



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.

5. Broad and Narrow Interpretations

5.1. Introduction

The present chapter deals with courts' approaches towards interpretation of the obligations created by the UNSC. Inherently, the need for interpretation leaves courts certain latitude for establishing the meaning of such obligations. When employing this latitude, courts may arrive either at a broad or a narrow understanding of what is required by the UNSC. A broad construction may be informed by a court's emphasis on the interest of maintaining international peace and security, and a narrow construction by an emphasis on the interest of upholding as far as possible individuals' human rights. While the former is more likely to confirm and even add to the challenges posed by the UNSC to judicial protection of international human rights, the latter may neutralize that challenge, and provide an opportunity for judicial protection. Therefore this chapter takes a somewhat intermediate position in the distinction between judicial protection's challenges, discussed in the previous chapter, and opportunities for judicial protection, which will be discussed (further) in subsequent chapters.

The focus of this chapter is not so much on the hermeneutic process of interpretation in general. Every determination of the meaning of any text essentially includes an act of interpretation. Hence courts are engaged in interpretation throughout the whole decision-making process. The focus is rather on interpretation as a (implicit or explicit) preliminary stage in the exercise of judicial review. It concerns establishing the meaning of a measure required by a UNSC resolution, as to its content and scope. This step unavoidably precedes a court's assessment of the lawfulness of the application of that measure to a particular situation, if such assessment is then still necessary.

The chapter will start, in section 5.2, by illustrating the inevitable latitude that courts have in interpreting obligations created by the UNSC. This will be underpinned by a brief exploration of the methods of interpretation in international law. Thereafter, the chapter will provide an analysis of relevant case law. Section 5.3 will deal with cases in which courts have emphasised the effectiveness of the implementation of a UNSC resolution. Such an approach results in a broad construction, and may articulate a potentially underlying conflict of norms, instead of avoiding it. This may have adverse consequences for the individuals concerned. After that, section 5.4 will focus on cases in which courts have entertained interpretations that have resulted in an avoidance of a conflict of norms. This created the opportunity for them to provide judicial protection, and even a measure of relief for the affected individuals. Finally, section 5.5 will draw conclusions from the present chapter's discussion.

5.2. Interpretation of UNSC Resolutions by Domestic and Regional Courts

In the decentralized international legal system, states have the power of auto-interpretation of international law.¹ In principle, this power is equally present in relation to UNSC action.² States, as 'agents of execution', need to interpret UNSC resolutions before they can give effect to them in the domestic legal order.³ When implementing UNSC action, not only the executive but also domestic courts, as state organs, are fit to carry out this task of interpretation when engaging in a review of a domestic implementation's lawfulness.⁴

¹ A Tzanakopoulos *Disobeying the Security Council* (Oxford University Press Oxford 2011) 114.

² *Ibid.* 115, 117.

³ *Ibid.* 118. See also H Schermers and N Blokker *International Institutional Law* 5th ed. (Martinus Nijhoff Publishers Leiden 2011) [1352]; and 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, 798.

⁴ Tzanakopoulos *ibid.* See also Schermers and Blokker *ibid.* [1353].

It is ultimately for the judiciary to provide an interpretation of the relevant legal instruments when asked to decide on the circumstances of a specific situation.⁵ Since there is no universal judiciary competent to hear complaints of individuals, the specific situations – the complaints brought by affected individuals – end up before domestic and regional courts. Prior to deciding such cases, these courts need to determine what the applicable provisions mean before they can apply them to the particular circumstances of the case at hand. In relation to such a determination, courts enjoy a certain amount of latitude. This latitude is inherent in the use of language, since words are often subject to multiple meanings. Moreover, certain scope for interpretation is necessary to apply a UNSC resolution to specific circumstances, since the drafters of that resolution could never have foreseen all situations in which it would be engaged.

First, subsection 5.2.1 will illustrate the possibilities with which the need for interpretation provides to courts. After that, subsection 5.2.2 will explain the methods of interpretation. These methods confirm and demarcate the courts' latitude for interpretation. This subsection will also contend that, while interpretation could be perceived of as a neutral exercise of textual exegesis, it often involves a matter of free will.⁶ Courts can, to a certain extent, within the limits set by the methods of interpretation, determine the amount of latitude for interpretation, and steer towards their preferred result. However, the UNSC Sanctions Committees also have to interpret the relevant provisions in UNSC resolutions when carrying out their task.⁷ Moreover, occasionally, state executives seek an interpretation by the relevant Sanctions Committee before implementing certain sanctions measures.⁸ Subsection 5.2.3 will explore the extent to which courts regard their room for interpretation to be limited by the

⁵ See T Allan *Constitutional Justice* (Oxford University Press Oxford 2001) 13-14.

⁶ See H Kelsen *Introduction to the Problems of Legal Theory (A Translation of the First Edition of the Reine Rechtslehre)* (Oxford University Press Oxford 1992) 82.

⁷ M Wood 'The Interpretation of Security Council Resolutions' (1998) 2 Max Planck Yearbook of United Nations Law 73, 84.

⁸ M Scharf and J Dorosin 'Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee' (1993) 19 Brooklyn Journal of International Law 771.

interpretations given by the UNSC Sanctions Committees. In other words, do courts feel bound by such interpretations when construing the meaning of a UNSC resolution?

5.2.1. Courts' Latitude Following from the Need for Interpretation

When deciding upon a case, courts are provided with certain latitude to construe the meaning of an obligation created by the UNSC. The extent of the latitude, in principle, depends on the kind of language used in the resolution. Specific terminology will result in less room for interpretation than open-ended and undefined words and phrases. The use of the latter may be done with the intention of giving states a certain scope for the implementation of the resolution, but equally (or even more often) it has merely been necessary to reach agreement within the highly politicised UNSC.⁹

Hence courts have to establish what they consider to be the scope and content of the obligations created by the UNSC. When a court entertains a broad construction, it accepts that the implementation of a resolution affects a larger group of individuals, or causes a deeper infringement of affected individuals' human rights than under a narrow construction. Such an approach will further articulate a potentially underlying conflict of norms, instead of seeking to harmonize the diverging norms involved. A broad construction of the obligations created by the UNSC could be the result of a court attributing, implicitly or explicitly, special importance to the need for ensuring the effective operation of the UNSC, which it may regard as necessary for the maintenance of international peace and security.

The latitude inherent in interpretation equally provides courts with an opportunity to opt for a narrow interpretation. A court may, for example, establish that a particular individual was not meant to be within the scope of the impugned measures, or that the measures taken by the national authorities were

⁹ Scharf and Dorosin *ibid.* 812. See also Wood, who notes that '[i]t is, of course, only possible to use clear language when the policy is clear.' Wood 1998 (n 7) 82.

not intended by the UNSC. From the perspective of an affected individual seeking judicial protection of his human rights, such an approach creates an opportunity thereto, and may even constitute an effective means to obtain relief. A potential conflict between a state's obligation under a UNSC resolution and an obligation stemming from international human rights law is avoided. As a result, the court does not have to decide on such conflict and creates an opportunity to secure judicial protection of human rights, since it regards there to be no longer a contrary obligation upon the state under the UN Charter.

The latitude courts have in interpreting a UNSC resolution needs to be distinguished from the notion of scope of discretion, as was discussed in chapter 2.2.2. The research uses scope of discretion as a tool to assess which resolutions are relevant for the research. The research deals only with those aspects of obligations created by the UNSC that leave states no scope of discretion as regards their implementation. When a UNSC resolution leaves states a large scope of discretion, the connection between the adversely affected individual and the UNSC decision would be more tenuous. Any impugned action would then not be required by the UNSC, but would be taken on the initiative of the state itself. There would be no international obligation upon states under the UN Charter for the impugned action, and thus also the prevailing effect pursuant to article 103 of the UN Charter would not be engaged. Hence, there would be no link between the potential infringements of individuals' human rights and a decision by the UNSC. Therefore, provisions in UNSC resolutions that leave states a large scope of discretion are less relevant for the research.

It should be noted, however, that the determination of whether a resolution leaves states a scope of discretion for the implementation is also subject to interpretation. As was mentioned earlier, the need for interpretation can never be fully excluded. Indeed, courts have been debating whether a particular provision of a resolution did or did not leave a scope of discretion. The General Court, for

example, did not agree with the Court of Justice's finding in the *Kadi I* case that targeted sanctions left states such scope as regards their implementation.¹⁰

Yet whatever interpretation a court entertains, it cannot unilaterally release the state from its international obligations by means of interpretation.¹¹ Whether a court's interpretation is correct from the perspective of international law is a different matter. Its interpretation could very well constitute a violation of any of the international obligations at issue. The present chapter is not concerned with this aspect of interpretation of international obligations. Its focus is on the effect of different approaches towards interpretation for the domestic application of UNSC measures to certain individuals. In a similar vein, the effect of a particular interpretation remains within the that legal order. For example, an individual who through a particular interpretation is released from the domestic implementation of UNSC targeted sanctions will remain on the UNSC blacklist. Hence courts could provide such individuals, at most, with effective, but limited, relief.

In addition to interpreting the meaning of the relevant provisions, courts have to assess the facts of a case as well, before being able to give a judgment. They need to determine which facts are judicially relevant, and how these facts should be qualified from a legal perspective. Similar to the exercise of interpretation, this provides courts with some latitude in applying the requirements stemming from a UNSC resolution to a particular instance. Essentially, qualification of the facts could be seen as a mirror image of interpretation. While interpretation concerns the construction of the general meaning of a provision, qualification of the facts concerns the determination of the judicial relevance of particular circumstances under that provision. The difference with interpretation is that that

¹⁰ See discussion in chapter 2.3.1. Case T-85/09 *Kadi v European Commission (Kadi II)* [2010] ECR II-05177 [116]; and Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)* [2008] ECR I-06351 [298].

¹¹ Tzanakopoulos 2011 (n 1) 116.

assessment engages the meaning of the underlying UNSC resolution. Therefore, it is that exercise that is the most relevant for the research. Still, it also needs to be acknowledged that qualification of the facts provides courts with certain latitude with which they might be able to release the affected individual from the application of the implementation of a UNSC resolution. Moreover, in practice, both exercises could be difficult to distinguish. The latitude employed by courts in some of the presently discussed cases could be analysed from the perspective of a qualification of the facts as well.

5.2.2. Methods of Interpretation of UNSC Resolutions

Methods of interpretation guide courts in construing the meaning of a text. By these means, courts can arrive at a range of different interpretations. At the same time, these methods also demarcate the boundaries of what could be the outcome of their interpretation. By limiting the ways in which a text can be construed, they function as a natural limitation to what could be read in a text. However, it cannot simply be said that courts are bound by certain methods of interpretation.¹² These methods are means for assisting the interpretative process. They do not constitute a set of rules.¹³ The present subsection will discuss different methods for interpreting UNSC resolutions. Its primary aim is to examine the opportunities and the scope left by the different methods for courts to insert their own preferences in the construction of a resolution's meaning.

¹² In practice, many courts have a tendency to apply their domestic concepts and methods when interpreting international treaties. See C Schreuer 'The Interpretation of Treaties by Domestic Courts' (1971) 45 *British Yearbook of International Law* 255, 264.

¹³ J Kammerhofer 'Book Review: Alexander Orakhelashvili. *The Interpretation of Acts and Rules in Public International Law*' (2009) 20 *European Journal of International Law* 1282, 1284. Also, within the ILC, during the drafting the Vienna Convention on the Law of Treaties there was discussion as to whether there actually existed general rules of interpretation and what their normative character would be. ILC 'Report of the International Law Commission on the work of its Eighteenth Session' (4 May - 19 July 1966) UN Doc A/CN.4/191; *Yearbook of the International Law Commission 1966* vol II, 218. Moreover, it is not settled whether domestic courts, even when interpreting international treaties, should follow the general rule of interpretation laid down in the Vienna Convention. R Gardiner *Treaty Interpretation* (Oxford University Press Oxford 2008) 19, 126.

There are no international guidelines specifically tailored to the interpretation of UNSC resolutions. Nor are there many academic writings that could provide useful guidance in such interpretation.¹⁴ Some scholars argue that insight might be drawn from the ICJ's *Namibia* Advisory Opinion.¹⁵ That opinion, however, does not contain a general instruction on how resolutions should be interpreted. The ICJ merely considered whether a particular UNSC resolution had binding effect. Moreover, the only instruction that could be usefully employed in practice is that the Court held that regard must be had to the terms of the resolution.¹⁶ Hence any practical guidance on the interpretation of UNSC resolutions needs to be found elsewhere.

