>217</sup> *M, A, MM v HM Treasury* [2006] EWHC 2328 (Admin). See also *A, K, M, Q, & G v HM Treasury* [2008] EWHC 869 (Admin) [33]. This case was decided before Court of Justice decision in *Kadi I* (appeal) (n 214), but after the Opinion in that case by AG Maduro. See Case C-402/05 P *Opinion of Advocate General Poiares Maduro* [2008] ECR I-06351.

<sup>218</sup> *M v HM Treasury* *ibid.* [71].

<sup>219</sup> *Nada* (CH) (n 18). See also similarly *IA-48/2007* [2008].

acknowledged that Mr Nada did not have any effective possibility to challenge the implementation of the targeted sanction measures. Even so, the Court found itself competent only to examine whether, and to what extent, Switzerland was bound by the UNSC resolutions. It did not consider itself competent to lift the sanctions against the targeted person on account of violations of basic rights.<sup>220</sup>

The Federal Court arrived at this decision despite the fact that the specific circumstances in the *Nada* case resulted in a particularly drastic limitation on the enjoyment of his human rights. Mr Nada lived in very small (1.6 square km) Italian enclave in Switzerland, so in effect the limitations on his freedom of movement constituted a house arrest.<sup>221</sup> A similar decision in a subsequent Swiss case also had far-reaching consequences for the targeted individuals' enjoyment of human rights.<sup>222</sup> The case concerned the obligation to freeze assets on the basis of UNSC resolution 1483.<sup>223</sup> This resolution instituted sanctions against the former regime of Saddam Hussein. One difference from the 1267 regime, which applied to Mr Kadi and Mr Nada, was that under this Iraq sanction regime the assets not only had to be frozen, but they also had to be transferred to the Development Fund for Iraq.<sup>224</sup> Hence the assets were not merely preventively and temporarily blocked, but were effectively confiscated. This makes the issue of judicial review even more compelling.<sup>225</sup>

---

<sup>220</sup> *Nada* *ibid.* [8.3].

<sup>221</sup> *Ibid.* [10.2]. UNSC resolution 1390 (succeeding resolution 1267) held, besides the obligation to freeze assets, that states have to 'prevent the entry into or transit through their territories'. UNSC Res 1390 (28 January 2002) UN Doc S/Res/1390 [2(b)]. This led to a strong limitation of his liberty of movement. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 12. Switzerland is a party to the ICCPR.

<sup>222</sup> 2A-783/2006 [2008]. This case was decided in a similar way to the *Nada* case, even though it post-dates Maduro's AG opinion for the *Kadi I* (appeal) (n 217).

<sup>223</sup> UNSC Res 1483 (22 May 2003) UN Doc S/Res/1483. Similar to the sanctions regime considered in the above cases a Sanctions Committee was established to designate the individuals and entities that had to be targeted. UNSC Res 1518 (24 November 2003) UN Doc S/Res/1518. The measures could potentially target a rather broad group of people. 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>.

<sup>224</sup> UNSC Res 1483 (2003) *ibid.* [23].

<sup>225</sup> Indeed, with regard to the measures taken under the 1267 regime one, of the considerations of courts unable to exercise judicial review was indeed that the sanction measures only

In a totally different situation – concerning measures taken by the Dutch government against Iranian nationals with the aim of preventing the proliferation of nuclear knowledge, arguably in accordance with an obligation thereto imposed by the UNSC<sup>226</sup> – a Dutch District Court also found itself incompetent to engage in a review due to a presumed underlying conflict of norms in international law.<sup>227</sup> It held that, in principle, Dutch courts are competent to review whether an implementation by the Dutch government of an international obligation interferes with another international obligation. The Court found that this is different, however, when the two international obligations are in a hierarchical relationship on the basis of article 103 of the UN Charter. Accordingly, the Court ruled that when the Dutch government takes action to implement an obligation under the UN Charter, Dutch courts would not be competent to review whether that obligation interferes with another international obligation. This finding was plainly rejected in the appeal.<sup>228</sup>

#### **4.3.3.3. Conclusion**

Obligations created by the UNSC under Chapter VII of the UN Charter, which pursuant to article 103 prevail over all other international agreements, may lead some domestic courts to place limitations on their own jurisdiction. Apparently these courts have considered obligations under the UN Charter to outweigh their competence to fully review individuals' complaints. They came to this finding notwithstanding the fact that their competence finds its basis in domestic law.

---

limited the use of funds and that they, unlike confiscation, did not affect the very substance of the right to property. See, for instance, *Yusuf* (n 207) [299]. See also *Ayadi* (n 207) [135] and *IA-48/2007* [2008] [7.2]. Note, however, that Switzerland is not a party to the First Protocol to the ECHR; still, the right to property is guaranteed in article 26 of its constitution. See Swiss Federal Constitution 1999, article 26.

<sup>226</sup> UNSC Res 1737 (23 December 2006) UN Doc S/Res/1737.

<sup>227</sup> *A and Others v The Netherlands* [2010] LJN: BL1862; ILDC 1463 (NL 2010) (*Iranian Nationals*). Eventually, the Court decided the case by determining that the measures taken by the Dutch Government were not required by the UNSC resolution. States had a scope of discretion in relation to the implementation of the measures. *Ibid.* [4.6].

<sup>228</sup> The Court of Appeal considered article 103 UN Charter (n 4) not to preclude a domestic implementation from being reviewed against international human rights law. *The Netherlands v A and Others* [2011] LJN: BQ4781 (*Iranian Nationals*) [5.5]. See also discussion in chapter 6.3.1.

Accordingly, they adopted a rather broad understanding of the working of article 103 of the UN Charter.

Such an approach results in a serious limitation on individuals' access to court. As a consequence, potential infringements with these individuals' human rights will escape judicial review. It seems that these courts considered the interest of securing the effective implementation of UNSC decisions, or the unqualified cooperation with an International Tribunal, more compelling than the possibility for affected individuals to have their arguable claims of human rights violations reviewed. Herewith the effectiveness of the judicial mechanism for human rights protection is undermined. This results in a situation in which interferences with human rights can simply be maintained without any judicial surveillance. Moreover, there is only a thin line between non-review and non-application of human rights. This was also illustrated by the UK High Court in the *M* case, which concerned the implementation of certain measures against spouses of individuals targeted by UNSC sanctions.<sup>229</sup> After having considered the General Court's reasoning in the *Kadi I* case on the limitations on its competence to review, this Court seriously doubted whether the provisions of the ECHR 'could have any application at all in the present context.'<sup>230</sup>

#### **4.3.4. Judicial Protection Only in Regard to *Ius Cogens***

The present subsection will consider whether courts which have denied (in part) jurisdiction or competence to review implementations of international obligations which are underpinned by article 103 of the UN Charter see a limit to their refusal to hear a case dependent on the human right that is allegedly affected. Is there a threshold which, when reached, will tip the balance in favour of judicial review? In other words, to what extent does the nature of the right invoked by the individual concerned relate to the lawfulness of the limitation put

---

<sup>229</sup> *M v HM Treasury* (UK, first instance) (n 217).