An analogy could best be made with the general rule on the interpretation of treaties as laid down in the Vienna Convention on the Law of Treaties (VCLT).¹⁷ This general rule states that the meaning of a treaty shall be construed in *good faith*, and in accordance with the *ordinary meaning to be given to its terms* in their *context* and in light of its *object and purpose*.¹⁸ Despite important differences between treaties and UNSC resolutions, it seems uncontroversial to

¹⁴ Wood 1998 (n 7) 74-76, see also A Orakhelashvili 'R (On the Application of Al-Jedda) (FC) v. Secretary of State for Defence [2007] UKHL 58' (2008) 102 *American Journal of International Law* 337, 342. Other articles dealing with the topic are: J Frowein 'Unilateral Interpretation of Security Council Resolutions - a Threat to Collective Security?' in V Götz, P Selmer and R Wolfrum (eds.) *Liber Amoricum Günther Jaenicke - zum 85. Geburtstag* (Springer Verlag Berlin 1999) 97- 112, and A Orakhelashvili 'The Acts of the Security Council: Meaning and Standards of Review' (2007) 11 *Max Planck Yearbook of United Nations Law* 143.

¹⁵ Wood *ibid.* 75. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council resolution 276 (1970)* [1971] ICJ Rep 16 [114].

¹⁶ The other elements are: the discussion leading to it; the Charter provisions invoked; and all circumstances that might assist in determining the legal consequences of the resolution. *Namibia* *ibid.* [114]. However, the UNSC does not usually keep a public record of resolutions' negotiating history. Wood *ibid.* 81. In addition, the UNSC does not often refer to specific articles in the UN Charter, apart from a more general referral to a particular chapter. Finally, the last 'all circumstances' element is rather broadly defined and, therewith, impracticable for guiding any interpretation.

¹⁷ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) article 31. See also *The Netherlands v A and Others* [2012] LJN: BX8351; ILDC 1959 (NL 2012) (*Iranian Nationals*) [3.7.2], and Peters 2012 (n 3) 791-854, 798-799.

¹⁸ VCLT *ibid.* article 31 (1).

use the elements arising from this general rule as a starting point for the interpretation of UNSC resolutions, with due attention to the latter's particularities.¹⁹

Therefore the present discussion will be guided by relevant elements from the VCLT.²⁰ What has to be noted, first, is that the VCLT attaches primary importance to the method of literal or textual interpretation. The ILC holds that interpretation is not an investigation *ab initio* into the intentions of the parties, but merely the elucidation of the meaning of the text.²¹ The text must be regarded as reflecting the intentions of the parties.²² At first sight, the emphasis on the literal meaning of a text seems to leave little scope for courts to employ the latitude left for interpretation as they deem fit. However, the language used in UNSC resolutions often remains ambiguous. In part this is due to the attempt to reach unanimity within the UNSC. In addition, these resolutions are usually drafted in a highly politicised context, and regularly under considerable time pressure.²³ It is difficult to unequivocally establish the ordinary meaning of inherently ambiguous terminology. Accordingly, in interpreting UNSC resolutions a literal interpretation does not always provide clear guidance in determining what the UNSC intended to express. Most often, the only intention was merely to reach and express agreement on a particular issue.

Moreover, a literal interpretation of the different language versions of a UNSC resolution could lead to different results.²⁴ While most drafts for UNSC

¹⁹ See Frowein 1999 (n 14) 99.

²⁰ The present section does not consider the role of the supplementary means of interpretation in article 32 VCLT (n 17). These supplementary means may also not be as useful in the interpretation of UNSC resolutions, since the preparatory works of UNSC resolutions and the circumstances of their conclusion are usually not publicly known. See also *supra* footnote 16.

²¹ ILC Report 1966 (n 13) 220.

²² *Ibid.*

²³ Wood 1998 (n 7) 82.

²⁴ See, for example, Case C-340/08 *M and Others v HM Treasury* [2010] ECR I-03913 [45]-[49].

resolutions will have begun in English only,²⁵ the eventual resolution will be enacted in the UN's six equally authentic language versions. The VCLT states that in a situation of a divergence of the authentic texts, the meaning which best reconciles the texts, having regard to the object and purpose, shall be adopted.²⁶ Hence additional methods may need to be employed in order to clarify the instrument's meaning.

Another method is interpretation of a provision in the context of the instrument. In respect of treaty interpretation, the context may be found in the preamble and annexes to the text of the treaty.²⁷ This seems to be equally applicable in regard to UNSC resolutions.²⁸ In addition, a particular resolution is often part of a sequence of resolutions on the same topic. Moreover, UNSC resolutions are not mere separate agreements between states, but decisions of an organ acting on the basis of a constituent treaty.²⁹ Therefore UNSC resolutions cannot be interpreted in isolation from other relevant resolutions and the UN Charter.

Two consecutive judicial decisions in the *Al-Jedda* case evidence how interpretation in the context of the UN Charter could lead to totally different results. In that case, the House of Lords first construed a broad understanding of the obligations created by a UNSC resolution in the context of the UN's

²⁵ Wood 1998 (n 7) 81. He adds that also 'the negotiations, including informal consultations of the whole, will have concentrated on the English language text.'

²⁶ VCLT (n 17) article 33 (4). Cf., ILC Report 1966 (n 13) 224-225.

²⁷ The second paragraph of article 31 VCLT (n 17) explicates further what is meant by the context for the purpose of interpretation of a treaty. The third paragraph of the article mentions other elements that shall be taken into account together with the context. This comprises: subsequent agreements; subsequent practice; and relevant rules of international law. Article 31 (2): 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.'

²⁸ The ECtHR, for example, referred to the relevant resolution's preamble when assessing its presumption of compliance: see *infra* subsection 5.4.2.

²⁹ See Wood 1998 (n 7) 85-86.

collective security mechanism.³⁰ Conversely, the ECtHR, when later deciding upon the same case, referred to the purposes and principles of the UN as laid down in the UN Charter to construe a narrow scope of the obligations created by the UNSC.³¹ These cases will be discussed extensively in subsequent sections.

The VCLT also mentions other contextual elements and ‘elements that shall be taken into account together with the context’.³² It is conceivable that courts include such contextual elements as ‘subsequent practice’ or ‘relevant rules of international law’ in the interpretation of a resolution.³³ With regard to the latter element, it is argued by some scholars that courts should interpret UNSC resolutions as to the effect that, if not stated otherwise, it was not the intention of the UNSC to deviate from relevant rules of international law, such as human rights norms.³⁴ This appears to be a powerful tool for creating an opportunity for judicial protection of international human rights.

An especially interesting method for the present research is interpretation in the light of an instrument’s object and purpose, which is a reflection of the method of teleological interpretation. Its effect is very much restricted in the VCLT by it being linked to the ordinary meaning of the terms in their context.³⁵ As was already mentioned, according to the ILC, in finding the parties’ intention a close link must be maintained with the text of the instrument, which is presumed to be the authentic expression of the intentions of the parties.³⁶ The fear was that a too liberal teleological method might result in a subjective and self-interested

³⁰ *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, ILDC 832 (UK 2007) (*Al-Jedda*) [30]-[34]. For a further discussion see *infra* subsection 5.3.

³¹ *Al-Jedda v The United Kingdom* [2011] ECHR 1092 [102]-[110]. See *infra* subsection 5.4.2.

³² VCLT (n 17) article 31 (3).

³³ *Ibid.* article 31 (3) (b), (c).

³⁴ J E Alvarez 'The Security Council's War on Terrorism: Problems and Policy Options' in E d Wet and A Nollkaemper (eds.) *Review of the Security Council by Member States* (Intersentia Antwerp 2003), 135. See also M Herdegen 'Interpretation in International Law' (2010) Max Planck Encyclopedia of Public International Law [31].

³⁵ Schreuer 1971 (n 12) 279.

³⁶ ILC Report 1966 (n 13) 220 [11].

approach.³⁷ Still, this method seems to leave substantial latitude for courts to insert their own preferences in the construction of a UNSC resolution's meaning.

The principle of effectiveness, which could be regarded as a sub-category of the teleological method,³⁸ especially appears to provide courts with significant scope in arriving at a particular interpretation. The ILC holds in respect of this principle that 'good faith' and 'object and purpose' demand that in the case of two possible interpretations, the one that enables the treaty to have appropriate effects should be adopted.³⁹ It is difficult, however, to make a neutral assessment of what exactly are the appropriate effects of a particular UNSC resolution. What makes a norm effective can be established only if it is clear what the norm is intended to achieve. The principle of effectiveness leads the interpreter into a vicious circle. He can assess what an effective application of a norm requires only if he knows what the norm means, but if that meaning is determined by what makes the norm effective then a norm's meaning is a norm's meaning.⁴⁰ What actually happens when the method of effective interpretation is used is that the interpreter smuggles the meaning in through the backdoor.⁴¹ In that way the result of the interpretation might be influenced by external values, such as the interpreter's own moral-political views. These provide the additional information by which the vicious circle is avoided.⁴²

³⁷ Schreuer 1971 (n 12) 279.

³⁸ See 'Effectiveness (*effet utile*)' in Herdegen 2010 (n 34) [30]. The principle of effectiveness is also an important interpretative tool for the ECtHR in its interpretation of the Convention. The Court distilled this principle from the Convention's object and purpose. R White and C Ovey *The European Convention on Human Rights* 5th edn (Oxford University Press Oxford 2010) 73.

³⁹ The ILC commentary makes clear that 'the maxim does not call for an "extensive" or "liberal" interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty.' ILC Report 1966 (n 13) 219 [6].

⁴⁰ J Kammerhofer 2009 (n 13) 1285. See similarly Schreuer in respect of the application of a teleological method in the interpretation of treaties. He holds: '[T]his method starts off with what can only be the result of the whole exercise.' Schreuer 1971 (n 12) 282.

⁴¹ Kammerhofer *ibid.*

⁴² *Ibid.*

Accordingly, the teleological method provides a means by which courts can insert their own value system into their decision. These values may reflect their own preferences on how in a specific case the conflicting interests of international peace and security and the protection of individuals' human rights ought to be balanced.⁴³ This then has an important impact on the interpretation and application of the international legal rules concerned. By approaching a conflict of norms from the perspective of achieving the aim of the impugned UNSC resolution instead of from the objective of the thereby potentially conflicting individual's human right, courts give preferential treatment to the interest underlying the former.

In this way the teleological interpretation (especially in its guise of the principle of effectiveness) may function as a vehicle for promoting the value of international peace and security. It could lead to a construction of the meaning of a UNSC resolution that is as broad as possible. Conversely, courts could equally consider, for example, that an adverse effect on an innocent third party could not have been the object or purpose of a certain UNSC resolution. Such an approach would lead to a narrow construction. Both diverging approaches, which follow from the same method of interpretation, will be evidenced in the analysis of case law in the subsequent sections.

The present discussion illustrates that the result of a certain interpretation does not inevitably follow from the words of a text.⁴⁴ Rather, most often it concerns *giving* meaning to a text.⁴⁵ In this sense, interpretation never leads to a single correct result, but always to different possible results.⁴⁶ This means that courts have certain latitude as to the determination of the meaning of a UNSC

⁴³ Cf., A Orakhelashvili *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press Oxford 2008) 180 et seqq.

⁴⁴ Harvard Law School 'Article 19. Interpretation of Treaties' (1935) 29, Supplement: Research in International Law American Journal of International Law 937, 946. See Gardiner 2008 (n 13) 26.

⁴⁵ Harvard Law School *ibid.* (original emphasis). See Gardiner *ibid.* 26.

⁴⁶ Kelsen 1992 (n 6) 81.

resolution and its domestic implementation. Hence, it is ‘a function of will’ to arrive at a particular interpretation of the meaning of a resolution leading to a certain scope of application of that resolution.⁴⁷ As a consequence, the ostensibly neutral exercise of mere interpretation might come down, in practice, to a value loaded choice between several ‘right’ options.⁴⁸ This gives a profile to courts’ decisions on interpretation that is relevant for the research’s analysis of how domestic and regional courts deal with (potential) conflicts of norms.

5.2.3. The Role of the Interpretations by the UNSC Sanctions Committees

The UNSC, as the body enacting the resolutions, is the sole institution able to provide an *authentic* interpretation of these resolutions.⁴⁹ Occasionally it issues such interpretations in the shape of a subsequent resolution.⁵⁰ Thus it is difficult to make a clear distinction between interpretation and amendment.⁵¹ Accordingly, for courts the normative relevance of authentic interpretations given by the UNSC is the same as that of the original resolution. In addition, the UNSC can establish institutions competent to give *authoritative* interpretations.⁵²

Usually Sanctions Committees are not explicitly granted such power in relation to their respective sanction regimes.⁵³ However, many states address questions on the interpretation of particular provisions of a sanction regime to the committee

⁴⁷ See *ibid.* 83.

⁴⁸ See *ibid.* 80.

⁴⁹ *Jaworzina (Poland v Czechoslovakia)* [1923] PCIJ Rep Series B No 8, 37. Other UN organs, such as the GA or the ICJ, may have to interpret UNSC resolutions in order to carry out their functions. These interpretations are not ‘authentic’ but may still be ‘highly persuasive’. Wood 1998 (n 7) 82 and 85. Cf., Orakhelashvili 2008 (n 43) 514.

⁵⁰ See for examples: Wood *ibid.* 83-84.

⁵¹ *Ibid.* 84; Orakhelashvili 2008 (n 43) 515.