<sup>230</sup> *Ibid.* [71].

on the right of access to court?<sup>231</sup> For example, does an interference with a *ius cogens* norm bring about a corresponding non-derogable right of access to court?<sup>232</sup>

The International Court of Justice (ICJ) answered this question plainly in the negative.<sup>233</sup> That court followed a clear distinction between procedural and substantive norms, and considered the special status of *ius cogens* to apply only in regard to substantive norms. It therefore found, in that particular case, the rules on state immunity not to be in conflict with obligations pursuant to norms of a *ius cogens* status. The two sets of rules simply address different matters, according to the Court. It came to this finding aware of the fact that the consequence was that it could thereby preclude judicial redress for individuals arguably adversely affected by violations of *ius cogens* norms.<sup>234</sup> The Dutch Supreme Court referred to this decision when it concluded that the UN enjoyed absolute immunity before Dutch courts irrespective of the seriousness of the acts complained of.<sup>235</sup>

Similarly, in principle, the application of the rules on attribution of conduct cannot be influenced by the legal nature of the human right allegedly affected.<sup>236</sup> The question of unlawfulness of conduct is different from that of attribution of conduct. The ECtHR, in its decisions in cases such as *Behrami*, has attributed the impugned conduct to the UN without taking into account the character of the

---

<sup>231</sup> F Francioni 'The Right of Access to Justice under Customary International Law' in F Francioni (ed.) *Access to Justice as a Human Right* (Oxford University Press Oxford 2007) 1-55, 2.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Jurisdictional Immunities of the State (Germany v Italy)* [2012] ICJ Rep (not yet reported) [95].

<sup>234</sup> *Ibid.* [104].

<sup>235</sup> *Mothers of Srebrenica v The Netherlands* [2012] LJN: BW1999; ILDC 1760 (NL 2012) [4.3.14]. The Supreme Court also relied on *Al-Adsani v United Kingdom* [2001] 35763/97 [61].

<sup>236</sup> However, as was argued here, the application of these rules by the ECtHR seems to have been influenced by the special legal nature of obligations created by the UNSC. Formally, this should not have been a relevant argument for the Court.

allegedly affected human rights.<sup>237</sup> A Dutch District Court, in the *Nuhanovic* case, found it necessary to consider explicitly that the international obligations under the ECHR, the ICCPR, and the Genocide Convention would not alter its finding on the issue of attribution.<sup>238</sup>

Also, the ECtHR, when refusing to engage in an equivalent protection test, where the situation concerned state conduct required to give effect to the decisions of the UNSC, did not make an exception for a specific category of human rights.<sup>239</sup> The Court did engage in such marginal review in cases regarding states acting in support of other IOs' operations. However, the different attitude did not depend on the character of the particular human rights invoked. Instead, it depended on the nature of the IO concerned.

What about the other approaches leading courts to limit or reject the possibility of a judicial review? As was mentioned in the previous subsection, the Swiss Federal Courts upheld their rejection of jurisdiction with regard to complaints invoking human rights of an 'ordinary' normative status, even when the effects in the particular cases were far-reaching. However, the balance does seem to tip when human rights norms with the status of *ius cogens* are engaged. In this regard, the Swiss Court held in the *Nada* case that the international obligation to implement UNSC resolutions finds its limits in *ius cogens*.<sup>240</sup> Hence the Court needed to review whether norms of that character were affected by these resolutions. It then concluded that the right to property and due process invoked by Mr Nada were not part of the peremptory norms of international law.<sup>241</sup>

The Swiss court largely followed the General Court's approach in the *Kadi I* case. That court also considered that it could indirectly review UNSC resolutions

---

<sup>237</sup> See previous footnote.

<sup>238</sup> *H. N. v The Netherlands* [2008] LJN: BF0181; ZA 06-1671 [4.12.1].

<sup>239</sup> See *supra* subsection 4.3.2.

<sup>240</sup> *Nada* (CH) (n 18) [7].

<sup>241</sup> *Ibid.* [7.3].

against norms of *ius cogens*, which it regarded as binding on the UNSC as well.<sup>242</sup> The General Court, however, adopted a broader and rather controversial understanding of *ius cogens*, and included the right to respect for property, the right to be heard, and the right to an effective judicial review.<sup>243</sup> Still, it concluded that there was no violation of these rights, in so far as they were protected by *ius cogens*.<sup>244</sup> In contrast to the nature of *ius cogens*,<sup>245</sup> the Court also balanced the two conflicting norms. It found the targeted individual's interest in having a court hear his case on the merits not to outbalance the essential public interest of maintaining international peace and security.<sup>246</sup>

In conclusion, some courts which have found their jurisdiction limited on the basis of an obligation created by the UNSC have considered that limitation not to include their competence to engage in a review against norms of *ius cogens*.<sup>247</sup> Accordingly, in contrast to what the ICJ considered later in its decision on *Jurisdictional Immunities*,<sup>248</sup> these courts have related the question of whether they would hear an individual's claim to the prevailing normative status of the human rights norm invoked. Therewith, they linked the mechanism for obtaining judicial protection of human rights to the content of the human rights norms it

---

<sup>242</sup> *Kadi I* (first instance) (n 18) [226].

<sup>243</sup> The UK High Court in the *M* case followed this interpretation of *ius cogens*. *M v HM Treasury* (UK, first instance) (n 217) [72]. Still, this interpretation has been critiqued by many legal scholars. See, for example, D Halberstam and E Stein 'The United Nations, The European Union, and the King of Sweden; Economic Sanctions and Individual Rights in a Plural World Order' (2009) 46 *Common Market Law Review* 13, 54-55, and 58; C Tomuschat 'Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission, judgment of the Court of First Instance of 21 September 2005; Case T-315/01, Yassin Abdullah Kadi v. Council and Commission, judgment of the Court of First Instance of 21 September 2005' (2006) 43 *Common Market Law Review* 537, 547 et seq.; G De Búrca 'The European Court of Justice and the International Legal Order after *Kadi*' (2009) 51 *Harvard International Law Journal* 1, 21.

<sup>244</sup> For example, it held that 'only an arbitrary deprivation of [the right to property] might, in any case, be regarded as contrary to *jus cogens*.' *Kadi I* (first instance) (n 18) [242]. Similarly, it considered that 'the limitation of the applicant's right of access to a court, as a result of the immunity from jurisdiction [...] is inherent in that right as it is guaranteed by *jus cogens*.' *Ibid.* [288].

<sup>245</sup> Halberstam and Stein 2009 (n 243) 54.

<sup>246</sup> *Kadi I* (first instance) (n 18) [289]. The application of proportionality and necessity tests will be further discussed in Chapter 7.

<sup>247</sup> See similarly *M v HM Treasury* (UK, first instance) (n 217) [72].

<sup>248</sup> *Jurisdictional Immunities* (n 233) [95].

sought to protect. This concurs with the understanding of the right of access to court as an instrument for providing judicial protection of (other) human rights. A result of this approach would be that the gap in judicial protection of international human rights would be slightly mitigated. However, most of the human rights affected in the cases at issue do not qualify as *ius cogens*.<sup>249</sup>

#### **4.4. Courts Addressing the Conflict between International Norms**

In the previous section, individuals adversely affected by the implementation of UNSC decisions obtained very limited, or no, judicial protection of their international human rights, because the courts before which the cases were brought did not engage in a (full) review. The present section concerns courts engaging in such a review, but striking a balance in favour of a UNSC resolution. This means that the individuals' human rights were not merely lawfully limited, but were found to be inapplicable due to a conflicting obligation under such resolution. Yet, at least, by having access to court the individuals obtain some measure of judicial review. This gives courts an opportunity to assess whether these individuals' enjoyment of their human rights is not restricted any further than required by the relevant UNSC resolution.

Subsection 4.4.1 will start by analysing indications towards a hierarchy between obligations under the UN Charter and human rights norms from the perspective of international human rights case law. Currently, the international legal order lacks a clear and direct ruling on how the norms emanating from these instruments mutually rank. Some indications thereto will be deduced from the case law of the ECtHR, and from opinions of UN treaty bodies. Thereafter, subsection 4.4.2 will discuss how some domestic courts have dealt with the conflict of norms.

---

<sup>249</sup> See chapter 3.2.

#### 4.4.1. Indications on Hierarchy from International Human Rights Case Law

Conceptually, a conflict can exist only between two norms applicable in the same legal order.<sup>250</sup> International regional courts, like the ECtHR, are by their very nature placed within the same legal order as the UN. It is more difficult for them than for domestic courts to escape having to rule on the conflict of international norms by resorting to a dualist approach, which is a solution many domestic courts indeed adopt.<sup>251</sup> The ECtHR cannot reserve its findings on hierarchy exclusively for the Convention's legal order, and separate these from general international law. Rulings of the ECtHR are inherently part of, and have a direct impact on, the international legal order. In addition, the ECtHR is in a particularly complicated position.<sup>252</sup> Being a human rights court – which is assigned the task of observing member states' compliance with the ECHR<sup>253</sup> – it would be counterintuitive for it to conclude that UNSC resolutions simply prevail over the ECHR.<sup>254</sup> However, it would hardly be feasible politically for it to draw the opposite conclusion. Ultimately, the Court can only go as far as the state parties to the Convention allow it to go.

As was discussed earlier,<sup>255</sup> the ECtHR's approach in the *Behrami* case resulted in it not having to rule on how a conflict between an obligation under the ECHR and an obligation under the UN Charter would have to be solved. Yet from that judgment it could be derived that the Court accords high importance to the objectives the UNSC is established to pursue.<sup>256</sup> Its emphasis on the imperative nature of the UNSC's objectives was even so pressing that it led Lord Phillips to

---

<sup>250</sup> Milanovic 2009 (n 5) 102. Pauwelyn would refer to this as a horizontal conflict, which he distinguishes from vertical conflicts (between national law and international law). J Pauwelyn *Conflict of norms in public international law how WTO law relates to other rules of international law* (Cambridge University Press Cambridge 2003) 10-11.

<sup>251</sup> See chapter 6.2.

<sup>252</sup> See also discussion in *supra* subsection 4.3.1.

<sup>253</sup> See ECHR (n 40) article 19.

<sup>254</sup> Milanovic 2009 (n 5) 86. See also *Nada* (ECtHR) (n 105) concurring opinion of Judge Malinverni [20].

<sup>255</sup> See *supra* subsection 4.3.1.

<sup>256</sup> *Behrami* (n 27) [148]-[149].

suggest, in his opinion in the *Ahmed* case, that the ECtHR ‘was prepared to recognise the primacy of obligations under the UN Charter over obligations under the Convention.’<sup>257</sup> In addition, the fact that the Court refused to engage in a marginal review of state conduct demanded by the requirements for an effective operation of the UNSC could be seen as another indication of how the ECtHR would decide on the international norm conflict.<sup>258</sup>

Also, in its subsequent decision in the *Al-Jedda* case, the ECtHR did not address the matter straightforwardly.<sup>259</sup> There, the Court held first that, when interpreting an obligation created by the UNSC, it must start from the presumption that the UNSC did not intend to impose any obligation upon states that are in violation of fundamental principles of human rights.<sup>260</sup> This presumption can be rebutted, the Court added, when an obligation to such effect is caught in clear and explicit language.<sup>261</sup>

With this finding the Court, at first sight, seemed to protect human rights vigilantly, especially as the Court appeared to apply a very strong presumption of compliance, which seemed to be not easily rebutted.<sup>262</sup> However, its decision could be interpreted to state, *a contrario*, that in principle, obligations under a UNSC resolution prevail over the ECHR, if the UNSC intends it to have that effect.<sup>263</sup>

Moreover, in its subsequent decision in the *Nada* case, the presumption did not appear as strong as could be inferred from its decision in the *Al-Jedda* case. Mr Nada was subject to the UNSC’s targeted sanctions, including the imposition of a travel ban. Before the ECtHR he claimed violations of his rights to family and

---

<sup>257</sup> *Ahmed* (n 16) [98].

<sup>258</sup> See discussion in *supra* subsection 4.3.2.

<sup>259</sup> *Al-Jedda* (ECtHR) (n 76).

<sup>260</sup> *Ibid.* [102]. Chapter 5.4.2 will explore further this presumption of compliance. See somewhat similarly *Mothers of Srebrenica* (appeal) (n 15) [5.5].

<sup>261</sup> *Al-Jedda* *ibid.*

<sup>262</sup> See Milanovic 2012 (n 77) 138.

<sup>263</sup> See also *ibid.* 138.

private life, and his right to an effective remedy. In relation to Mr Nada's right to private and family life, the Court invoked relatively modest and indirect indications by which it found the presumption of compliance to be rebutted. The UNSC did not unequivocally set aside any human rights in regard to the obligation at issue.<sup>264</sup>

Whatever could be said of that, the Court did not indicate, subsequently, what the consequences were of the rebuttal. It merely continued by investigating what Switzerland could have done within the confines of the relevant resolution in order to somehow mitigate the infringement with Mr Nada's human right.<sup>265</sup> It concluded that the respondent state did not do its utmost to harmonize, as far as possible, both international obligations. Therefore, the Court found Switzerland to have acted in violation of Mr Nada's right to private and family life. Arriving at this conclusion, the Court felt it was dispensed from ruling on a hierarchy between the obligations at issue.<sup>266</sup> Accordingly, the Court considered only what Switzerland could have done for Mr Nada without acting in violation of the UNSC resolution. It did not consider the lawfulness of the measures imposed by the resolution itself.