⁵² Orakhelashvili *ibid.*

⁵³ For example, even the highly active Sanctions Committees on Iraq and Yugoslavia, which were addressed by states with many questions of interpretation, were not explicitly given authority to issue such interpretations. See P Conlon ‘Lessons From Iraq: The Functions of the Iraq Sanctions Committee as a Source of Sanctions implementation Authority and Practice’ (1995) 35 *Virginia Journal of International Law* 633, 636; and Scharf and Dorosin 1993 (n 8) 774.

concerned.⁵⁴ This subsection examines whether courts regard the latitude they have towards interpretation to be limited by an interpretation given by a Sanctions Committee.⁵⁵ In other words, do they feel bound to follow such interpretations?

From case law it appears that this question has to be answered in the negative. An illustration thereof can be found in the Dutch *Crna Gora* case.⁵⁶ Relevant for the present discussion is that the Dutch District Court's interpretation of the impugned sanctions regime deviated from the interpretation given by the relevant Sanctions Committee. The Court had to decide in an interim injunction procedure whether the unloaded cargo of a targeted ship had to be sanctioned by impoundment. The relevant Sanctions Committee had already, upon request of the Dutch government, answered in the affirmative.

However, the District Court considered the Sanctions Committee to have the power of recommendation only.⁵⁷ It determined that the unloaded cargo had to be regarded as neutral and distinct from the targeted ship.⁵⁸ Therefore it did not find any legal basis on which the coal could be kept to be impounded.⁵⁹ As a consequence, the Dutch government had to release the coal. The government acted in accordance with the Court's order. Still, it considered the Court's decision to be wrong and found it to constitute a breach of its international obligations.⁶⁰ After the decision it became clear that the Sanctions Committee had already, before the Court issued its judgment, changed its view, and also

⁵⁴ See Scharf and Dorosin *ibid.* 773. According to Conlon these states regard the Committees' responses to be binding. Conlon *ibid.* 653.

⁵⁵ Note that the present discussion does not concern Sanctions Committees' competence to designate individuals in the context of targeted sanctions. The latter is a task explicitly delegated by the UNSC to the relevant committees. The legal nature of these decisions was discussed in chapter 2.3.3.

⁵⁶ *Zeta Ocean Shipping v Intercor, and The Netherlands (Crna Gora III)* [1993] Schip en Schade (SES) 1993/113. This case will be discussed further in *infra* subsection 5.4.3.

⁵⁷ *Ibid.* [4.3].

⁵⁸ *Ibid.* [6.4].

⁵⁹ *Ibid.* [6.5].

⁶⁰ A Soons 'The Netherlands' in V Gowlland-Debbas (ed.) *National Implementation of United Nations Sanctions* (Martinus Nijhoff Publishers Leiden 2004) 341-380, 367.

established that the coal could be released. This position, however, was not communicated to the Dutch government, or to the Court, until after the judgment.⁶¹

Another rejection by a court of an allegedly obliging nature of Sanctions Committees' interpretations can be found in the Irish High Court's decision in the *Bosphorus* case.⁶² In that case, the executing state (Ireland) had to determine whether a particular aircraft, which was at Dublin airport for service maintenance, fell within the meaning of the economic sanctions imposed by the UNSC against the FRY.⁶³ The Irish authorities, upon a communication by the Sanctions Committee, determined that the aircraft fell within the meaning of the sanctions regime and decided to impound it. The High Court, however, felt that the unexplained conclusion of the Sanctions Committee was not of any value to it in the deciding upon the case.⁶⁴

Similarly, the Advocate General (AG), in a preliminary ruling in the same case before the Court of Justice, did not consider the Sanctions Committee's interpretations to be binding in that particular instance.⁶⁵ He considered only that due regard must be given to the opinion of the Committee and that its views must carry considerable weight.⁶⁶ However, it seemed to him questionable whether the Committee's opinion could be regarded as binding, since the relevant provisions of the resolutions did not provide for such effect.⁶⁷ Moreover, he found the opinion expressed by the Committee to be of little assistance because it contained little or no reasoning.⁶⁸ Accordingly, the opinions of the Sanctions

⁶¹ Ibid. 366.

⁶² *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Minister for Transport, Energy and Communications* [1994] 3 CMLR 464.

⁶³ UNSC Res 820 (17 April 1993) UN Doc S/Res/820 [24].

⁶⁴ *Bosphorus* (IRL, first instance) (n 62) [13].

⁶⁵ Case C-84/95 *Opinion of Advocate General Jacobs on the Bosphorus case* [1996] ECR I-3956.

⁶⁶ Ibid. [46].

⁶⁷ Ibid.

⁶⁸ Ibid.

Committee could be considered as authoritative, but are held to be binding only if provided by the relevant UNSC resolution.⁶⁹

Occasionally Sanctions Committees have been explicitly granted the power of approval of exemptions from sanction measures.⁷⁰ But even then courts have not always accepted that power. The UK authorities, for example, referred to such power in the *Othman* case before the High Court, concerning the implementation of targeted sanctions.⁷¹ They argued that the 1267 Sanctions Committee had the exclusive power to take decisions on exemptions to the implementation of the targeted sanctions.⁷² This was also what the European implementation of that sanctions regime held.⁷³ The Court, however, denied this special role when it found it ‘quite absurd to think that that sort of matter would have to be determined by the United Nations through the Taliban Sanctions Committee.’⁷⁴

An instance in which a court did find a Sanctions Committee’s determination, at least, legally relevant was the *Centro-Com* case before the UK Court of Justice.⁷⁵ The case concerned the implementation of general economic sanctions against the FRY.⁷⁶ Under this sanctions regime states had to prevent the sale from their territories of any products to any person in the FRY, except for products intended

⁶⁹ See Wood 1998 (n 7) 84.

⁷⁰ See chapter 2.3.3.

⁷¹ *The Queen (on the Application of Othman) v Secretary of State for Work and Pensions* [2001] EWHC 1022 (Admin) 2001 WL 1422967.

⁷² *Ibid.* [47].

⁷³ Council Regulation No 467/2001, as amended by Regulation No 2062/2001 [2.3]. *Ibid.* [29].

⁷⁴ *Othman* *ibid.* [61]. The High Court did not mention the fact that indeed no provision in the UNSC resolution concerned required such approval. However, that was because at that moment no possibility for an exemption, relevant to the situation at hand, was yet provided for. Provisions on exemptions for basic expenses, and extraordinary expenses, were only inserted later in UNSC Res 1452 (20 December 2002) UN Doc S/Res/1452, respectively [1a] and [1b]. Exemptions in regard to the latter were made subject to the Committee’s approval, while the former required mere notification to the Committee by the state granting such exemption. *Ibid.* [3b].

⁷⁵ Case C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* [1997] ECR-00081.

⁷⁶ UNSC Res 757 (30 May 1992) UN Doc S/Res/757.

strictly for medical purposes.⁷⁷ To ensure the effective implementation of the sanctions, the United Kingdom permitted payment for products which were classified as being for strictly medical purposes only if the export of those goods took place from the United Kingdom itself.⁷⁸ It did this to enable UK authorities to exercise effective control over products exported to the FRY, so as to ensure that they actually qualified under the humanitarian exemption.⁷⁹ As a consequence, it also prohibited payment for products that were classified earlier by the Sanctions Committee as to fall within the exemption to the economic sanctions, but which were not exported from the United Kingdom.

In this context the Court of Justice attributed decisive importance to the determination by the Sanctions Committee. However, in contrast to what the situation would have been in the earlier discussed cases, the acceptance of the Committee's determination in that case was beneficial for the party affected by the sanctions. The Court found that when the products were classified by the Sanctions Committee to be strictly for medical purposes, the United Kingdom was not allowed to prohibit payments for these goods.⁸⁰ Interestingly, under a literal reading of the relevant UNSC resolution, the Sanctions Committee only needed to be notified of the sale of such goods: the provision at issue does not require the Committee's approval.⁸¹

From the above-discussed cases it appears that most of these courts did not find themselves bound to follow the interpretations given by the Sanctions Committees. Hence the ability to employ the interpretation that they deemed fit does not seem to have been limited in this way.⁸²

⁷⁷ Ibid. [4].

⁷⁸ *Centro-Com* (n 75) [15].

⁷⁹ Ibid. [16].

⁸⁰ Ibid. [53].

⁸¹ UNSC Res 757 (30 May 1992) UN Doc S/Res/757 [4c]. Moreover, paragraph 5 on making available any funds or economic resources did not grant a role to the Sanctions Committee at all. Approval by the Sanctions Committee was required, however, under paragraph 7.

⁸² For a critical analysis of a rejection by a court of an authoritative interpretation by an international body see Orakhelashvili 2008 (n 43) 524.

5.3. Emphasis on the Interest of Maintaining International Peace and Security

Subsection 5.2.2 explained the role that the concern for maintaining international peace and security could play in a court's construction of the meaning of a UNSC resolution.⁸³ Adherence to this interest may prompt a court to rely on the principle of effectiveness, and it may influence the result of the application of that principle in the interpretation of a resolution. Which interpretation makes a resolution effective then depends on which interpretation most supports the maintenance of international peace and security. A court's inclination towards endorsing this interest most likely leads to a broad interpretation of the relevant UNSC resolution. The result of such an approach will be that a court confirms the challenge to judicial protection, and possibly even adds to it. It does not use the room inherent in interpretation to afford the affected individuals a measure of relief. As a consequence, that court is subsequently required to engage in an assessment of the lawfulness of the domestic implementing measures. Instead of avoiding a conflict of norms, it then, through the process of interpretation, contributes to a clear articulation of such conflict.

An example thereof can be found in the House of Lords' decision in the *Al-Jedda* case, which concerned an individual interned by UK forces operating in Iraq under authorization of the UNSC.⁸⁴ The House of Lords might have had the opportunity to entertain a narrower interpretation of what was required under the UN Charter than it did. However, it did not opt for an interpretation that would harmonize the diverging obligations involved. As a result, it was required, eventually, to solve a conflict between an obligation under the UN Charter and an obligation under the ECHR.⁸⁵ How it solved this conflict was discussed

⁸³ Cf., *ibid.* 180 et seqq.

⁸⁴ See *Al-Jedda* (UKHL) (n 30).

⁸⁵ Mr Al-Jedda, the interned individual, complained of a violation of his right to liberty and security. (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 5 (1).

earlier:⁸⁶ the present discussion focuses on the House of Lords' approach towards the interpretation of the obligation created by the UNSC.

An important issue in this interpretation was whether the UNSC established an obligation to intern Mr Al-Jedda upon the United Kingdom. The answer to that question determined whether article 103 of the UN Charter was applicable to the situation at hand, since this provision provides that in the case of conflict, *obligations* under the UN Charter prevail over obligations under any other international agreement.⁸⁷ However, it could be argued that the relevant resolution did not require, but merely *authorised*, the UK to intern Mr Al-Jedda. If that argument were to be accepted there would be no conflict of obligations, and article 103 would not be engaged.⁸⁸

Yet Lord Bingham, writing the leading opinion, brought forward three main reasons why he thought the United Kingdom was under an obligation to arrest that particular person, and why article 103 of the UN Charter was applicable to the present situation. The first reason was that the UNSC intended to continue, after the ending of the formal occupation, the security regime as it pre-existed under the law of occupation.⁸⁹ This security regime entailed, according to Lord Bingham, that if UK forces considered it necessary for the safety of the public or the occupying power to detain a certain individual, then that generated an obligation to do so.⁹⁰ He applied the relevant provisions of the Fourth Geneva Convention by analogy to the present situation, despite the fact that Mr Al-Jedda, as a UK citizen, was not a protected person under that Convention.⁹¹ Hence such an analogy might not necessarily have been appropriate.

⁸⁶ See chapter 4.4.2.1.

⁸⁷ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter) article 103 (emphasis added).

⁸⁸ *Al-Jedda* (UKHL) (n 30) [30].

⁸⁹ *Ibid.* [32]. According to Lord Bingham, the security regime was based on article 43 of the Hague Regulations 1907 and articles 41, 42 and 78 of the Fourth Geneva Convention.

⁹⁰ *Ibid.* [32]. See also Lord Brown of Eaton-under-Heywood at *ibid.* [152].

⁹¹ See *ibid.* [32]. See also Baroness Hale at *ibid.* [128], and F Messineo 'The House of Lords in *Al-Jedda* and Public International Law: Attribution of Conduct to UN-Authorized Forces

The second reason reflected, in the words of Lord Bingham, a purposive interpretation of article 103 of the UN Charter.⁹² He considered that because the UNSC does not have its own troops at its disposal, it can do no other than authorise member states to take action.⁹³ To ensure an effective operation of the UNSC, the authorizing language should be read as obligatory, according to Lord Bingham. This evidences a teleological interpretation resulting in a broad construction of the obligations concerned. In a similar vein, the third reason was that because of the importance of maintaining international peace and security, article 103 of the UN Charter should not be read in a narrow contract-based meaning.⁹⁴ Lord Bingham concluded his explanation on the scope of the obligation upon the United Kingdom by considering that he did not regard the UK to have been under a specific obligation to detain Mr Al-Jedda in particular. But he thought there was a general obligation to detain individuals where this would be necessary for imperative reasons of security.⁹⁵

As was explained earlier, to read the UNSC's authorizations for military action as obligatory is in itself uncontroversial.⁹⁶ The system of authorizations is regarded as a necessary substitute for direct action by the UNSC.⁹⁷ That does not necessarily entail, however, that all authorizing language automatically establishes an obligation.⁹⁸ Yet the House of Lords took that perspective and did not consider whether the authorizing language at issue indeed intended to

and the Power of the Security Council to Displace Human Rights' (2009) 56 *Netherlands International Law Review* 35, 55-56.