Interestingly, the Court did not extend the presumption of compliance, or the rebuttal thereof, to Mr Nada's right to an effective remedy. In regard to that right the Court merely held that Mr Nada was not able to obtain such a remedy within the national legal order,<sup>267</sup> and therefore his right to an effective remedy was violated.<sup>268</sup> The Court did not take into account that this was an effect inherent in the application of the centrally imposed targeted sanctions. Providing such a remedy at the national level would amount in practice to a violation of the obligation created by the UNSC. The Court appears to have opted for a dualist

---

<sup>264</sup> See discussion in chapter 5.4.2.

<sup>265</sup> *Nada* (ECtHR) (n 105) [185]-[195].

<sup>266</sup> *Ibid.* [197].

<sup>267</sup> *Ibid.* [211]. See *supra* subsection 4.3.3.2.

<sup>268</sup> *Ibid.* [213]-[214].

approach in this regard,<sup>269</sup> or at least to have required national courts to take such an approach.<sup>270</sup> The consequence of such an approach will most likely be that the domestic measures against the individual will have to be annulled, because no review of the merits is possible.<sup>271</sup> Therewith, the right to an effective remedy would in effect prevail over the obligation created by the UNSC. However, even if the domestic remedy were to be successful for the individual concerned, it would provide him with limited relief. Only the domestic implementation can be annulled. He would still remain on the UNSC blacklist.

The HRC, too, has not (yet) given a clear opinion on how the norm conflict should be solved. In the *Sayadi and Vinck* case it referred on its own motion to article 46 of the ICCPR, which states that ‘nothing in the Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations.’<sup>272</sup> The Committee, however, did not find this provision relevant to the case at hand. In addition, Sir Nigel Rodley, in his individual (concurring) opinion, formulated an interpretative principle similar to the one later used by the ECtHR in the *Al-Jedda* case.<sup>273</sup>

In contrast, the UN Committee on Economic, Social, and Cultural Rights has explicitly pronounced on the matter, in the context of the imposition of comprehensive economic sanctions against certain states, such as Iraq and the former Yugoslavia. This UN treaty body held in a General Comment that the provisions of the International Covenant on Economic Social and Cultural Rights (ICESCR) could not be set aside only because it would be regarded as necessary

---

<sup>269</sup> The Court indeed referred to the Court of Justice’s decision in *Kadi I* (appeal) (n 214). See *Nada* *ibid.* [212].

<sup>270</sup> T Theniel ‘Nada v Switzerland: The ECtHR Does Not Pull a Kadi (But Mandates It for Domestic Law)’ (12 September 2012) Invisible College Blog <http://invisiblecollege weblog.leidenuniv.nl/2012/09/12/nada-v-switzerland-the-ecthr-does-not-pu/>.

<sup>271</sup> See Chapter 8.

<sup>272</sup> UN Human Rights Committee ‘Views of the Committee Concerning the Communication Submitted by Sayadi and Vinck’ (29 December 2008) CCPR/C/94/D/1472/2006 (*Sayadi and Vinck*) [10.3].

<sup>273</sup> *Ibid.* 36.

for the maintenance of international peace and security to impose sanctions.<sup>274</sup> In its comment, however, the Committee primarily addressed the responsibility of UNSC member states to fully take into account human rights concerns when designing an appropriate sanctions regime.<sup>275</sup> Hence it was not directly concerned with a conflict of obligations under international law, since it focussed on the situation prior to a UNSC decision. Still, it indicates that the Committee considered the interests of peace and security not simply to outweigh the interest of securing protection of human rights.

Accordingly, at present, there is no clear-cut decision at the international level on a hierarchy between obligations under the UN Charter and obligations arising from international human rights treaties. Any indications towards such a hierarchy remain ambiguous. It appears that an individual's human rights are not readily overruled, but at the end of the day they can still be outweighed by obligations under the Charter, if the UNSC explicitly wishes to do so.

#### **4.4.2. Domestic Courts on the International Norm Conflict**

Before the ECtHR formulated its presumption of compliance in the *Al-Jedda* case, the House of Lords had already in the same case pronounced on how the norm conflict at issue had to be solved.<sup>276</sup> That court considered itself 'deep inside the realm of international law – indeed inside the very chamber of the United Nations Security Council itself.'<sup>277</sup> It regarded it necessary to assess how the case would fare before the ECtHR.<sup>278</sup> Subsequently, several other domestic courts have also decided directly on the international norm conflict.

---

<sup>274</sup> UN Committee on Economic, Social and Cultural Rights 'General Comment No. 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights' (12 December 1997) UN Doc E/C.12/1997/8 [7]; see also C Chinkin 'Jus Cogens, Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution' (2006) 27 Finnish Yearbook of International Law 63, 71.

<sup>275</sup> General Comment No. 8 *ibid.* [12].

<sup>276</sup> *Al-Jedda* (UKHL) (n 57).

<sup>277</sup> *Ibid.* [55].

<sup>278</sup> *Ibid.*

First, subsection 4.4.2.1 will analyse how the House of Lords attempted to reconcile both international obligations. Then, subsection 4.4.2.2 will consider the subtly diverging interpretations of the Lords' decision by other UK courts. Finally, subsection 4.4.2.3 will briefly discuss other domestic courts' perspective on how to solve the norm conflict.

#### **4.4.2.1. Reconciling International Obligations in *Al-Jedda* (House of Lords)**

The *Al-Jedda* case concerned an individual who was arrested and interned in Iraq by UK forces, which operated as part of the MNF. These forces were acting on the basis of a UNSC resolution, which authorized them to intern persons where this would be necessary for imperative reasons of security in Iraq.<sup>279</sup> This UNSC mandate, essentially, came down to a continuation of the security regime as it existed before the formal ending of the occupation of Iraq.<sup>280</sup> However, by such internments the UK was inevitably acting in violation of article 5(1) of the ECHR.<sup>281</sup> This article mentions six grounds on the basis of which a person may be lawfully detained. Being a threat to the security of a country is not one of the six grounds. Therefore, absent a derogation,<sup>282</sup> this internment for reasons of security was in direct confrontation with article 5(1) of the ECHR.<sup>283</sup> Accordingly, after the House of Lords had established that the authorization by the UNSC in fact created an obligation upon the United Kingdom,<sup>284</sup> it had to consider the inter-relationship (or hierarchy) between the two competing obligations: on the one hand, the obligation based on articles 25 and 103 of the UN Charter,<sup>285</sup> and on the other, the obligation arising from article 5(1) of the ECHR.

---

<sup>279</sup> UNSC Res 1546 (2004) (n 60) [10], in combination with the letter annexed to this resolution of US Secretary of State Mr Powell.

<sup>280</sup> See *Al-Jedda* (UKHL) (n 57) [32].

<sup>281</sup> ECHR (n 40) article 5 (1).

<sup>282</sup> See ECHR *ibid.* article 15.

<sup>283</sup> See F Jacobs and R White *The European Convention on Human Rights* 4th edn (Oxford University Press Oxford 2006), 127. This was also acknowledged by the House of Lords at *Al-Jedda* (UKHL) (n 57) [37].