⁹² *Al-Jedda* *ibid.* [33].

⁹³ *Ibid.* [33].

⁹⁴ *Ibid.* [34].

⁹⁵ *Ibid.* But see *ibid.* [39], and to the same effect Lord Carswell in *ibid.* [136]. See also Messineo 2009 (n 91) 49.

⁹⁶ See chapter 4.2. J Frowein and N Krisch 'Article 39' in B Simma (ed.) *The Charter of the United Nations: A Commentary* 2nd ed. vol. I (Oxford University Press Oxford 2002) 717-729, 729; M Milanovic 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke Journal of Comparative & International Law* 69, 78.

⁹⁷ Frowein and Krisch *ibid.* 729.

⁹⁸ Cf. R Kolb, 'Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorizations Adopted by the Security Council?' (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 21, 33.

establish an obligation. In contrast, the ECtHR regarded the authorization to intern individuals, which was only mentioned in a letter annexed to the resolution, as merely one of several options to maintain the security and stability in Iraq.⁹⁹ According to the ECtHR, the UNSC left it for states within the MNF to choose the means by which that aim could be achieved.¹⁰⁰

The consequence of the House of Lords' interpretation was that it made the conflict of norms stand out in sharp relief. Hence it was subsequently compelled to rule on the relationship between an obligation created by a UNSC resolution and an obligation stemming from an international human rights treaty. This high-profile decision on principle left it little latitude for an inconspicuous alleviation of the limitation of the affected individual's human rights. A clear ruling on the conflict of norms most likely results in an unfavourable outcome for the protection of an individual's international human rights, because article 103 of the UN Charter will be engaged. This was eventually also illustrated by the House of Lords' decision in this case, which was (therefore) discussed in the previous chapter.¹⁰¹ Presumably this is exactly what the ECtHR, in its subsequent decision in the *Al-Jedda* case, sought to avoid by using the interpretative technique of a presumption of compliance.¹⁰²

Also the Court of Justice, in several cases concerning the implementation of the UNSC's sanction measures in the EU, has emphasized the importance of an effective implementation of UNSC resolutions, which has resulted in rather broad interpretations as well.¹⁰³ For example in its preliminary ruling in the *Bosphorus* case, it justified a broad construction by referring to the purpose of

⁹⁹ *Nada v Switzerland* [2012] ECHR 1691 [105].

¹⁰⁰ *Ibid.*

¹⁰¹ See chapter 4.4.2.1.

¹⁰² See *infra* subsection 5.4.2. See also Milanovic 2009 (n 96) 86.

¹⁰³ An example of a case in which the Court of Justice did not explicitly emphasise the importance of maintaining international peace and security, but in which its broad construction of the sanctions regime illustrates an inclination towards that interest, can be found in the Court's preliminary ruling in the *Ebony Maritime* case. Case C-177/95 *Ebony Maritime SA and Loten Navigation Co. Ltd v Prefetto della Provincia di Brindisi and others* [1997] ECR I-01111.

the sanction measures and the need for their effective implementation. This ruling concerned the Turkish company Bosphorus, which was an (arguably) innocent party affected by the implementation of UNSC sanctions against the FRY.¹⁰⁴

The Irish authorities, with the aim of implementing the sanctions against the FRY, had impounded an aircraft owned by Yugoslav Airlines (JAT) – which was an undertaking ‘in or operating from the Former Republic of Yugoslavia’.¹⁰⁵ A complicating factor was that at the time the aircraft was leased and operated by the Turkish company Bosphorus. The impoundment caused that company to bear drastic financial losses.¹⁰⁶ Several courts deciding upon the case dealt with the central issue of the interpretation of the resolution’s wording ‘majority or controlling interest’, which was used in the UNSC resolution and copied into the EU Regulation.¹⁰⁷ The Irish High Court arrived at a narrow construction of the resolution’s meaning on the basis of a teleological method of interpretation.¹⁰⁸ Eventually the Irish Supreme Court requested a preliminary ruling.

AG Jacobs, in his opinion to the case before the Court of Justice, explicitly rejected the High Court’s method of interpretation in respect of the UNSC resolution. He held that, in this particular instance, the method of literal interpretation carried more weight, since at issue was not the intention of the EU, which implemented the sanction measures, but the purpose of the UNSC.¹⁰⁹ The AG found it hazardous to attempt to determine the exact purposes of the UNSC’s decision.¹¹⁰ Still, this seems to be exactly what he eventually did. He held that the object of the sanctions could be to deprive the Yugoslav company of even

¹⁰⁴ See *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* [2005] 42 EHRR 1 [102].

¹⁰⁵ See UNSC Res 820 (1993) (n 63) [24], and Council Regulation (EEC) No 990/93 of 26 April 1993, article 8.

¹⁰⁶ It would, according to Bosphorus, even destroy and obliterate the company. See *Opinion of Advocate General Jacobs* (n 65) [54].

¹⁰⁷ UNSC Res 820 (1993) (n 63) [24], and Council Regulation No 990/93 (n 105) article 8.

¹⁰⁸ This decision will be discussed in *infra* subsection 5.4.3.

¹⁰⁹ *Opinion of Advocate General Jacobs* (n 65) [40].

¹¹⁰ *Ibid.* [41].

indirect benefits such as the continued maintenance and insurance of the aircraft.¹¹¹ He added that as long as it remains in operation there is always the possibility of it unexpectedly changing course back towards the FRY.¹¹² Moreover, he saw the risk of a termination of the lease contract before its expiry and the subsequent return of the aircraft to its owner.¹¹³ Hence, in contrast to the Irish High Court, the AG argued for a broad construction of the sanctions regime and determined that the resolution did cover the leased aircraft.¹¹⁴

Subsequently, the Court of Justice also engaged in an assessment of the UNSC resolution's objective without reservation. It held that, because the EU regulation concerns an implementation of UNSC sanctions, it is necessary, when assessing the scope of that regulation, to take account of the text and the aim of the underlying UNSC resolution.¹¹⁵ The Court of Justice did not explicitly apply the extensive teleological arguments of the AG, but arrived at the same conclusion. It held that the impoundment of the aircraft was consistent with the aim of the sanctions, since it put pressure on the FRY by restricting the exercise by the FRY and its nationals of their property rights.¹¹⁶ Such an approach inevitably results in a broader application of the measures than if the Court had considered whether not applying the sanctions would be inconsistent with the sanctions regime.

In addition, the Court found that the literal interpretation of the word 'interest' did not exclude ownership as a determining criterion for the impoundment.¹¹⁷ Moreover, that word was used in conjunction with the word 'majority', which according to the Court clearly implied the concept of ownership.¹¹⁸ However, it appears to be quite obvious that the sanctions were intended to be applied to the

¹¹¹ Ibid. [39].

¹¹² Ibid. [42].

¹¹³ Ibid.

¹¹⁴ These arguments are also referred to in chapter 7.2.1.1 as potential arguments for the Court to reject Bosphorus' suggestion of there being a less restrictive alternative available.

¹¹⁵ Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* [1996] ECR I-3953 [14].

¹¹⁶ Ibid. [17].

¹¹⁷ Ibid. [15].

¹¹⁸ Ibid.

owners residing in the FRY. The issue in the present case was, rather, whether the sanctions should be applied even though a party other than the owner, which was not residing in the FRY, would be severely affected.

Furthermore, the Court added in the same vein that using day-to-day operation and control, rather than ownership, as the decisive criterion for applying the measures would endanger the effectiveness of the strengthening of the sanctions.¹¹⁹ It would allow, according to the Court, the FRY or its nationals to evade application of those sanctions.¹²⁰ Accordingly, the Court of Justice explicitly acknowledged the importance it attached to an effective implementation of the sanctions regime in the construction of the meaning of that regime.

The Court of Justice continued its practice of emphasizing the importance of effective implementation of UNSC sanctions in its preliminary ruling in the *Möllendorf* case.¹²¹ This case concerned a family which had sold immovable property to a group of people amongst whom a man who was targeted by the UNSC 1267 sanction regime. This meant that that individual's assets had to be frozen, and that it was prohibited to make available to him any economic resources.¹²² The blacklisting happened after the sale agreement was concluded but before that agreement was registered in the Land Register. This latter formal act is necessary under German law to officially effectuate the transfer of ownership.¹²³ The question before the Court of Justice was whether the prohibition to make available to the targeted individual any economic resources precluded the final registration of the sale agreement. If that question were to be answered in the affirmative, the ownership of the property in question would not

¹¹⁹ *Ibid.* [18].

¹²⁰ *Ibid.*

¹²¹ Case C-177/06 *Möllendorf and Möllendorf-Niehuus* [2007] ECR I-08361.

¹²² UNSC Res 1267 (15 October 1999) UN Doc S/Res/1267, UNSC Res 1333 (19 December 2000) UN Doc S/Res/1333 and UNSC Res 1390 (28 January 2002) UN Doc S/Res/1390. The last one is implemented in the EU by Common Position 2002/402/CFSP and Regulation No 881/2002.

¹²³ *Möllendorf* (n 121) [34].

be able to transfer to the buyers. As a consequence, the Möllendorf family might come under an obligation to undo the sale agreement and to repay the purchase price.¹²⁴

To answer this question the Court of Justice considered whether by registration of the sale agreement an economic resource would be made available to the blacklisted person.¹²⁵ The Court started by noting that the expression ‘made available’ has a wide meaning.¹²⁶ It included, according to the Court, all acts necessary to obtain full power over the property concerned.¹²⁷ It concluded that final registration in the Land Register was such an act.¹²⁸ This conclusion was not affected by the fact that before the listing several steps in the property transaction were already taken.¹²⁹ Moreover, the Court found this immediate effect to be consistent with the objective pursued by the regulation, which could not be implemented as effectively if the persons were allowed to complete their transactions.¹³⁰ Finally, the Court found its interpretation also confirmed by the broad and unambiguous terms in the underlying UNSC resolution.¹³¹ The broad terms of the relevant provision also led the Court to refuse the argument that in effect no economic resource would be made available since an economic balance would be maintained between paying the purchase price and receiving ownership of the immovable property.¹³² In addition, accepting such an argument would,

¹²⁴ That would then, of course, have to be paid on frozen bank accounts. See *Ibid.* [70]. The sale took place some years earlier, and they were alleged to have already spent the proceeds of the sale. Case C-117/06 *Möllendorf* (*Opinion of Advocate General Mengozzi*) [2007] ECR I-8364 [96].

¹²⁵ The Court held that immovable property is in itself an economic resource, because it can be used to obtain funds, goods, or services. *Möllendorf* (n 121) [46].

¹²⁶ *Ibid.* [51].

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* [52].

¹²⁹ *Ibid.* [62]. According to the Advocate General a contrary interpretation is implied by the Greek and Dutch language versions of the regulation. *AG Mengozzi in Möllendorf* (n 124) [76].

¹³⁰ *Möllendorf* (n 121) [63]. The affected parties called the application of the latter assessment in regard to this particular instance into question. *AG Mengozzi in Möllendorf* (n 124) [97]-[106]. This argument concerns the alleged availability of a less restrictive alternative means, which is discussed in chapter 7.2.1.1.

¹³¹ *Möllendorf* *ibid.* [56].

¹³² *Ibid.* [49]-[50]. See also *AG Mengozzi in Möllendorf* (n 124) [38], [71].

according to the Court, present the member states with difficult problems of implementation.¹³³

Hence the Court argued primarily from the perspective of effectively sanctioning the targeted individual, rather than from the perspective of avoiding as far as possible adverse effects upon the human rights of the affected sellers of the immovable property. Another illustration thereof is that it held that the application of the measures, as it was done at present, was consistent with the objective of the resolution.¹³⁴ Instead, it could also have considered whether allowing an exception or applying a narrower interpretation would be *inconsistent* with the objective. The Court's approach, which inevitably leads to a broader scope of application, is essentially similar to the one it took earlier in the *Bosphorus* case.¹³⁵

Moreover, the Court also held that targeting the buyer of the property falls within the objectives of the sanctions provided for by the resolution.¹³⁶ However, the question before the Court was not whether the measures against the targeted individual himself were within the scope of the resolution. The question was rather whether the resolution, in the pursuance of its objectives, meant to accept that innocent third parties would be adversely affected. The case concerned not the infringement upon the rights of the targeted individual, but the infringement upon the rights of the Möllendorf family. However, the Court did not attempt to construe a meaning specifically tailored to avoiding infringements on their human rights. Instead it applied a broad interpretation, emphasising the need for an efficient and effective implementation of the sanction measures, like it did in the above-discussed cases concerning general economic sanctions.