<sup>284</sup> How the House of Lords arrived at this interpretation is discussed in chapter 5.3.

<sup>285</sup> See chapter 2.2.1, and *supra* subsection 4.2.

Lord Bingham, writing the leading opinion, acknowledged the conflicting interests underlying this norm conflict. He quoted the appellant, apparently in agreement, who submitted that ‘while maintenance of international peace and security is a fundamental purpose of the UN, so too is the promotion of respect for human rights.’<sup>286</sup> This consideration, which was reiterated by other UK courts in subsequent cases,<sup>287</sup> foreshadowed the presumption of compliance approach subsequently applied to this case by the ECtHR.<sup>288</sup> However, the House of Lords did not construe such a presumption. Neither did Lord Bingham regard the special character of the ECHR, as a human rights instrument, to absolve it from the working of article 103 of the UN Charter.<sup>289</sup> According to him, as he found to appear from the consensus of learned opinion, that article leaves no room for any excepted category, apart from norms with a *ius cogens* character.<sup>290</sup> Therefore, he concluded that in the case of conflict, an obligation under the UN Charter would prevail over an obligation under the ECHR. Hence he found that the United Kingdom could lawfully exercise the power to detain, as authorised by the relevant UNSC resolution, where this would be necessary for imperative reasons of security.<sup>291</sup> He added, however, that the United Kingdom must ensure in that situation that the infringement with the detainee’s rights under article 5 of the ECHR does not go beyond the extent inherent in such detention.<sup>292</sup>

Thus the House of Lords accepted the precedence of the obligation under the UN Charter over the observance of Mr Al-Jedda’s human rights. The restriction was not provided for by the human rights regime itself; it was not foreseen by the system of limitations. Rather, it emanated from an external regime. The conflict

---

<sup>286</sup> *Al-Jedda* (UKHL) (n 57) [37].

<sup>287</sup> See *A, K, M, Q, & G* (first instance) (n 217) [33] and *A, K, M, Q, & G v HM Treasury* [2008] EWCA Civ 1187 [116].

<sup>288</sup> See *supra* subsection 4.4.1, and more elaborately chapter 5.4.2.

<sup>289</sup> *Al-Jedda* (UKHL) (n 57) [35].

<sup>290</sup> *Ibid.*

<sup>291</sup> *Ibid.* [39].

<sup>292</sup> *Ibid.*

was decided on the more abstract level of applicability of norms.<sup>293</sup> Hence this decision resulted in a serious challenge to the protection of the international human rights of the individual concerned.

Still, the House of Lords accepted no more than a limited qualification of Mr Al-Jedda's rights. It found that his rights could be overruled only where his detention would be necessary for imperative reasons of security. This requires an independent assessment by the national authorities when acting pursuant to the UNSC authorization. This assessment might be subject to judicial review. Moreover, the House of Lords held that Mr Al-Jedda's rights could not be infringed to any greater degree than inherent in such detention.<sup>294</sup> This suggests that his rights under article 5(4) of the ECHR could remain unaffected. This provision entitles the detained person to take proceedings by which the lawfulness of his detention shall be decided speedily by a court.<sup>295</sup> However, in the present case the Court was not concerned with these issues.<sup>296</sup> It did not elaborate on the exact scope of the authorization given by the UNSC,<sup>297</sup> and nor did it clarify the extent to which article 5 of the ECHR was 'qualified or displaced'.<sup>298</sup> It decided the issue of what would be the effect of a UNSC authorization on a more abstract level.<sup>299</sup>

What is clear, however, is that the House of Lords attempted to employ a nuanced approach.<sup>300</sup> It accepted that the United Kingdom could indeed lawfully

---

<sup>293</sup> Alternatively, the decision could be perceived as adding, to the already existing six grounds mentioned in article 5 ECHR (n 40), an extra ground for lawful detention; i.e. when the detention or internment is authorized by a UNSC resolution. See for a slightly different, but similar, suggestion: Messineo 2009 (n 33) 57-58.

<sup>294</sup> *Al-Jedda* (UKHL) (n 57) [39]. See similarly, Lord Carswell at *ibid.* [136], and Baroness Hale at *ibid.* [126].

<sup>295</sup> ECHR (n 40) article 5 (4).

<sup>296</sup> See *Al-Jedda* (UKHL) (n 57) [46].

<sup>297</sup> See Baroness Hale at *ibid.* [129]. See also *ibid.* [126].

<sup>298</sup> See also *ibid.* [126], and see also *Al-Jedda* (UK appeal) (n 58) [80].

<sup>299</sup> See *Al-Jedda* (UKHL) *ibid.* [129].

<sup>300</sup> See in this respect also Messineo who concluded that 'were it not for the repeated affirmation that the appellant's claim had to be dismissed, one could even have wondered if the Lords actually thought his internment was lawful.' Messineo 2009 (n 33) 51.

intern Mr Al-Jedda on the basis of the UNSC resolution concerned. Yet, informed by the importance of maintaining, as far as possible, the individual's enjoyment of his human rights, it also clearly demarcated the consequences of this finding. Moreover, its decision suggests that domestic courts can and should review the necessity of the domestic measures giving effect to UNSC resolutions. Such judicial review ensures that the protection of affected individuals' human rights is not fully surrendered to a state executive's discretion when implementing UNSC resolutions. In addition, the fact that the House of Lords engaged in a review at least gave it the opportunity to circumscribe narrowly the extent to which the individual's human rights were set aside by the implementation of a UNSC resolution.

#### **4.4.2.2. Subsequent Interpretations of *Al-Jedda* (House of Lords)**

Subsequently, Mr Al-Jedda sought damages before the UK courts for unlawful imprisonment under Iraqi law.<sup>301</sup> In its decision on this claim the Court of Appeal recognized the House of Lords' nuanced approach. It found the House of Lords not to have considered Mr Al-Jedda's rights under the ECHR to have been completely displaced.<sup>302</sup> Yet the Court also acknowledged that the House of Lords did not consider the exact scope of the authorisation given by the UNSC, and what remained of his Convention rights.<sup>303</sup> The Court of Appeal itself also refrained from directly addressing that issue. It was concerned only with the application of Iraqi law, and did not have to rule directly on the international norm conflict.<sup>304</sup> Accordingly, it did not have to assess 'the residual protection' granted by the ECHR.<sup>305</sup>

---

<sup>301</sup> *Al-Jedda v Secretary of The State for Defence* [2010] EWCA Civ 758.

<sup>302</sup> *Ibid.* [17].

<sup>303</sup> *Ibid.*

<sup>304</sup> The majority of the Court found no infringement of Iraqi law. *Ibid.* [126], [163], [182], [227], see also [82].

<sup>305</sup> *Ibid.* [17].