¹³³ *Möllendorf* (n 121) [58], see also [59]; and *AG Mengozzi in Möllendorf* (n 124) [65] and [72].

¹³⁴ See *Möllendorf* *ibid.* [63].

¹³⁵ See *Bosphorus* (CJEU) (n 115) [17].

¹³⁶ *Möllendorf* (n 121) [57].

Arguably, the relevant UNSC resolution left sufficient room for interpretation for the Court to avoid a conflict of norms and to minimize the infringements placed on the affected individuals' human rights.¹³⁷ However, it chose not to entertain such an interpretation, and eventually concluded that it was for the national court to decide on the conflict that had arisen between the consequences of the regulation under national law and the individuals' human rights.¹³⁸

The Court of Justice seems to have taken a totally different approach in the subsequently decided *M* case.¹³⁹ Therefore this decision will be discussed in subsection 5.4.1 on narrow interpretations. In the same case, however, domestic courts opted for a broad construction. The situation in the *M* case was to a certain extent similar to the situation leading to the *Möllendorf* case. It concerned the wives of men targeted by the 1267 sanction regime. Similar to the Möllendorf family, their rights were being affected for the purpose of an effective implementation of targeted sanctions against another party. A difference is that in the *Möllendorf* case the affected individuals were not themselves subject to sanctions. They were only affected due to the implementation of targeted sanctions against another individual. Conversely, in the *M* case, the spouses themselves were directly targeted by the domestic authorities to ensure the effectiveness of the sanction measures imposed against their husbands.

The issue before the courts was whether the social security benefits paid to the spouses were also meant to be covered by that regime, this to avoid the risk of them making available to the targeted individuals any economic resources. The consequence of such interpretation, which was indeed employed by HM Treasury, was that the payment of benefits to the spouses by the Department for Work and Pensions had to be licensed. This meant that they still received those benefits but that these were now controlled as to how they could draw and use

¹³⁷ At least, in the subsequent *M* case, it found sufficient latitude to interpret the relevant provision consistent with the rights of the affected individuals. See *infra* subsection 5.4.1.

¹³⁸ See also chapter 7.2.1.1.

¹³⁹ *M v HM Treasury* (CJEU) (n 24).

them. Accordingly, their right to private life and respect for property were interfered with.

The case commenced before the UK High Court.¹⁴⁰ That court considered, first, that on the basis of the plain language of the regulation payment of social security benefits clearly falls within the scope of the measures.¹⁴¹ Second, and more important, according to the Court, was that a narrower interpretation would not provide the relevant UNSC resolution with full and proper effect.¹⁴² The Court found that the language of the resolutions clearly indicated the UNSC's intention to remove all economic support from the targeted individuals, in order to combat international terrorism and to promote peace, security, and safety.¹⁴³ The Court considered these to be public policy objectives of the highest importance.¹⁴⁴ Therefore, the Court established that 'the prohibitions are deliberately draconian' and make 'no exception for any purpose'.¹⁴⁵ The Court of Appeal, subsequently, fully confirmed the High Court's interpretation.¹⁴⁶

Accordingly, these domestic courts emphasised the importance of the sanction regime's effective implementation. Their construction of the meaning of the regime necessarily led to a broad scope of application, and adverse effects on innocent third parties' enjoyment of their human rights. After these decisions the House of Lords referred the case to the Court of Justice for a preliminary ruling.¹⁴⁷ While the UK High Court and Court of Appeal construed on the basis of the measures' objective a broad domestic implementation, the Court of Justice, also relying on the objective of the measures, placed a limitation on the

¹⁴⁰ *M, A, MM v HM Treasury* [2006] EWHC 2328 (Admin).

¹⁴¹ *Ibid.* [63].

¹⁴² *Ibid.* [64].

¹⁴³ *Ibid.*

¹⁴⁴ By using the phrase 'highest importance' the Court had already in the interpretation stage of the judgment provided an indication of its assessment of the measures. Still, at that stage it only determined the scope of the sanction regime, and not yet its lawfulness.

¹⁴⁵ *M v HM Treasury* (UK, first instance) (n 140) [64].

¹⁴⁶ *The Queen (on the application of M, A and MM) v HM Treasury* [2007] EWCA Civ 173.

¹⁴⁷ *R (on the application of M) v HM Treasury* [2008] UKHL 26. See discussion in *infra* subsection 5.4.3.

scope of their implementation. Subsection 5.4.1 will analyse the Court's narrow construction of the sanctions regime in this case, and will contrast it with its earlier discussed approach in the *Möllendorf* case.

In conclusion, a teleological approach gives courts significant latitude in construing the meaning of a UNSC resolution. The exact objective of a resolution usually leaves considerable scope for argument.¹⁴⁸ The present section has illustrated that broad constructions of UNSC resolutions resulted from courts' emphasis on the interest of maintaining international peace and security. Therewith, the implementation of these sanctions affected a relatively large group of individuals, or certain individuals, to a relatively large extent. The consequence for the court taking such approach is that it could be required, subsequently, to rule on the lawfulness of the domestic implementation of the UNSC resolution concerned. This could mean that it has to decide on the underlying conflict of norms, which is governed by the application of article 103 of the UN Charter. Moreover, since that court has already evidenced an inclination towards the interest of maintaining international peace and security, it would be very difficult, subsequently, for the individuals concerned to convince it of giving precedence to the protection of their human rights when deciding upon the norm conflict.

5.4. Creating an Opportunity for Judicial Protection through Interpretation

When courts employ the latitude inherent in the need for interpretation to construe a narrow meaning of the relevant provisions of a UNSC resolution they could come to the conclusion that the domestic measures adopted in the implementation of that resolution went beyond what that resolution required. As a consequence, the particular domestic implementation affecting certain individuals' rights is then no longer grounded on an international obligation

¹⁴⁸ In this respect the opinion of the AG in the *Bosphorus* case is insightful. *Opinion of Advocate General Jacobs* (n 65) [37] et seqq.

under the UN Charter. Hence courts can engage in a review of an entirely domestic measure. This creates an opportunity for them to secure judicial protection of affected individuals' human rights and may even result in them obtaining an effective measure of relief. Moreover, the reviewing court is able to avoid having to rule on the underlying conflict of norms, because the obligation created by the UNSC is no longer engaged.

Subsection 5.4.1 will start by considering case law from different courts in which they found the domestic implementation of a UNSC resolution to be too broad. Either the measures went beyond any reasonable understanding of the underlying UNSC resolution, or the court applied a rather narrow construction of the meaning of a resolution. In the latter instance it could not be said that the narrow interpretation followed obviously from the meaning of the resolution. Arguably these courts put effort into arriving at a narrow interpretation, which reduced the infringements upon individuals' human rights, or even resulted in a measure of relief for the affected individuals. In addition, this subsection will also consider an apparent change of approach by the Court of Justice. In the several cases discussed in the previous section, that court entertained a broad understanding of what was required by the UNSC. In contrast, the present section will discuss a case in which it opted for a narrow interpretation. It will analyse this case against the Court's earlier case law in order to provide some insight into the reasons for the different approach. After that, subsection 5.4.2 will discuss the technique of presumption of compliance. If not stated otherwise, the meaning of a UNSC resolution will then be presumed to be consistent with the affected individual's human rights. This may also lead to a narrow interpretation of the resolution concerned. Finally, subsection 5.4.3 will deal with cases in which courts went even further than merely employing a narrow interpretation. They went so far as to the extent that they seemed to have blurred the demarcation between mere interpretation of a resolution and assessment of its lawfulness. This then also resulted in a situation in which the interference with individuals' human rights caused by the implementation of a resolution was mitigated.

5.4.1. Narrow Interpretation of UNSC Resolutions

This subsection will consider how different courts arrived at an interpretation of a UNSC resolution which was narrower than the one entertained by the domestic authorities implementing that resolution. In such a situation, the domestic implementation is no longer backed by a UNSC resolution. Hence the court can scrutinize the lawfulness of the limitation of an individual's human right caused by the domestic regulation claiming to implement a resolution. It does not then have to defer to the UNSC resolution, or engage in the hierarchical difficulties arising from article 103 of the UN Charter. Thus a potential conflict of norms is defused and the case can be decided as being entirely within the domestic legal order.

Occasionally domestic authorities have a tendency to interpret UNSC resolutions rather broadly. By this means, they presumably attempt to legitimize domestic policies. Certain purely domestic measures are then claimed to be necessary in order to meet obligations under a UNSC resolution. Courts, when interpreting the resolution concerned, may come to the conclusion that the measures executed against the affected individual were actually not required by that resolution.¹⁴⁹ In such a situation, the limitation of an individual's human right cannot be said to be the result of that resolution.

A manifest example of adding measures to the ones prescribed by a UNSC resolution can be found in a case before a Pakistani High Court.¹⁵⁰ The Pakistani government sought to justify the detention of certain individuals on the basis of them being targeted by the 1267 regime. The Court concluded that the measures taken by the Pakistani government against the targeted individuals were not required by any UNSC resolution.¹⁵¹ A relatively modest example of such

¹⁴⁹ See, for example, the *Bosphorus* case in which the Court of Justice held that to be able to interpret the EU implementation it also needed to take into account the text and aim of the underlying resolutions. *Bosphorus* (CJEU) (n 115) [13]-[14].

¹⁵⁰ *Saeed and Others v Government of the Punjab Home Department and Others* [2009] No. 6208.

¹⁵¹ *Ibid.* 22, and 24.

practice can be found in a Dutch case. In that case, concerning a foundation that was put on the 1267 blacklist, the public prosecutor requested dissolution of that foundation.¹⁵² The Court of Appeal considered that dissolution that included, where possible, an adjustment of accounts would in fact constitute an expropriation.¹⁵³ It concluded, without more, that this was not the intention of the sanction measure of freezing the foundation's assets.¹⁵⁴

In most cases it is not immediately obvious whether a court has corrected an overzealous domestic implementation, or whether it has entertained a particularly narrow interpretation of the UNSC resolution concerned. An example thereof can be found in a Dutch case concerning UNSC sanctions against Iran.¹⁵⁵ The Dutch government, in the implementation of those sanctions,¹⁵⁶ enacted a regulation that prescribed that it was prohibited to grant Iranian nationals access to certain security-sensitive locations and databases (enumerated in the annex to that regulation).¹⁵⁷ In addition, it prohibited providing certain specialized education to Iranian nationals, which could contribute to Iran's proliferation-sensitive activities or the development of nuclear weapon delivery systems, without a license of the Ministry of Education, Culture, and Science.

Several Iranian nationals affected by the regulation filed a complaint before Dutch courts. They invoked the prohibition on discrimination,¹⁵⁸ arguing that the measures were imposed against one particular group of people only, on the sole

¹⁵² *OM v Stichting X (Al Haramain)* [2006] LJN: AY0279; NJF 2006/281.

¹⁵³ *Ibid.* [3.13].

¹⁵⁴ *Ibid.*

¹⁵⁵ *A and Others v The Netherlands* [2010] LJN: BL1862; ILDC 1463 (NL 2010) (*Iranian Nationals*), and *The Netherlands v A and Others* [2011] LJN: BQ4781 (*Iranian Nationals*).

¹⁵⁶ UNSC Res 1737 (23 December 2006) UN Doc S/Res/1737.

¹⁵⁷ Amendment to the Sanction Regulation Iran 2007, DJZ/BR/0588-08, 23 June 2008 (Netherlands) ('Amendment') which amended the Sanction Regulation Iran 2007, DJZ/BR/0916-07, 17 October 2007 (Netherlands) ('Sanction Regulation Iran 2007').

¹⁵⁸ They based their claim on article 1 Dutch Constitution; article 1 of the Twelfth Protocol to the ECHR; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 26; and article 12 EU Treaty. *Iranian Nationals* (first instance) (n 155) [3.2].

basis of them possessing Iranian nationality.¹⁵⁹ In response, the government referred to its obligations under the relevant UNSC resolution. In this resolution the UNSC called upon all states to ‘exercise extra vigilance and prevent specialized teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran’s proliferation sensitive nuclear activities and development of nuclear weapon delivery systems.’¹⁶⁰

However, the District Court and the Court of Appeal determined that this provision left states a scope of discretion with respect to the implementation of the measures in their domestic legal systems.¹⁶¹ Whether a resolution was properly implemented had to be judged, according to the Court of Appeal, against the background of the objective the UNSC sought to achieve.¹⁶² It did not regard the domestic authorities to have sufficiently motivated why this objective could be achieved only by making a distinction between Iranian and non-Iranian nationals. Eventually both courts considered the UNSC not to have obliged member states to make a distinction as regards nationality which was not necessary and justified.¹⁶³ As a result, the courts could simply engage in a review of the domestic measures against the human rights invoked.¹⁶⁴

The Dutch Supreme Court subsequently confirmed the lower courts’ interpretation that the resolution did not oblige the Netherlands to make a distinction between Iranian and non-Iranian nationals. In addition, it held that the Netherlands, when implementing the relevant UNSC resolution, was under an obligation to do everything it could to avoid making such a distinction. It derived this obligation to harmonize diverging international obligations from the

¹⁵⁹ Ibid. [4.9]

¹⁶⁰ UNSC Res 1737 (2006) (n 156) [17].

¹⁶¹ *Iranian Nationals* (first instance) (n 155) [4.6], and *Iranian Nationals* (appeal) (n 155) [5.3].

¹⁶² *Iranian Nationals* (appeal) *ibid.*

¹⁶³ *Iranian Nationals* (first instance) (n 155) [4.6], and *Iranian Nationals* (appeal) *ibid.* [5.4].

¹⁶⁴ *Iranian Nationals* (first instance) *ibid.* [4.9]-[4.10].

ECtHR's ruling in the *Nada* case, which will be discussed below.¹⁶⁵ In the present instance, engaging this obligation appears slightly redundant since the Supreme Court had already decided that there was no obligation to make a distinction, and the lower courts indeed arrived at the same result without it.

Still, it might provide an additional justification for the Court's interpretation, especially since alternative constructions of the relevant provision were possible. If a strictly textual interpretation were applied it would be hard to deny that the resolution literally requires member states to prevent Iranian nationals from following certain specialized teaching or training.¹⁶⁶ This provision leaves a scope of discretion as regard the latter element only. It is for states themselves to determine which teaching or training would qualify as contributing to 'Iran's proliferation sensitive nuclear activities and development of nuclear weapon delivery systems.'¹⁶⁷ However, the first element of excluding Iranian nationals from such studies appears to be abundantly clear,¹⁶⁸ and does not seem to leave any scope of discretion. Hence, from the options available, the Dutch courts chose to interpret the relevant provision as leaving states a scope of discretion. This fits with the obligation enunciated by the Supreme Court to interpret the meaning of a UNSC resolution in accordance with a state's obligations under international human rights law.

The Canadian Federal Court, in the *Abdelrazik* case, was also able to guarantee the protection of an individual's human rights by employing a narrow interpretation of an obligation created by the UNSC.¹⁶⁹ This case concerned a Canadian national, Mr Abdelrazik, who had travelled to Sudan. There he was

¹⁶⁵ *Nada* (ECtHR) (n 99) [170]. The Supreme Court, however, appears to have confused the obligation to harmonize as applied in the *Nada* case with the one formulated in *Al-Jedda* (ECtHR) (n 31). See on this distinction subsection 5.4.2.

¹⁶⁶ UNSC Res 1737 (2006) (n 156) [17].

¹⁶⁷ *Ibid.*

¹⁶⁸ See, however, the opinion by Mr Vlas to *Iranian Nationals* (Supreme Court) (n 17) [2.14]-[2.15].

¹⁶⁹ *Abousfian Abdelrazik v The Minister of Foreign Affairs* [2009] 2009 FC 580; ILDC 1332 (CA 2009).

detained twice, during which he was allegedly tortured. After his second period of detention he had recourse to the Canadian embassy. During his stay in Sudan Mr Abdelrazik was put on the 1267 blacklist. This caused Canada to argue that it could not allow him to return from Sudan, because of the travel ban comprised in that regime.

The Canadian Federal Court started by heavily criticising the 1267 sanctions regime.¹⁷⁰ This remained, however, largely *obiter dictum*. Eventually it decided the case by engaging in an interpretation of the relevant UNSC resolution. This led it to conclude that Mr Abdelrazik's return would not constitute a violation of the resolution. The Court could provide him a measure of relief by entertaining an interpretation which was narrower than the one entertained by the Canadian government. For at least part of this interpretation the Court could rely on a convincing literal understanding of the relevant provision.¹⁷¹ It did not have to engage in 'interpretative gymnastics'.¹⁷² Yet in respect of one element, the Court seemed to have touched upon the boundaries of mere interpretation, arguably for the benefit of human rights protection.

First, the element of rather uncontroversial interpretation concerned the meaning of the notion of territory. Since the resolution spoke only of preventing the entry into or transit through territory, the issue was whether 'territory' was meant to include airspace. The Canadian government was of the opinion that it did. It argued that since Mr Abdelrazik had to fly through foreign airspace in order to return to Canada, Canada's assistance to that effect would constitute a breach of the travel ban.¹⁷³ Referring to the Chicago Convention on International Civil Aviation, the Court concluded that 'airspace is above territory, not a part of it.'¹⁷⁴

¹⁷⁰ Ibid. [51] and [53].

¹⁷¹ E Macdonald 'Abdelrazik v. Canadian Minister of Foreign Affairs: A Challenge to the Security Council's 1267 Regime?' (2009) Global Administrative Law blog <http://globaladminlaw.blogspot.com/2009/08/abdelrazik-v-canadian-minister-of.html>.

¹⁷² Ibid.

¹⁷³ *Abdelrazik* (n 169) [122].

¹⁷⁴ Ibid. [124].

The Court found this interpretation to be confirmed by Canada's own report to the UNSC on the measures it took to implement the 1267 sanctions regime.¹⁷⁵

In a further foundation of its construction of the resolution's meaning, the Court also relied on the principle of effectiveness and the object and purpose of the sanctions regime. Herein it found a confirmation of its interpretation of the measures.¹⁷⁶ The travel ban makes an exception for the state's own nationals.¹⁷⁷ So, by arguing that targeted individuals were not allowed to travel over the territory or airspace of other countries, as Canada did, the exception to the travel ban for its own nationals would become meaningless. It would take effect only when such individual would actually be located at the country's border crossing.¹⁷⁸ Such interpretation, according to the Court, would lead to a nonsensical result, and could not have been the intention of the drafters.¹⁷⁹ Moreover, the Court found its own interpretation, which would allow Mr Abdelrazik to return to Canada, to be consistent with the objective of the travel ban. According to the Court, Mr Abdelrazik, when in Canada, would be just as much prevented from travelling to other countries to raise funds and arms and spread terrorism than when he would be in Sudan.¹⁸⁰

The Federal Court did not only correct an overtly broad interpretation by the Canadian government, but it also went a bit further than that, in narrowing down the resolution's scope of application. It pushed the method of interpretation to its limits when it engaged in an assessment of the possible exceptions to the sanctions. Canada had argued that it could not provide Mr Abdelrazik with any financial assistance for his return to Canada because that would be in violation of the prohibition to make available to him any funds.¹⁸¹ The Court, however, found

¹⁷⁵ *Ibid.* [126].

¹⁷⁶ *Ibid.* [127].

¹⁷⁷ UNSC Res 1390 (2002) (n 122) [2(b)].

¹⁷⁸ *Abdelrazik* (n 169) [127].

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.* [129].

¹⁸¹ *Ibid.* [162].

the fulfilment of a ‘judicial process’ to constitute an exception to that prohibition.¹⁸²

However, the relevant resolution mentions the possibility for such an exception with regard to the travel ban only.¹⁸³ Moreover, the guidelines of the Sanctions Committee unequivocally state that when an individual obtains an exemption from the travel ban he remains subject to the other sanction measures.¹⁸⁴ Accordingly, the Court applied a rather broad understanding of the exceptions to the sanction measures,¹⁸⁵ which led to a narrow application of these measures.

The Court’s approach, which was quite bold in some respects, might have been infused by its impatience with, or possibly even a lack of confidence in, the Canadian government in this particular case. This was illustrated by the requirement that Mr Abdelrazik upon arrival must present himself before the Court in order for it to be sure that he in fact returned to Canada.¹⁸⁶ Whatever the Court’s rationale was, what is relevant for the present chapter is that the result of its interpretation was that it did not have to rule on a conflict of norms. In addition, its narrow interpretation of the application of the resolution, partly due to its broad interpretation of the exceptions to that application, made it possible to limit the infringements on Mr Abdelrazik’s human rights, and eventually even to grant him a form of relief.

¹⁸² *Ibid.*

¹⁸³ UNSC Res 1822 (30 June 2008) UN Doc S/Res/1822 [1b]. See also *ibid.* [57]; and A Tzanakopoulos 'From Interpretation to Defiance: Abdelrazik v Canada and United Nations Sanctions in Domestic Courts' (2010) 8 *Journal of International Criminal Justice* 249, 254.

¹⁸⁴ Guidelines of the Committee for the Conduct of its Work (Adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007, and 9 December 2008 and 22 July 2010) [12] et seq. Available at <http://www.un.org/sc/committees/1267>.

¹⁸⁵ In addition, the Court also employed an extensive interpretation of the notion ‘judicial process’, ‘so as to include measures of execution ordered by the court.’ Tzanakopoulos 2010 (n 183) 254.

¹⁸⁶ *Abdelrazik* (n 169) [167].

The Court of Justice's decision in the *M* case had a similar effect. In this regard it differed from several other cases decided by this court, which were discussed earlier in section 5.3. In those cases the Court of Justice, due to its emphasis on the need for an effective implementation of sanction measures, arrived at a broad understanding of the meaning of those measures. Conversely, in a preliminary ruling in the *M* case, it entertained a narrow construction of the UNSC resolution underlying the impugned EU regulation. That case concerned measures against the spouses of individuals targeted by the 1267 sanctions regime. The issue was whether the social security benefits paid to them were meant to be covered by that regime as well, this to avoid the risk of them making available any economic resources to the targeted individuals. The case was discussed also in section 5.3 because the UK High Court¹⁸⁷ and Court of Appeal¹⁸⁸ essentially confirmed this broad understanding, and endorsed HM Treasury's interpretation of the sanctions regime. The House of Lords and the Court of Justice, however, arrived at a narrower interpretation.¹⁸⁹

Arguing from the objective of the sanctions measures,¹⁹⁰ these courts did not see how social benefits paid to the spouse of the targeted individual, which are fixed at a level intended to meet only the strictly vital needs of the persons concerned, could be diverted in order to support terrorist activities.¹⁹¹ Moreover, they did not consider that the benefit in kind that a designated person might indirectly derive from the social payments made to his spouse could compromise the objective pursued by the sanction measures.¹⁹² Therefore they found the intrusive regime

¹⁸⁷ *M v HM Treasury* (UK, first instance) (n 140).

¹⁸⁸ *M v HM Treasury* (UK, appeal) (n 146).

¹⁸⁹ The House of Lords did not actually decide upon the case: it only wrote a report in relation to the preliminary ruling it sought from the Court of Justice. Still, this report left no doubt about the House of Lords' position in this case. *M v HM Treasury* (UKHL) (n 147).

¹⁹⁰ According to the Court of Justice, a textual interpretation of the EU Regulation (as well as of the UNSC resolution) was not conclusive – because the literal meaning of the wording in the different languages was inconsistent. Therefore, it considered the objective of the regulation as being decisive. *M v HM Treasury* (CJEU) (n 24) [49], [56].

¹⁹¹ *M v HM Treasury* (UKHL) (n 147) [12]; *M v HM Treasury* (CJEU) *ibid.* [61] and [69].

¹⁹² *M v HM Treasury* (UKHL) *ibid.* [13]; *M v HM Treasury* (CJEU) *ibid.* [62].

constructed by HM Treasury not to be required to give effect to the purpose of the UNSC resolution.

The Court of Justice concluded that the measures must apply only to those resources that can be used to support terrorist activities.¹⁹³ It arrived at this conclusion despite the fact that, as was noted earlier by other courts,¹⁹⁴ the measures did not foresee any exception. However, the Court did not invoke an exception: instead it relied on the objective of the resolution to confine the scope of its application.¹⁹⁵ This approach is different from the Court's approach in the *Möllendorf* case, which also concerned a third party who was adversely affected by the targeted sanctions addressed to others. As was explained earlier,¹⁹⁶ in this case the Court of Justice, equally relying on the objective of the sanction measures, arrived at a broad construction of the prohibition to make available economic resources.¹⁹⁷ That construction was the result of the Court's inclination towards securing an efficient and effective implementation of the sanction measures.¹⁹⁸ Hence in both cases the Court relied on the objective of the measures to interpret their meaning, but the consequences for the individuals concerned were rather different.

The Court's different perspective in the *M* case might be explained by it attributing higher importance in that case to the protection of the human rights of innocent third parties. An alternative reason might have been the fact that in the *M* case the domestic measures were specifically taken against the spouses themselves, in order to be able to target more effectively the listed men. In the *Möllendorf* case, however, the measures were meant to target directly a designated individual, but in their application they had an incidental adverse

¹⁹³ *M v HM Treasury* (CJEU) *ibid.* [56].

¹⁹⁴ See *M v HM Treasury* (UK, first instance) (n 140) [64]; *M v HM Treasury* (UK, appeal) (n 146) [17]. See similarly *Othman* (UK) (n 71) [51]; and also *AG Mengozzi in Möllendorf* (n 124) [69].

¹⁹⁵ See *M v HM Treasury* (CJEU) (n 24) [57].