Nonetheless, Justice Elias appears to have been concerned with the scope of the obligation under the UNSC resolution.<sup>306</sup> He did not see how an opportunity for judicial review would endanger Iraq's security when the individual concerned would be safely locked away.<sup>307</sup> Hence he assessed the possibility for a *habeas corpus* review within the requirements posed by the UNSC resolution. Moreover, he regarded the Court as competent, in response to the plea of act of state, to review whether the detention was proportionate to the risks at stake, and to guarantee elementary principles of fairness in the detention process.<sup>308</sup> Accordingly, Justice Elias acknowledged the executive's power to detain, but emphasised the judiciary's power to engage in a review of such detention.<sup>309</sup>

In the totally different situation of the *A, K, M, Q and G* case, a Court of Appeal also found the power to engage in a judicial review of measures taken by the executive following an obligation created by the UNSC.<sup>310</sup> That case concerned, among others, an individual targeted by the 1267 sanctions regime. The Court relied on the House of Lords' decision in the *Al-Jedda* case to argue that it could engage in a merits-based review of the measures taken against the applicant.<sup>311</sup> It inferred, from considerations by Lord Bingham<sup>312</sup> and Lord Carswell,<sup>313</sup> that the UNSC resolution at issue must have left them a scope for such review as well.<sup>314</sup> It came to this finding despite the fact that the UNSC resolutions constituting the targeted sanctions regime do not leave states any scope of discretion in relation to the implementation of the sanction measures.

---

<sup>306</sup> Despite an earlier negation thereof by Lady Justice Arden. *Ibid.*

<sup>307</sup> *Ibid.* [182].

<sup>308</sup> *Ibid.* [218]. In contrast, Lady Justice Arden did find the defence of act of state to apply, because of the importance of states cooperating with the UNSC. *Ibid.* [108].

<sup>309</sup> *Ibid.* [218].

<sup>310</sup> *A, K, M, Q, & G* (appeal) (n 287).

<sup>311</sup> *Ibid.* [118].

<sup>312</sup> It quoted Lord Bingham saying that in addition to maintaining international peace, the promotion of respect for human rights is also a fundamental purpose of the UN. *Ibid.* [116], see also *A, K, M, Q, & G* (first instance) (n 217) [33]. The courts refer to *Al-Jedda* (UKHL) (n 57) [37].

<sup>313</sup> Lord Carswell emphasized that the power to detain had to be exercised 'in such a way as to minimise the infringements of detainees' rights'. *A, K, M, Q, & G* (appeal) (n 287) [117], quoting *Al-Jedda* (UKHL) *ibid.* [136].

<sup>314</sup> *A, K, M, Q, & G* (appeal) (n 287) [118].

Hence, similar to the House of Lords, the Court of Appeal narrowly demarcated the obligation under the UNSC resolution due to the importance of maintaining, as far as possible, the individual's enjoyment of his human rights. As a result, it found itself competent to consider, as far as it could, 'what the basis of the listing was.'<sup>315</sup> In the present case a review was possible, the Court held, since the United Kingdom knew most or all of the facts which led to the individual's designation.<sup>316</sup> Such a review may involve, as the Court suggested, the use of a special advocate.<sup>317</sup>

The *A, K, M, Q and G* case was, eventually, joined in appeal with the very similar *HAY* case before the then newly established Supreme Court.<sup>318</sup> At the moment of that court's decision the *Al-Jedda* case was still pending before the ECtHR. However, in the meantime, the Court of Justice had issued its judgment in the *Kadi I* case.<sup>319</sup> That court had decided that international obligations – even those under the UN Charter – could not prejudice the constitutional principle that all EU acts must respect fundamental rights.<sup>320</sup> Yet it also plainly rejected the General Court's finding that it could engage in a (indirect) review of UNSC resolutions against *ius cogens*.<sup>321</sup> Instead, the Court of Justice confirmed the primacy of UNSC resolutions in international law.<sup>322</sup> However, since it separated the international from the EU legal order, it could simply engage in a review of the implementation of the sanctions against the fundamental rights guaranteed under the general principles of EU law.<sup>323</sup> Accordingly, the Court of Justice did

---

<sup>315</sup> *Ibid.* [119].

<sup>316</sup> *Ibid.* [120].

<sup>317</sup> *Ibid.* [120]. The use of special advocates will be discussed in chapter 8.3.1.

<sup>318</sup> *HAY v HM Treasury and Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1677 (Admin); ILDC 1367 (UK 2009). This case went directly from the High Court to the Supreme Court through a leapfrog procedure.

<sup>319</sup> *Kadi I* (appeal) (n 214).

<sup>320</sup> *Ibid.* [285].

<sup>321</sup> *Ibid.* [287].

<sup>322</sup> *Ibid.* [288].

<sup>323</sup> *Ibid.* [326].

not review the implementation of the sanctions directly against international human rights law.<sup>324</sup>

Still, one of the applicants in the *Ahmed* case argued that the Supreme Court should, in light of the Court of Justice's decision, reconsider the balance drawn between the conflicting international norms by the House of Lords in the *Al-Jedda* case.<sup>325</sup> The Supreme Court concluded, however, that it could not follow the Court of Justice because the position of the EU is different from that of the UK.<sup>326</sup> The EU is not a member of the UN. Hence the UN Charter does not bind the EU and, therefore, the Court of Justice was not faced with the applicability of article 103 of the UN Charter.<sup>327</sup> As a consequence, the Court of Justice could conveniently separate the obligations under the UN Charter from those stemming from the fundamental rights guaranteed in the EU legal order, and maintain that the latter must be observed. Remarkably, while the Supreme Court distinguished its position from that of the Court of Justice, it eventually took the same dualist approach.<sup>328</sup> It similarly decided the case by separating the domestic implementation from the underlying UNSC resolution, and thereby excluding the applicability of article 103 of the UN Charter.<sup>329</sup>

On the international norm conflict, the Supreme Court did not think it open to itself to predict what the ECtHR would decide in the pending *Al-Jedda* case.<sup>330</sup> Accordingly, it found that it had to take guidance from the decision by the House of Lords.<sup>331</sup> Yet, in contrast to the Court of Appeal's earlier nuanced

---

<sup>324</sup> See chapter 6.3.2.

<sup>325</sup> The applicant did not seem to suggest that *Kadi I* (appeal) (n 214) should, through the workings of EU law, have a direct effect in the national legal order. Rather, he seemed to argue that the ECtHR, where the *Al-Jedda* case was pending at that moment, might be influenced by Court of Justice's decision in *Kadi I*, and might therefore not vest UNSC resolutions with all-prevailing force. *Ahmed* (n 16) [66] and [105]-[106].

<sup>326</sup> *Ahmed* *ibid.* [71] See also Lord Phillips *ibid.* [104], and Lord Brown *ibid.* [203].

<sup>327</sup> *Ibid.* [71].

<sup>328</sup> *Ibid.* [75]. A hint at this similarity was also given by Lord Mance *ibid.* [244].

<sup>329</sup> This element of the decision will be discussed further in chapter 6.4.1.

<sup>330</sup> *Ahmed* (n 16) [74].