¹⁹⁶ See section 5.3.

¹⁹⁷ See discussion in subsection 5.2.2.

¹⁹⁸ See, for example, *Möllendorf* (n 121) [58] and [63].

effect on a third party. Accordingly, while the measures in the *M* case might be qualified as a too broad domestic implementation, in the *Möllendorf* case they might be regarded as an indirect effect of the targeted sanctions, possibly foreseen and accepted by the UNSC itself.

Also, AG Mengozzi, who wrote the opinion in both cases, changed his approach towards a more friendly interpretation for the individuals affected. In the *Möllendorf* case he considered that it was not justified to make a difference between resources that do enable targeted individuals to obtain funds, goods, or services, and those that do not.¹⁹⁹ Moreover, he found the economic value of the resource to be irrelevant, since it was the making available of property as such that was prohibited.²⁰⁰ However, in the *M* case he made an exception for social security benefits. He considered that the scope of the measures' application depended on their objective.²⁰¹ Notwithstanding his reasoning in the *Möllendorf* case, he thought that the modest sum involved in the present case did not create a risk that the targeted individual would obtain funds, goods, or services which he could use for the funding of terrorist activities.²⁰² Accordingly, while the AG's approach was very principled in the *Möllendorf* case, he adopted a more pragmatic approach in the *M* case, which left room to take into account the significance of the economic resources concerned.

The cases discussed in this subsection have illustrated the opportunities with which the exercise of interpretation provides courts. They can entertain a construction of the meaning of measures imposed by the UNSC resolution which results in an avoidance of a conflict of norms. This takes away a potential hindrance for them to secure the protection of affected individuals' human rights.

¹⁹⁹ *AG Mengozzi in Möllendorf* (n 124) [66], see also [67].

²⁰⁰ *Ibid.* [71].

²⁰¹ Case C-340/08 *M (FC) and Others v HM Treasury (Opinion of Advocate General Mengozzi)* [2010] ECR I-03913 [88].

²⁰² *Ibid.* [96]-[97].

These individuals might even be directly released from the measure's application due to courts' narrow understanding of what is required by the UNSC.

5.4.2. Presumption of Compliance

The presumption of compliance is an interpretative technique which is also likely to result in a narrow construction of the obligations under a UNSC resolution. There is a strong presumption against normative conflict in international law.²⁰³ From this perspective, courts may presume that a state's obligations under one international instrument were not intended to be in conflict with obligations under another. In the context of treaty law, some support for this approach can be found in the general rule on interpretation contained in the VCLT.²⁰⁴ That rule states that for the purpose of interpretation of the meaning of a treaty, 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account, together with the context.²⁰⁵ Alternatively, the principle of effectiveness could be regarded as requiring an interpretation of treaties which is not in contrast with superior norms of international law.²⁰⁶ Similarly, in relation to obligations created by UNSC resolutions, it is argued that, if not stated otherwise, courts should interpret UNSC resolutions to the effect that it was not the intention of the UNSC to deviate from relevant rules of international law, such as human rights norms.²⁰⁷ Sir Rodley, in his individual (concurring) opinion to the HRC's view on the *Sayadi and Vinck* case, formulated a similar interpretative principle.²⁰⁸

²⁰³ ILC International Law Commission 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law' UN Doc A/CN.4/L.682 [37]; J Pauwelyn *Conflict of norms in public international law how WTO law relates to other rules of international law* (Cambridge University Press Cambridge 2003) 240.

²⁰⁴ VCLT (n 17) article 31.

²⁰⁵ Ibid. article 31 (3) (c).

²⁰⁶ Herdegen 2010 (n 34) [31]. Thus, according to him, 'it may generally be presumed that an agreement does not purport to violate *ius cogens*.' Ibid.

²⁰⁷ Alvarez 2003 (n 34) 135-137. See similarly Tzanakopoulos 2011 (n 1) 118, 120.

²⁰⁸ 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*) 36.

Essentially the ECtHR followed the same approach in its decision in the *Al-Jedda* case.²⁰⁹ There the Court presumed that obligations created by the UNSC are not intended to be in conflict with fundamental principles of human rights.²¹⁰ It construed this presumption by interpreting the resolution concerned in the context of the UN Charter. The Charter holds that the UNSC ‘shall discharge its duties in accordance with the Purposes and Principles of the United Nations.’²¹¹ The Court established that in addition to maintaining international peace and security, the purposes of the UN include encouraging respect for human rights and fundamental freedoms as well.²¹² From this it derived that there must be a presumption that the UNSC does not intend states to take measures that would result in a breach of their obligations under international human rights law.²¹³ Hence the Court determined that when the meaning of a particular provision is unclear, the interpretation that harmonizes the obligation created by the UNSC most with the states’ obligations under international human rights law must be followed. It added, however, that the presumption could be rebutted when the UNSC uses clear and explicit language to that effect.²¹⁴

In the *Al-Jedda* case, a letter annexed to the relevant UNSC resolution explicitly mentioned internment as one of the options for the MNF to counter on-going threats to the security of Iraq.²¹⁵ Even so, the ECtHR found the resolution not to provide a legal basis for Mr Al-Jedda’s internment. The Court’s arguments for this conclusion were that the resolution itself did not refer to the possibility of internment; the preamble to the resolution phrased the commitment of all forces to act in accordance with international law, which would include the ECHR; and the UN Secretary General (SG) explicitly condemned the use of security

²⁰⁹ *Al-Jedda* (ECtHR) (n 31).

²¹⁰ *Ibid.* [102].

²¹¹ UN Charter (n 87) article 24 (2).

²¹² *Ibid.* article 1 (1), and (3) in conjunction with articles 55 and 56. See *Al-Jedda* (ECtHR) (n 31) [102].

²¹³ *Al-Jedda* *ibid.*

²¹⁴ *Ibid.*

²¹⁵ UNSC Res 1546 (8 June 2004) UN Doc S/Res/1546. The annexed letter of US Secretary of State Colin Powell refers to ‘internment where this is necessary for imperative reasons of security’.

internment by the MNF in Iraq.²¹⁶ Therefore, the Court established that the impugned UNSC resolution did not explicitly or implicitly require the United Kingdom to put individuals who are regarded as posing a risk to the security of Iraq into ‘indefinite detention without charge.’²¹⁷ As a consequence, the Court found no conflict to exist between the UK’s obligations under the UNSC resolution and the ECHR.²¹⁸

This interpretation is in full contrast with the House of Lords’ earlier finding in the same case.²¹⁹ Contrary to that court’s approach, the ECtHR interpreted the conflict as an intra-regime conflict which had to be resolved within the context of the UN’s legal system itself, instead of an inter-regime conflict between the different legal instruments. Essentially it interpreted human rights protection within the UN context as being synonymous with observance of obligations under the ECHR. In this sense it incorporated the human rights under the ECHR into the UN Charter. By taking this broader perspective, the objectives pursued by international human rights treaties are, in principle, not in conflict with the objectives the UN seeks to pursue.

As was mentioned, the presumption of compliance can be rebutted when the UNSC uses sufficiently clear and explicit language to that effect. It could be said that it is then for the UNSC to squarely confront what it is doing and to accept the political cost of superseding international human rights.²²⁰ In the *Al-Jedda* case, the Court employed a very strong presumption, which appeared to be not easily rebutted.²²¹ The Court considered even the explicit referral to the option of

²¹⁶ *Al-Jedda* (ECtHR) (n 31) [105]-[106].

²¹⁷ *Ibid.* [109].

²¹⁸ *Ibid.*

²¹⁹ See *supra* section 5.3.

²²⁰ By way of analogy with the concept of parliamentary sovereignty as applied in the UK: see, for example, *HM Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 2 & UKSC 5; ILDC 1533 (UK 2010) (*Ahmed*) [111], [193] and [240]. See also chapter 6.4.1.

²²¹ M Milanovic '*Al-Skeini and Al-Jedda* in Strasbourg' (2012) 23 *European Journal of International Law* 121, 138.

internment in the letter annexed to the relevant resolution as not sufficient to rebut the presumption.²²²

In the subsequent *Nada* case, however, the ECtHR found a rebuttal of the presumption.²²³ The case concerned an individual who was subject to the UNSC's targeted sanctions.²²⁴ The Court found that the UNSC used clear and explicit language when it imposed an obligation upon states to take measures that were capable of breaching individuals' human rights.²²⁵ However it did not consider what would be the effect of that rebuttal. It simply continued by examining whether the obligation created by the UNSC left sufficient scope for Switzerland to implement that obligation in accordance with the obligations under the ECHR.²²⁶

Moreover, it added an obligation upon Switzerland to harmonize as far as possible both obligations. This appears to be a different obligation to harmonize than the one entertained earlier in the *Al-Jedda* case. In that case the Court held that the interpretation of a UNSC resolution that is most in harmony with states' obligations under the Convention must be followed.²²⁷ The present instance, however, concerned an obligation upon Switzerland to adapt the implementation of the obligation created by the UNSC, as far as possible, to Mr Nada's individual situation. This is not a matter of interpretation. Rather, it puts an obligation of conduct upon Switzerland when implementing UNSC resolutions. Eventually the Court found that Switzerland had not sufficiently taken into account the realities of the particular case when it applied the travel ban to Mr Nada.²²⁸

²²² *Ibid.*

²²³ *Nada* (ECtHR) (n 99) [172].

²²⁴ For a further detailed description of the circumstances of the case see chapters 4.3.3.2 and 4.4.1.

²²⁵ *Nada* (ECtHR) (n 99) [172].

²²⁶ *Ibid.* [176]-[180].

²²⁷ *Al-Jedda* (ECtHR) (n 31) [102].

²²⁸ *Nada* (ECtHR) (n 99) [195]-[196].

The Court concluded that by arriving at the finding that it did, it was dispensed from determining the question of hierarchy between an obligation created by the UNSC and an obligation under the Convention.²²⁹ Hence it remains unclear what the Court actually considers to be the effect of a rebuttal. Employing *a contrario* reasoning, it must mean that obligations under a UNSC resolution would prevail over the ECHR if the UNSC intends it to have that effect. However, whether that is what the Court has in mind remains, for the moment, a product of scholarly interpretation.²³⁰

What is clear is that the seemingly high threshold posed in the *Al-Jedda* case appeared not to be as stringently applied as expected. In the *Nada* case the Court did not invoke particularly strong evidence of the UNSC's intention to override international human rights. Nowhere in the provision relied on by the Court did the UNSC explicitly consider how the measures should relate to states' obligations under international human rights law.²³¹ It merely imposes a clear obligation to implement the impugned sanction.²³² Hence the presumption was rebutted by implication only. Another provision referred to by the Court concerned the position of international agreements in general, and was not specifically tailored to international human rights law.²³³ Moreover, that provision was part of a resolution that was enacted long before the adoption of the sanction measures at issue.²³⁴ If the Court had instead considered the preamble of a resolution that was subsequently adopted, then it might have come to a different conclusion. This preamble holds that '[s]tates must ensure that any measures taken to combat terrorism comply with all their obligations under

²²⁹ *Ibid.* [197].

²³⁰ See, for example, Milanovic 2012 (n 221) 138.

²³¹ *Nada* (ECtHR) (n 99) [172].

²³² UNSC Res 1390 (2002) (n 122) [2b].

²³³ *Nada* (ECtHR) (n 99) [172]. See UNSC Res 1267 (1999) (n 122) [7].

²³⁴ The travel ban in this sanctions regime was first adopted in resolution UNSC Res 1390 (2002) (n 122) [2b].

international law, and should adopt such measures in accordance with international law, in particular international human rights law'.²³⁵

5.4.3. Beyond Interpretation?

The distinction between interpretation and assessment of lawfulness is not always clear-cut. In principle, the former concerns the construction of a provision's meaning, in general, and the latter concerns an assessment of the lawfulness of applying that provision, as interpreted by the court, to a specific situation. However, yet, the fine line between these two successive steps might blur, even to the extent that both steps appear to have blended into one. In this way courts may stretch the latitude they have for interpretation to its limits. Occasionally they make the outcome of a resolution's interpretation dependent on their assessment of the lawfulness of that outcome.

For example, some interpretative considerations in the *M* case seem to have been the result of not only the construction of the relevant resolution's meaning, but also the review of lawfulness thereof. This can be illustrated by the arguments used by the House of Lords in its request to the Court of Justice for a preliminary ruling. The question was whether the implementation of restrictive measures against spouses of individuals targeted by the 1267 regime was required by the EU regulation implementing that UNSC targeted sanctions regime.²³⁶ The House of Lords argued that an interpretation to such effect produced 'a disproportionate and oppressive result'.²³⁷ Moreover, such construction would constitute, according to the Court, 'an extraordinary invasion of the privacy of someone who is not a listed person'.²³⁸ Therewith, the House of Lords clearly linked the determination of the correct interpretation of the relevant provision to the

²³⁵ UNSC Res 1624 (14 September 2005) UN Doc S/Res/1624 preamble. See similarly the declaration contained in UNSC Res 1456 (20 January 2003) Un Doc S/Res/1456 [6]. See also Special Rapporteur 'Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (26 September 2012) UN Doc A/67/396 [18]-[19].

²³⁶ Council Regulation 881/2002, implementing UNSC Res 1267 (1999) (n 122) and UNSC Res 1390 (2002) (n 122).

²³⁷ *M v HM Treasury* (UKHL) (n 147) [15].

²³⁸ *Ibid.*

lawfulness of the result of that interpretation in a particular instance. Hence the provision's scope of application was demarcated not by an interpretation of its own wording, but by a countervailing obligation.

Quite a sweeping example of such an approach can be found in the decision of the UK High Court in the *Othman* case, which concerned an individual whose assets were frozen pursuant to the targeted sanctions imposed against him.²³⁹ The Court first interpreted the EU regulation implementing the UNSC targeted sanctions regime.²⁴⁰ It found the language of the regulation clear and exceedingly wide.²⁴¹ Moreover, to secure the measures' effectiveness in achieving their objective, the Court held that they were intended to cover all sorts of payments.²⁴² Accordingly the Court found, on the basis of the language and purpose of the regulation, that it did not exclude any resource.²⁴³

Albeit with the clear and drastic results of its interpretation, the High Court created some latitude to make a correction to the harsh outcomes. It quite boldly considered that it would read down the relevant regulation in order to secure the targeted individual's bare necessities of life.²⁴⁴ Moreover, it found that the individual's family must suffer no more hardship than was reasonably necessary as a consequence of the implementation of the sanction measures.²⁴⁵ Hence, under the heading of interpretation, the High Court indicated what it thought were the boundaries of a lawful limitation of the individual's human rights. Because of the safeguards it included in its interpretation of the regulation, it did not feel compelled to engage in a discussion on the applicability of the ECHR's

²³⁹ *Othman* (UK) (n 71).

²⁴⁰ Council Regulation 467/2001, as amended by Regulation 2062/2001, implementing UNSC Res 1267 (1999) (n 122) and UNSC Res 1333 (2000) (n 122).

²⁴¹ *Othman* (UK) (n 71) [45], [51].

²⁴² *Ibid.* [45].

²⁴³ *Ibid.* [45], [51].

²⁴⁴ *Ibid.* [57], [60].

²⁴⁵ *Ibid.* [60].

provision on the prohibition on torture and inhumane treatment to the present situation.²⁴⁶

Examples in other cases in which mere interpretation converged with (a beginning of) an assessment of lawfulness of a limitation on individuals' human rights are somewhat more subtle. Especially when applying a teleological method of interpretation, a court may carefully obfuscate a strict distinction between the two. It may regard it, for example, beyond the intention of the drafters of a resolution that an unlawful limitation is placed on certain individuals' human rights. This approach, which bears some similarity to the earlier discussed presumption of compliance,²⁴⁷ seems to have been followed by the Irish High Court in the *Bosphorus* case.²⁴⁸ This case concerned the Turkish airline company, Bosphorus, which had leased an aircraft from a Yugoslav company. Irish authorities subsequently impounded this aircraft in order to implement the sanction measures imposed by the UNSC against the FRY. Under these circumstances, the Court regarded Bosphorus as an innocent victim of the sanctions regime.²⁴⁹

The Irish Court first held that it was clear that the measures were intended to sanction the people or government of the FRY.²⁵⁰ However, it found it equally clear that these measures were not intended to punish or penalise innocent third parties.²⁵¹ Therefore, according to the Court, they could not have intended to cause any hardship to those third parties other than what would necessarily result from the application of the sanctions to the targeted state.²⁵² It added that the

²⁴⁶ Ibid. [65].

²⁴⁷ The difference is that with the approach of presumption of compliance, the presumption is that the decision-maker would not create an obligation, in general, which is in conflict with another obligation. Conversely, the basis of the presumed intention of the decision-maker in the present discussion is grounded on the object and purpose of the particular instrument.

²⁴⁸ *Bosphorus* (IRL, first instance) (n 62).

²⁴⁹ Ibid. [9], [18].

²⁵⁰ Ibid. [16].

²⁵¹ Ibid.

²⁵² Ibid.

hardship suffered by innocent parties should not be disproportionate to the sanction sought to be imposed on the targeted state.²⁵³

By this approach the Court limited the construction of the measures' scope of application to what it would regard as constituting an unnecessary adverse effect upon innocent parties.²⁵⁴ Therewith, it seems to have inserted a proportionality assessment in the exercise of interpretation. Eventually the Court concluded that the aircraft did not fall within the meaning of the resolution,²⁵⁵ because that 'would constitute a wholly unwarranted intervention in the business of Bosphorus.'²⁵⁶

A somewhat similar approach, in which the interpretation of a sanction measure depended on the reasonableness of the outcome of that interpretation in a specific situation, can be found in the *Crna Gora* case.²⁵⁷ In that case a Dutch court considered the cargo that was unloaded from a ship that was impounded pursuant to the sanctions against the FRY to be neutral. Therefore this cargo did not fall, according to the Court, within the meaning of the sanctions regime. It grounded this conclusion at least partly on the basis of the consideration that the interested third parties, who were stakeholders of the cargo, did not know and could not have known that the cargo was going to be shipped by a ship owned by a company from the FRY.²⁵⁸ Accordingly, the exercise of establishing a provision's meaning, in general, was influenced by the effect of such a construction on the parties concerned.

This subsection has evidenced courts employing elements of assessment of lawfulness in the construction of the meaning of a UNSC resolution. Similar to the earlier discussed interpretative approaches, this approach enabled these

²⁵³ Ibid.

²⁵⁴ See also *ibid.* [18].

²⁵⁵ Ibid. [19].

²⁵⁶ Ibid. [18].

²⁵⁷ *Crna Gora III* (n 56). See also *supra* subsection 5.2.3 and chapter 7.2.1.1.

²⁵⁸ Ibid. [6.4].

courts to provide the affected individuals a measure of relief, without having to address the potentially underlying norm conflict. In addition, by the present approach these courts indicated what they thought were the boundaries of a lawful implementation. The apparently more neutral exercise of construing the meaning of a resolution was applied to comment on the lawfulness of that resolution.²⁵⁹ What is more, the exercise of interpretation was arguably used to obfuscate the fact that they were actually modifying the scope of a resolution's application, in order to be able to limit the infringements on individuals' human rights.

5.5. Conclusion

Before courts are able to engage in an assessment of the lawfulness of a domestic measure implementing a UNSC resolution, they first need to determine the meaning of that measure. In that exercise they often examine the scope and content of the underlying resolution as well. They may seek to establish whether, and to what extent, the domestic measures are indeed required by that resolution. At first sight, the exercise of interpretation appears primarily as a neutral determination of the meaning of a resolution, as if it were an exercise of mere textual exegesis. This somewhat inconspicuous appearance could be the reason for some courts to prefer to solve or avoid (potential) conflicts of norms by means of interpretation. Arguably, this is a less controversial exercise for courts to engage in than review of the lawfulness of domestic measures implementing UNSC resolutions that leave no or limited scope of discretion. In the latter instance, courts would indirectly review the lawfulness of the underlying UNSC resolution.²⁶⁰ Many of them would not regard themselves competent to engage in such review,²⁶¹ and they resort to different ways to avoid it. The exercise of interpretation allows them to arrive at the preferred result without having to articulate their stance, for example, on a hierarchy of norms.

²⁵⁹ Cf. Schermers and Blokker 2011 (n 3) [1353].

²⁶⁰ See chapter 2.2.2.

²⁶¹ See also Schermers and Blokker 2011 (n 3) [1353].

Essentially, interpretation entails a choice between several possible meanings of a text.²⁶² Hence, whether a conflict of norms is indeed avoided is to a certain extent a matter of preference.²⁶³ This opportunity follows from the fact that all UNSC resolutions leave room for interpretation. Such latitude is inherent in the use of language, and is extended by the use of open-ended and ambiguous terminology. Courts may engage in interpretation through several methods of interpretation, which could lead to different outcomes. By choosing a method that results in an interpretation that is consistent with (apparently) conflicting obligations under international human rights law, courts are able to avoid having to address such conflict. This grants them a possibility to secure judicial protection of the affected individuals' human rights. At the same time, they might even afford the individuals a measure of relief. For instance, a court may determine that the UNSC resolution which the domestic authorities claimed to implement did not intend to cover the individual concerned. Such a finding can be arrived at either because the domestic regulations implementing the resolution obviously went further than the resolution itself meant to go, or because the court employed a particularly narrow construction of the resolution. The latter may even go so far as reading limitations into a resolution which are not literally in the text. Such a practice may blur the boundary between mere interpretation and assessment of lawfulness.

In international law there is a strong presumption against normative conflict.²⁶⁴ One of the consequences of this presumption is that in the case of ambiguous terminology, the interpretation that avoids a conflict with another international norm is to be preferred.²⁶⁵ A special emanation of this principle, which the ECtHR applies in the context of interpreting UNSC decisions, is the presumption that the UNSC does not have the intention of creating obligations upon states that would be in conflict with their obligations under international human rights

²⁶² See Kelsen 1992 (n 6) 80 et seqq.

²⁶³ See also ILC 'Fragmentation of International Law' (n 203) [42].

²⁶⁴ Ibid. [37]; Pauwelyn 2003 (n 203) 240.

²⁶⁵ See Pauwelyn *ibid.* 240-241.

law. The Court first formulated this presumption in the *Al-Jedda* case. There it considered that the UN Charter mentions that promoting and encouraging respect for human rights is one of the purposes of the UN, in addition to maintaining international peace and security. From that it inferred that unless the UNSC clearly and explicitly states so, it cannot be presumed to have had the intention of overriding international human rights. Accordingly, if the presumption is not rebutted, the obligation created by the UNSC must be interpreted in harmony with the obligations under the ECHR. In principle, this interpretative technique might prove to create an effective opportunity for the judicial protection of international human rights. It could be expected that the members of the UNSC cannot readily agree on the explicit language required to set aside international human rights law.²⁶⁶ However, in the *Nada* case, the Court accepted a rebuttal of the presumption on the basis of weak and indirect indications of the UNSC's intention to override international human rights. Therewith it appears to have given away much of the technique's potential for securing judicial protection.

The will to harmonize does not always seem to be present.²⁶⁷ From the several potential results of interpretation, courts may and must choose the result they deem fit for the purpose they seek to achieve. Hence, when engaging in the exercise of interpretation, courts are almost unavoidably also making a value assessment. For example, by placing the emphasis on the effectiveness of a measure, a court is more likely to arrive at a broad construction of the relevant UNSC resolution. This might be motivated by a court's inclination towards the interest of guaranteeing international peace and security, for which it deems an effective operation of the UNSC resolution necessary. Instead of avoiding a conflict of norms by mere interpretation, this approach will contribute to the articulation of such conflict, requiring the court eventually to decide on it.

²⁶⁶ Milanovic 2012 (n 221) 138.

²⁶⁷ ILC 'Fragmentation of International Law' (n 203) [42].

Moreover, even though such a finding is without prejudice to that court's subsequent decision on the lawfulness of the measures in a particular case, it does accept the consequence that the impugned implementation potentially affects the human rights of a larger group of individuals, or of certain individuals to a larger extent. Individuals affected by a broad application based on the argument of effective implementation, subsequently, have the burden of proving that application of the measures in their particular case is unjustified or unlawful.²⁶⁸ They need to argue why protection of their human rights should prevail over an effective application of the sanctions. Such an approach may be explained by a court's inclination towards the interest of maintenance of international peace and security.

Conversely, a court's predilection for the protection of human rights might result in a narrow interpretation. A court could be inclined to read into a resolution terms or conditions that are not literally present in the instrument's text, but which result in avoiding, as far as possible, interferences with individuals' human rights guarantees. Still, this approach could also be accounted for by a court's wish to avoid having to rule on a conflict of norms, or simply by its conviction that it is entertaining the 'right' interpretation.

What is clear, however, is that certain approaches towards interpretation constitute an opportunity for individuals affected by the implementation of UNSC action to obtain judicial protection of their human rights. These approaches may also have the effect of limiting the infringements upon individuals' human rights, or even affording them a measure of relief. Other approaches discard this opportunity and confirm, or even add to, the challenges posed to the judicial protection of human rights against decisions of the UNSC.

²⁶⁸ A notable exception is the High Court in *Othman* (UK) (n 71). The Court first arrives at a broad interpretation but then corrects this by reading some human rights guarantees into the resolution.

It should, however, be noted that a court's particular interpretation cannot absolve a state from its obligations under the relevant UNSC resolution. A court may entertain an interpretation that effectively results in a violation by the state of an obligation created by the UNSC. Moreover, with regard to the targeted sanctions, even if a court is able, by employing a narrow interpretation, to release the targeted individual from the domestic application of the sanctions, that individual will remain on the UNSC blacklist. Hence at most, a court could provide such directly targeted individuals with a measure of relief that is limited to their own legal order. The same is true for relief granted on the basis of a dualist approach, which will be discussed in the subsequent chapter.