<sup>331</sup> *Ibid.* [71], [74].

understanding of that decision expressed in the *A, K, M, Q and G* case, the Supreme Court interpreted the *Al-Jedda* case rather narrowly. It only focussed on the part of the ruling in which the House of Lords held that there are no exceptions to the rule laid down in article 103 of the UN Charter.<sup>332</sup> Hence the Supreme Court merely concluded that obligations under the UN Charter prevail over obligations under all other international agreements, including those under the ECHR.<sup>333</sup>

Therefore the Supreme Court's finding lacked the subtlety of the House of Lords' more nuanced approach,<sup>334</sup> which, at least, recognized the importance of securing, as far as possible, the individuals' enjoyment of international human rights. Lord Bingham's important restriction pronounced in the *Al-Jedda* case – that the United Kingdom must make sure that the individual's rights under the Convention are not infringed to any greater extent than necessary<sup>335</sup> – was mentioned twice merely in passing.<sup>336</sup> Moreover, Lord Brown explicitly rejected the Court of Appeal's suggestion in the *A, K, M, Q and G* case that it would be possible to achieve a merits-based review within the scope of the resolution.<sup>337</sup>

There were, of course, important differences between the two cases. In assessing the factual circumstances leading to the internment of Mr Al-Jedda, the UK authorities had a larger discretion than in executing the targeted sanctions. If Mr Al-Jedda was considered a threat to the security of Iraq they had an obligation to arrest him, but whether he was such a threat they had to determine themselves. In contrast, targeted sanctions are directly imposed upon individuals designated by the UNSC Sanctions Committee, comprised of the fifteen members of the UNSC. Still, in the *A, K, M, Q and G* case it was the United Kingdom itself that suggested the appellant's name for listing. Hence also in this regard the UK's

---

<sup>332</sup> Ibid. [74].

<sup>333</sup> Ibid. See similarly, Lord Rodger, with whom Baroness Hale agreed, at *ibid.* [175].

<sup>334</sup> See also Milanovic 2009 (n 5) 82-83.

<sup>335</sup> *Al-Jedda* (UKHL) (n 57) [39].

<sup>336</sup> *Ahmed* (n 16) [72] and [238].

<sup>337</sup> *Ibid.* [203].

domestic authorities had made an assessment of the facts, on the basis of which the measures were eventually applied.

The Supreme Court did not seriously consider whether the targeted individual's human rights, even in the situation where the United Kingdom must have known the basis for the listing, were not restricted to any greater extent than was necessary under the UNSC resolution. Accordingly, the Supreme Court accepted fully the precedence of the domestic measures implementing the relevant UNSC resolutions over international human rights law, without imposing any clear delimitation. Eventually, this did not save the sanctions' domestic implementation from annulment. The Court found it to be *ultra vires* a domestic prescription. This will be discussed further in chapter 6.4.1. Hence the Supreme Court did not regard the precedence of UNSC resolutions to permeate the domestic legal order.

What appears from the present discussion is that these UK courts generally accepted the precedence in international law of obligations created by the UNSC over obligations under the ECHR. Still, the House of Lords in the *Al-Jedda* case maintained an opportunity for judicially protecting those elements of individuals' human rights not affected by a UNSC resolution. Other courts, in different circumstances, appeared willing to follow such an approach. However, the Supreme Court in the *Ahmed* case did not investigate any such possibility in relation to the implementation of targeted sanctions.

#### **4.4.2.3. Other Domestic Courts' Perspectives on the International Norm Conflict**

Dutch courts in the *Mothers of Srebrenica* case also had to deal with the relationship between an obligation under the UN Charter and an obligation under international human rights law. The case concerned a complaint brought by several individuals and a foundation against the UN regarding that organization's failure to prevent the genocide committed in Srebrenica. The issue before the courts was whether the UN has absolute immunity, on the basis of an obligation

under the UN Charter,<sup>338</sup> or whether such immunity has to be balanced against individuals' right of access to court.

The Court of Appeal determined that article 103 of the UN Charter did not preclude it from reviewing whether the UN's immunity before Dutch courts was in accordance with the international human right of access to court.<sup>339</sup> Moreover, it considered it unlikely that article 103 of the UN Charter intends to prejudice enforcement of such human rights.<sup>340</sup> This presumption indicates that the Court did not readily accept that obligations created by UNSC resolutions prevail over obligations under international human rights law. Moreover, it did not leave open the possibility that the UNSC would be able, when it wishes to do so, to take decisions in contravention of international human rights law, like the ECtHR did in the *Al-Jedda* case.<sup>341</sup>

Instead, the Court of Appeal engaged in a marginal review by applying a reasonable alternative means test.<sup>342</sup> This test is part of assessing whether the limitations placed on an individual's human right of access to court due to an IO's immunity are justified.<sup>343</sup> On appeal, the Dutch Supreme Court totally rejected the possibility of engaging in such a review.<sup>344</sup> The Supreme Court considered that, since the ECtHR has not pronounced on the relationship between the right of access to court guaranteed under the ECHR and article 103 of the UN Charter, it cannot be assumed that that court would apply a reasonable alternative means test to the UN, when states have acted pursuant to a UNSC resolution under Chapter VII.<sup>345</sup> To confirm the UN's special position in the international legal order, the Supreme Court referred to the ECtHR's decision in

---

<sup>338</sup> UN Charter (n 4) article 105 (1).

<sup>339</sup> *Mothers of Srebrenica* (appeal) (n 15) [5.5]. See similarly *Iranian Nationals* (appeal) (n 228) [5.5]. See also chapter 6.3.1.

<sup>340</sup> *Mothers of Srebrenica* *ibid.*

<sup>341</sup> See *supra* subsection 4.4.1, and chapter 5.4.2.

<sup>342</sup> *Mothers of Srebrenica* (appeal) (n 15) [5.6]-[5.12].

<sup>343</sup> See chapter 3.6.2 and also chapter 7.3.

<sup>344</sup> *Mothers of Srebrenica* (Supreme Court) (n 235).

<sup>345</sup> *Ibid.* [4.3.3].

the *Behrami* case.<sup>346</sup> Therefore the Supreme Court found the UN's immunity to be absolute.<sup>347</sup> It held that UN member states are under an obligation to uphold the UN's immunity. This obligation is laid down in the UN Charter.<sup>348</sup> Therefore, according to the Court, it prevails pursuant to article 103 of the UN Charter over all obligations states may have under any other international agreement.<sup>349</sup> Hence the Dutch Supreme Court decided the case on the basis of an argument pertaining to the hierarchy of norms in international law, which it saw as confirmed by the importance of the aims pursued by the UNSC.

## 4.5. Conclusion

The present chapter has explored the challenges for judicial protection of international human rights resulting from the working and influence of article 103 of the UN Charter, and the importance attached to the objectives the UNSC seeks to pursue. The primary challenge to such protection emanates from courts not engaging in a judicial review, due to a lack of competence. The ECtHR, for example, considered the complaints in the *Behrami* case to fall outside its jurisdiction after having attributed the conduct complained of to the UN. It did this on a rather controversial basis, which raises the suspicion that it sought to dispose of the case arguably in order to avoid a ruling on the underlying norm conflict. A consequence of that approach, however, is that the impugned conduct passed without any judicial assessment. Therewith, in practice, it prevailed over the enforcement of the adversely affected individuals' human rights.

---

<sup>346</sup> Ibid. [4.3.5]. See discussion in *supra* subsection 4.3.2.

<sup>347</sup> Ibid. [4.3.6].

<sup>348</sup> UN Charter (n 4) article 105 (1). This article holds: 'The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.'

<sup>349</sup> *Mothers of Srebrenica* (Supreme Court) (n 235) [4.3.6]. In addition, the Court considered that, similar to the immunity of states, the UN's immunity does not depend on the status of the norm allegedly violated. Ibid [4.3.14]. In that regard it referred to *Al-Adsani* (n 235) [61] and the ICJ's decision in *Jurisdictional Immunities* (n 233).

A similar effect followed from some domestic courts placing a limitation on their jurisdiction to review particular domestic implementations of obligations created by the UNSC. These courts maintained the connection between the domestic implementations and the underlying UNSC resolutions, and found the operation of article 103 of the UN Charter to extend over domestic law as well. This was despite the fact that that provision is concerned with the precedence of obligations under the UN Charter over conflicting obligations stemming from *international* agreements only. The courts considered the implementations to take precedence over their competence to fully review individuals' complaints, even though the exercise of their jurisdiction is based on domestic regulations. Herewith, they placed a limitation on the individuals' access to court. This appears to be in conflict with states' obligations under international human rights law, especially since no alternative remedy is available. Accordingly, in effect, the obligations under the UN Charter outweighed judicial protection of the adversely affected individuals' human rights.

Some of these courts, which had not assumed jurisdiction to review the lawfulness of domestic implementations of targeted sanctions, regarded themselves as competent to conduct a review against norms with the status of *ius cogens*.<sup>350</sup> Hence they considered the importance of the interest protected by this special category of norms to outweigh the reasons for their initial refusal to engage in a review. Thereby they established a connection between the importance of the substance of the norm allegedly infringed and the lawfulness of limitations on judicial protection. Due to the lack of discretion left by the UNSC resolutions imposing targeted sanctions, these courts indirectly reviewed the lawfulness of these resolutions in regard to norms of *ius cogens*. Accordingly, they considered obligations under UNSC resolutions not to prevail

---

<sup>350</sup> *Kadi I* (first instance) (n 18) [226]; *Nada* (CH) (n 18) [7]; and *M v HM Treasury* (UK, first instance) (n 217) [71].

over an individual's right of access to court in respect of alleged violations of norms of *ius cogens*.<sup>351</sup>

However, even if a court does not accept that its competence to engage in a review is outweighed by an obligation under the UN Charter, it could still conclude that the obligation under the UN Charter prevails over international human rights law. In the seminal *Al-Jedda* case, for example, the House of Lords found that an obligation created by the UNSC could 'qualify or displace' an individual's human right as far as that right was directly in conflict with what the UNSC required. The Court took a nuanced approach in which it confirmed the importance of the imperative objectives of the UNSC, but also found it necessary to emphasise that obligations under UNSC resolutions cannot override individuals' human rights to any extent further than necessary. Moreover, it considered it for the courts to review the scope of an obligation created by the UNSC, and in that review to secure the maintenance of the individual's residual human rights not affected by the resolution. Accordingly, on the one hand, the Court seemed to regard the imperative objectives the UNSC seeks to achieve of overriding importance. On the other hand, however, it also clearly delineated the prevailing effect of obligations under UNSC resolutions by reference to the importance of the (seemingly) contrary concern of guaranteeing individuals' human rights. Several other UK courts have recognized the House of Lords' nuanced perspective. However, the UK Supreme Court interpreted this balanced approach rather cursorily to mean simply that obligations under the UN Charter prevail over obligations stemming from international human rights law.

In addition, the Supreme Court considered that only the ECtHR could authoritatively expound on whether, and to what extent, rights under the ECHR could be held to prevail over obligations under the UN Charter.<sup>352</sup> It found it for that court to 'provide the authoritative guidance that is needed so that all the

---

<sup>351</sup> *Kadi I* *ibid.*; *Nada* *ibid.*

<sup>352</sup> *Ahmed* (n 16) [74].

contracting states can adopt a uniform position'.<sup>353</sup> At the moment, however, the ECtHR has not yet decided unequivocally on how a conflict between the international norms concerned should be solved. From the ECtHR's decision in the *Al-Jedda* case it could be inferred that it was ready to accept the precedence of obligations created by the UNSC, if it were to use clear and explicit language to that effect. However, when in the subsequent *Nada* case it indeed found the UNSC to have used such clear and explicit language, it did not consider what the consequence thereof would be. It merely reviewed whether the respondent state did all it could have done within the confines of the relevant resolution to alleviate as far as possible the interferences with the applicant's human rights. Hence while it might be inferred from this decision that it indeed accepted the applicant's human rights to be set aside in so far as required by the UNSC resolution, it did not explicitly consider it so. Understandably, it would be difficult for an institution created to guarantee the protection of individuals' human rights to admit the precedence of decisions of the UNSC over these rights. Probably for similar reasons, the UN human rights treaty bodies also have not yet provided a clear ruling on this matter.

In conclusion, the approaches discussed in the present chapter largely result in a lack of judicial protection of international human rights in the cases concerned. Most of the courts that maintained a connection between a domestic implementation of UNSC action and article 103 of the UN Charter either placed a limitation on their jurisdiction, or ruled that the implementation overrode the affected individual's human rights. Despite some indications to the contrary, most courts that directly decided on the international norm conflict essentially accepted the precedence of UNSC resolutions over international human rights law, possibly with the exception of *ius cogens*. The latter exception probably will not be of much assistance to the individuals affected by decisions of the UNSC, since most human rights interfered with do not belong to that special category of norms.

---

<sup>353</sup> Ibid.

The present chapter has expounded on the challenges for judicial protection of international human rights. Subsequent chapters will evidence alternative approaches courts may take which could result in opportunities for such judicial protection. By these approaches courts may guarantee the protection of individuals' international human rights or equivalent norms in domestic law. These opportunities could follow from courts entertaining a narrow interpretation of the obligation created by the UNSC. This will be discussed in Chapter 5, which will also concern the consequences of courts entertaining a broad interpretation. In contrast to providing an opportunity for judicial protection, such an interpretation instead contributes to the challenges described in the present chapter. Accordingly, in the analytical framework of the research, Chapter 5 takes a somewhat intermediate position in the division between challenges and opportunities for judicial protection. After that, Chapter 6 will examine the opportunities following from a dualist approach. This approach may result in guaranteeing adversely affected individuals protection of rights that are of a similar scope and content as the norms that international human rights law intends to secure.